Hui Commercial Enterprise (Africa) Company Limited Aka Hui Commercial Epz (K) Limited & another v Ndunguli & 13 others (Civil Appeal E005 of 2021) [2023] KECA 648 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 648 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E005 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JUNE 9, 2023

BETWEEN

HUI COMMERCIAL ENTERPRISE (AFRICA) COMPANY LIMITED AKA HUI COMMERCIAL EPZ (K) LIMITED ..... 1ST APPELLANT

WRONY WANG ..... 2ND APPELLANT

AND

SALIF MICHAEL NDUNGULI ..... 1ST RESPONDENT

JACOB KATUMO MUSYOKI ..... 2ND RESPONDENT

NZOMO MULUVE FREDRICK ..... 3RD RESPONDENT

PAULINE KHADIORI ..... 4TH RESPONDENT

IBRAHIM ALUMERA AMIMO ..... 5TH RESPONDENT

JOHN NYAGA IRERI ..... 6TH RESPONDENT

SWALEH KIBWANA ..... 7TH RESPONDENT

KELVIN MURITHI NJERI ..... 8TH RESPONDENT

KAVESA MARY MUTUA ..... 9TH RESPONDENT

GLADYS AKINYI ODUOR ..... 10TH RESPONDENT

MILANDI NJOGU ..... 11TH RESPONDENT

ALICE ACHIENG OCHIENG ..... 12TH RESPONDENT

DAVID THOYA NDURYA ..... 13TH RESPONDENT

DENNICE ODWOR ODHIAMBO ..... 14TH RESPONDENT

(An appeal arising from the ruling of the Employment and Labour Relations Court at Mombasa by Hon. Rika, J delivered on 29th June, 2020 in Employment and Labour Relations Court Case No. 394 of 2018)

JUDGMENT

1. On June 12, 2018, the Respondents herein filed a Memorandum of Claim dated June 8, 2018 against the Appellants herein before the Employment and Labour Relations Court at Mombasa being Cause No. 394 of 2018. According to the Respondents, they were employed by the Appellants on diverse dates and years in different capacities which they respectively set out as well as their respective earnings.

2. It was pleaded that on diverse dates from August 15, 2017 to January 1, 2018, the Respondents were told to go home because the business had gone down and that they would be recalled once the business picked up. According to the Respondents, this was a ploy to terminate their services on account of redundancy yet they were not given any notice of termination. It was their case that the Appellants' action amounted to unfair termination since their services were terminated without any justifiable cause, without following the due process and without payments of their terminal and contractual dues.

3. They therefore claimed a total sum of Kshs 8, 206,348.00 against the Appellants being their terminal and contractual dues based on the said unfair, unjust and wrongful termination.

4. According to the Respondents, the Appellants were using multiple business entities to obscure ownership and control of their business interests and that while the employment contracts were under the name of Hui Commercial Enterprise (Africa) Co. Ltd, for the purposes of remittance of the Respondents' NSSF deductions, the Appellants were using Hui Commercial EPZ (K) Limited. It was the Respondents' case that the Appellants were doing so in order to avoid statutory obligations hence the joining of the 2nd Appellant to the suit.

5. The matter proceeded ex parte and on September 26, 2019, judgement was entered in favour of the Respondents against the Appellants in the sum of Kshs 8,206,348.00 together with costs and interests at 14% per annum from the date of judgement till payment in full.

6. On October 25, 2019, the Appellants filed a Notice of Motion dated October 24, 2019 seeking that the said judgement be set aside and that leave be granted to them to defend the suit. The said Motion was based on the ground that the Appellants were never served with Summons to Enter Appearance and Memorandum of Claim. The affidavit in support of the application was sworn by Philip Sadhi Mrima, who described himself as a "representative of the Respondent/Applicant Company duly authorized". According to the deponent, on October 1, 2019, they received a letter from the Respondents' advocates together with a notice of entry of judgement dated September 30, 2019 demanding payment of Kshs 9,733,423.00. Since the Appellants were unaware of the case, they instructed their advocates on record to peruse the court file and advise them further and it was upon the same that they became aware of the case.

7. According to the deponent, contrary to the averments in the affidavit of service, that service was effected upon one Babu, the Appellants' human resource manager, at the Appellants' offices situated in Mama Ngina Drive near GSU Headquarters, the Appellants' registered office is situated in EPZ Kigorani in Mikindani, Mombasa and that the Appellants have no office in Mama Ngina Drive as alleged. Further, that the Appellants did not have a human resource manager by the name Babu. It was averred that since the Appellants were not served with the summons, the judgement was irregular and ought to be

set aside so that the Appellants could defend the suit since, according to the deponent, the Appellants had a good defence that raised triable issues.

