



**Bungoma Line Sacco v Bluemarks Shuttle (Civil Appeal E009 of 2024)  
[2024] KEHC 13887 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13887 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E009 OF 2024  
S MBUNGI, J  
NOVEMBER 8, 2024**

**BETWEEN**

**BUNGOMA LINE SACCO ..... APPELLANT**

**AND**

**BLUEMARKS SHUTTLE ..... RESPONDENT**

*(Being an appeal arising from the judgment and decree of the  
Honorable C. Cheruiyot RM delivered on 19th October 2023 at  
Kakamega in Small Claims Court COMM CLAIM No. E480 of 2023)*

**JUDGMENT**

**Brief facts of the case.**

1. Having been dissatisfied with the judgment proffered in Small Claims Court Comm Claim E480 of 2023 at Kakamega, the appellant filed a memorandum of appeal dated 06.02.2024. By leave of this court, the appellant filed an amended memorandum of appeal dated 05.03.2024 on the following grounds: -
  - a. The Learned Magistrate erred in law and in fact by refusing to set aside the default judgment entered on the 19<sup>th</sup> of October 2023 despite all the evidence placed before her showing that the Appellant was actually never served with the hearing dates and that the advocate who was hired by the insurance erroneously entered appearance for the appellant without instructions.
  - b. The Learned Magistrate erred in law and in fact by holding that the claimant had proven their case against the respondent where there was indisputable evidence that the Appellant was not the company the Respondent had entered into a contract with. They sued the wrong party and the Court rubber stamped and affirmed it.



- c. The Learned Magistrate erred in law and in fact by affirming her decision despite the fact that the Appellant herein proved through two company registration documents that they were not the correct party to be sued as the contract was with an affiliate company with whom they share the first name.
  - d. The Learned Magistrate erred in law in finding for the respondent herein where the Appellant insisted that the law firm of Kibet Rop Advocates was not hired to represent them in any dealings and was masquerading as having instructions. The law firm was procured for purpose to derail Appellant's case.
  - e. The learned Magistrate erred in law and in fact by allowing execution to issue against the appellant where there is no actual judgement in the court file and the decree was only extracted from proceedings of the court and not an actual judgment.
  - f. The Learned Magistrate erred in law and in fact by delivering a default judgment despite the fact that there was no proof of service on the Appellant.
  - g. The Learned Magistrate erred in law and in fact by refusing to set aside the default judgment despite the overwhelming evidence before her that would have merited and dictated that the default Judgment be set aside.
  - h. The Learned Magistrate erred in law in not considering the claimant did not prove their case to the required standard of proof and ignoring the legal aspect that he who claims must prove a case even when the same is undefended.
  - i. The Learned Magistrate erred in fact and in law in placing heavy reliance on the claim as filed while the same was not supported by any reliable evidence other than the affidavit of the claimant therein.
  - j. The learned Magistrate erred in fact and in law in placing heavy reliance on what was filed by the claimant and never hearing the case on actual merits.
  - k. The Learned Magistrate erred in law and in fact by ruling against the appellant herein by making her decision without considering all the facts before her and ignored her paramount duty as well as her inherent powers of doing substantial justice in the matter having regard to all the circumstances of the case.
  - l. The Learned Magistrate erred in law in failing to consider all issues or to do so adequately and critically consequently coming to the wrong unsupported and illogical judgment.
  - m. The Learned Magistrate's decision ruling is unfair and unjust and cannot be maintained as it is contrary to the interest of justice.
2. Parties agreed that the appeal be canvassed by way of written submissions.

### **Appellant's Case.**

3. It was the appellant's submission that the respondent did not enter into any contract with them and provided documentation shows that they are a separate entity from Bungoma Line Safaris and the averment was supported by the affidavit sworn by the chairman of Bungoma Line Sacco who stated that they were a separate entity from Bungoma Line Safaris.
4. The appellant submitted the claimants attached a cheque dated 28.09.2024 to prove their case in the small claims court. They submitted that the cheque was issued by Bungoma Line Safaris, not Bungoma



Line Sacco and the same should have been reason enough to set aside the judgment on a balance of probabilities as provided for in Order 1 Rule 10.

5. The appellant further averred that they were not properly represented and did not hire the firm of Kibet Rop to come on record. The appellant averred that confusion arose since the matter had been previously withdrawn and a total stranger entered into appearance for them. They further submit that the mention dates were never served upon their advocate, Anwar and the matter proceeded without their knowledge or input. The appellant leaned on the above averments as reasons for the failure to file his memorandum of appearance or defence and sought that the default judgment be set aside on balance of probabilities as per Order 10 Rule 11 of the Civil Procedure Rules.
6. The appellant further submitted that the trial magistrate opined there was no inordinate delay by the appellant in filing the application, averring that the appellant was in good time to have the default judgment set aside.
7. The appellant submitted that triable issues for consideration were raised in the application dated 08.01.2024, stating that they have suffered prejudice from a default judgment being entered against them.

