Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 872 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E074 OF 2022

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

JULY 7, 2023

BETWEEN

YOOSHIN ENGINEERING CORPORATION ..... APPELLANT

AND

AIA ARCHITECTS LIMITED ..... RESPONDENT

(Being appeal from the ruling and orders of Njoki Mwangi J issued on 15th July 2022 in Mombasa High Court Civil Case No. 36 of 2019)

JUDGMENT

1. The background to the appeal is that on 4th May, 2019, the Appellant herein is alleged to have terminated the contract of a sub tenancy agreement dated 18th August, 2017 entered into between the Appellant and the Respondent in respect of construction of the Lamu Port South Sudan Ethiopia Corridor Project (LAPSSET). The Respondent aggrieved by the alleged termination filed a suit challenging the termination. Contemporaneously with the suit, the Respondent filed an application dated 8th May, 2019 seeking interim injunctory reliefs against the Appellant. The said reliefs were, inter alia, an order suspending the effective date of the impugned notice of termination, so as to allow the Respondent continue working on the project as per the terms of the contract. The Respondent also sought that it be allowed to continue holding on to the soft copies of the designs of the buildings and associated infrastructure in respect of the project. Further, the Respondent on 31st May 2019 filed an application seeking injunctory reliefs against the Appellant, restraining it from constructing, supervising and or doing any works on the buildings and structures in respect of the LAPSSET Project.

2. The Appellant did not file a defence but instead filed a notice of Preliminary Objection challenging the court's jurisdiction to hear and determine the matter in view of the arbitration clause contained in the contract between the parties.

3. On 23rd September, 2019, the court overruled the Appellant's preliminary objection and granted the injunctory reliefs sought by the Respondent against the Appellant. The Appellant was then directed to file a defence within 14 days. Aggrieved by the said decision the Appellant appealed against the decision to this Court in Civil Appeal No. 147 of 2019 and by its judgement dated 23rd October, 2020, this Court partly allowed the appeal and set aside the injunctive orders granted to the Respondent but disallowed the appeal against the order dismissing the preliminary objection.

4. Meanwhile on 8th October, 2019, the Respondent requested for judgement which judgement was entered against the Appellant on 18th October, 2022. By an application dated 17th October, 2019 and filed on 22nd October 2019, the Appellant sought, inter alia the following order:

> That the Honourable Court be pleased to grant and hereby grants orders setting aside any judgement in default (if any) entered in this matter.

5. The said application was based on the grounds that the summons to enter appearance was never served on the Appellant and that the Appellant could not file its defence as it was challenging the court's jurisdiction to entertain the suit hence by filing the defence it would have had the effect of compromising its defence.

6. In her ruling, the Learned Trial Judge found that the Respondent did not take out summons or effect service of the same on the Appellant. However, noting that the Appellant filed a memorandum of appearance on 20th May 2019 and that the Appellant participated in the proceedings without objecting to lack of service of summons, the Appellant waived its right to challenge the non-service of summons. It was held that the impugned interlocutory judgement was regular as the Appellant failed to comply with the order issued on 23rd September 2019 to file a defence within 14 days.

7. On the basis of the Respondent's apprehension that the Appellant might leave the jurisdiction of the court, having been paid the full contract sum, the court, in the exercise of its discretion set aside the said interlocutory judgement on condition that the Appellant deposits within 45 days Kshs 413,900,005.00 (the tender amount). The court also awarded the Respondent thrown away costs which was assessed in the sum of Kshs 100,000/=.

8. Aggrieved by the said decision, the Appellant, on 27th July, 2022 filed its Notice of Appeal and subsequently this appeal. In this appeal, the Appellant has taken issue with want of service of summons; the order of conditional setting aside without legal basis; the award of an excessive, punitive and contested amount of Kshs 413,900,005.00 as a condition for setting aside the impugned judgement; the award of thrown away costs in addition to the conditional setting aside amount of Kshs 413,900,005.00; and the faulting of the Appellant to file a defence yet it had challenged the jurisdiction of the court.

9. When this appeal was called out for hearing on 2nd March, 2023, Learned Counsel Mr Kibet Sang appeared with Ms Mary Njagi for the Appellant while Mrs J. Ashioya appeared for the Respondent. Both counsels relied on their respective submissions which they highlighted.

10. According to the Appellant, there was no regular judgement entered by the trial court because there was no service of summons to enter appearance and in this regard the case of *James Kanyiitta Nderitu & Another v Marios Philotas Ghikas & Another* (2016) eKLR was cited. It was the Appellant's case that in the spirit of fairness and equality in application of procedural dictates, the Appellant cannot be faulted for failure to comply with a procedural step (on filing the defence within 14 days) while the Respondent is excused from compliance with a mandatory procedure (service of Summons). It

was contended that there was no waiver of the mandatory requirement to serve summons and that the interlocutory judgement, being irregular, ought to have been set aside ex debito justitiae.

