



REPUBLIC OF KENYA



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**Safaricom PLC v Ali (Civil Appeal E32 of 2022)
[2023] KEHC 4045 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E32 OF 2022**

OA SEWE, J

MAY 4, 2023

BETWEEN

SAFARICOM PLC APPELLANT

AND

MOHAMED MWINYI ALI RESPONDENT

(Being an Appeal from the Ruling and Orders of the Magistrate's Court (Hon. C.N. Ndegwa, SPM), delivered on the 16th February, 2022 in Mombasa SRMCC No. 916 of 2019)

JUDGMENT

1. The appellant, Safaricom PLC, was sued before the lower court in Mombasa SRMCC No. 916 of 2019 by the respondent, Mohamed Mwinyi Ali, for general and special damages together with interest and costs. The respondent's cause of action was that, on or about the 11th December 2018, while lawfully travelling as a pillion passenger aboard Motor Cycle Registration No. KMDN 935V, the motor cycle was knocked by the appellant's Motor Vehicle Registration No. KCJ 116K, Toyota Hilix Double Cab; thereby occasioning him bodily injuries, whose particulars were supplied at paragraph 7 of the Plaintiff dated 3rd May 2019. The respondent alleged negligence on the part of the appellant and/or the appellant's driver/agent, and the particulars thereof were likewise provided in the Plaintiff.
2. The record of the lower court shows that interlocutory judgment was recorded in favour of the respondent on 13th February 2022 after the appellant failed to enter appearance. The matter was thereafter fixed for formal proof which culminated in the judgment dated 22nd March 2021. The respondent thereafter applied for execution by way of attachment of the appellant's movable property. It was that attachment that jolted the appellant into action. It accordingly filed an application seeking stay of execution as well as leave to defend, among other prayers.
3. While the appellant's application was pending, the respondent also filed a Notice of Motion dated 9th August 2021 seeking the setting aside of the default judgment along with leave to amend the Plaintiff. The



two applications were thereafter canvassed by way of written submissions and the impugned ruling delivered in respect thereof on 16th February 2022. Dissatisfied with the said ruling, the appellant filed this appeal on 15th March 2022 on the following grounds:

- (a) The learned magistrate erred in failing to consider whether summons to enter appearance had been served and the effect of the failure to serve summons after twelve (12) months.
 - (b) The learned magistrate erred in law and fact in allowing an amendment not sought *bona fide* and in the absence of a suit.
4. Accordingly, the appellant prayed that the appeal be allowed and that the ruling and orders of the subordinate court delivered on 16th February 2021 be set aside in its entirety and be substituted with an order allowing the appellant's Notice of Motion dated 20th May 2021 in terms of prayers 3, 4 and 6 thereof; as well as an order dismissing the respondent's Notice of Motion dated 9th August 2021. The appellant also prayed that the costs of the appeal be awarded to it.
 5. The appeal was canvassed by way of written submissions, pursuant to the directions of the Court, given on 27th June 2022. Accordingly, learned counsel for the appellant, Mr. Kongere, filed his written submissions on 6th October 2022 in which he underscored the centrality of Summons to Enter Appearance and the imperative that service thereof be effected within the prescribed period. Counsel submitted that, where service is not effected within 12 months, as stipulated in Order 5 Rule 2 of the Civil Procedure Rules, the suit automatically abates unless extension is sought in good time. He relied on *Pecker Woods Limited v Bank of Africa Kenya Limited* [20121] eKLR and *Nagendra Saxena v Miwani Sugar Mills Limited & 3 Others* [2011] eKLR to buttress his submissions that the learned magistrate erred in not making a finding that the lower court suit had abated for failure to serve Summons within 12 months.
 6. Mr. Kongere also pointed out that, though summoned to attend court for purposes of cross-examination, the process server failed to do so. He accordingly urged the Court to draw an adverse inference from that refusal to attend court on the basis of *Serraco Limited v Attorney General* [2014] eKLR, to the effect that had he attended court for cross-examination, it would have been evident that no service was effected.
 7. On the second ground of appeal, namely, that the learned magistrate erred in allowing amendment after judgment, Mr. Kongere submitted that the sole reason proffered by the respondent for the amendment was meritless, granted the provisions of Section 66 of the *Companies Act*, No. 17 of 2015. He also relied on *Kiarie v Waiganjo* [2004] eKLR for the proposition that pleadings cannot be amended after judgment. He further posited that the amendment was not sought in good faith, as is the intention was solely to render the appellant's application academic. Thus, Mr. Kongere urged the Court to find merit in the appeal and to allow it as prayed.
 8. On behalf of the respondent, Mr. Opole relied on his written submissions dated 1st September 2022. He traced the background of the appeal and asserted that, following the impugned ruling, the respondent filed an Amended Complaint before the lower court. In his view, the learned magistrate exercised his discretion judiciously and therefore that the appeal is utterly unwarranted. He prayed for its dismissal with costs.



