



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO.318 OF 2019**

**TOTAL KENYA LIMITED.....APPELLANT**

**VERSUS**

**THE PROJECT AND ALLIED CONSULTANTS LTD.....RESPONDENT**

*(An appeal from the Ruling and Orders of the learned Hon. D.O Mbeja (Mr.)*

*Senior Resident Magistrate delivered on 7<sup>th</sup> June 2019 in CMCC No. 4557 of 2014*

*Milimani Commercial Courts Nairobi)*

**JUDGMENT**

1. Projects and Allied Consultants Limited (the respondent) sued Total Kenya Limited (the appellant) seeking damages for illegal detention, emotional stress, costs and interest before the lower court. The following are brief facts.
2. An interlocutory Judgment was entered on 15<sup>th</sup> November 2018. The appellant through the firm of Walker Kontos advocates filed a memorandum of appearance on 5<sup>th</sup> December 2018 together with a defence.
3. The matter was fixed for hearing on 8<sup>th</sup> January 2019 when it proceeded ex parte. Judgment was delivered on 12<sup>th</sup> March 2019.
4. The appellant later filed a notice of motion dated 3<sup>rd</sup> April 2019 before the trial court seeking the following orders:
  - i) Spent
  - ii) **THAT** there be a stay of execution of the Judgment dated 12<sup>th</sup> March 2019 pending the inter – parties hearing and determination of the present application.
  - iii) **THAT** the Interlocutory Judgment and the final Judgment entered against the Defendant in this matter and all consequential order/directions be set aside and the matter be heard de novo.
  - iv) **THAT** the Honourable court make further orders and issue other directions as it may deem just and expedient.
  - v) **THAT** the costs of this application be awarded to the applicant.
5. The respondent in response to the said application filed a preliminary objection (P.O) dated 18<sup>th</sup> April 2019. It did not file any replying affidavit. In the P.O the respondent sought to have the application dated 3<sup>rd</sup> April 2019, the memorandum of appearance and defence dismissed.
6. The P.O was argued orally and a ruling delivered on 7<sup>th</sup> June 2019, upholding it and disallowing the application dated 3<sup>rd</sup> April 2019. The learned trial magistrate then dismissed the application with costs.

7. Being dissatisfied with the ruling the appellant filed this appeal raising the following nine (9) grounds:

- i. The learned Magistrate erred in law and in fact in making a finding that affidavit of service of summons on record had not been challenged when the same had been strongly challenged and serious irregularity issues raised in the application dated 3<sup>rd</sup> April, 2019 which had not been controverted.
- ii. The learned Magistrate erred in Law and in fact in failing to consider and make a determination on the main issue of the two purported affidavits of service of summons both dated 17<sup>th</sup> June, 2019 and sworn by two different process servers but filed in court on direct dates in 2015 and 2016 alleging service of the same summons at the same date and time.
- iii. The Learned Magistrate erred in Law and in fact in failing to consider and make a determination that the issues of fact raised in the application dated 3<sup>rd</sup> April, 2019 had not been converted.
- iv. The learned Magistrate erred in law and in fact in making a finding that there had been inordinate delay on the part of the Appellant in defending the suit, yet the court had failed to consider the serious issues of irregularities in the purported service of summons raised in the application dated 3<sup>rd</sup> April, 2019 which issues had not been controverted.
- v. The Learned Magistrate erred in law and in fact in making a determination that the application dated 3<sup>rd</sup> April, 2019 is devoid of merits despite the fact the serious issues of irregularity raised in the application, the sworn supporting affidavit in support of the application and evidence exhibited thereto had not been controverted.
- vi. The Learned Magistrate erred in law and in fact in failing to make finding that the issue of whether the Appellant was properly on record could only be determined after the court had addressed the issues of service raised in the application which issued had not been controverted.
- vii. The Learned Magistrate erred in law and in fact in ignoring the clear irregularities and clear falsehood perpetuated by the respondent to secure interlocutory judgment using affidavits of service sworn by different process servers and in effect sanitizing illegal acts by purported process servers.
- viii. The learned Magistrate erred in law and in fact in making a finding that the Appellant affidavit of service on record in proof of service had not been challenged for reason that there was no notice to cross –examine the process server, despite the fact that the respondent had not controverted the issues raised in the application, the sworn supporting affidavit and evidence exhibited thereto.
- ix. The Learned Magistrate erred in law and in fact in failing to make a finding that the preliminary objection was not merited.

