



REPUBLIC OF KENYA



**Teachers Service Commission v Kariuki (Environment and Land Appeal
34 of 2023) [2024] KEELC 1339 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 34 OF 2023
YM ANGIMA, J
MARCH 14, 2024
(FORMERLY NYAHURURU ELCA.NO.E033 OF 2022)**

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

GEOFFREY NGARUIYA KARIUKI RESPONDENT

*(Being an Appeal against the Ruling and Order of Hon. Charles Obulutsa
(CM) dated 02.12.2022 in Nyahururu CM ELC No. E060 of 2021)*

JUDGMENT

A. Introduction

1. This is an appeal against the Ruling and Order of Hon. Charles Obulutsa (CM) dated 02.12.2022 in Nyahururu CM ELC No. E060 of 2021 – Geoffrey Ngaruiya Kariuki -vs- Teachers Service Commission. By the said ruling, the trial court dismissed the Appellant’s application dated 15.07.2022 seeking, *inter alia*, the setting aside of the *ex parte* judgment entered against it and all consequential orders and leave to defend the Respondent’s suit. The trial court, however, lifted the process of execution of the *ex parte* decree through attachment and sale of the Appellant’s assets.

B. Background

2. The material on record shows that vide a plaint dated 30.07.2021 the Respondent sued the Appellant seeking numerous reliefs which included damages for breach of contract, damages for trespass, loss of expected income and various amounts of money on account of alleged rent arrears and the cost of partitioning the demised premises at which the Appellant was a tenant. The lease between the parties was said to have been for a period of 5 years and 6 months with effect from 01.09.2014. It was contended



by the Respondent that despite the lease having expired about March, 2020, the Appellant had failed to vacate the demised premises and it was still in occupation without making payment of any rent.

3. The record shows that the Appellant neither entered appearance nor filed a defence to the action in consequence whereof the Respondent sought and obtained interlocutory judgment against the Appellant. The record further shows that the suit proceeded for formal proof whereupon a final *ex parte* judgment was entered against the Appellant on 17.02.2022.
4. Vide a notice of motion dated 15.07.2022 expressed to be grounded upon Articles 50(1) and 159 of the Constitution, Order 10 Rule 11, Order 12 Rules 7 & Order 51 Rule 1 of the Civil Procedure Rules, Sections 3A and 63 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, Section 21 of the Government Proceedings Act Cap. 40 of the Laws of Kenya and the inherent power of the court the Appellant sought, *inter alia*, the setting aside of the *ex parte* judgment together with all consequential orders, leave to file its defence out of time, and the lifting of the execution process which had already commenced against it. The Appellant contended that it had not been served with summons to enter appearance and pleadings in the suit; that it had a good defence on the merits to the action; and that the entire process of execution was in contravention of the law including, in particular, Section 21 of the Government Proceedings Act (Cap.40) and Section 21 of the Teachers Service Commission Act, 2012. The Appellant further contended that the Respondent had filed and proceeded with the suit clandestinely whilst the parties were negotiating a settlement which culminated in the payment of all rent arrears in full.

C. Trial Court's Decision

5. By a ruling dated 02.12.2022 the trial court only lifted the mode of execution levied by the Respondent as being contrary to the law. The court, however, declined to set aside the *ex parte* judgment and to grant the Appellant leave to defend the suit. The trial court found and held that the Appellant had been properly served with summons to enter appearance and pleadings in the matter and that it had no reasonable defence to the Respondent's claim. The trial court was of the opinion that by entering into an agreement to pay the Respondent rent arrears the Appellant had, in effect, admitted liability hence it had no plausible defence to the action to warrant the grant of leave to defend.

D. Grounds of Appeal

6. Being aggrieved by the ruling and order of the trial court dated 02.12.2022 the Appellant filed a memorandum of appeal dated 20.12.2021 and amended on 22.08.2023 raising the following 16 grounds of appeal:
 - a. That the honourable magistrate misdirected himself on the evidence and the law on the matters before him consequently making a wrong and erroneous decision in law and fact particularly failing to find that the Respondent had sued a non-judicial person.
 - b. That the honourable magistrate misdirected himself in giving consideration to irrelevant matters and/or failing to give consideration to relevant matters in arriving at his decision.
 - c. That the honourable magistrate erred when he failed to uphold a correct principle of law that courts should not re-write contracts for parties.
 - d. That in failing to uphold the contract entered into by the parties on 01.09.2014, the learned magistrate erred in law by importing extraneous issues which were irrelevant to the matter before him.