9. On an appeal such as this, it is the duty of this Court to re-evaluate the evidence placed before the lower court for the purpose of making its own conclusions thereon. The words of Sir Clement de Lestang, VP, in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, are apt, namely, that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

10. Moreover, it is pertinent to bear in mind that the impugned decision was made in the exercise of discretion on the part of the lower court; and therefore, as an appellate this Court must bear in mind the principles brought out in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA 898, that:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

11. The same position was taken by the Court of Appeal in *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR thus:

“...this Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice.”

12. The principles are equally germane to appeals from the subordinate court to the High Court. Accordingly, I have given careful consideration to the submissions made herein by learned counsel in the light of the proceedings of the lower court. The background facts are not in dispute, namely that the interlocutory judgment dated 13th February 2020 was recorded on the basis of the Affidavit of Service sworn on 22nd January 2020 by the process server, Mr. Peter Ogweno. The lower court matter was thereafter listed for formal proof and a final judgment was delivered on 30th March 2021 in favour of the respondent in the total sum of Kshs. 1,507,000/= together with interest and costs.

13. The record of the lower court further confirms that, upon the execution process being set in motion by the respondent, the appellant filed a Notice of Motion dated 20th May 2021 under a Certificate of Urgency, seeking the following orders:

- (a) spent
- (b) Spent
- (c) That the court be pleased to unconditionally set aside the judgment and the resultant decree issued on 30th March 2021.



- (d) That the plaintiff's suit be declared to have abated when the summons to enter appearance issued on 20th June 2019 were not served within one (1) year from the date of issue.
- (e) That in the alternative, and without prejudice to [d] above, the defendant be granted unconditional leave to defend the suit.
- (f) That the costs of the application, and of the unlawful proclamation of attachment, be borne by the plaintiff.
14. The application was brought under Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 10 Rules 6 and 11 as well as Order 51 Rule 1 of the Civil Procedure Rules. It was premised on the Supporting Affidavit of Mr. Daniel Ndaba in which it was contended, inter alia, that the appellant was never served with any court process prior to the entry of judgment and issuance of the resultant decree. Mr. Ndaba further averred that although from the Affidavit of Service it was indicated that Summons to Enter Appearance was served on Safaricom Limited, the company had changed its name to Safaricom PLC with effect from 1st January 2018 and therefore could not have affixed its stamp in the name of Safaricom Limited in June 2019 as alleged.
15. Hence, it was averred by Mr. Ndaba at paragraphs 7 and 8 of the Supporting Affidavit that, having failed to effect service of Summons to Enter Appearance, the same became invalid at the end of twelve (12) months from the date of issue; and therefore that there is no suit to respond to. He added that, even if there was proper service and the suit still existed, the appellant had a reasonable defence to the claim.
16. In an apparent reaction to the appellant's application, the respondent filed the Notice of Motion dated 9th August 2021 under Order 8 Rule 3 and Order 10 Rules 6 and 11 of the Civil Procedure Rules, among other provisions of the law, for orders that:
- (a) The court be pleased to set aside the judgment dated 30th March 2021 and the ensuing decree.
- (b) The plaintiff be granted leave to amend the Complaint dated 3rd May 2019 within 14 days.
- (c) The defendant be granted corresponding leave to amend its Defence.
- (d) Costs of the application be provided for.
17. The respondent's application was premised on the grounds that he had sued Safaricom Limited whereas the company had changed its name to Safaricom PLC. At paragraphs 4 and 5 of the respondent's Supporting Affidavit sworn on 9th August 2021, he relied on the averments by the appellant in their application for setting aside judgment that Safaricom Limited no longer exists, having changed its name to Safaricom PLC. In addition, they proposed to enjoin the driver of Motor Vehicle Registration No. KCJ 116K in terms of the draft Amended Complaint annexed to the Supporting Affidavit as Annexure "A".
18. In his determination, the learned magistrate resolved all the issues arising in the two applications thus:
- “...Both sides are seeking to have the judgement set aside I accordingly set it aside. It goes without saying that once the amended Complaint is filed it will be served on the Defendant which will have an automatic right to defend the suit. Consequently leave is granted to the plaintiff to amend, file and serve the amended complaint within 14 days. The Defendant to file its defence within 7 days of being served with the amended complaint. Each party to bear their costs.”
19. It is plain from the foregoing that the learned Magistrate paid no attention to the pertinent issues raised by the appellant as to whether or not Summons to Enter Appearance had been served; and whether



the suit had abated; having opted for the setting aside of the default judgment on the ground that both sides had applied for it. In this respect I agree with Mr. Kongere that reliefs are not granted just because both parties have asked for it, but because they are warranted, taking into account the applicable law as applied to the facts and circumstances of the particular case.

20. In the premises, the issues for determination, arising from the two Grounds of Appeal, are:
- a. Whether the suit had abated on account of failure to serve Summons to Enter Appearance within the timeframe prescribed by Order 5 Rule 2 of the Civil Procedure Rules.
 - b. Whether the learned magistrate erred in allowing an amendment not sought *bona fide* and in the absence of a suit.

