



**PN Mashru Limited v Kahiga (Appeal E057 of 2023)  
[2024] KEELRC 2082 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2082 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E057 OF 2023**

**M MBARÚ, J  
JULY 18, 2024**

**BETWEEN**

**PN MASHRU LIMITED ..... APPELLANT**

**AND**

**ANTHONY WACHIRA KAHIGA ..... RESPONDENT**

*(Being an appeal from the ruling of Hon. Lesootia Saitabau delivered  
on 15 February 2023 in Mombasa CMCC ELRC No.993 of 2019)*

**JUDGMENT**

1. The appeal herein arises from the ruling delivered on 15 February 2023 in Mombasa CMCC ELRC No.993 of 2019. The appellant is seeking that the trial court ruling and order on 15 February 2023 be set aside, the ex-parte judgment and decree of 8 June 2021 be set aside, and the appellant be allowed unconditional leave to file a response and defend the claim by way of hearing on merit.
2. The appeal is that the appellant filed an application dated 12 July 2021 before the lower court which was not considered on the merits. The trial court failed to consider the fact that the service of summons upon the appellant was contrary to Order 5 rule 3(a) of the Civil Procedure Rules and hence failed to consider the draft response attached to the application. The ex-parte judgment delivered on 8 June 2021 should have been set aside and the appellant allowed leave to defend the claim. The discretion bestowed upon the court was not judicially applied effectively denying the appellant the chance to be heard on merit.
3. The appeal is also that by failing to allow the appellant the right to a hearing, the award of Ksh.1, and 821,565 was erroneous and it failed to balance rights and the effect of dismissing the application dated 12 July 2021 resulted in the denial of access to justice and the orders sought in the appeal should be allowed.
4. Both parties attended and agreed to address the appeal by way of written submissions.



5. The appellant submitted that in the application dated 12 July 2021, the appellant was seeking the trial court to set aside the ex-parte judgment delivered on 15 February 2023 because the service of summons upon the appellant offended the provisions of Order 5 rule 3(a) of the Civil Procedure Rules. The trial court observed that the Process Server served a summons to enter an appearance upon the clerk/supervisor who accepted service by signing on the reverse of the summons. This service was irregular as the process server never followed the mode of service envisaged under Order 5 Rule 3(a) of the Civil Procedure Rules which requires service upon a corporate on either the secretary, director or principal officer. In the case of *Agigreen Consulting Corporation Limited v National Irrigation Board* [2020] eKLR the court held that service of summons on a corporation is set out under Order 5 rule 3.
6. The appellant submitted that the trial court failed to consider the draft defense and to allow the appellant a fair chance to be heard. The draft response had triable issues and raised a good response to the claimant. The fact raised by the appellant challenging the claim should have been heard on the merits such as;
  - a. Whether the respondent was employed in April 2018 on a fixed-term contract as a heavy commercial driver;
  - b. Whether the fixed term contract of 3 months commenced on 15 February and expired on 15 May 2019;
  - c. Whether the respondent's employment was terminated on 31 May 2019;
  - d. Whether unfair and unlawful termination arose when the fact of fixed term contract of employment had expired on 15 May 2019; and
  - e. Whether the respondent is entitled to the reliefs sought in the Memorandum of Claim.
7. The appellant submitted that the direction bestowed on the court is to apply the same judicially and to secure access to justice for both parties. No prejudice will be visited upon the respondent if the appellant is allowed a chance to urge its case on the merits.
8. The respondent submitted that the application dated 12 July 2021 was dismissed on merit. The application was premised on the provisions of Section 12(3) of the *Employment and Labour Relations Act*, Rules 17 and 32, Order 22 Rule 22(1), Order 10 Rule 11 and section 3A of the *Civil Procedure Act*. The respondent opposed this application because the service of summons was proper and the trial court applied the law and a finding that the appellant was aware of the matter but failed to file any response. In the case of *David Koome Matugi v APA Insurance Limited* [2021] eKLR the court held that the burden of proof is on the persons alleging that there was no proper service to demonstrate that the summons were not effected as alleged. If the fact of service is denied, it is desirable that the process serve be put in the witness box and cross-examined given to those who deny the service.
9. Service given against a corporate body under Rule 12 of the ELRC Rules should be to the principal officer or left at the registered offices of the corporate. While the appellant sought to cross-examine the process server, they did not dispute that they were the employers of the respondent and that the address where the supervisor was served was indeed the correct address and office. The appellant was properly served as held in *Mungai v Gichubi & Another* [2005] eKLR.
10. The application to set aside the judgment of the trial court is not justified upon the appellant failing to satisfy the provisions of Order 10 rule 11 of the *Civil Procedure Rules* as held in *Shah v Mbogo & Another* [1967] EA.



## Determination

11. This is the first appeal on the ruling delivered on 15 February 2023. The ruling related to the application dated 12 July 2021 where the appellant as the applicant was seeking orders that;
  - a. The ex-parte judgment entered against the respondent/applicant on the 8<sup>th</sup> of June 2021 be set aside;
  - b. The respondent/applicant be granted unconditional leave to file its response to the Memorandum of Claim within such time as the court may order.
  - c. Costs of this application be provided for.
12. This application was dismissed because there was proper service upon the appellant who failed to attend or file a response leading to a proper judgment delivered on 8 June 2021.
13. In this appeal, the appellant is seeking that the trial court ruling and order on 15 February 2023 be set aside, the ex-parte judgment and decree of 8 June 2021 be set aside, and the appellant be allowed unconditional leave to file a response and defend the claim by way of hearing on merit.
14. Under Legal Notice No.6024 of 22 June 2018, the Chief Justice allowed Magistrates to hear employment claims according to the provisions of Article 48 of *the Constitution* read together with Section 29 of the *Employment and Labour Relations Court Act*. Upon being seized of an employment claim, a magistrates court is regulated under the applicable rules of Procedure, the *Employment and Labour Relations Court (Procedure) Rules* (the Court Rules).
15. Indeed, for service of summons upon a corporate, Rule 12 of the Court Rules apply. In the ruling delivered on 15 February 2023, the learned magistrate addressed the motion of service of summons upon the appellant and analyzed the facts of service and the Affidavit of Service by the Process Server. Well addressed, the respondent adhered to the provisions of Rule 12 of the Court Rules.

### Was the ex-parte judgement delivered on 8 June 2021 irregular?

16. Upon proper service, the appellant was made aware of the proceedings before the trial court and failed to attend as required, to urge the court that there was no proper service and hence was denied a fair hearing and the right to access justice is not correct. Invited to attend and properly served, the appellant failed to urge its case through a response or attendance before the trial court.
17. The right to a hearing is not absolute. Article 48 of *the Constitution* provisions cut both ways. One cannot remain outside court and once a judgment is issued seek to negate the entire process on the basis that there is a right to access justice. Invited to attend upon service of summons, the appellant squandered the opportunity leading to the judgment on 8 June 2021. Application of Order 5 rule 3(a) of the *Civil Procedure Rules* cannot be applied to cure the non-attendance by the appellant. The trial court was well regulated under this Court Rules which the learned magistrate well appreciated and correctly dismissed application dated 12 July 2021.
18. The appeal herein is solely on the ruling delivered on 15 February 2023. As analyzed above, the court cannot fault the findings of the trial court.
19. Accordingly, the court finds no merit in the appeal and the same is dismissed with costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF JULY 2024.**



**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

