



**Anindo t/a Igare Auctioneers v Tarus (Civil Appeal 41 of 2019)
[2024] KEHC 16871 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 41 OF 2019
JRA WANANDA, J
NOVEMBER 15, 2024**

BETWEEN

MARGARET ANINDO T/A IGARE AUCTIONEERS APPELLANT

AND

DAVID TARUS RESPONDENT

(Ruling on 26/02/2020 by Hon. Lady Justice O. Sewe whereof the Appellant was granted an order stay of execution pending Appeal.)

JUDGMENT

1. This Appeal had been dormant for a very long time and pursuant thereto, I fixed it for dismissal for want of prosecution for 8/12/2023. When the same came up before me on the said date, Mr. Wambua, Counsel for the Appellant appeared and pleaded with the Court not to dismiss the Appeal and, instead give him time him to prosecute the same. The last action that had taken place in the file was delivery of a Ruling on 26/02/2020 by Hon. Lady Justice O. Sewe whereof the Appellant was granted an order stay of execution pending Appeal. Mr. Wambua also informed me that Mr. S.K. Kitur, Counsel for the Respondent, had since passed on and that his office was now under an Administrator. Clearly therefore, upon obtaining the order of stay of execution, the Appellant, enjoying the comfort thereof opted to “go to sleep” and never bothered to prosecute the Appeal. Upon hearing Mr. Wambua, I gave strict timelines for prosecuting the Appeal. I also directed Mr. Wambua to ensure that service was effected upon the Administrator of the late Mr. S.K. Kitur’s law firm and/or the Respondent directly.
2. The Appeal arises from the Ruling delivered on 10/12/2018 in Kapsabet Senior Principal Magistrates’ Court Case No. 130 of 2017 dismissing the Appellant’s Application (Notice of Motion) dated 8/06/2018. In that suit, the Appellant was the Defendant while the Respondent was the Plaintiff. The Application was filed by Messrs Wambua Kigamwa & Co. Advocates and had sought orders as follows:
 - i. [.....] spent.



- ii. [.....] spent.
 - iii. That the ex parte Judgment against the Defendant be set aside together with all consequential orders thereto.
 - iv. That the Court finds that the execution proceedings being carried out are a nullity and sets them aside.
 - v. That the costs of the Application be sourced by the Plaintiff.
3. In her Affidavit in support of the Application, the Appellant deponed that on 25/05/2018, she was away from her offices in Eldoret town when she was called by her Secretary and informed that a Notice to Show Cause (NTSC) scheduled for hearing on 28/05/2018 had been left at her offices, that she instructed her Advocates to attend on her behalf as she was not aware of the matter, and that upon her instructions, the Advocates obtained copies of the Court pleadings. She deponed that the Judgment being executed was irregular and the execution a nullity and ought to be set aside ex debito justitiae for the reasons that the Plaintiff did not serve her, that the Affidavit of Service did not indicate the time of service and the person who identified her, and that the Affidavit of Service indicates her gender as a male in some instances and as a female in others, which raises the preponderance that service was never effected.
 4. She deponed further that the Request for Judgment did not indicate that the Judgment was for a liquidated sum while the case still proceeded to formal proof, that no notice of entry of Judgment was served as required by Order 22 Rule 6 of the Civil Procedure Rules and none accompanied the Application for execution. She added that no application for execution was ever lodged, and that the NTSC was not served by a Licensed Process Server as the Licence attached was for the year 2015. The Appellant then deponed that she had a sound defence and exhibited a copy of a draft thereof.
 5. I am unable to verify whether the Respondent, represented by Messrs S.K. Kitur & Co. Advocates, filed any Response to the said Application since none is included in the Record of Appeal. There are however copies of respective written Submissions that were filed by the parties before the trial Court in respect to the Application.
 6. Be that as it may, and as aforesaid, by the Judgment delivered on 10/12/2018, the Application was dismissed.
 7. Aggrieved with the decision, the Appellant filed this Appeal vide the Memorandum of Appeal filed herein on 25/3/2019. The grounds of Appeal were a recap of the matters set out in the Supporting Affidavit referred to above, as follows:
 - i. That the learned magistrate erred in law and fact in failing to find that the service of summons was not duly effected as the affidavit of service failed to indicate the time of service of summons, the person identifying the Appellant to the process server or how the process server identified the Appellant, it indicated her gender as male instead of female which raised a clear preponderance of want of service, the affidavit indicated that she signed the summons while no endorsement of the signature existed on record.
 - ii. That the learned magistrate erred in law and fact in failing to find that the judgment was irregular as the request for judgment lodged did indicate the judgment sought was for a liquidated sum while the Respondent proceeded with formal proof.