- e. That the honourable magistrate failed to appreciate and consider the submissions and arguments, and the authorities filed by the Appellant on the issues, which failure had occasioned a miscarriage of justice.
 - f. That in upholding an interlocutory judgment, the honourable magistrate erred in law in condemning the defendant unheard contrary to the provisions of Articles 47, 48 & 50 of the Constitution.
 - g. That the honourable magistrate failed to exercise his discretion correctly in failing to allow the Appellant to file a defence to enable it be heard thereby violating the cardinal principles of natural justice.
 - h. That the honourable magistrate erred in relying on a draft defence that was not properly on record as the court was yet to grant leave for the same to be filed.
 - i. That the honourable magistrate erred in law and fact for failing to find that the pleadings were meant to be served upon TSC Nyandarua County yet the process server claimed to have served the pleadings at the TSC Headquarters, Nairobi.
 - j. That the honourable magistrate erred in law for failing to find that the alleged service upon the Appellant was not proper and lawful.
 - k. That the honourable magistrate erred when he contradicted himself for holding that the interlocutory and final judgment are valid and making a finding that parties should sit down and reconcile their accounts.
 - l. That the honourable magistrate erred in law and fact when he failed to find that the negotiations between the parties were totally based on good faith correspondence and had nothing to do with the court case as the Appellant was not aware of the same.
 - m. That the honourable magistrate erred in law in failing to consider that allowing the *ex parte* judgment would greatly prejudice the Appellant as the Appellant had not placed before court its case and evidence.
 - n. That the honourable magistrate erred in law and fact in slamming the Appellant with such severe and excessive damages for a perceived wrong which was certainly baseless and unfounded.
 - o. That the honourable magistrate erred in law when he awarded damages which were never contractually agreed between the parties.
 - p. That the ruling and order of court dated on 02.12.2022 is erroneous in law and fact, contrary to equity judicial prejudice and a gross miscarriage of justice.
7. As a result, the Appellant sought the following reliefs in the appeal:
- a. The partial appeal be allowed.
 - b. The ruling made by the Chief Magistrate's Court at Nyahururu in CM ELC No. E060 of 2021 (Hon. Charles Obulutsa) dated 02.12.2022 and delivered on 08.12.2022 be partially overturned, the judgment be set aside and the Appellant be given a chance to be heard after being granted leave to file a defence.
 - c. The costs of the appeal and of the proceedings before the subordinate court be borne by the Respondent.



- d. Such other orders be made to meet the ends of justice as the honourable court may deem appropriate.

E. Directions on Submissions

8. When the appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on or about 22.01.2024 whereas the Respondent's submissions were filed on or about 09.02.2024.

F. Issues for Determination

9. Although the Appellant raised 16 grounds in its memorandum of appeal, its advocates summarized and argued them as 3 grounds only. The Respondent also summarized them into 3 but two out of the three issues framed differed from the issues as framed by the Appellant. The court is of the opinion that the key issues which arise for determination in the appeal are the following:
 - a. Whether the trial court erred in law in disallowing the Appellant's prayers for setting aside the *ex parte* judgment and for leave to defend the Respondents suit.
 - b. Whether the Appellant is entitled to the reliefs sought in the appeal.
 - c. Who shall bear costs of the appeal.

G. Applicable Legal Principles

10. There is no doubt from the material on record that while determining the Appellant's notice of motion dated 15.07.2022 the trial court was exercising judicial discretion. However, like all judicial discretion, the trial court was obligated to exercise it judiciously and on the basis of sound and established legal principles. It has been held that an appellate court should not readily interfere with the exercise of judicial discretion by the court of first instance unless certain violations are established on the part of the latter.
11. In the case of *Mbogo & Another -vs- Shab* [1968] EA page 93 it was held, *inter alia*, that:

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
12. Similarly, in the case of *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others* [2003] eKLR it was held that an appellate court may only interfere with the exercise of judicial discretion if satisfied that the judge of first instance:
 - a. Misdirected himself in law; or
 - b. Misapprehended the facts; or
 - c. Took into account considerations of which he ought not to have taken account; or
 - d. Failed to take account of considerations of which he should have taken account; or
 - e. The decision, albeit a discretionary one, was plainly wrong.



H. Analysis and Determination

Whether the trial court erred in law in disallowing the Appellant's prayers for setting aside the *ex parte* judgment and for leave to defend the Respondent's suit

13. The court has considered the material and submissions on record on this issue. Whereas the Appellant faulted the trial court for its decision, the Respondent fully supported the decision of the trial court. The principles which govern the adjudication of an application for setting aside an *ex parte* decree were summarized in the case of *Pitbon Waweru Maina -vs- Thuka Mugiria* [1983] eKLR as follows:

“2. The principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:

- 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 76 C 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 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48. c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93
3. The court has no discretion where it appears there has been no proper service (*Kanji Naran v Velji Ramji* [1954] 21 EACA 20). Judgment does not cease to apply because a decree has been extracted (*Fort Hall Bakery Supply Company v Frederick Muigon Wargoe* [1958] EA 118). 5. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been *ex parte* and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (*Jesse Kimani v McConnel* [1966] EA 547, 555 F).
6. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be



remembered that to deny the subject a hearing should be the last resort of a court. (*Jamnadas v Sodha v Gordandas Hemraj* (1952) 7 ULR 7).”

