Managing Director Tumaz & Tumaz Enterprises Ltd v Bukhungu Petroleum Co Ltd (Civil Appeal 104 of 2018) [2026] KEHC 122 (KLR) (15 January 2026) (Judgment)

Neutral citation: [2026] KEHC 122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 104 OF 2018

S MBUNGI, J

JANUARY 15, 2026

BETWEEN

THE MANAGING DIRECTOR TUMAZ & TUMAZ ENTERPRISES LTD ..... APPELLANT

AND

BUKHUNGU PETROLEUM CO LTD ..... RESPONDENT

(Arising from the ruling of Hon. Lopokoit delivered on 12th July 2018 vide KAKAMEGA CMCC CIVIL SUIT 345 of 2017)

JUDGMENT

1. The appellant herein had filed a Notice of Motion application dated 18th April 2018 seeking that the court varies and/or set aside the interlocutory judgment entered and that the draft defence be entered on record. According to the appellant, they were never served with suit papers, which is the reason why the plaintiff obtained an interlocutory judgment. He further denied having entered into any contractual obligation with the Respondent.

2. In its judgment, the trial court found that the appellant was properly served although they had refused to receive the documents and further that the appellant failed to challenge the claim by the respondent, hence they were not prejudiced. The trial court declined to set aside the interlocutory judgment against the appellant and dismissed the application.

3. The appellant, being dissatisfied with the decision of the trial court, appealed the ruling based on the following grounds;

    a. That the learned Magistrate erred in law and in fact in failing to find that the Appellant had a viable defence which raised triable issues, the Appellant having denied the existence of any contract with the Respondent herein and also having contested the receipt of any goods from the Respondent.

b. That the learned Magistrate erred in law and in fact in finding that failure by the Appellant's former advocate to annex a draft defence rendered the application to set aside the exparte judgment fatal.

c. That the learned Magistrate erred in law and in fact in failing to find that in the face of the overriding objective principles as advocated under section 1 A,2A and 3A of the *Civil procedure Act* and the civil procedure Rules 2010 and Article 159 of *the constitution*, it was only prudent, fair and in the interest of justice, that the Appellant be allowed to file a defence and to have a day in court to defend the suit and the plaintiff will suffer no injustice as the case would be heard and determined on its merits.

4. They pray that the appeal be allowed and the ruling dated 12th July 2018 dismissing the Appellant's application dated 18th April 2018 to set aside the exparte judgment be set aside and or vacated.

5. That the Honourable court be pleased to set aside the exparte judgment entered on 26th January 2018 in Kakamega CMCC Civil Suit 345 of 2017 and the Appellant herein be allowed to file his defence.

6. The court directed that the appeal be canvassed by way of written submissions, although at the time of writing the judgment, none of the parties had filed their submissions.

7. I have perused the trial court record, the pleadings and the Ruling. I note that the respondent, Bukhungu Petroleum Co. Ltd, filed a plaint dated 22nd November 2017 claiming Kshs. Six hundred and eighty-two thousand three hundred and eighty-seven (Kshs. 682,387/=) from the appellant for the alleged supply of petrol and diesel products to the defendant.

8. According to the respondent, they served the appellant with several summons to enter appearance and finally requested an interlocutory judgment against the appellant, which was issued, and the respondent applied for an execution of the decree.

9. On 18th April 2018, the appellant filed an application seeking to set aside the interlocutory judgment and the decree of Kshs. 702,259/= claiming that they were never served with the pleadings and only became aware of the suit when they were served with the execution orders by the auctioneers.

10. They claim that they had an arguable defence and further denied having entered into any contractual agreement with the respondent for them to supply petrol and diesel products to them.

11. The respondent claims that they served the appellant and produced the demand notice dated 12/10/2017 and service to the defendant dated 21/11/2017, which the appellant failed to acknowledge receipt despite being served by the process server Habil Wanyama and Elphas Okiya.

12. They claimed that the appellant only took the matter seriously after being served with a proclamation notice on 13/4/2018 and filed their application on 27/4/2018, and prayed that the application to set aside the interlocutory judgment be dismissed.

13. This being a first appeal, it is this court's duty to re-evaluate the evidence on record and come to its own independent conclusion, as provided under Section 78 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.

14. The main issue for determination in this appeal is whether the learned trial magistrate erred in declining to set aside the interlocutory judgment entered against the appellant on 26th January 2018. The power to set aside such a judgment is discretionary and is anchored in Order 10, Rule 11 of the Civil Procedure Rules, 2010, which 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."

15. This discretion must be exercised judicially to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a party who has deliberately sought to obstruct or delay the course of justice. In Shah v Mbogo [1967] EA 116, Harris J. held that "the 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."

