



REPUBLIC OF KENYA



KENYA LAW
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**Gitau t/a Gallant Worldwide Auctioneers v Mbanda (Civil Appeal
E146 of 2024) [2024] KEHC 16136 (KLR) (Civ) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E146 OF 2024**

**TW OUYA, J
DECEMBER 9, 2024**

BETWEEN

JESSE GITAU T/A GALLANT WORDWIDE AUCTIONEERS APPELLANT

AND

COLLINS MBANDA RESPONDENT

*(An appeal emanating from Ruling of Hon. Kiongo Kagenyo in
SCCC No. E6383 of 2022 delivered on 19th January 2024.)*

RULING

Background

1. The Claimant herein instituted claim vide statement of claim filed on 19th October 2022 and the same was duly served upon the defendant both physically and by WhatsApp.
2. The claimant's claim was for the refund of ksh.30,191/= which was meant for the sale of a 55" inch Sony TV which did not materialize after the claimant had sent the money to the Respondent via Mpesa but the Respondent failed to reverse or to refund.
3. Request for judgement was made by the claimant on 28th November 2022. Same was served upon the Defendant and affidavit of service sworn on the same date filed.

“The Plaintiff requests the Honourable Court for an Ex – Parte Judgement against the Defendant herein who has failed to enter appearance and/or file a Defence within the prescribed time, for a total of kshs.30,191/= being the Liquidated Claim, together with interest from the date of filing suit until payment in full.”



4. Judgement was entered vide Ruling dated 9th January 2024 which read: “The Respondent has come to court by way of Notice of Motion Application dated 10th August 2023. I have looked at the documents filed by the parties and submissions therein. I have also looked at proceedings and request for judgement dated 28th November 2022 and I am satisfied that the default judgement as entered was regular. In the end, I do dismiss the application dated 10th August 2023 with costs of ksh.10,000/= to the Claimant.”
5. The court being satisfied with the service against the Respondent entered Default judgement against the Respondent and directed that the matter to proceed under section 30 of the [Small Claims Court Act](#).
6. At this juncture the Respondent filed a Notice of motion dated 10th August 2023 for an injunction and stay of execution against orders issued against it on 4th August 2023 and further that the said orders be set aside.
7. The same was heard and dismissed vide Ruling dated 9th January 2024 which read in part:

“The Respondent has come to court by way of Notice of Motion Application dated 10th August 2023. I have looked at the documents filed by the parties and submissions therein. I have also looked at proceedings and request for judgement dated 28th November 2022 and I am satisfied that the default judgement as entered was regular. In the end, I do dismiss the application dated 10th August 2023 with costs of ksh.10,000/= to the Claimant.”
8. The Respondent/Appellant then filed the instant appeal in the High Court on the grounds that:
 - i. The learned trial Magistrate erred in fact and in law in failing to appreciate the nature of the subject matter of the Application dated 10th August 2023.
 - ii. The learned trial Magistrate erred in fact and in law by finding that service of the statement of claim and pleadings by the Respondent herein was properly effected upon the Appellant in the trial court matter.
 - iii. The learned trial Magistrate erred in fact and in law in denying the Appellant herein an opportunity to cross-examine the process server who allegedly effected service upon the Appellant herein in the trial court matter.
 - iv. The learned trial Magistrate erred in fact and in law by failing to provide justifications and reasons behind the determination that is the ruling delivered on the 19th January 2024.
 - v. The learned trial Magistrate erred in law by failing to consider the Appellant’s submissions to the application dated 10th August 2023 in delivering the ruling on the 19th January 2024.
 - vi. The learned trial Magistrate erred in fact and in law by failing to consider that the Appellant herein has a triable case at the trial stage with a high probability of success.
 - vii. The learned trial Magistrate erred in fact and in law in failing to consider that the Appellant has not been granted the right to be heard and defend his claim and has therefore been condemned unheard at the right stage.
9. Parties canvassed the appeal by way of submissions. I have carefully read and considered.
10. In his submissions the Appellant has raised issues that the trial court erred in dismissing his application for setting aside judgement based on the fact that interlocutory judgement was entered against him



when there was no proper service upon him. He also raised issue that he had an arguable case with a defense that raises triable issues. That the trial court erred by failing to consider the Appellant had not been given an opportunity to be heard on merit.

