



**Omagwa & another v Ecobank Kenya Limited (Civil Appeal  
E057 of 2021) [2024] KEHC 12081 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12081 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E057 OF 2021  
TA ODERA, J  
OCTOBER 8, 2024**

**BETWEEN**

**JOEL OMAGWA ..... 1<sup>ST</sup> APPELLANT**

**GEORGE MONDA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ECOBANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Appellants (vide a memorandum of Appeal dated 9<sup>th</sup> June, 2020 filed against the Ruling of Hon S. N. Lutta delivered on 31<sup>st</sup> May, 2020. The Appellant's was based on the grounds that;
  - a. The learned magistrate erred both in law and fact when he failed to find that the Appellants were never served with summons to enter appearance in the face of overwhelming evidence in this regard.
  - b. The learned magistrate erred in law and/ or fact in failing to appreciate that the Appellant did not appoint M/S.Benson Sironka as their duly appointed agent for the purposes of acceptance of service of the summons to enter appearance in the cause and for the purposes of appointing M/S. Ochoki & Co. Advocates to represent them in the cause and, in the subsequent Appeal.
  - c. The learned magistrate erred both in law and fact in finding that there was a valid and/or an appeal from CMCC No.667 of 2016 (being Kisii High Court Civil Appeal No.35 of 2020) capable of affecting the Appellants negatively.
  - d. The learned magistrate's decision/ ruling was against the weight and consequences of the matters before him which he failed to adequately evaluate and in particular, the draft defense and the fact on record that the appellants did not in any manner participate in the proceedings.



- e. The learned Magistrate erred in law in failing to adequately consider the application and/ or all matters before him before making the decision he made.
2. The appellants thus prayed for orders that:
    - a. This appeal be allowed.
    - b. The Ruling and Decision of the Chief Magistrate's Court made on 31st / 05 / 21 be set aside.
    - c. The Application dated 22nd /10/20 be allowed.
    - d. The costs of this Appeal and the Chief Magistrate's Court be awarded to the Appellants.

### **The Factual Background of the Suit**

3. The Respondent herein filed a suit against the Appellants and one Benson Sirengo, trading as Nyanza Shuttle And Ewings Coaches in the matter vide an amended plaint dated 30<sup>th</sup> September 2017 seeking sum of 13 Million plus interest that accrued after the Appellants defaulted in making repayments towards settling loan facility totaling to Kshs. 15, 570,000 they had obtained from the respondent in order to purchase Motor vehicles registration number KBQ 022J and KBQ 033J. The Defendants through the firm of Ochoki & Co. Advocates filed an amended statement dated 15<sup>th</sup> January, 2018 denying the claim owing the plaintiff any money.
4. Upon hearing both parties in the suit, the learned trial magistrate delivered his Judgment on 25<sup>th</sup> May, 2020 wherein he found the Appellants in breach of their obligation under the chattels mortgage and proceeded to award the plaintiff Kshs. 10,536,072.13 with interest at 25.5% with effect from 30<sup>th</sup> June, 2017 until payment is made in full.
5. However, the Appellants herein filed an Application dated 22<sup>nd</sup> October, 2020 seeking to set aside Judgment of the court as well as an order of stay of execution of the said Judgement pending the hearing and determination of the said Application. The Application was based on grounds the Appellants were never served with summons to enter appearance. They also claimed that they never gave any instructions to firm of Ochoki & Co. Advocates to enter Appearance and defend the suit on their behalf. They also claimed that services of Ochoki & Co. Advocates were sought by Benson Sirengo, the 2<sup>nd</sup> defendant in suit who did not involve them in the said decision. It was their assertion that they did not participate in the suit which was solely filed by Benson Sirengo who was not well versed with the facts of the case. Further too they claimed that they have a defence which raises triable defense and has high chances of success and thus urged the court to allow them defend the suit.
6. In response to the Application the respondent herein filed a replying affidavit dated 4<sup>th</sup> October, 2020 sworn by Mr. Ocharo Kebira, it's learned counsel in the matter. Mr. Kebira averred that it was not difficult to see the Application was prompted in bad faith and thus the same was defective and an abuse of the court process. He averred that the summons to enter appearance were taken out and served upon the defendants. He reiterated that process server did inform him that he served the parties who in turn appointed an advocate to enter appearance on their behalf. He indicated that six years had elapsed since the service was carried out and that it would be very difficult to call upon the process server to confirm that he indeed served all the parties personally. He stated that upon the advocate for the defendants entering appearance he did not find it necessary to file an affidavit of the process server to enter appearance. He pointed to the court that the defendants had in deed proceeded to file an Appeal i.e High Court Civil Appeal No. 35 of 2020 and he attached a copy of the memorandum of Appeal. He further averred that the said appeal was still pending determination and therefore the trial court lacked Jurisdiction to entertain the Application. He also pointed out the Appellants filed an