8. The appeal was canvassed by written submissions. The appellant's submissions were filed by the firm of Walker Kontos and are dated 8<sup>th</sup> July 2021. Counsel submitted that a preliminary objection must be based on a pure point of law which must be clearly stated and based on the assumptions that all facts pleaded by the other side are correct. Counsel referred to the case of **Margret Nyiha Gatambia & 2 others v Peninah Ngechi Njaaga & 3 others {2019} eKLR** where the court stated as follows:

*“A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean: -*

*“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.*

Further **Sir Charles Nebbold, JA** stated that: -

*“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.*

9. It is counsel's submission that the trial court proceeded to uphold the P.O without even stating under which law it was based.

10. Counsel wondered how the respondent could raise a P.O on the issue of the appellant not being properly on record when:

- i. The appellant had not been served with summons and pleadings.
- ii. The appellant had filed memorandum of appearance after the matter came to the attention of the appellant.
- iii. The appellant had filed a statement of defence after the matter came to the attention of the appellant before formal proof.
- iv. No law prohibits the appellant from filing memorandum of appearance and defence at any time after becoming aware of existence

of court proceedings.

v. No notice of entry of Judgment was served on the appellant

vi. No law was quoted by the respondent as being the basis of his P.O.

11. On the application dated 3<sup>rd</sup> April 2019, he submitted that there was no proof of service of the plaint and summons to enter appearance; there were two affidavits from the two different people alleging to have served the appellant with the plaint and summons on 22<sup>nd</sup> August 2014, the appellant was never served with the notice of entry of Judgment and notice of hearing of the formal proof.

12. On the issue of service of the summons counsel relied on the case of **Deposit Protection Fund Board v City Cabanas Ltd {2010} eKLR** where the court held:

*“I find that the service of summons in this matter is highly questionable and that the judgment in default cannot stand in the absence of positive proof of the existence of Anne Nge’ndo. Therefore, the same warrants to be set aside. If I am wrong in finding that the service of summons to enter appearance was irregular, and that the judgment in default should be set aside on account of that irregularity, this Court still retains jurisdiction to set aside the judgment and any consequential decree or order upon such terms as are just.”*

13. In **Charles Khisa Ngwengwe & 3 others v Simon Wachie & 5 others {2014} eKLR** the court stated:

*“Service of summons is so central to any litigation. Without proper service or no service at all, the court is entitled to set the ex-parte judgment ex debito justitiae. For arguments sake even if the court were to assume that service was proper, the draft defence and even the replying affidavit by the respondents show that there are serious contested issues which the applicants ought to be given opportunity to defend.”*

14. The appellant invited the court to reconsider the application dated 3<sup>rd</sup> April 2019 and find in favour of the appellant.

15. The respondent’s submissions were filed by Rabala & company advocates and are dated 26<sup>th</sup> July 2021. It is counsel’s submission that service of pleadings and summons serves two purposes namely:

i) To enable the party served to claim to know that there is a claim that exists against them.

ii) Summons invite the defendant to enter appearance.

16. To support this he relied on the case of **Pecker Woods Ltd v Bank of Africa Kenya Ltd {2021} eKLR** where Justice M. Kasango stated:

*“I have belaboured the point of the important role the summons play in a suit because the plaintiff submitted that Order 5, requiring a party to take out summons, is directory and not mandatory. That in my view is erroneous. Granted that there are some decided cases that indeed have held that the requirement of summons is not mandatory. I find that such a view is not supported by Order 5 of the Rules. A plaint on its own may inform a defendant there is a claim against him but does nothing more than that. It does not direct the defendant what to do and when to do it if he does not accept that claim. It is the summons however, making reference to the plaint, which invites the defendant to file, within a specified period, his appearance. The summons further warns the defendant that if he does not file an appearance within the specified period the suit may proceed in his absence and judgment may be entered against him as prayed in the plaint.....”*

17. Relying on Order 5 Rule 3 of the Civil Procedure Rules he explained how a corporation is served with summons when it has been sued. He therefore submitted that the appellant was properly served on 2<sup>nd</sup> August 2014. He also quoted the case of **Shardack Arap BaiYwo v Bodi Bach KSM Civil Appeal No 122 of 1986 {1987} eKLR** where it was held:

*“There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”*

18. He finally submitted that the appellant slept on its rights and ought to have questioned the process server which it did not do. That the appellant could not have been accorded audience by the trial court without seeking leave to file its defence out of time. He urged the court to dismiss the appeal and order for release of the money in the joint interest earning account to the respondent.

### **Analysis and determination**

19. This being a first appeal the court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. An allowance must be given owing to the fact that this court unlike the trial court has not seen nor heard the witnesses. see **Selle & another v Associated Motor Boat Co. Ltd & others 1968 EA 123**.

20. I have duly considered the evidence on record, the grounds of appeal both submissions and the authorities cited. I have already set out in paragraph 2-6 of this Judgment the chronology of what happened in this matter.

21. In the Ruling dated 7<sup>th</sup> June 2019 this is what the learned trial Magistrate state at page 3:

*“The applicant in the instant case chose to ignore the court summons requiring it to enter appearance is rather unfortunate. The explanation by the applicant in the opinion of the court is not credible. The result is that the matter proceeded ex parte in the applicant’s absence duly served (sic). I have considered the grounds advanced by the applicant in support of the instant application. I have also considered the affidavit evidence so far on record coupled with rival oral submissions by the parties and I am satisfied that the applicant has been sluggish in defending his case. There has been inordinate delay and lack of vigilance by the applicant. In view of the foregoing I am inclined to uphold the preliminary objection dated 18<sup>th</sup> April 2019 which I hereby uphold and disallow the application before court and on the same wavelength I find in the result that the application dated 3/4/2019 is devoid of merit and it is dismissed with costs to the plaintiff all circumstances considered. Parties at liberty to apply.”*

22. From the above findings by the trial court one would think the application dated 3<sup>rd</sup> April 2019 was heard which is not the case. First of all the respondent never filed any replying affidavit to the said application. So there is no way the application could be said to be dismissed. If it was incompetent, then it ought to have been struck out and not dismissed.

23. What then was the basis of the P.O? According to the respondent the appellant had no right of audience because it filed a memorandum of appearance and defence out of time. These are documents which would IN NO WAY be considered without the leave of the court because there was already an interlocutory Judgment and a final Judgment on record. What then was the respondent’s fear?

24. Order 10 Rule 11 of the Civil Procedure Rules provides:

*“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”*

A party (as the appellant) who has been adjudged has a right to come to court under the above provision and seek the setting aside of the Judgment entered under Order 10 of the Civil Procedure Rules which was the case here.

25. The mere fact that the appellant filed a memorandum of appearance and defence out of time was not reason to deny them audience before a court of law when there was a pending application for regularizing their appearance. There was no way the documents filed by the appellant could form part of the record of the court without the leave of the court. Such Leave could only be obtained or denied through the hearing and determination on merit of the Notice of Motion dated 3<sup>rd</sup> April 2019.

26. It is therefore my finding that the learned trial Magistrate erred in upholding the P.O which was not based on any known law. He also erred in dismissing the application dated 3<sup>rd</sup> April 2019 without hearing the parties. I find merit in this Appeal which I allow.

27. I set aside the Ruling dated 7<sup>th</sup> June 2019 and substitute it with an order dismissing the P.O dated 18<sup>th</sup> April 2019 and reinstate the application dated 3<sup>rd</sup> April 2019 to be heard on merits.

ii) The lower court file to be returned and placed before the Chief Magistrate in charge of Milimani Commercial court within 14 days for allocation for hearing before any Magistrate with competent jurisdiction besides Hon. D.O Mbeja (Mr.).

iii) The appellant is awarded costs of the appeal.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 8TH DAY OF OCTOBER 2021 AT MILIMANI, NAIROBI BY:**

**H. I. ONG’UDI**

**JUDGE**