14. The court has noted from the material on record that the trial court found and held that the Appellant was properly served with summons to enter appearance and that its employee duly acknowledged receipt even though the Appellant had denied service. The trial court reached that conclusion on the basis that the summons bore a signature and a date. The trial court did not consider the fact that name of the person who purportedly received service of the summons was not mentioned. The trial court did not consider that the Appellant was a state organ which would ordinarily have an official receiving stamp for documents received in the course of its business.
15. The court is further of the opinion that on the basis of the material before the trial court there was no way of reliably telling that the date and signature on the summons were appended by the Appellant or with its authority in the absence of an official rubberstamp thereon. It is incredible that the Appellant as state organ could operate casually and conduct its business without an official rubberstamp to distinguish it from other public entities.
16. Although it may have been desirable for the Appellant to apply for the cross-examination of the process server who purportedly served the court process the court is of the view that such a failure was not fatal to the Appellant’s application for setting aside. This is so because there was no credible evidence on the face of the summons to show even on a *prima facie* basis that the Appellant’s office ever received the summons. The court is thus of the opinion that the trial court failed to take into account all the relevant factors before concluding that there was credible evidence of service of summons to enter appearance upon the Appellant. This is especially so where there are other documents on record bearing the Appellant’s rubberstamp impression of other documents received at its offices. In particular, the Respondent’s replying affidavit to the setting aside application had numerous letters received and stamped by the Appellant.
17. The court has also considered the material on record on whether or not the Appellant’s proposed defence raised any triable issues. One of the defences raised by the Appellant was that it had fully settled the rent arrears and that the only amount outstanding was with respect to the cost of partitioning which could only be paid upon the Respondent availing the relevant valuation report. The trial court was of the view that the parties’ agreement on payment of the undisputed amount of Kshs.3,737,300/= was an admission of liability of the Respondent’s entire claim.
18. The court is of the opinion that the trial court made an erroneous assumption that an admission of a lesser claim necessarily implied admission of the entire claim. There would be nothing wrong in a party negotiating a settlement and making payment of the undisputed amount since that may help to narrow down the issues in dispute and reduce his liability. The court finds no justification in the trial court’s finding that the Appellant’s conduct constituted an admission of the entire claim.
19. Even assuming that the Appellant had admitted the Respondent’s liquidated claim as particularized in paragraphs (a), (b), (c), (d) & (e) of the plaint, there was no justification for holding that the Appellant had admitted the rest of the claims such as the claim for expected loss of income, damages for breach of the lease agreement, penalties for breach of contract, damages for trespass, et cetera. These latter claims could properly be contested by the Appellant in the proceedings.
20. The court is thus of the opinion that the trial court erred in law in holding that there was credible evidence of service of summons to enter appearance upon the Appellant for reasons stated earlier in the judgment. The court is further of the opinion that even if the Appellant had been properly served with court process, the Appellant should still have been accorded an opportunity of being heard since



its proposed defence had raised some triable issues. As was held in the case of *Patel -vs- Cargo Handling Services (supra)* a defence which raises triable issues does not mean that it must necessarily succeed at the trial. In the premises, the court is of the view that it is entitled to interfere with the exercise of judicial discretion by the trial court.

Whether the Appellant is entitled to the reliefs sought in the appeal

21. The court has already found and held that there was no credible evidence of service of court process upon the Appellant. The court has also found that the Appellant's proposed defence to the Respondent's claim raised some triable issues which ought to have been allowed to proceed to trial. As a result, the court is of the opinion that the Appellant is Entitled To The Reliefs Sought In The Appeal. In particular, the Appellant is entitled to setting aside of the *ex parte* judgment dated 02.12.2022 together with all consequential orders as well as unconditional leave to defend the Respondent's suit.

Who shall Bear Costs of the Appeal

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful Appellant should not be awarded costs of the appeal. Consequently, the Appellant shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

23. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. As a result, the court makes the following orders for disposal thereof:
- a. The appeal be and is hereby allowed.
 - b. The *ex parte* judgment of the trial court dated 17.02.2022 in Nyahururu CM ELC No. E060 of 2021 be and is hereby set aside in its entirety together with all consequential orders.
 - c. The Appellant is hereby granted unconditional leave to defend the Respondent's suit before the trial court.
 - d. The Appellant shall enter appearance and file its defence within 21 days from the date hereof.
 - e. The original record of the trial court shall be remitted to the Chief Magistrate's Court at Nyahururu for trial of the Respondent's suit.
 - f. The Appellant is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 14TH DAY OF MARCH, 2024.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Langat holding brief for Mr. Ochieng for the Appellant

Mr. Osongo holding brief for Mr. Kunini for the Respondent



C/A - Carol