### **Respondent's Case.**

8. Vide submissions dated 18.06.2024, the respondent identified the key issues for determination as follows: -
  - i. Whether the default judgment entered on the 19th October 2023 against the appellant was regular.
  - ii. Whether the appellant is introducing new evidence at the appeal stage without leave of court.
  - iii. Whether the trial Court's ruling delivered on 5/02/2024 in Kakamega Small Claims Court Claim No. E480 of 2023 was sound in law and facts.
9. On the first issue, the respondents submitted in the affirmative, averring that prior to the claim that gave rise to the instant appeal, the respondent had initially filed a claim COMM Case No. E306 of 2023 that was subsequently withdrawn by consent of both advocates on record, being Mr. Mulama and Mr. Anwar for claimant and respondent (appellant herein) respectively, on the agreement that the respondent (Blue marks Shuttle) was to file a new claim against the appellant which then culminated to COMM No. E480 of 2023, the subject of this appeal. It was the respondent's submission that the latter information ought to have been duly communicated by Mr. Anwar who was acting on behalf of the appellant herein.
10. The respondent submitted that the appellant's chairman in his affidavit admitted that he was served, and he forwarded the documents to their lawyer which is a clear indication of service hence the judgment was regular.
11. Further, the respondent submitted that the appellant has failed to disclose the select lawyers authorized by them to act on their behalf. The respondent further averred the firm of Kibet Rop & Company Advocates filed notice of appointment to enter into appearance for the appellant, and there is evidence that they were involved in payment negotiations with the advocates for the respondent herein (page 39 of record of appeal).
12. On issue (2), The respondents rebutted the claims by the appellant stating that the chairman of the appellant never raised the issue of there having existed two separate and distinct entities trading as



Bungoma Line Savings and Credit Cooperative Society, Bungoma Line Safaris Limited or Bungoma Line Sacco.

13. The respondents also averred that the chairman of the appellant did not annex or make reference to such registration numbers as adduced in grounds 1 and 2 of the appellant's memorandum of appeal.
14. Lastly, the respondents submitted that the trial adjudicator properly applied her mind in determining that the appellant failed to demonstrate what substantial loss they stood to suffer if stay was not granted. The firm of Kibet Rop & Company advocates who acted for the appellant had been duly served hence the default judgment entered against the appellant was regular on all counts.

### **Analysis and Determination.**

15. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated 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 reanalyze 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. I have looked at the lower court proceedings, the ruling appealed against and the submissions filed by the counsels. The first issue for determination is whether magistrate was right to decline to set aside the ex-parte judgment entered on 19.10.2023.

17. Rule 11(1) of the Small Claims Rules states:

Where a respondent fails to file a response to the claim within the time specified in these Rules or within such additional time as the Court may have allowed, the Court shall, on the written request of the claimant, enter default judgment and issue a decree in favor of the claimant.

Rule 11(4) of the Small Claims Rules provides as follows: -

The Court may set aside a default judgment or any consequential orders given under this rule on the written request of any Admission of claim, set-off, or counterclaim, etc. Power of court to enter or set aside default judgment. 756 Kenya Subsidiary Legislation, 2019 party that is aggrieved by the decree or order if the Court is satisfied, on evidence given by the applicant, and on hearing the other parties to the proceeding that; —

- (a) the default was inadvertent;
- (b) the applicant has a valid defence with a probability of success;
- (c) there are sufficient grounds to warrant setting aside the default judgment, decree or order.

18. In the case of *Mohamed & Another -v- Shoka* (1990) KLR 463 the Court set out the tenets a court should consider in setting aside interlocutory judgment to include:

- i. Whether there is a regular judgment;
- ii. Whether there is a defence on merit;



- iii. Whether there is a reasonable explanation for any delay;
  - iv. Whether there would be any prejudice.
19. the case of James Kanyiita Nderitu & Another [2016] eKLR, the court stated:
- “...From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another -vs- Shah* (1968) EA 98, *Patel -vs- E.A. Cargo Handling services Ltd* (1975) B.A. 75, *Chemwolo & Another -vs- Kubende* (1986) KLR 492 and *CMC Holdings -vs- Nzioka* [2004] I KLR 173. In an irregular default 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 justiae*, 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 issue 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.”
20. In the case of *Maina v\_ Mugiria* (1983) the court of Appeal held:
- a) First there are no limits or restrictions on the Judges' discretion except that it should be based on such terms as may be just because the main concern for for the court is to do justice to the parties.
  - b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice( *Shah Vs Mbogo* (1976)E.A.
  - c) The court has no discretion where it appears there has been no proper service(*kanji Karan v Velji Ramji*(1954)21 EACA20)
21. I have looked at the ruling. The magistrate declined to set aside the default judgment for the reason that the appellant was duly served with the claim and subsequent mention dates. In page 6 of her ruling, she held: “On the first tented the court finds that all both advocates were duly served with the claim and were represented by the firm of Kibet, Rop & Company Advocates. Further the 1<sup>st</sup> Respondent’s