- iii. That the learned Magistrate erred in law and fact in failing to consider the draft defence which had been brought to its attention to annexure “A” to the affidavit in support of the application which raises triable issues.
- iv. That the learned Magistrate erred in law and fact in failing to find that the execution being carried out by the Respondent was irregular and a nullity for the reasons; no notice of entry of judgment was duly issued and served as required by Order 22 Rule 6 of the Civil Procedure Rules, 2010 and filed with the first application for execution as required and no application for execution of the decree was duly lodged by the Respondent.

Hearing of the Appeal

8. The parties were then directed to prosecute this Appeal by way of written Submissions. Pursuant thereto, the Appellant filed her Submissions on 9/01/2024 whereas the Respondent filed on 17/01/2024.
9. I note that the Respondent’s Submissions has been filed by Messrs Talam & Co. Advocates, a firm which has never taken part in this Appeal before and in respect to which I have also not come across any Notice of Change of Advocates. However, since as aforesaid, Mr. Wambua, Counsel for the Appellant, had informed the Court that Mr. S.K. Kitur Advocate whose law firm was hitherto on record for the Respondent is since deceased, and that he would therefore serve hearing notices upon the Administrator of the law firm, then I presume that the said Messrs Talam & Co. Advocates, is the Administrator law firm.

Appellants’ Submissions

10. Counsel for the Appellant submitted that the Appellant was not personally served with the Summons and Complaint, that an examination of the Affidavit of Service reveals that the Process Server was not clear as to the gender of the person that he was to serve, that the Appellant is of female gender but the Process Server indicates that he served a male, that he does not indicate the time and how he was able to identify the person served and that if he at all relied on the clerk, he does not name the clerk.
11. He added that the Process Server claims that the Summons were signed by the Appellant but there is no signed acknowledgment accompanying the Affidavit as evidence thereof. According to Counsel therefore, it is clear that the Appellant was not served in person and he cited the decision in *Yalwala v Indimuli & Another*, (1989) eKLR. He further submitted that the failure to effect valid service renders the ex-parte judgment to be irregular and that the same was entitled to be set-aside as of right, that the Learned Magistrate also failed to consider the draft defence which had been brought to her attention, that as confirmation that the ex-parte judgment was irregular, the Respondent’s Request for Judgment indicated that the judgment sought was for a liquidated sum but then the Respondent proceeded with formal proof.
12. Counsel contended further that the Respondent was bound by Order 22 Rule 6 of the Civil Procedure Rules to serve the Appellant with a Notice of entry of judgment before commencing execution and which was not done, that no evidence exists that such Notice was filed with the first application for execution as required by law, and that no application for execution was ever lodged in this matter. He cited the case of *Anderson Nyagah Wachira v Simon Njuguna* (2018) eKLR.

Respondents’ Submissions

13. On his part, Counsel for the Respondent submitted that the Respondent clearly proved service of Summons, Complaint and their components upon the Appellant by filing the Affidavit of Service sworn



by one Benard Osewe on 15/08/2017 and that it is prima facie evidence that service was duly effected in compliance to the provision of Order 5 of the Civil Procedure Rules.

14. He contended that service was proper as the same was effected by a licensed Process Server, that the licence was attached to the Replying Affidavit and that upon being served, the Appellant signed on a copy of the Summons. According to Counsel, the Appellant was duly served but she failed, on her own volition, to enter Appearance. He cited the case of Philip Kiptoo Chemwoh and Mumias Sugar Company Ltd Augustine Kubende (1982-1988) KAR, and submitted that for the above reasons, the Ruling by the trial Magistrate was sound and well-reasoned and that she arrived at a just and safe conclusion.