(a) On Whether the Suit Had Abated:

21. Needless to say that service of Summons to Enter Appearance is key to the exercise of the constitutional right to fair hearing as envisaged by Article 50(1) of the *Constitution*. This was underscored by Hon. Kasango, J. in *Pecker Woods Limited v Bank of Africa Kenya Limited* [2021] eKLR thus:

“Order 5 of the Rules makes it abundantly clear that it is the summons that are accompanied by the plaint. In other words, the summons is the primary document in a suit. The plaint is secondary. That order of preeminence of the summons is obvious when one considers what the summons and the plaint require the defendant to do...A plaint on its own may inform a defendant there is a claim against him but does nothing more than that. It does not direct the defendant what to do and when to do it if he does not accept that claim. It is the summons however, making reference to the plaint, which invites the defendant to file, within a specified period, his appearance. The summons further warns the defendant that if he does not file an appearance within the specified period the suit may proceed in his absence and judgment may be entered against him as prayed in the plaint. In my view, it is plainly clear that a suit, which does not have summons inviting the defendant to enter appearance, may remain in perpetuity without being defended by the defendant and without judgment being entered for the Plaintiff for lack of summons inviting the defendant to participate in it. Summons are the heart and soul of a suit.”

22. Similarly, in *Law Society of Kenya v Martin Day & 3 Others* [2015] eKLR the point was made thus:

“It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence.”

23. Accordingly, Order 5 Rule 1 of the *Civil Procedure Rules* stipulates that:

1. When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.
2. Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
3. Every summons shall be accompanied by a copy of the plaint.
4. The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:



Provided that the time for appearance shall not be less than ten days.

5. Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.
 6. Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.
24. The record of the lower court shows that Summons to Enter Appearance was promptly issued by the lower court on 20th June 2019; and that the same was served on the appellant on 12th November 2019. There being no indication that the Summons was not collected within 30 days for service, I find no reason to fault the respondent in that regard; and therefore Order 5 Rule 1(6) of the *Civil Procedure Rules* is inapplicable to the facts hereof.
25. As to the validity of Summons to Enter Appearance, Order 5 Rule 2(1) of the *Civil Procedure Rules* provides:
- “A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.”
26. In this instance, the respondent relied on the Affidavit of Service sworn by Peter Ogwen to prove that the Summons was served on 12th November 2019; after about 5 months. From that premise, the argument by Mr. Kongere that the suit had abated would have no basis, for it was premised on the hypothesis that summons had not been served at all as at 20th May 2021 when the appellant filed its application for setting aside judgment. Having given due consideration to the arguments advanced by the appellant to support the stance as to non-service of summons, I am unable to conclude that summons was not served as posited.
27. For instance, one of the reasons given was that the appellant, having changed its name, could not have stamped the summons in the name of Safaricom Limited. The Court was also invited to conclude that the signature in the Affidavit was not genuine. These were however surmises other than proven facts and as such cannot be the basis for a definite conclusion that summons was never served. I therefore find no basis for holding that the suit had abated.

(b) On Whether the Learned Magistrate Erred in Allowing an Amendment Not Sought Bona Fide and in the Absence of a Suit:

28. The discretion to allow an application for amendment of a plaint is recognized by Order 8 Rules 3(1) of the *Civil Procedure Rules*; which rule is explicit that:
- “...the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”
29. Accordingly, in *Nyamodi Ochieng Nyamogo v Kenya Posts and Telecommunication Corporation* [2007] eKLR, the rationale for the provision was set out thus:
- “The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of



the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim."

30. Likewise, in *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR it was observed that:

"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings."

31. The principles that guide the exercise of discretion in an application of this nature were discussed in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* (*supra*) by the Court of Appeal thus:

"The law on amendment of pleading ... was summarized by this Court, quoting from *Bullen and Leake & Jacob's Precedents of Pleading* – 12th Edition, in the case of *Joseph Ochieng & 2 others vs. First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:-

"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts." (see also *Central Kenya Ltd v Trust Bank Ltd & 5 Others* [2000] eKLR)

32. In the case at bar, the respondent only sought to correct the name of the appellant, upon learning from the appellant itself, that it had changed its name from Safaricom Limited to Safaricom PLC. There is no gainsaying that, where reliefs are prayed for in the alternative, it is open to the court to choose which of the reliefs to give, as guided by the evidence (see *Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjibia* [2015] eKLR). Thus, the learned Magistrate having set aside the default judgment before allowing the prayer for amendment of Plaint, cannot be faulted for his decision.
33. Counsel cited Section 66 of the *Companies Act* to demonstrate that the amendment was not necessary and to support the argument that the amendment was sought for an ulterior motive, namely, to render the appellant's application academic. However, that posturing appears incongruous with the fact that the amendment was only granted after the appellant's application had been granted. I therefore find it untenable.
34. In the result, I find no merit in the appeal. The same is hereby dismissed with costs.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF MAY, 2023
OLGA SEWE



JUDGE

