



REPUBLIC OF KENYA



**Tahir Sheikh Said Transporters Ltd v Odari (Civil Appeal E031 of 2023)  
[2024] KEHC 11971 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11971 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E031 OF 2023  
SM GITHINJI, J  
OCTOBER 8, 2024**

**BETWEEN**

**TAHIR SHEIKH SAID TRANSPORTERS LTD ..... APPELLANT**

**AND**

**LILIAN MCHANJI ODARI ..... RESPONDENT**

*(Being an appeal from the ruling and orders of the Senior Resident  
Magistrate's Court at Mariakani (Hon. N. Chepchirchir dated  
21st February 2023 in Mariakani SRMCC No. 193 of 2018)*

**JUDGMENT**

1. The Appellant aggrieved by the Ruling of the learned Senior Resident Magistrate in Civil Suit No 193 of 2018 dated 21<sup>st</sup> February, 2023 set forth the following grounds in the Memorandum of appeal dated 9<sup>th</sup> March, 2023;
  1. That the Learned Magistrate erred in law and in fact in finding that the interlocutory judgment entered on 23<sup>rd</sup> July, 2019 was regular.
  2. The Learned magistrate in any event, injudiciously exercised her discretion in refusing to set aside the default judgment.
2. In a nutshell, Interlocutory judgment was entered against the Appellant on 18<sup>th</sup> April, 2019 followed by a judgment after formal proof entered on 23<sup>rd</sup> July, 2019. The trial court thereafter dismissed the Appellant's Notice of Motion application dated 20<sup>th</sup> June, 2020 that sought to have the judgment entered on 23<sup>rd</sup> July, 2019 in favour of the Respondent set aside.
3. In her ruling, the trial court relied on the principles for setting aside an interlocutory judgment as stated in the case of *James wanyoike & 2 others v CMC Motors Group Limited & 4 others* (2015) eKLR. According to the ruling, pursuant to an application dated 16<sup>th</sup> July, 2018 seeking leave to serve the



defendant by way of substituted service and which was allowed on 12<sup>th</sup> February, 2019; the trial court held that the interlocutory judgment entered against the defendant was regular and summons were served within time.

4. The appeal was canvassed by way of written submissions with the appellant filing its submissions on the 20<sup>th</sup> day of July, 2023. Counsel in submitting on the ground that the judgment was regular stated that although the trial court found that there had been substituted service, the ruling was silent on how service was effected. According to him, there was no evidence that substituted service had been effected through advertisement in the Daily Nation. Further, that when the lack of evidence was pointed in the appellant's supplementary affidavit, the Respondent later alluded in her submissions that service was by registered post.
5. On the 2<sup>nd</sup> ground of appeal of failing to find that there was a plausible defence, counsel submitted that the trial court seems to have fettered its discretion by presuming that the triable issue must emanate from a draft defence annexed to the application. He submitted that although there is some merit in asking for a draft defence, it cannot be an inexorable rule that the absence of a draft defence removes any discretion from the court. He relied on the case of *International Air Transport Association & another v Shian Tours & Travel Limited & 2 others* (2021) eKLR. According to him, the proposed defence need not be in the form of a draft defence. He further submitted that it was an irrelevant consideration which led to the exercise of discretion in a manner that was patently and manifestly wrong.
6. The Respondent on the other hand filed submissions on the 13<sup>th</sup> day of July, 2023. Counsel identified two issues for determination; whether the trial court erred in finding that the interlocutory judgment entered on 23<sup>rd</sup> July, 2019 was regular and whether the trial court injudiciously exercised its discretion in refusing to set aside the default judgment. On the 1<sup>st</sup> issue for determination, counsel submitted that the Appellant was procedurally served and the same confirmed by the trial court in the initial suit dated 17<sup>th</sup> May, 2018.
7. It is her submission that the issue the Appellant is opposing and relying on is the typographical error on the part of the Respondent. She confirmed that the Respondent was served via registered post but failed to defend the suit. On the 2<sup>nd</sup> issue for determination counsel submitted that the decision whether or not to set aside ex parte judgment is discretionary. On this heading, she relied on the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubebe* (1982-1988) and Order 10 Rule 11 of the *Civil Procedure Rules*.

### **Analysis and Determination**

8. I have considered the appeal in its entirety, the trial court Ruling which is the subject of this appeal and submissions by counsels. In my view, the following issue is for determination:

Whether the trial court erred in finding that the judgment was regular.

9. Order 10 Rule 11 of the *Civil Procedure Rules* empowers the court to set aside an *ex parte* judgment for default of appearance and defence.
10. A distinction exists between a default judgment that is regularly entered and one which is irregularly entered. The difference between the two was elaborated in detail by the Court of Appeal in CA No 6 of 2015 *James Kanyita Nderitu v Marios Philotas Gbika & another* (2016) eKLR, where it was held that: "...In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend



the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer, whether in the whole it is in the interest of justice to set aside the default judgement, among others.”

11. The considerations are however different in case of an irregular judgement. The Court stated as follows: -“In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyang Oloo v Attorney General [1986 – 1989] EA 456).”
12. I have perused the trial court file in order to ascertain whether the said judgment is a regular or an irregular one. I note that the Plaintiff made an application on the 17<sup>th</sup> July, 2018 to be allowed to serve the defendant by way of substituted service and the same was allowed on the 12<sup>th</sup> February, 2019. On the 18<sup>th</sup> day of April, 2019, interlocutory judgment was entered as against the defendant and the matter proceeded by way of formal proof and judgment entered on the 23<sup>rd</sup> day of July, 2019.
13. I have looked at the request for judgment dated 17<sup>th</sup> April, 2019 and the annexed affidavit sworn by John Kombe on the 29<sup>th</sup> day of March 2019 as well as the annexures thereto and I am satisfied that service was duly effected. In Gulf Fabricators v County Government of Siaya [2020] eKLR, Aburili J. while appreciating the importance of service of summons to enter appearance and which decision I find persuasive, held that; -

“...It must be appreciated that service of summons to enter appearance and plaint upon the Defendant in a suit is crucial. In addition, before the court can be asked to proceed and grant leave to the plaintiff to apply for interlocutory judgment and before such interlocutory judgment leading to formal proof hearing in unliquidated claims is entered and or issued, the court must be satisfied that summons to enter appearance and plaint were properly served upon the defendant, as stipulated in the law...”
14. As observed by the learned magistrate in her ruling, the appellant did not annex any draft defence and as such the court could not exercise its discretion in favour of the applicant. In its submissions, the applicant also contended that there was no need to attach the said draft defence as their proposed triable issues could be inferred from their application. In my view, the only way to ascertain whether a party has triable issues is by going through the document they intend to rely upon. The Appellant did not make such an effort and it is not sufficient to call upon this court to infer their intention from previously filed documents.
15. In the premises aforesaid, it is my considered view that the appeal herein has no merit and the same is hereby dismissed with costs to the respondent.



**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**S.M. GITHINJI**

**JUDGE**

In the Absence of; -

1. Mr Kongore for the Appellant
2. Ms. Obunga holding brief for Mrs. Onyango for the Respondent (present).

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**S.M. GITHINJI**

**JUDGE**

**8/10/2024**