8. In opposing the application, the Respondents relied on a replying affidavit sworn by Laura Mbihe Mwadime, the Respondents' advocates, in which it was averred that service was duly effected on the Appellants as evidenced by the attached affidavit of service after which the matter proceeded to formal proof. It was averred that the 2nd Appellant is the director of the 1st Appellant and is notorious for having multiple companies/businesses names in order to avoid employer statutory obligations. Based on the information received from the process server, Andericus Odera, it was averred that the 2nd Appellant resided at Mama Ngina Drive near GSU Headquarters where service was effected. It was disclosed that notwithstanding the failure to appear, the said process server effected service of the hearing notice on the Appellants on June 19, 2019 and the affidavit of service was attached to that effect. Further, that the letter notifying the Appellants of the judgement, decree and certificate of costs was served in the same manner. It was noted that since the Appellants did not deny having received the same, they could not question the legitimacy of service effected by the process server. To the deponent, the application was an afterthought and the Court was urged to dismiss the application.

9. After hearing the application, the Learned Trial Judge delivered his ruling on June 29, 2020 dismissing the said application. According to the Learned Judge, service of Summons to Enter Appearance, hearing notice and notice of judgement were effected on the Appellants on various days by the Respondents' process server and a detailed affidavit of service filed. However, the process server was never summoned to be cross-examined on the same by the Appellants hence the Court had no reason to doubt service. It was the Learned Trial Judge's view that there was no reasonable response to the claim as the attached draft merely denied the Claim stating there was no redundancy while confirming the Respondents' position that they were asked to leave because the business was down. However, there was no evidence that the Respondents were invited back. The Learned Judge further noted that the deponent of the supporting affidavit did not disclose in what capacity he was swearing the affidavit and it was not sufficient for him to simply state that he was a representative of the Appellants without disclosing the position held by him and how that position related to the matters in inquiry. According to the Learned Judge the said affidavit could not be relied upon by the Court.

10. It was that decision to that provoked this appeal

11. We heard this appeal on the Court's virtual platform on February 7, 2023. Learned Counsel Mr Mwarandu held brief for Mr Kenga for the Appellants while Ms Munene appeared for the Respondents. At the hearing learned counsel relied on their written submissions which they highlighted.

12. According to the Appellants, service ought to have been effected under Order 5 Rule 3 of the *Civil Procedure Rules* of 2010, which mandatorily require that service be effected either on the secretary or director or any principal officer of the 1st Appellant, a corporation. If the process server was unable to find the offices of the 1st Appellant's company, he should have effected service as provided for under sub-rule(b) of rule 3 which is basically substituted service.

13. As regards the 2nd Appellant, it was submitted that the mode of service of the pleadings should have been as provided under Order 5 Rule 8 of the *Civil Procedures Rules*, the 2nd Appellant being a natural person.

14. It was submitted that an examination of the affidavit of service that was relied on by the trial court to proceed with the matter ex-parte confirms nonservice of the summons or pleadings on the Appellants. According to the Appellants, the entire affidavit neither mentioned the person(s) who made the

identification of the person to be served, nor did the court process server reveal how he knew where the Appellants were to be served or where their offices were located. This, according to the Appellants, lent credence to the Appellants' claim that they were not served with the suit papers. While acknowledging that on November, 2019 the same process server swore a lengthy affidavit with a view to correcting the defects of the 1st affidavit, the Appellants maintained that the proceedings commenced ex-parte on the basis of the said 1st affidavit of service. In any case, it was submitted, the time of service mentioned in both affidavits were conflicting with one stating 10:00 am in the morning of the June 21, 2018 while the 2nd affidavit of service filed after the Notice of Motion Application dated October 24, 2019 mentioned 2:30 pm of the same day. According to the Appellants this inconsistency contravened Order 5 Rule 15 which provides in mandatory terms that time of service must be indicated in the affidavit of service.

15. In the Appellants' view, since the court process server lied under oath it was not necessary to have him cross-examined as the evidence available clearly confirmed nonservice and therefore the Application dated October 24, 2019 should have been allowed. It was therefore the Appellants' case that they were condemned unheard contrary to Articles 25 and 50 of the *Constitution*. It was contended that the learned judge erred in failing to consider the draft statement of defence which contrary to the Court's findings raised triable issues

16. In support of the submissions the Appellants relied on *Sebei District Administration v Gasyali* [1968] EA 300 which emphasizes on the right to fair hearing and a right of natural justice and urged us to allow the appeal as prayed with costs.