Application dated 10<sup>th</sup> June, 2021 in the lower court seeking stay of execution pending Appeal which application was supported by the affidavit of Benson Sirengo who stated that he swore the same on his own behalf and on behalf of the Appellants who were his co-defendants. He also pointed out that the evidence that the Appellant attached in support of their claim had already been produced by the 2<sup>nd</sup> Defendant in his testimony and thus there was nothing new they intended to bring to court other than taking the court backwards to hear a matter it had already rendered a final judgment on.

7. Interestingly, Mr. Sirengo on 25<sup>th</sup> February, 2021, in his bid to respond to the averments made by the Mr. Kebira, swore an affidavit claiming that he was the only one who was served by the process server. He claimed too that the process server requested him to appear and defend the suit on behalf of the other Defendants and thus proceeded to engage an advocate on his own volition without involving the other defendants. He claimed that all the defendants participated in all negotiations prior to the suit being filed. He claimed that he mistakenly believed that he could give instructions to an advocate to appear for all the parties. He claimed further that Mr. Kebira was aware that he was the only one who appeared as witness in the matter. He claimed too that he did proceed to instruct his advocate Mr. Ochoki to file an appeal against the decision of the court in 2020. He stated that his co-defendants/appellants came to the picture after the Judgment was delivered and took a very negative view of his conduct. He exclaimed that he was so surprised that they had a different defense to his issue.
8. Upon considering the Application, the response thereto and the submissions of the parties the trial court dismissed the Application. The learned trial Magistrate in his ruling dated 31<sup>st</sup> May, 2021 observed as follows.

“After the judgment was delivered in this matter the respondents filed Kisii High Court Civil Appeal Number 35 of 2020.

In the present Application the respondents have not denied knowledge of the existence of the Appeal.

There was another Application dated 22<sup>nd</sup> September, 2020 where the Applicants at paragraph 2 deponed that he had the authority to swear the affidavit of the present applicants.

I therefore find that the present Application is without merit and I proceed to dismiss it with costs to the plaintiff/respondent.”

9. It is against the above Ruling that the Appellants have approached based on the grounds outlined herein above. They directed the parties to file their written submissions for consideration in disposing of this Appeal.

### **Analysis and Determination**

10. It is important setting aside a judgement for the reasons the Appellant raised in their Application that gave rise the impugned ruling is a decision that is purely based on the discretionary power of a judicial officer. In essence the Appellants are asking this court exercising its Appellate Jurisdiction to interfere with the discretion of the learned trial Magistrate in not allowing their Application to set aside its judgement. The general principles on when an appellate court may interfere with a discretionary power of a trial were set out in the case *Mbogo & Another vs Shah*, [1968] EA, as follows: -

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as



a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

11. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A observed as follows regarding an appellate court interfering with the discretion of a trial court.

“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 of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

12. In the case of *Price and Another v Hilder* {1996} KLR 95 it was held as follows

“In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”

13. The Supreme Court in the case *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, had this to say:

“In reiterating the above position, we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court’s exercise of discretion.”

