



**Gor v Molyn Credit Limited & another (Civil Appeal E020 of 2021)
[2023] KEHC 20251 (KLR) (Commercial and Tax) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E020 OF 2021**

DAS MAJANJA, J

JULY 7, 2023

BETWEEN

DAVID OUMA GOR APPELLANT

AND

MOLYN CREDIT LIMITED 1ST RESPONDENT

STEPHEN UMEME ODERA 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. A. Ocharo, PM dated 18th June 2019 at the Nairobi Magistrates Court, Milimani in CMCC No. 362 of 2015)

JUDGMENT

1. It is not clear which the decision the Appellant appeals from. From the heading in the Memorandum of Appeal dated 26th February 2021, the Appellant states that it appeals against the Judgment delivered on 18th June 2019 by Hon. Ocharo, PM. Its recital states, “Take Notice That the above-named Appellant, David Ouma Gor being aggrieved and dissatisfied with the whole ruling of the Honourable Magistrate Edgar Kagoni (PM) in the Notice of Motion application dated 19.10.2020 delivered on 18th of June 2019 hereby appeals to the High Court wholly against the said Ruling, and set forth his grounds of Appeal as follows” The Appellant then prays for the following reliefs:
 1. This Appeal be allowed and the Ruling of the Subordinate Court dated 27th January 2021 be set aside in its entirety.
 2. That the judgment of this Subordinate Court dated 18th June 2019 be set aside in its entirety.
 3. That the Honourable Court do issue directions that the matter be tried afresh.
 4. That the Respondent to pay the costs of this Appeal and the Claim in any event.



5. Any further relief that the Honourable Court deems fits in the interest of justice.
2. From the record, the court delivered Judgment on 18th June 2019. Since the suit leading up to the judgment was heard in the absence of the Appellant, he filed an application dated 19th October 2020 seeking to, *inter alia*, set aside the judgment and all *ex-parte* proceedings and for unconditional leave to defend the claim. The court, Hon. E. Kagoni, PM, heard the application and dismissed it by the ruling delivered on 27th January 2021. The record does not show that any ruling was delivered on 18th June 2019 as stated in the recital.
3. It is clear from the foregoing that the Appellant cannot appeal against the judgment delivered on 18th June 2019 as an appeal must, in accordance with section 79G of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), be filed within 30 days from date of the decision appealed from. The appeal from the Judgment therefore ought to have been filed by 19th July 2019 latest. The Appellant could only file an appeal against the ruling dated 27th January 2021 which appeal was filed within the time prescribed. I shall therefore proceed on the basis that this is an appeal from the aforesaid ruling and not the Judgment.
4. The basic facts leading to this appeal are not in dispute. The 1st Respondent, as Plaintiff, filed the suit before the Subordinate Court by a plaint dated 20th January 2015 against the Appellant and 2nd Respondent seeking judgment against them jointly and severally for Kshs. 369,469.00 due and owing as at 12th November 2014 with interest accruing at 2% per month until payment in full on account of credit facilities advanced to the Appellant and guaranteed by the 2nd Respondent. The Appellant entered appearance and filed his Statement of Defence dated 6th March 2015. On 22nd June 2015, the court entered default judgment against the 2nd Defendant. The court ordered the suit to proceed against the Appellant and after the pre-trial conference, the Appellant's advocates on record, Onyoni and Company Advocates applied for and were granted leave to cease acting for the Appellant on 1st August 2017.
5. The suit, which came up for hearing on 4th March 2019, proceeded in the absence of the Appellant. Thereafter the court delivered judgment on 18th June 2019. It is the execution of this judgment that gave rise to the Appellant's application dated 19th October 2020 seeking to set aside the *ex-parte* proceedings supported by the Appellant's affidavit sworn on the same day. The 1st Respondent opposed it through the Grounds of Opposition dated 2nd November 2020 and the replying affidavit of its advocate, Swaka Mine, sworn on 23rd November 2020. The application was argued and dismissed by the ruling dated 27th January 2021 which gives rise to this appeal.
6. The gravamen of the Appellant's application was that he was not served with the notice for the hearing scheduled on 4th March 2019. He contended that from the affidavit of service relied on by the court, the 1st Respondent did not prove service as it did not produce proof of postage of the notice. That his statement of defence was merited and that no prejudice would be suffered by the 1st Respondent if judgment was set aside and that the application was not brought after undue delay. The trial magistrate rejected the grounds proffered in the application and dismissed it thus giving rise to this appeal.
7. This appeal was also heard in the absence of the Appellant. The Advocates on record for the Appellant, Onyoni and Company Advocates, applied for an were granted leave to withdraw from acting for the Appellant on 14th March 2021. The Appellant appeared in person and undertook to instruct an advocate to prosecute his appeal. Despite being given an opportunity to do so, the Appellant failed to instruct an advocate and I directed the appeal proceed for hearing. I have therefore considered the appeal based on the record before the court.