17. On behalf of the Respondents, it was submitted that the learned Judge was right in fact and in law, in considering the two Affidavits of Service drawn by the Court process server, as the basis of his conviction in relation to proper service, and allowing the matter to proceed ex-parte, and to dismiss the Appellant's Application. It was submitted that the Court Process server indicated that service was effected upon the 2nd Appellant who was a Director of the 1st Appellant and that 'Babu' was the name that the 2nd Appellant was identified by among the Respondents, and had been identified by the 1st Respondent who had accompanied him for the service.

18. It was submitted that the Appellants did not contest the fact that the 2nd Appellant was the Director of the 1st Appellant in which case substituted service was not necessary as alleged by the Appellants. The service effected upon the 2nd Appellant on behalf of the Appellants was therefore procedural following the *Civil Procedure Rules*.

19. According to the Respondents, the 2nd Appellant did not expressly deny receipt of the Summons, pleadings and hearing notice served upon him by the Court process server.

    He also did not deny residing at the said premises where the service of documents took place since he did not swear an affidavit to that effect. It was the Respondents' submissions that the Appellants seemed to have been satisfied with the contents of the process server's affidavit, as they did not prompt for him to be summoned for cross examination regarding the contents of his affidavits expounding on how he effected the service. In support of their submissions, the Respondents relied on *Shadrack Arap Baiywo v Bodi Bach* [19871 eKLR and noted that the Appellants did not dispute service of the Notice of Entry of Judgment, Decree and Certificate of costs served upon them on September 30, 2019 which documents were served in the same manner as the Summons, Pleadings and the Hearing Notice by the same process server. Although they acknowledge receipt, the Appellants did not disclose how they received the Notice of Entry of Judgment, Decree and Certificate of costs, thereby having knowledge of the suit against them.

20. It was submitted that the relief for setting aside being an equitable remedy as opposed to a right, it is only available to a party at the discretion of the Court. However, in this case, it was submitted that the conduct of the Appellants depicted foul play on their part, as they did not come to Court with clean hands and that their application should not be entertained, as they only followed up with the case after they realized that the Respondents were on the verge of proceeding with execution against them.

21. Regarding the draft defence, it was submitted that the learned Judge at trial court considered the same and made a determination that the Appellants merely denied the Claim, with no reasonable response to the Claim. The trial Court further confirmed that the Appellants' draft defence actually substantiated the position stated by the Respondents, that the procedure for declaring the Respondents redundant was not followed and therefore the defence did not raise any triable issues which would warrant the setting aside the ex- parte judgment. In this regard the Respondents relied on *Philip Keipto Chemwolo & another v Augustine Kubende* [19861 eKLR and *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [20131 eKLR.

22. It was further submitted that the learned Judge was right in finding that the supporting Affidavit sworn by one Phillip Sandhi Mrima on behalf of the Appellants could not be relied upon to set aside the judgement as it did not disclose his position in the Appellants' company and how it related to the matters under enquiry.

23. We were therefore urged to dismiss the appeal in its entirety, with costs.

Analysis And Determination

24. We have considered the written submissions by and on behalf of the parties herein as highlighted by learned counsel.

25. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions always bearing in mind that we have neither seen nor heard the witnesses and hence we should make due allowance in this respect. However, we are not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See *Selle v Associated Motor Boat Co.* [1968] EA 123, *Abdul Hameed Saif -v - Ali Mohamed Sholan* (1955), 22 EACA. 270 and *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212.

26. This is a post judgement appeal arising from the decision of the Learned Trial Judge declining to set aside the judgement entered in favour of the Respondents following the ex parte hearing of the Respondents' case. It is settled that the decision whether or not to set aside an ex parte judgement is an exercise of discretion and the discretionary power should be exercised judicially and in selective and discriminatory manner, not arbitrarily or idiosyncratically. See *Mwangi v Mugiria* [1983] KLR 78.

27. In this case the reason advanced for the failure by the Appellants to defend the suit was that they were never served with the Summons to Enter Appearance and the Memorandum of the Claim. If that position is correct, then the resultant judgement would have been irregularly entered and the Appellants would have been entitled to have the judgement set aside ex debito justitiae. See *Magon v Ottoman Bank* [1968] EA 156. In response to that contention that Respondents filed a replying affidavit in which they attached an affidavit sworn by the process server, Andericus Otieno Odera, in which the deponent set out in detail the steps he took in effecting service on the Appellants. According to the process server when he went to Mikindani where he was directed by the Respondents' advocates that the 1st Appellant was situate, (and the Appellants have admitted that that was where their offices

were situate), he was informed by the security guards that the 1st Appellant's offices were closed and that the Appellants operated from the residential premises of the 2nd Appellant along Mama Ngina Drive next to GSU Headquarters. At 2.30pm, in the company of the 1st Respondent he proceeded to where he was directed and found one Babu, a gentleman of Chinese origin who, according to the 1st Respondent, was the one responsible for the payment of salaries, who accepted service and acknowledged that he knew the 1st Respondent. On February 21, 2019, he served the 2nd Appellant with the hearing notice for the formal proof at the same place. It was also at the same place that the notice of judgement was similarly served.