Determination

15. The duty of an appellate Court was set out in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

16. Evidently, the issue that arises for determination in this appeal is “whether the Appellant was duly served with Summons to enter Appearance and therefore, whether the trial Magistrate was justified in declining to set aside the default Judgment entered.

17. Order 5 Rule 8(1) of the Civil Procedure Rules provides as follows:

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

18. When I began writing this Judgment, I realized that, although the typed proceedings of the trial Court was contained in the Record of Appeal, the lower Court file itself had not been supplied from the Kapsabet Magistrate’s Court. As aforesaid, this Appeal had been dormant since delivery of a Ruling herein on 26/02/2020 and the same had therefore been fixed for dismissal for want of prosecution.

19. Although where an Appeal has been preferred, it is the Court’s duty to facilitate supply the lower Court’s file to the Appellate Court, that process has to be initiated by the Appellant who must then also diligently follow-up on the process and ensure its progress. An Appellant cannot simply sit back inactive and hope that the process will be promptly and smoothly undertaken without his input. In this case therefore, the Appellant had the obligation to follow up and ensure that the process of supplying the trial Court file to this appellate Court was undertaken and actualized. I have nothing before me to demonstrate that the Appellant moved the Court in any way to facilitate the forwarding of the trial Court to this appellate Court. Considering that it is 5 years since the Appeal was filed, I am not persuaded that the Appellant was diligent enough. Whatever the explanation, the fact is that I do not have before the lower Court file.

20. Having made the above observations, I note that in this matter, the Appellant seems to have left out relevant pleadings from and/or failed to include the same in the Record of Appeal. Notable pleadings presumably not in the Record of Appeal would include possibly, the Replying Affidavit filed by the Respondent in response to the Application dated 8/06/2018, the subject of this Appeal, to which Affidavit, I presume, relevant exhibits, such as the Summons alleged to have been signed by the Appellant and the Process Server’s Licence alleged to have been expired, were attached.



21. Without the benefit of the copy of the Summons alleged to have been signed by the Appellant and also without perusing the Process Server's said impugned Licence, I am unable to conclusively interrogate and make an informed decision on whether the Appeal herein is merited. Since it is the Appellant who had the duty to, and did, prepare and file the Record of Appeal, it is her who must suffer the consequences of any omissions or deficiencies therein.
22. Granted, I could have deferred this Judgment until the lower Court file was supplied from the Kapsabet Magistrate's Court but considering the fact that this Appeal has been in Court since 2019 and also taking into account the inaction displayed by the Appellant in failing to promptly prosecute the Appeal, deferring this Judgment would have been unjust as it would only have perpetuated the delay further and unnecessarily added to the Court's backlog. Since it was the Appellant's duty to ensure that the Record of Appeal contained all relevant pleadings, certainly the Appellant cannot blame the Court for taking this course.
23. In any event, I have perused both the Affidavits of Service contained in the Record in respect to service of the Summons and in respect to the subsequent service of the NTSC and note that both allude to service by the same Process Server and in the same manner. Since the Appellant confirms that she was indeed served with the subsequent NTSC by the same Process Server in the same manner, it is difficult to disprove the earlier service of the Summons by the same Process Server alleged to have been served in the same manner.
24. Further, in any event, my view is that the best way to have interrogated the issue of service of Summons would have been for the Appellant to have applied to cross-examine the Process Server. There is however no indication that the Appellant invoked this right. In the circumstances, the trial Magistrate ruled on the basis of the material that was presented before her. In view thereof, the Appellant cannot fault the Magistrate for ruling as she did.

Final Orders:

25. The upshot of my findings above is that this Appeal fails and is accordingly dismissed.
26. I however decline to award costs to the Respondent since, despite the absence of any activity in the file for an inordinately long period of time, he, too, made no effort to either bring the issue of the delay to the attention of the Court or to move the Court to dismiss the Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF NOVEMBER 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Mogambi for the Appellant

N/A for the Respondent

Court Assistant: Brian Kimathi