11. On the amount awarded for conditional setting aside, it was urged that there was no legal basis for doing so because the circumstances envisaged under Order 39 of the *Civil Procedure Rules* and Order 42 Rule 6(2)(b) of the Civil Procedures Rules were not applicable. Since Order 10 Rule 11 of the *Civil Procedure Rules* does not prescribe the deposit of security as condition for setting aside interlocutory judgement, but only allocates judicial discretion, it was submitted that it was erroneous exercise of discretion to order the deposit of a huge amount and reliance was placed on the case of *Toshike Construction Co Ltd v Harambee Co-operative Savings & another* (2019) eKLR on the principles warranting setting aside of the interlocutory judgement. According to the Appellant, the condition imposed was unconscionable, drastic and unjust taking into account the fact that costs were awarded to the Respondent. According to the Appellant the trial court erred in taking the view that the sum of Kshs 413,900,005.00 was payable to the Appellant when the amount included sums to be utilised for local contracts, such as local flights, local remuneration, local travelling and transport, local consultancy services, local training expenses, local office rent, furniture and equipment, local reimbursable, local taxes, local per diem, local miscellaneous expenses and other expenses.

12. Counsel faulted the trial court for not considering the Appellant's reason for the failure to file a defence being that the Appellant was avoiding a situation where by filing the defence, it would be deemed to have admitted the jurisdiction of the Court which was a key issue before this Court. Reliance was placed on *Kenya Broadcasting Corporation v. NACADA*[2015] eKLR. It was submitted that the trial court erred in finding that the Appellant was a foreign company with no known fixed assets in Kenya yet there was a demonstration that the Appellant was not only a permanent establishment in Kenya but had ongoing contracts. In any case, it was submitted that it was untenable and unjustifiable to base the decision on foreign domicile, lack of known assets and completed projects in order to order the depositing of contested amount that had not been tried on merits as a condition for setting aside the default judgement, when the trial court found that the Appellant's defence raised triable issues.

13. It was submitted that the conditions for setting aside the interlocutory judgement amounted to denial of access to justice and right to fair hearing on merits.

14. In opposition to the Appeal, 3 issues were framed for determination, being Firstly, whether the subject interlocutory judgement was regular; Secondly, jurisdiction to order deposit of security and whether the Learned Judge acted judiciously in ordering the deposit; and finally, whether the order to deposit Kshs 413,900,005.00 should be set aside.

15. It was submitted, as regards the first issue, that the Appellant and its counsel were present on 23rd September 2019 when the court made directions that they file a defence and that the Appellant was obliged to comply with the directions which were valid as they were not challenged. It was urged that by filing a memorandum of appearance, the Appellant waived its right to be served with summons and that by so acting, it was aware of the suit against it. Counsel sought to distinguish the case of *James Kanyiitta Nderitu & another v Marios Philotas Ghikas & another* (2016) eKLR, and urged that in the instant case, the Appellant was aware of the existence of the suit against it. It was added that the Appellant did not apply for stay of proceedings and that the impugned interlocutory judgement was a regular one and could only be set aside based on the discretion of the judge in accordance with Order 10 Rule 11 of the *Civil Procedure Rules*.

16. On the 2nd issue, it was argued, while placing reliance on the cases of *Waweru v Ndiga* (1983) KLR and *Roofspace & Allied Workers Co Ltd v George Kamau Thuge* (2009) eKLR, that the decision of the Learned Judge was sound for reasons that the subject of the suit needed the protection of the

court. Counsel explained that there were good reasons for granting conditional order and these were the fact that the Appellant is a foreign company, with no known assets in Kenya and no known bank accounts in Kenya; the directors of the Appellant were residents of Korea; the Appellant had history of disobeying court orders; the Appellant had frustrated the negotiation process; and that the Appellant was about to close shop as the performance of the contract was nearing conclusion and there was no proof that the Appellant was not at flight risk. It was further urged that the Respondent met the legal threshold under Order 39 Rule 1 of the *Civil Procedure Rules*.

17. It was argued that the Appellant had not demonstrated how the trial court acted injudiciously in the decision it made.

Analysis And Determination

18. We have considered the issues raised in this appeal.

19. This being a first appeal, we are mindful that the duty of this Court as set out in the decision of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* (1968) EA 93.

