REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL APPEAL NO. E975 OF 2024

ANTHONY KIGONDU MBURU ..... **1ST APPELLANT**
NELSON KIMBO KIMANI ..... **2ND APPELLANT**

VERSUS

STEVE OKETCH OGOLA ..... **RESPONDENT**

(Being an appeal from the Ruling of Hon. A.G. Njuguna (Adjudicator) delivered on 9th August 2024 in Milimani SCCC E5943 of 2024)

JUDGMENT

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Background

1. The Respondent sued the Appellants before the trial court for damages arising out of an accident that occurred on on 26th March 2023. The Respondent claimed that the 2nd Appellant drove a motor vehicle owned by the 1st Appellant negligently thereby causing damage to his vehicle.

2. The Appellants did not enter appearance or file a defence and consequently, judgment was entered in favour of the Respondent on 1st March 2024.

3. The Appellants subsequently filed an application seeking to set aside the judgment and for stay of execution, which

application was dismissed by the trial court on 9th August 2024 thereby prompting the present appeal.

The Appeal

4. The Appellants contend that they were not properly served with court process and that the trial court misdirected itself by applying the wrong legal principles and failing to exercise its discretion judiciously.

5. The Respondent maintains that service was properly effected through electronic means and that the Appellants failed to demonstrate any triable defence or sufficient cause to warrant setting aside the judgment.

6. As a first appellate court, this Court is obligated to re-evaluate the evidence and arrive at its own independent conclusion, as stated in ***Selle & Another v Associated Motor Boat Co. Ltd*** **[1968] EA 123**.

7. The appeal turns on the following issues:

   a) ***Whether the Appellants were properly served with the statement of claim and court process;***
   b) ***Whether the Learned Adjudicator applied the correct legal principles in declining to set aside the ex parte judgment;***
   c) ***Whether the discretion of the trial court was properly exercised;***
   d) ***Whether this Court should interfere with the exercise of discretion.***

Analysis and Determination

Service

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8. On whether service with the statement of claim and court process was properly effected, the Respondent asserts that service was effected via email and WhatsApp pursuant to Order 5 Rules 22B and 22C of the Civil Procedure Rules (the Rules). The court is alive to the fact that these provisions indeed recognize electronic service. However, they impose a critical requirement of proof of delivery.

9. In particular, Order 5 Rule 22B(2) of the Rules provides that service by email is deemed effected upon receipt of a delivery receipt while Rule 22B(4) of the same rules requires that such delivery receipt be annexed to the affidavit of service. Similar requirements apply to service through mobile-enabled messaging platforms under Rule 22C.

10. In the instant case, a perusal of the record reveals that the Appellants specifically challenged the absence of proof of delivery. I note that the material placed before the trial court did not demonstrate, with certainty, that delivery receipts confirming successful transmission and receipt were annexed especially in respect to initial service with the Statement of Claim.

11. The importance of strict compliance with the requirement of service was emphasized in ***Sifuna & Sifuna Advocates vs. Patrick Simiyu Khaemba*** **[2021] eKLR**, where the Court held that mere sending of an email is insufficient without proof of delivery. Similarly, in ***Commission for Human Rights & Justice v Jacob Kimutai Torutt & 5***

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Others **[2021] eKLR**, the Court found service defective where delivery receipts were not provided.

12. In the present circumstances, this Court finds that service was not proved to the required legal standard, thereby rendering the ex parte judgment irregular.

Effect of Improper Service

13. It is trite that where a default judgment is entered without proper service, such judgment is irregular and must be set aside *ex debito justitiae* (as of right).

14. In ***Remco Ltd vs. Mistry Jadva Parbat & Co. Ltd*** **[2002] 1 EA 233**, the Court held that failure of proper service renders a judgment irregular and the court has no discretion but to set it aside.

15. This principle has been consistently affirmed, including in ***Winnie Wambui Kibinge & 2 Others vs. Match Electricals Ltd*** **[2012] eKLR**, where the Court stated that such a judgment must be set aside as a matter of judicial duty.

