REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

COMMERCIAL APPEAL NO. E213 OF 2024 (CONSOLIDATED WITH E328 OF 2024)

G4S KENYA LIMITED……..APPELLANT

VERSUS

MOBICOM KENYA LIMITED……..RESPONDENT

JUDGMENT

Background

1. This appeal arises from the ruling of the Chief Magistrate delivered on 15th July 2024 in Milimani CMCC No. E181 of 2021, by which the learned magistrate set aside an interlocutory judgment entered on 13th June 2023.

2. The Appellant had instituted the suit on or about 10th February 2021 through the Case Tracking System (CTS). The Respondent's position is that only a list of documents was uploaded and no plaint was filed, thereby rendering the proceedings incompetent.

3. The Appellant, however, maintains that a plaint dated 29th January 2021 was duly filed, filing fees were paid, and that any omission in the CTS system arose from an error in uploading.

4. Upon alleged failure by the Respondent to enter appearance, interlocutory judgment was entered. The Respondent thereafter applied to set aside the

same, contending that there was no plaint and no proper service. The learned magistrate allowed that application, prompting the present appeal and cross-appeal.

5. The respondent lodged its appeal against the ruling by a Memorandum of Appeal dated 2nd August 2024. This was filed in the Civil Division of the High Court in Civil Appeal No. E926 of 2024 but was later transferred to this court and assigned Appeal No. E328 of 2024.

6. The two appeals were consolidated by this court on 17th June, 2025 with the proceedings to be recorded in this appeal.

Memorandum of Appeal

5. The Appellant's set out its grounds of appeal, in the Memorandum of Appeal filed on 14th August 2024 in the following terms:

> **a.** ***"THAT the Learned Magistrate erred in law and fact in finding that there was no Plaint on record."***
> **b.** ***"THAT the Learned Magistrate erred in law and fact in holding that the interlocutory judgment entered herein was irregular."***
> **c.** ***"THAT the Learned Magistrate failed to appreciate that the Plaintiff had filed the suit and paid the requisite court fees."***
> **d.** ***"THAT the Learned Magistrate erred in failing to consider that the Defendant had not annexed a draft defence or demonstrated any triable issue."***
> **e.** ***"THAT the Learned Magistrate misdirected himself in exercising discretion to set aside a regular judgment."***

6. The Respondent's cross-appeal challenges the finding that a competent suit existed and supports the setting aside of the interlocutory judgment.

Appellant's Submissions

7. The Appellant submitted in summary, that a plaint was duly filed, and that the absence of the same in the CTS system was occasioned by an error in categorisation at the point of uploading.

8. It is further submitted that the plaint exists in the physical court file, filing fees were assessed and paid, and the omission is therefore a procedural irregularity that ought not to defeat substantive justice.

9. Counsel relied on the Electronic Case Management Practice Directions, 2020 and submitted that the said Directions allow flexibility in circumstances where the system cannot accommodate proper filing, such as the present case.

10. On service, the Appellant relies on the various affidavits sworn by Joyce Muthoni and Isaac Miano, both licensed process servers, in support of the submission that on 3rd April 2023, the appellant effected service upon the respondent's remaining director, Mr Paul Wanderi, who acknowledged receipt of the pleadings, which included a copy of the plaint.

11. It is contended that the Respondent failed to enter appearance despite such service, thereby justifying entry of a regular interlocutory judgment.

12. It contended that the test for setting aside default judgment as enunciated below had not been met. Namely, that the respondent had not demonstrated:
    a) **That it had some serious defence to the action.**
    b) **That it had a satisfactory explanation for his failure to enter an appearance to the writ.**

13. It submitted that the learned Magistrate had erroneously held that interlocutory judgment was entered on 13th March 2023 which was before Mr Wanderi was served on 3rd April 2023. Further, the learned Magistrate also erroneously faulted the appellant for failing to explain the anomaly in the dates.

14. It explained that this confusion relating to the divergence in the dates was brought about by the decree which was issued by the court on 10th August, 2023 and which erroneously indicated that judgment was entered on 13th March, 2023. It clarified that the request for judgment was lodged on 20th April 2023, and therefore, judgment could only be entered at a later date being 13th June, 2023 which was confirmed by the extract from CTS. Accordingly, the reference to 13th March 2023 was an error.

15. In short, the respondent was duly served with the pleadings, and there was therefore no irregularity to warrant the setting aside of the judgment.