- Chairman in his affidavit sworn on 08/1/2024 he admitted that when the claimant sent the claim documents to him he forwarded the same to their lawyer in the firm of Anwar & Co. advocates to deal. Therefore, there was a regular default judgment on record.”
22. I have looked at the affidavit sworn on 18.01.2024 by the appellant’s chairman. It is true that he admits receiving the claim documents from the claimant and forwarded the same to their lawyers Anwar & Company Advocates to deal. Therefore, the trial magistrate cannot be faulted for finding that there was proper service and for subsequently entering judgment in default against the appellant.
23. The assertion by the appellant that he had not hired the firm of Kibet Rop to come on record for them, the court cannot be faulted for proceeding in belief that the appellant had hired the said firm of advocates. Normally, courts do not regulate on which advocate to represent a party. So long as there is a notice of appointment filed in court, the courts proceed in belief that such an advocate is duly instructed by the party being represented.
24. Having found that the ex-parte judgment was regular, she proceeded and reconsidered whether the draft defence raised triable issues or whether it was reasonable and in considering this she was guided by the case of Tree Shade Motor Limited vs DT Dobie Co. Ltd CA 38/98. The trial magistrate held: “...The 1<sup>st</sup> Respondent/Applicant has attached a draft response which they submitted raises triable issues. The Court has had the benefit of reading through the draft defence, and in my opinion the defence admits the claimant and the 1<sup>st</sup> Respondent are a joint entity and they entered into an agreement to pay the claimant which was anchored on the 2<sup>nd</sup> Respondent paying as the insurance provider which agreement is therefore not denied save that the 2<sup>nd</sup> Respondent is currently insolvent and unable to cover the agreed payment. The defence attempts to raise that the agreement did not raise any contractual obligation but a good faith arrangement of fast settlement pf the claim. From the said perusal, it is the court’s finding that the said defence does not raise any triable issue as it does not dispute the said agreement save that the said agreement does not create liability on its part but that of the 2<sup>nd</sup> Respondent who is currently insolvent...”
25. I have looked at the draft response. Paragraphs 3 and 4 state: -
- “That the claimant and the 1<sup>st</sup> respondent are a joint entity and as such claiming against us is like claiming against themselves unless they can produce a document showing how the relationship was terminated.
- That the agreement to pay the claimant was anchored in the idea that the 2<sup>nd</sup> respondent would remain as the insurance provider for the claimant and the 1<sup>st</sup> respondent.”
26. From the above it is clear that the appellant admits the claim. To me it is not the problem of the respondent that the insurance of the appellant, Invesco Insurance Limited, became insolvent. Clearly, the appellant admits there was an agreement between the appellant and the respondent and further in the draft response the appellant did not bring up the issue that the appellant and the respondent were separate entities. In fact, the appellant insisted that they were the same entity and no one could claim against the other.
27. Therefore, I find that the trial magistrate was right in finding that the draft response to the claim raised no triable issues.
28. On the aspect of whether there was delay, the trial court found that there was no delay. The default judgment was entered on 19.10.2023 and the notice of motion to set aside was filed on 08.01.2024; a difference of two months and three weeks. Hence the magistrate cannot be faulted for finding there was no inordinate delay in bringing the application.



29. Lastly, on the issue of whether the appellant would have been prejudiced by refusal of the court to set aside the regular judgment, the trial court found that there was no prejudice. The appellant failed to demonstrate the prejudice it would suffer. I will take the same position given the fact that the appellant admitted having been served with the claim documents and also having admitted in its draft response that there was an agreement between the appellant and the respondent upon which the claim was anchored.
30. The ex parte judgment was a lawful judgment. There was no need for formal proof hearing for the claim was a liquidated claim. Paragraph 5 of the claim (first tick) shows the remedy sought was for a judgment in the sum of Kshs. 360,000/-. The decree was procedurally extracted.
31. In a nutshell, I have no reason to fault the trial magistrate for declining to set aside the ex parte judgment. Therefore, the appeal has no merit. It is hereby dismissed. Costs to the respondent.
32. Right of appeal 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Mr. Mulama holding brief for Mr. Abuya for the respondent present online.

Ms. Mburu for the appellant absent.

Court Assistant – Elizabeth Angong'a