14. Equally the Supreme Court in the case of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR held as follows:

“We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was



capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v. Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (*Kacem*) where it was held:

“In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

15. The question therefore is has the Appellant in their Appeal demonstrated the learned trial Magistrate in exercising his discretionary power made an error of law, failed to take into account relevant consideration or took into account irrelevant fact?
16. The learned trial Magistrate in his decision following to reasons as to why he could not exercise his discretion in allowing the Application;
  - a. There was an Appeal that had been pending in the High court which the Applicant did not deny knowledge of.
  - b. That there was an Application filed before him on 22<sup>nd</sup> September, 2020 seeking stay of execution pending Appeal wherein the Applicant therein averred that he had instruction from the Appellant’s herein to file the Application on their behalf.
17. From the factual background of set out hereinabove, it is outright the facts considered by the court were drawn from the averments raised by Mr. Kebira in his Affidavit that were never rebutted by the Appellants in anyway. Mr. Benson Serengo in his affidavit dated 25<sup>th</sup> February, 2021 confirmed that there was an Appeal pending in this court. He equally did not rebut Mr. Kebira’s averment relied upon by the trial court in its ruling that he did swear an affidavit in support of the Application dated 22<sup>nd</sup> September, 2020 stating that he had instructions of the appellants to swear the same on their behalf. Therefore I find no reason whatsoever to make a finding that the learned trial Magistrate relied on irrelevant facts.
18. Further from the facts of the case, the Appellants and Mr. Serengo were partners who were trading under Nyanza Shuttle and Ewings Coaches which entered to Chattel Mortgage agreement. In his Affidavit dated 25<sup>th</sup> February, 2021, Mr. Serengo confirmed all of them were involved in negotiations regarding the settlement of the mortgage agreement which bolted leading to the filing of this suit. Equally there are demand notes attached sent to Nyanza Shuttle and Ewings Coaches from the Respondents demanding payment settle the debt that had accrued as a result of default as well as well notices sent the business entity from the auctioneers communicating the intentions of the Respondents to exercise its power of sale in order to recover part of the defaulted debt.
19. The above observation notwithstanding, it is clear from record before me that the appellants engaged the Respondent were trading as or rather engaged the Respondent Nyanza Shuttle and Ewings Coaches and were sued in that capacity and thus it is rather strange that they expected the trial court as separate persons from their business entity they used to engage the Respondent.
20. Equally, it is unbelievable that they expected the trial court to believe they did not have any idea that a suit had been filed against their business entity as early as 2014 and only got to know about in 2020 when a judgment was entered against their entity. I find it rather strange that Appellants would want this court to believe the suit filed against their business entity was being defended by their partner in business for six years running without their knowledge and yet they never pleaded that the said partner



was no longer a partner in their entity and had no capacity to defend the entity in his capacity as a partner.

21. As if that is not enough they did not make any attempt to explain to the trial court how and when they got to learn about the Judgement entered against them if at all they are strangers to this and were never received the summons to enter appearance. Strangely while perusing the pleadings filed by the parties in relation the Application, I came across notice of withdrawal dated 25<sup>th</sup> May, 2021 purporting to withdrawal Appeal no. 35 of 2025. In as much it is not clear whether the same was endorsed by this court, I find quite disturbing that it was filed several months after the Respondent revealed to the trial court that the appeal was pending before this court. If indeed the Appellants were honest about being strangers to all the proceedings against their business entity, it should not have taken those several months to seek withdrawal that had been filed.

In any event, the repealed sections 7 and 8 of the repealed partnership Act provided that “7. Power of partner to bind the firm Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

8. Partners bound by acts on behalf of firm an act or instrument relating to the business of the firm, and done or executed in the firm name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners: .....” It is clear from that Mr. Sironga was a partner of the appellants at the material time and he thus had authority to act on behalf of the appellants. He exercised that authority and filed a defence in the lower court on behalf of the partnership. Filing of a defence in a matter upon being served with a plaint and summons to enter appearance is generally done in good faith and to protect the defendant. This is what is expected of any reasonable defendant. The decisions he made by Mr. Sironga regarding filing of defence and appointment of M/S Ochoki & Co advocates are binding on the appellants herein who were his co -partners and the firm. The appellants cannot be heard now to attempt to run away from the appointment of the said firm of advocates and the defence on record.
22. Based on the above reasons I do not see any reason to interfere with the discretion of the learned Trial Magistrate which he exercised within the law.
23. I therefore find no merit in the appeal and I proceed to dismiss it with costs to the Respondent.

**T.A ODERA**

**JUDGE**

**8.10.24**

Delivered Virtually Via teams platform in the presence of:

Siagi for the Appellant

N/A for the Respondent

Court Assistant - Oigo