11. The Claimant/Respondent refers this court to his submissions at the trial court in determining whether the grounds in the memorandum of appeal are merited. He points out that the Appellant did not make any prayer to be allowed to cross-examine the process server and as such cannot fault the trial court in this appeal. He argues that the Appellant's main ground in his application for setting aside the judgement were not satisfied and that costs could not be awarded to the Appellant because his application did not succeed. He prays that the appeal be dismissed with costs.
12. This court has considered the submissions by parties together with the pleadings and the entire record of appeal.
13. This court being the final court of appeal in the small Claims proceedings has the duty to consider matters of law. The Appellant one main issue of law that there was no proper service upon him by the Respondent. He faults the trial court for believing the allegations that the Respondent served him by WhatsApp instead of physical service when their offices are in close proximity. He cites order 5 Rule 8 which provides that:

“ 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 will be sufficient

He also cites Rule 14, 16 to the effect that the process server could have affixed the summons on the outer door or some conspicuous place and then file a return of service
14. The court has considered the affidavit of service sworn on 24th October, 2022 by one Benedict Musembi Mutuku, a court process server who effected service upon the Appellant via WhatsApp. He has explained clearly how his attempts to serve the Appellant in person or his authorized agent in his office at Utalii House 2nd Floor were frustrated. He has attached evidence that the WhatsApp message and attachments were delivered to the appellant's number 0725259379 as per the business and that was given by his office.
15. This court has no doubt that the Appellant was duly served and that he had knowledge of the matter and the statement of claim, witness statements and all the annexures together with mention date for 1st November 2022. The court has also seen the request for judgement dated 28th November 2022 which was exparte under Order 10 Rule 4 (2) of Civil Procedure Rules.
16. Having considered the above, I find that the service to the Appellant was regular and that the default judgment was entered in a regular manner.
17. The court has also considered the proceedings by the Respondent's Notice of Motion dated 10th August 2023, the submissions by parties and Ruling thereto dated 9th January 2024. It is noteworthy that the Appellant raised similar issues that is, improper service, lack of due process and that his defence raises triable issues and likelihood of prejudice if the exparte judgment is allowed to stand. The issue of being allowed to be cross examine the process server did not feature anywhere in the Appellant's pleadings or submissions.
18. The subject matter of the appeal is the Ruling dated 9th January 2024. The Appellant filed a Notice of Motion under certificate of urgency dated 10th August 2023 seeking for an injunction to warrants dated 4th August 2023 pending hearing and determination of the application. The application was canvassed



by way of submissions after parties filed corresponding affidavit. The court came to a determination that the proceedings were regular in deciding the judgment in default.

19. Indeed, the Appellant attached a copy of draft response to the Respondent's claim but this was after Judgement in default was entered. This was close to one year afterwards as request for judgement was on 28th November 2022 while the attempts to set aside was on 10th August 2023. The issue of triable or arguable case was brought in late bearing in mind that this is a small claims court with a process that is meant to facilitate expeditious dispensation of justice.
20. The Appellant had a chance to be heard at the point of service where had he responded and filed his statement of defence, then he would have been heard. Having been properly served and having opted to stay away from the proceedings, he locked out his chances of defending the claim. The Appellant has raised issue that the Trial Court did not give reasons for its findings. Again, the small claims court by its very nature is not a place for back and forth. This court has considered the impugned Ruling by the Trial court against the evidence adduced by the plaintiff. This court does not believe either that the defendant was not properly served as alleged in the application to set aside the judgement in default.
21. For the above reasons I find that the Trial Court arrived at a proper decision in dismissing the Appellant's appeal and hereby uphold the said findings.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9th DAY OF DECEMBER, 2024

HON. T. W. OUYA

JUDGE

For AppellantRukwaro

For Respondent.....Ms Buluma

Court AssistanT: Martin