16. The Appellant pointed out that the Respondent had failed to demonstrate any triable issue, particularly by failing to annex a draft defence, and that the discretion to set aside ought not to have been exercised in its favour.

17. Notwithstanding, the above, the appellant contended in the event that the court were to find that that the lower court set aside an irregular judgment, and allow the respondent to defend the suit out of time, it ought to consider the principles set out in *Patel v East African Cargo Handling Services Ltd (1974) EA 75*, where the Court held:

> ***"There are no limits or restrictions on a judge's discretion except that if he does vary the judgment he does so on 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 or fetter the wide discretion given to it by the rules."***

Respondent's Submissions

14. The Respondent submitted that no competent suit existed because no plaint was filed within the e-filing system as is required.

15. Reliance was placed on Order 3 Rule 1 of the Civil Procedure Rules and Section 19 of the Civil Procedure Act.

16. The Respondent cited *Board of* ***Governors Nairobi School v Jackson Ireri Geta (1999) KLR,*** where the court stated the following:

> ***"Pleading is defined in Section 2 of the Civil Procedure Act to: Include a petition or summons and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a***

way as to accord with Order IV Rule 1 (now Order 3 Rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."

17. Further reliance was placed on ***Joseph Kibowen Chemior v William C Kisera [2013] eKLR,*** where the Court stated:

"Under Section 19 of the Civil Procedure Act, every suit shall be instituted in such manner as may be prescribed by rules… a person commencing a civil suit… needs to follow prescribed rules."

18. It submitted that a list of documents cannot constitute an originating pleading and that any alleged physical filing without leave of court contravened the Electronic Case Management Practice Directions.

19. On service, the Respondent submitted that there was no proper service and pointed to inconsistencies in dates, alleged service on a Sunday, expired summons, and use of inactive email addresses.

20. It relied on the decision in **Kimwele Muneeni vs. Carolyne Mamgo & 2 Others (2005) eKLR** for the proposition that;

"The affidavit of service is not adequate to prove proper service. Corporates are served at their registered office…"

21. And argued that the present judgment, set aside was an irregular ex parte default judgment based on the principles set out in ***Fidelity Commercial Bank Ltd v Owen Amos Ndungu & Another, HCC No. 241 of 1998 (UR)*** where the Court held:

> ***"A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served… the ex parte judgment entered… is regular. But where… there was no proper service… such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right."***

22. Finally, it explained that in the absence of being served with a plaint, the Respondent could not prepare or annex a draft defence.

Analysis and Determination

23. I have considered the Record of Appeal, the grounds of appeal, rival submissions, and the applicable law. The grounds set out in the memorandum may be reformulated into two primary issues, which arise for determination. Namely, whether there was a competent plaint before the court, and whether the interlocutory judgment was regular.

24. Looking at the record of appeal. It is evident that a plaint is on record. I also take note of the finding by the lower court at page 3, paragraph 3, the court states expressly "There is also a receipt of Kshs 70, 590, indicating that a plaint was actually paid for. I thus find that indeed there is a suit".

25. Of particular and further importance are the affidavits appearing at pages 265 to 280 of the Record of Appeal. In the affidavits deponed by Joyce Muthoni, at paragraph 11 of her affidavit she swears:

> ***"I proceeded to the court registry on the same day where upon perusing the court file, I confirmed that the plaint was still on the court file."***

26. Similarly, in the affidavit deponed by Isaac Miano at page 270 of the record of appeal, he swears that:

> ***" I met Mr. Wanderi in person and upon his confirmation that he was a director of the defendant, he acknowledged receipt of the summons and the court papers including the plaint."***

27. The Respondent's case rests on the absence of the plaint in the CTS system. However, the existence of the plaint in the physical court file, coupled with the uncontroverted affidavit evidence explaining the anomaly, demonstrates that the suit was in fact instituted.

28. The authorities cited by the Respondent, including ***Board of Governors Nairobi School v Jackson Ireri Geta (1999) KLR*** and ***Joseph Kibowen Chemior v William C Kisera [2013] eKLR***, correctly state the law that a suit must be instituted by a plaint. The issue here, however, is not the legal requirement, but whether that requirement was met on the facts.

29. On the material before this Court, I am satisfied that it was. The omission in the e-filing system, while irregular, does not negate the existence of a plaint duly presented and accepted by the court.

30. To hold otherwise would be to elevate procedural technicalities above substantive justice, contrary to the principles underpinning civil procedure.

31. On the issue of service, the Respondent has pointed to inconsistencies in dates and manner of service. However, the above affidavits expressly depose to personal service of the plaint and summons.

32. The distinction between regular and irregular judgments, as set out in *Fidelity Commercial Bank Ltd v Owen Amos Ndungu & Another supra*, is well settled. The question here is whether there was no service at all, or merely imperfect service.

33. In this case, the evidence does not demonstrate absence of service. At most, it points to irregularities.

34. In the present matter the record shows that the respondent had ceased operations at the time. Its location could not be found, and the appellant made numerous efforts to locate its directors. In the circumstances, I do not think that that the irregularities give rise to the level contemplated in *Mwala v Kenya Bureau of Standards (2001) 1 EA 148* so as to render the judgment liable to be set aside as of right.

35. Further, it is evident from the record that the respondent was served with a copy of the Plaint. It chose not to annex a draft defence or otherwise demonstrate any triable issue in spite of the fact that it was aware of the case against it. While not always fatal, this omission is material in the exercise of discretion.

36. I am guided by the decision of the Court of Appeal in **Nature Pharmacy Ltd & another v Gichuhi (Civil Appeal 245 of 2016) [2022] KECA 827 (KLR),** where the court, in dealing with the importance of annexing a draft defence held as follows:

> *"**Should the appellants have annexed a draft defence in their application to set aside the ex parte judgment? The answer is pretty obvious… To say that the trial court should have allowed an application where no intended defence had been annexed is far from the desired truth as the court would not be in a position to tell whether a party had an arguable defence or one that was not frivolous. As the old adage holds, ignorance of the law is no defence… The requirement to annex a draft defence to an application to set aside a judgment is to enable the trial court to exercise its discretion properly."***

37. In **Patel v E.A. Cargo Handling Services Limited [1974] E.A. 75** the court of appeal also affirmed Lord Russel's finding in **Evans v Bartlam [1937] AC 473** *that:*

"no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) <u>whether any useful purpose could be served by setting aside the judgment, and …. (b) how it came about that the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence."</u>

38. Based on the facts as set out above, in my view the judgment was regular, and the respondent ought to, at the very least demonstrated that it had a single triable issue worthy of contemplation. I say so noting that based on the facts before me, there appears to be little use in setting aside the judgment in the absence of a triable issue. It did not do so, and failed to muster the test set out in **Patel v Cargo Handling Services Ltd** supra.

39. Finally, the ruling of the lower court appears to have turned on its finding that interlocutory judgement was entered on 13 March 2023, before Mr. Wanderi was served. The court stated ***" this anomaly has not been explained by the respondent and casts doubt on the regularity of the interlocutory judgment entered".***

40. In my view the lower court went wrong here. The submissions on record before the court provide a clear and logical explanation for the anomaly that was before the court. The appellant's submission was that the same is a typographical error and the anomaly is addressed at page 335 of the record, from paragraph 42 to 48 in detail.

41. Moreover, the appellant produced an extract of the Case Tracking System (CTS) which confirmed that judgment was entered on 13th June 2023. The same is found at **page 310** of the Record.

42. Based on the evidence as stated above, I am satisfied that the clarification by the appellant in the lower court was satisfactory, and the accordingly, I find that the lower court reached an unreasonable conclusion in this respect. The disregard of the entry of the judgment on CTS by the learning Magistrate was therefore in error.

43. In the premises, I find that the interlocutory judgment was regular and I further find and hold that the learned magistrate misdirected himself in setting it aside.

Conclusion

37. In light of the foregoing, I find that a competent plaint existed before the lower court. The explanation for its absence in the CTS system is credible and supported by affidavit evidence. Service of summons was duly effected; and, the Respondent failed to demonstrate a defence or triable issue.

38. The upshot is that the discretion to set aside the interlocutory judgment was therefore improperly exercised.

Orders

i. The appeal is hereby allowed with costs payable by the respondent.

ii. The ruling of the Chief Magistrate delivered on 15th July 2024 setting aside the interlocutory judgment is hereby set aside.

iii. The interlocutory judgment entered on 13th June 2023 is hereby reinstated.

iv. The Respondent's appeal is dismissed with costs payable to the appellant.

Dated and **signed** at **Nairobi,** the **30th** day of **April 2026**. **Delivered virtually through Microsoft TEAMS.**

Aleem Visram, FCIArb

JUDGE