28. The Appellants instead of responding to these details contented themselves by stating that since the contents of the 2nd affidavit were different from the 1st affidavit which was the basis of the ex parte proceedings, the Court ought to have set aside the judgement.

29. In our view, the Court having had before it two affidavits, one which was not so detailed and another that was very detailed, was entitled to rely on either or both in exercising its discretion. It was upon the Appellants to place before the Learned Judge sufficient material on the basis of which the ex parte proceedings could be successfully impugned. The process server swore that on February 21, 2019, at the same premises, he served the 2nd Appellant with the Hearing Notice. The 2nd Appellant is stated to be a director of the 1st Appellant. Both the fact of service on him on that date at the same place and his position as a director of the 1st Appellant were not controverted since he did not swear any affidavit. The Appellants did not see the need to either have the 2nd Appellant swear an affidavit to controvert the damning averments made by the process server or, even at the very least, to summon the process server for cross-examination. We agree with the position stated in *Shadrack Arap Baiywo v Bodi Bach* [19871 eKLR where it was stated;

> " There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service."

30. Whereas it is not in every case that service is contested that the process server ought to be summoned to be cross- examined on his affidavit, where an elaborate affidavit of service is sworn detailing the steps taken by the process server, it would be desirable that the said process server be summoned particularly, as in this case, where those on whom service is alleged to have been effected have not bothered to rebut the averments made on oath by the process server. If the hearing notice was served on the 2nd Appellant at the same place where the Summons to Enter Appearance and Memorandum of Claim were served, and there is no challenge to that service, then it would require more than just mere denial for the Court to be satisfied that the later documents were not served.

31. The Appellants have, in their supporting affidavit disclosed that they received the notice of judgement. They have neither disclosed how the same were transmitted to them nor challenged the averments in the affidavit of service that they were served by the same process server at the place that the Appellants refutes as being their offices. Since it is the Appellants alleging lack of service it was upon them to explain how, in light of the averments by the process server, they received the notice of judgement. Without such explanation, it is only fair to conclude that the Appellants fall in that category of persons who deliberately seek (whether by evasion or otherwise) to obstruct or delay the course of justice. Such persons cannot be assisted by the Court. See *Shah v Mbogo* [1967] EA 116.

32. The matter, however, does not end with the finding that service was properly effected. Notwithstanding the fact that the proceedings were regular, the Court must proceed and consider the draft defence if brought to its attention. This was appreciated by this Court in *Sarfraz Motors & Another v Kisii Hardware* Civil Appeal No. 98 of 1990 where it was held that nature of the action should be considered, the defence if one is brought to the attention of the Court, however irregularly, should be considered, and that where the reason advanced for failure to defend the suit is not satisfactory., the question as to whether there is any meritorious defence available to the appellants assumes a lot more importance.

33. In the present appeal, the case against the Appellants was for unfair termination of employment. On a perusal of the draft defence, one cannot but agree with the Learned Trial Judge that the draft defence was substantially a mere denial. In the alternative, it was admitted that the 1st Appellant was forced to close down the entire factory for more than a year due to prevailing harsh economic environment. In our view, the draft defence did not substantially rebut the allegations made by the Respondents and the Learned Trial Judge properly exercised his discretion in finding that it did not disclose a triable defence on merits.

34. We also agree with the Learned Judge's finding that the supporting affidavit was deficient in so far as it did not disclose the capacity of the deponent in the 1st Respondent company in order to give him the locus to swear an affidavit on behalf of the Company. It was for rejection.

35. Based on the material placed before the trial court there is no basis upon which we can fault the exercise of discretion by the trial Judge as regards his findings on the service of the Summons to Enter Appearance and Memorandum of Claim as well as the Appellants' intended defence. We are unable to find that his decision was clearly wrong in order to justify our interference. As was held in *Joseph Ngunje Waweru v Joel Wilfred Ndiga* [1982-88] 1 KAR 210, the Court has an unfettered discretion to set aside or not and this court will not interfere with the judge's exercise of his discretion unless there has been a misdirection leading to a wrong decision or a manifestly wrong decision leading to injustice.

36. The decision would have been wrong if it was shown by the Appellants the Learned Judge misdirected himself or acted on matters on which it should not have acted or failed to take into consideration matters which he should have taken into consideration. This, the Appellants have failed to do in this case. See *Mbogo and Another v Shah* [1968] EA 93.

37. In the premises we find no merit in this appeal which we hereby dismiss with costs to the Respondents.

38. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR