



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 491 OF 2012**

**MARKAT ENGINEERING SERVICES LTD.....1<sup>ST</sup> APPELLANT**

**MARK KAHUKO KARIUKI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SEBASTIAN MWANGANGI MUTUA T/A SEMUM SUPLIES.....RESPONDENT**

**(Being an appeal from the ruling delivered on 6<sup>th</sup> September, 2012 by Hon. Mr. Nditika (Principal Magistrate) at Chief Magistrate's Court at Milimani Commercial Court Civil Case No. 82 of 2012)**

**JUDGMENT**

1. The Appellant, Markat Engineering Services Ltd and Mark Kahuko Kariuki were sued by the Respondent, Sebastian Mwangangi Mutua T/a Semum Suplies vide a plaint (amended) filed in court on 2<sup>nd</sup> March, 2012. The claim was for Ksh.1,186,650/= stated to be the value of the Respondent's goods wrongfully seized and detained by the Appellants.
2. On 27<sup>th</sup> March, 2012, the Respondent filed a request for judgment as there was no Entry of Appearance and no Statement of Defence had been filed within the prescribed time.
3. On 2<sup>nd</sup> April, 2012, *ex parte* judgment was entered for the Respondent.
4. On 10<sup>th</sup> July, 2012, the Appellants filed a Notice of motion of the same date seeking orders, *inter alia*, for the grant of unconditional leave to defend the suit and to file their Memorandum of Appearance and Defence. Secondly, that the annexed statement of defence, counterclaim and set off be deemed as having been properly filed.
5. The application was predicated on the grounds stated therein and was supported by the affidavit sworn by Mark Kahuko Karugi. Service of summons to enter appearance was denied. It was averred that the Appellants moved out of the premises situated at Industrial Area Kampala Road following the sale of the premises by their landlord, Kenya Farmers Association Ltd to Bonfide Clearing and Forwarding Company limited who took over possession of the same on the 15<sup>th</sup> December, 2011.
6. The application was opposed. It was stated in the replying affidavit that the Appellants were properly served but failed to enter appearance or file a defence. It was further stated that the service of summons was not at the building formerly owned and leased by the Kenya Farmers Association but at the premises bearing the name Markat Engineering Services Ltd along Kampala Road, Industrial Area.
7. On the 6<sup>th</sup> September, 2012, the trial magistrate held that the Appellants were properly served but observed that there was a draft defence and counterclaim and allowed the application on condition that the deposit of the decretal sum within 14 days.
8. The Appellants were aggrieved by the said ruling and appealed to this court on the following grounds.

**1. That the learned magistrate erred in law and fact in holding and finding that the Appellants were properly served with the summons and Plaint in the proceedings before the lower court.**

**2. That the learned magistrate erred in law and fact in failing to appreciate the irregularities in service and failing to find**

that the summons and Plaint in the proceedings before the lower court were not served according to law.

3. That the learned magistrate erred in law and fact in failing to give unconditional leave to the Appellant to Defend the suit before the lower court.

4. That the learned magistrate erred in law and fact in imposing conditions that were too onerous or unreasonably onerous as conditions for setting aside the judgment before the lower court.

5. That the learned magistrate erred in law and fact in failing to hold and find that the Appellant had set out sufficient grounds to satisfy the conditions for setting aside of *ex parte* proceedings unconditionally.

6. That the learned magistrate erred in law and fact in failing to assess the weight of the scales of justice that were tilted towards setting aside the *ex parte* proceedings given the peculiar circumstances of the case.

7. That the learned magistrate erred in law and fact in failing to exercise judicial discretion in favour of the Appellant.

9. The Appellants prayed for the following orders:

a. That this appeal be allowed.

b. That the finding of the lower court be set aside and more specifically the judgment of the lower court against the Appellant be set aside unconditionally.

c. That the Appellant's application dated 10<sup>th</sup> July, 2012 be allowed unconditionally and the Appellant be given unconditional leave to defend the suit before the lower court.

d. That the Appellant's be awarded the cost of the appeal.

10. During the hearing of the appeal, the parties relied on their written submissions which I have considered.

11. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

12. The principles applicable in determining whether to set aside an *ex parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983]eKLR** as follows:

**“a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but 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 v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c).**

13. Although both the affidavit in support and the replying affidavit delved into the merits of their respective cases, this court will only focus on the issue at hand, that is, whether the *ex parte* judgment should be set aside unconditionally with unconditional leave to defend the suit.

14. The affidavit of service sworn by the court process server, Julius Mutia Muthoka on 26<sup>th</sup> March, 2012 reflects that on 5<sup>th</sup> March, 2012 in the company of the Plaintiff, he proceeded to a premises in Industrial Area situated along Kampala Road bearing the sign board of Markat Engineering Services Ltd where the security guard who seemed to recognize the Respondent opened the gate for them. That they proceeded to the Managing Director's Mark Kariuki's receptionist who called the managing Director who received them and after exchange of pleasantries the processer servicer served him with summons to Enter Appearance and a copy of the Amended Plaint for both the 1<sup>st</sup> and 2<sup>nd</sup> Appellant herein. That the said Managing Director accepted the service but declined to sign the said documents.

15. Although it was averred in the affidavit in support that the Appellants would apply for the process server to be summoned to court for cross- examination, this did not happen. Although the Appellants have exhibited a letter dated 4<sup>th</sup> November, 2011 which reflects that they vacated the premises of Kenya Farmers Association Ltd on 31<sup>st</sup> October, 2011 the process server's affidavit reflects that service was at a premises along the same Kampala Road in Industrial Area with a signboard of Markat Engineering Service Ltd.

16. The processer server's affidavit reflects that the person served was Mark Kariuki while the 1<sup>st</sup> Appellant had given his name as Mark Kahuko Karugi Identity Card No. 4823159. On the other hand, the process server's affidavit reflects that he was accompanied by the Plaintiff who knew the 2<sup>nd</sup> Appellant who is reflected in the amended plaint at Mark Kaulu Kariuki. The court is therefore left with the word of one party against the other regarding the issue of service.

17. The affidavit of service did not have the original summons served attached to it as required under Order 5 rule 15(1) Civil Procedure Rules. No copies of the served summons were exhibited even in the replying affidavit in response to the application the subject of this appeal.

18. With the foregoing, there are doubts on the service and irregularities in the affidavit of service. Consequently, I allow the appeal and set aside the *exparte* judgment unconditionally.

19. Taking into account the circumstances of the appeal, the costs of the appeal will follow the event upon the determination of the suit.

**Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of Nov., 2018**

**B. THURANIRA JADEN**

**JUDGE**