



**Bhanderi & 2 others v Benvar Estates Limited (Civil Appeal
226 of 2019) [2024] KECA 1418 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1418 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 226 OF 2019
SG KAIRU, S OLE KANTAI & JM MATIVO, JJA
OCTOBER 11, 2024**

BETWEEN

ASHWIN BHANDERI 1ST APPELLANT

DEEPAK BHANDERI 2ND APPELLANT

BHANDERI ENTERPRISES LIMITED 3RD APPELLANT

AND

BENVAR ESTATES LIMITED RESPONDENT

*(Being an Appeal from the Judgment and Decree of the High Court at Nairobi
(L.Njuguna, J.) delivered on 7th February, 2019 in H.C. Civil Appeal No. 412A of 2014.)*

JUDGMENT

1 This is a second appeal from the judgment of the High Court of Kenya at Nairobi (Njuguna, J.) delivered on 7th February, 2019 which arose from a ruling by the Magistrates Court given on August 14, 2024. Section 72 [Civil Procedure Act](#) provides in relation to appeals to this Court from a decision of a subordinate court:

“72. Second appeal from the High Court

1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-
 - a. the decision being contrary to law or to some usage having the force of law;



- b. the decision having failed to determine some material issue of law or usage having the force of law;
 - c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
 2. An appeal may lie under this section from an appellate decree passed ex parte.”
- 2 This Court confirmed that position in the case of Charles Kipkoech Leting vs. Express (K) Ltd & Another [2018] eKLR by stating:

This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”
- 3 The facts of the case were straightforward. It was averred in a plaint filed at the Chief Magistrate’s Court at Thika by the respondent Benvar Estates Limited that it had agreed with the appellants Ashwin Bhanderi and Deepak Bhanderi as directors of the 3rd appellant Bhanderi Enterprises Limited to supply to them grade one building stones and the respondent supplied the stones as agreed. Payment for the same was to be within two (2) months and the appellants gave to the respondent postdated cheques some of which were deposited but that in the course of time the appellants stopped the cheques before settling on the invoices leaving an unpaid balance of Kshs.1,347,064, the subject of the suit. The undeposited cheques were annexed to the plaint.
- 4 The respondent filed an affidavit of service where a Court Process Server deponed how he had served Summons to Enter Appearance, plaint and other documents on the first two appellants on their behalf and that of the 3rd appellant.
- 5 He stated that the first two appellants accepted service of the pleadings and summons but declined to sign on the original copies stating that they would forward the documents to their lawyers to deal. According to the Process Server he knew the two appellants as directors of the 3rd appellant at the time of service as he had served them with other documents several times in the past; one of the appellants gave him his mobile number particulars which were given in the Affidavit of Service. A request for judgment was made on the strength of the affidavit of service and judgment was entered accordingly and a decree drawn.



6 What followed were multiplicity of applications one of which was an application by the appellants for the said judgment to be set aside and the appellants be allowed unconditional leave to defend the suit. Attached to the application was a draft statement of defence where it was admitted that the respondent supplied building stones to the appellants but it was denied that the same were to be sourced from “Muremba Mines.” It was admitted that the appellants had given postdated cheques to the respondent; that the first four (4) cheques were paid by the bank on presentation for payment:

... but the plaintiff refused to issue invoices in its name but instead issued invoices in the name of Muremba Mines which was a stranger to the 3rd Defendant.

9. The 3rd Defendant had to stop all its payment to the plaintiff and demanded for its invoices before any further payment could be made.”

7 The magistrate considered the application and finding that there was a triable issue and that the affidavit of service had not identified who amongst the two “defendants” had received summons on behalf of the 3rd appellant allowed the application.

8 The respondent was not amused by those findings leading to the appeal to the High Court where it was urged for the respondent that there had been acknowledgement of service of summons; that the affidavit of service identified who was served and there was no denial that the first two appellants were directors of the 3rd appellant. It was also argued that there was no good defence to the respondent’s claim.

9 It was argued for the appellants that the defence raised triable issues; that there was no proper service of summons to enter appearance. The Judge considered the procedure in Order 5 rule 3 on service of summons upon a corporation and found that summons had been properly effected on the 3rd appellant which was a corporation because the Process Server had served the 1st and 2nd appellants.

10 The Judge agreed that the defence raised a triable issue but after considering the effect of Order 10 rules 4 and 10 Civil Procedure Rules and having established that judgment had been regularly entered after the appellants had been properly served but had not entered appearance or filed a defence the Judge found the judgment regular. The ruling by the magistrate was set aside and the appeal was allowed.

11 There are 2 grounds of appeal in the Memorandum of Appeal drawn for the appellants by their lawyers M/s P. Sang & Company Advocates. It is said that the Judge erred in ‘law and facts’: by failing to consider the appellants’ submissions; that the Judge erred again in ‘law and fact’ by setting aside the said ruling delivered by the magistrate.

12 When the appeal came up for hearing before us on 5th June, 2024 learned counsel Mrs. Purity Rotich appeared for the appellants while learned counsel Mr. Andrew Kamunda who held brief for Mr. Daniel Kamunda appeared for the respondent. Both sides had filed written submissions and in a highlight of the same counsel for the appellants reiterated the facts of the case stating that the appellants had not been served with Summons to Enter Appearance and should have had the suit heard on merits. It was submitted for the respondent that there was proper service of summons as the process Server had even indicated the telephone number of one of the appellants.

13 We have considered the whole record, submissions made and the law.

14 As we indicated at the onset of this judgment our mandate in a second appeal like this one is limited; we are to deal with issues of law only.



15 The complaint by the appellants is the finding by the Judge that they were served with Summons. We have perused affidavit of service where the Process Server details how he visited the appellants' offices, found the 1st and 2nd appellants' and served them with Summons and accompanying documents. He knew them before because he had served them with other processes in the past. He even gave a telephone number of one of the appellants. The 1st and 2nd appellants informed the Process Server that they were to deliver court documents to their lawyers to deal. The appellants who were properly served with Summons failed to enter appearance and the respondent was within its rights to request for judgment in default of appearance. The suit was for a liquidated sum and judgment was regularly entered as the appellants had failed to enter appearance or file a defence as required. The magistrate was wrong to set aside a judgment which had been regularly entered and we agree with the Judge who set aside that ruling.

16 We have found no merit in this appeal which we proceed to dismiss with costs to the respondent who will also have costs below.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCI Arb.,

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