16. Accordingly, once the Court finds that service was not proper, the question of discretion does not arise.

17. My above findings on the issue of service would have been sufficient to determine this appeal but I am still minded to consider the critical issue of whether the trial court applied

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the correct principles when dismissing the Appellants' application.

18. The Appellants contended that the Learned Adjudicator applied principles relating to stay of execution rather than those governing setting aside of ex parte judgments.

19. The record supports this contention. The trial court considered factors such as delay, substantial loss, and provision of security criteria ordinarily associated with stay of execution under Order 42 Rule 6 of the Civil Procedure Rules, rather than the principles governing setting aside judgments. The said court rendered itself as follows:

    7. ***"6. The court in Kanja v Njoroge & 2 others (Civil Appeal E204 of 2022) [2023] KEHC 23564 (KLR), three conditions must be met for a Court to grant stay of execution orders: a) The application has been made without unreasonable delay; b) The applicant will suffer substantial loss; c) The applicant has offered security for due performance of the decree***
    8. ***Subjecting the instant application to the above criteria, the court finds that the Applicants did not make the Application without unreasonable delay as the suit was first filed in November 2023 and judgment entered on 26th March 2024. On the second limb, the Applicants has not demonstrated that they stand to suffer substantial loss. On the third limb, the Applicant has not offered security for performance of the decree.***
    9. ***The court in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016]***

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eKLR identified the factors to be considered in setting aside a judgment to include whether the defence raises triable issues and the respective prejudice each party is likely to suffer. The court finds that the intended defence does not raise triable issues.

10. ***The upshot of the foregoing is that the Applicant's Certificate of Urgency application dated 4th June 2024 fails. The judgment entered on 26th March 2024 is hereby upheld with costs of this application awarded to the Claimant/Respondent. The Claimant/Respondent is at liberty to proceed with execution."***

11. The applicable principles governing setting aside ex parte judgments were articulated in ***Patel vs. E.A. Cargo Handling Services Ltd*** **[1974] EA 75**, where the Court held that the main concern is to do justice to the parties and that the discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake.

12. I find that the trial court's reliance on the wrong legal framework, governing applications for stay of execution, amounted to a misdirection in law.

13. On the proper exercise of discretion, I find that even assuming that service had been proper, the trial court was still required to consider whether the Appellants' defence raised triable issues. In ***Tree Shade Motor Ltd v D.T. Dobie & Another*** **[1995-1998] 1 EA 324**, the Court held

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that even a single bona fide triable issue is sufficient to entitle a defendant to unconditional leave to defend.

14. Further, in ***Toshike Construction Co. Ltd v Harambee Co-operative Savings & Credit Society Ltd*** **[2019] eKLR**, it was emphasized that a defence need not succeed; it need only raise an arguable issue worthy of trial.

15. In the instant case, the Learned Adjudicator concluded that the defence did not raise triable issues but failed to provide adequate reasoning for that conclusion. This failure to consider a relevant factor, coupled with the application of wrong principles, demonstrates that discretion was not exercised judiciously.

16. On whether this court should interfere with the trial court's exercise of discretion, I find that having noted that the trial court failed to properly determine the issue of service, applied the wrong legal principles; and failed to exercise discretion judiciously, the threshold for interference has been met. I find guidance in ***Mbogo & Another vs. Shah*** **[1968] EA 93**, where the Court held that an appellate court may interfere where the lower court misdirected itself or reached a wrong conclusion.

17. In the end, this Court finds that the appeal is meritorious and makes the following orders:

    a) ***The appeal is hereby allowed.***
    b) ***The ruling of the Small Claims Court dated 9th August 2024 is hereby set aside.***

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c) ***The ex parte judgment entered on 1st March 2024 is hereby set aside.***

d) ***The Appellants are granted leave to file and serve their defence within fourteen (14) days from the date hereof.***

e) ***The matter is remitted to the Small Claims Court for hearing and determination on merit before a different adjudicator.***

f) ***Costs of the appeal shall abide the outcome of the suit in the trial court.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2026.

HON W. A. OKWANY

JUDGE

In the presence of

Mugo for Appellant

Ms Akoth for Respondent

Abdirzak - Court Assistant

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