16. On the first ground of appeal, the appellant contends that the trial court failed to recognise a viable defence raising triable issues, particularly the denial of any contract or receipt of goods. However, a perusal of the record shows that the appellant's application to set aside was not accompanied by a draft defence, which is a critical requirement to demonstrate the existence of triable issues. In Patel v East Africa Cargo Handling Services Ltd [1974] EA 75, the court emphasised that for a regular judgment, it will not usually be set aside unless there is a defence on the merits that raises a prima facie triable issue.

17. The Court of Appeal in Tree Shade Motors Ltd v DT Dobie & Another [1995-1998] 1 EA 324 held that a draft defence must be placed before the court to show that the defendant has a valid or triable defence.

18. The appellant's bare assertion that no contract ever existed was unsupported by any affidavit, evidence, documentary proof, or proposed defence on record. The trial magistrate cannot be faulted for refusing to give weight to a defence that was never placed before the trial court. This court concurs with the finding below that the complete omission of a draft defence was not a minor procedural lapse, but a fundamental defect that left the application devoid of any demonstrated arguable case worthy of trial. Accordingly, this ground of appeal lacks merit.

19. The second issue for determination is whether the appellant was properly served to enter appearance. The record contains affidavits of service sworn by process servers Habil Wanyama and Elphas Okiya, indicating that the appellant was served on several occasions but declined to acknowledge receipt.

20. In Shadrack Arap Baiywo v Bodi Bach [1987] KECA 69 (KLR), the Court of Appeal held that an affidavit of service is prima facie evidence of proper service unless impeached by credible evidence.

21. I have looked at the affidavit of service, the process served deponed that they knew the manager of the Appellant personally, that it is upon whom they effected service upon.

22. The Appellant has not denied this assertion, neither did he seek to cross examine

23. I have perused the trial court record and find that there were several summons to enter appearance served on the appellant before the interlocutory judgment. I note that the appellant only acted after execution proceedings commenced, despite prior service attempts. This delay, coupled with the refusal of service, does not demonstrate an excusable mistake but rather an effort to obstruct justice.

24. It is my finding that the trial court correctly balanced the interests of justice and found no prejudice to the appellant beyond their own making, and therefore, there is no need to interfere with the decision of the trial court.

25. On the issue of whether the trial court erred in declining to set aside the interlocutory judgment, the principles governing applications to set aside ex parte judgments are well settled in Patel v E.A. Cargo Handling Services Ltd [1974] EA 75, where the court held that setting aside is discretionary and must be exercised to avoid injustice, but not to assist a litigant who deliberately seeks to obstruct justice.

26. Similarly, in Shah v Mbogo [1967] EA 116, the courts emphasised that discretion should be used only where the applicant demonstrates a good defence or sufficient cause.

27. The appellant failed to establish any sufficient or reasonable cause for not entering appearance in the suit. I note that the appellant, despite being served, remained dormant until the execution process, a circumstance that Kenyan courts have treated as clear evidence of indolence and lack of diligence. Accordingly, I find no fault whatsoever in the manner in which the learned trial magistrate exercised his discretion.

28. On the third ground, the appellant invokes the overriding objective under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Cap 21, which aim at the just, expeditious, proportionate, and affordable resolution of disputes, as well as Article 159(2)(d) of *the Constitution* of Kenya, 2010, which mandates that justice be administered without undue regard to procedural technicalities. While these provisions promote substantial justice, they do not entitle a party to relief where there is evidence of evasion or lack of bona fides, in Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] KEHC 6699 (KLR)court reiterated that sufficient cause must be shown, liberally construed only where no negligence or want of good faith is imputed. Here, the process servers' affidavits indicate that the appellant was served but refused to acknowledge receipt, amounting to deliberate evasion.

29. The overriding objective cannot be used to reward such behaviour, as it would prejudice the respondent who has diligently pursued the claim.

30. Further, the appellant only acted after execution proceedings commenced, despite prior service attempts. This delay, coupled with the refusal of service, does not demonstrate an excusable mistake but rather an effort to obstruct justice, contrary to the principles in Shah v Mbogo (supra).

31. The trial court correctly balanced the interests of justice and found no prejudice to the appellant beyond their own making.

32. In conclusion, having re-evaluated the evidence and considered the grounds of appeal, I find that the learned trial magistrate exercised discretion properly and in accordance with the law. The appeal lacks merit and is hereby dismissed with costs to the respondent.

33. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA 15TH DAY OF JANUARY, 2026.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr Munzanga for the Appellant present online.

Mr. Isiaho holding brief, Mark J for respondent present online.