8. As this is an appeal against the exercise of discretion, this court can only intervene if it satisfied that the trial court in exercising its discretion misdirected itself on matters of principle and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of that discretion and that as a result there has been an injustice (see *Mbogo v Shab* [1968] EA 93).
9. The application before the Subordinate Court was for setting aside the ex-parte judgment and proceedings principally on the ground of lack of service of hearing notice. Order 10 rule 11 of the *Civil Procedure Rules* (“the Rules”) provides that, “Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.” The power of the Court to set aside ex parte orders and proceedings is wide and unfettered but must be exercised judicially. In *Patel v E.A. Cargo Handling Services Limited* [1974] EA 75, the Court was outlined the general principle as follows:

There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.

10. The trial magistrate considered whether the Appellant was served with the hearing notice particularly the contents of the affidavit of service sworn by the Process Server, Willis Agayi, which stated, in part as follows:

That I proceeded to the General post office Nairobi where I caused to be sent to David Ouma Gor the above mentioned document to his last known address which is P O Box 20 – 00430 Homabay. Annexed herewith marked WAI is the receipt for postage to confirm the same. That the said parcel has not returned as unclaimed parcel an indication that it was received by him.

11. The trial magistrate dismissed the Appellant’s contention that service was doubtful because the affidavit of service lacked proof of postage as baseless by noting that, “Annexure WAI is a receipt of postage from the Postal Corporation of Kenya. It is the finding of this court that the Applicant was indeed served and such service was proper and the judgment against the Applicant is regular.” Having looked at the original record and affidavit of service, I concur with the findings of the trial magistrate and hold that the Appellant was indeed served with the hearing notice hence the judgment was regular. In the circumstances, the Appellant is not entitled to an order setting aside the judgment *ex debito justitiae*. However, even where the judgment is regular, the court is still entitled to set aside an ex-parte judgment if the defence raises any triable issue. In *Tree Shade Motors Limited v D.T. Dobie Company Limited* NRB CA Civil Appeal No.38 of 1998 [1998] eKLR, the Court of Appeal stated that, “Even if the service was valid, judgment will be set aside if [the] Defence raised triable issues” (see also *James Kanyita Nderitu and another v Marios Philotas Ghikes and another* [2016] eKLR and *Shanzu Investments Ltd v Commissioner of Lands* NRB CA Civil Appeal No. 100 of 1993 [1993]eKLR).
12. Turning to whether the Appellant’s defence raises a triable issue, the trial magistrate expressed the view that, “I have examined the contents of the Draft Statement of Defence have examined the contents of paragraph 5 and 6 of the Draft Statement of Defence and I my view the same constitutes a Defence



on merit.” Having reached the decision that the defence had merit, the trial court still went ahead and declined to set aside the judgment on the grounds that Appellant did not demonstrate the prejudice that would be suffered by the 1st Respondent given the fact that the Appellant was delaying the suit by casting aspersions on the 1st Respondent for failing to effect service and making unmerited complaints against the court.

13. In my view, a party who has made out a case that its case has merit should be given an opportunity to present its case. However, the court may, in doing so and having regard to the conduct of the parties, impose such conditions as would mitigate the conduct complained of and assuage the prejudice of the other party. There may be instances where the court may come to the conclusion that the conduct of the party does not merit any discretion in its favour.
14. The trial magistrate referred to a complaint by the Appellant to the Chief Registrar of the Judiciary under the subject, “Co(m)plaint About Plucking Off the Documents from the File Missing of the File Case No. 362/205, at Milimani Commercial Law Court.” The Appellant had complained about the court decision made against him and that some documents were missing from the court file. The Office of the Chief Registrar responded to the Appellant *vide* the letter dated 28th April 2020 informing the Appellant that the court file was not missing and any complaints should be made through the proper office and that a party aggrieved by any decision should follow the prescribed procedure. Every party has a right to complain about the court procedures and processes and should not be penalized merely for addressing the complaint to the authorities. By filing the application, the Appellant was merely taking the advice that he ought to have followed the correct procedure if he was aggrieved by the decision made against him.
15. Having held that the judgment was regular and that the defence was merited, the trial magistrate was entitled to impose such conditions as are just in the circumstances particularly to assuage the prejudice occasioned to the party who had diligently prosecuted the suit.
16. For the reasons I have given, I am inclined to allow the appeal but on condition that the Appellant deposit half the decretal sum being Kshs. 150,000.00 in a joint interest earning account or in court. This is consistent with the order made on 1st July 2023 by Okwany J., as a condition for the appeal.
17. I allow the appeal on the following terms:
 - a. The ruling and order of the Subordinate Court dated 27th January 2021 is set aside and substituted with an order allowing the Appellant’s Notice of Motion dated 19th October 2022 on terms that the judgment delivered on 18th June 2019 be and is hereby set aside on terms that the Appellant shall deposit the sum of Kshs. 150,000.00 in court within 30 days from the date hereof and in default of compliance the judgment shall be reinstated.
 - b. The 1st Respondent shall have the costs of this appeal assessed at Kshs. 20,000.00.

SIGNED AT NAIROBI BY

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY JULY 2023.

F. MUGAMBI

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JUDGE



Court Assistant: Mr M. Onyango.

Appellant in person.

Ms Kirui instructed by Muchoki Kangata Njenga and Company Advocates for the 1st Respondent.