20. This being an interlocutory appeal, care must be taken to obviate expressing a conclusive view of the matter as the Respondent's suit is still pending before the High Court. The practice is and has always been that in interlocutory appeals the court may only express its views in the matters in controversy on a *prima facie* basis. Otherwise a concluded view is likely to tie the hands of the Court that would eventually hear the case, and is likely to embarrass that court. See *Mansur Said & Others v. Najma Surur Rizik Surur* Civil Appeal No. 186 of 2005 and *Niazons (K) Limited v. China Road & Bridge Corporation (Kenya)* Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502.

21. Before we deal with the issues placed before us we recognise that this appeal arises from the exercise of discretion by the High Court. In deciding the appeal, we are guided by the Supreme Court authority of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR in which it was held that:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v. Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:
>
> > " In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:
> >
> > (l) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.'"

22. It was therefore held by this Court in *Price & Another v Hilder* [1986] KLR 95 that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different. The Supreme Court of Uganda, in *Kiriisa v Attorney-General and Another* [1990-1994] EA 258 held that it is settled law that the discretion must be exercised judiciously

and an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously. As to what the term "discretion" connote the Court stated that:

> "Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances."

23. The issue before us in this appeal is whether in the circumstances of this case, the trial court was justified in giving a conditional leave to defend the suit and whether or not the conditions imposed were just. In answering this question, the first issue for determination is whether the judgement in question is regular or an irregular one. This Court in *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193 held that:

> "The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

24. The Court added that:

> "A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure."

25. While it is appreciated that the decision to set aside ex parte judgement is an exercise of discretion, this Court in the above matter held that:

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order, unless he has shown to have applied wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion, which may reverse or vary the order. Otherwise in interlocutory matters, the Judge might be regarded as independent of supervision. Yet an interlocutory order of the Judge may often be of decisive importance

on the final issue of the case, and may be one, which requires a careful examination by the Court of Appeal."

26. What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.

27. However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.

28. In this case, the Learned Judge found that summons to enter appearance were never served. She however held that since the Appellant nevertheless appeared and participated without raising the issue of non-service of the summons, the Appellant must have been deemed to have waived its defence as regards the Respondent's failure to serve the summons. In *Nanjibhai Prabhudas & Co. Ltd v. Standard Bank Ltd*. [1968] EA 670, a decision relied upon by the Learned Judge, it was held that:

> "The defect of which the defendant complains in regard to the service of the summons constitutes, at most, an irregularity capable of being waived, and, secondly, that irregularity has been waived...It does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. The practical difference between an irregularity and a nullity is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgement on a writ which has never been served and one in which there has been a defect in the service but the writ had come to the knowledge of the defendant...Here there is no doubt that the summons, which on the face states that a copy of the plaint was annexed to it came to the knowledge of the defendant and that the latter's subsequent course of conduct was adopted and followed in the light of the information so conveyed to it. Therefore, there can be no doubt that any defect there may have been in the service constituted an irregularity only, capable of being waived."

29. Newbold, P added that:

> "Although it was incorrect to put on the summons the seal of the Resident Magistrate's Court, the summons itself purports to issue from the High Court and is signed by the Deputy Registrar of the High Court. The defendant entered appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was incorrect. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant. The court cannot regard the incorrect placing of the seal of one court on a document,

> instead of the seal of another court, as an act so fundamental that it transforms what would otherwise be an effective document into a complete nullity...Although the service of the summons on the defendant instead of a notice was incorrect, the courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature and matters of procedure are not normally of a fundamental nature. To treat the service on a person of the summons itself instead of a notice, to which the summons itself is attached, as of so fundamental a nature that it results into a complete nullity and vitiates everything following would appear to be completely unreal unless there is a good reason for this distinction between the service of the summons and the service of the notice. It would seem therefore that there is nothing in this mistaken service of the summons instead of the notice of summons as could or should be regarded as so fundamental a nature as to result in a nullity...Where the defendant enters an unconditional appearance to an action it has always been regarded as an act which waives any irregularity."

30. In this case since the Appellant took action without raising the issue as regards the defect in or non-service of the summons to enter appearance, we agree with the Learned Judge that the Appellant was properly deemed to have waived its right to raise the issue.

31. As regards the issue whether it was proper to impose the conditions, the authorities are clear that where the judgement is regular, the Court has discretion to impose conditions which conditions must be just. However, it is not in every case that a judgement is entered that conditions must be imposed. Such conditions may be an order that the Defendant pays thrown away costs to the Plaintiff as was ordered in this case in the sum of Kshs 100,000.00.

32. That leads us to the issue whether this was a case in which it was justified in imposing further conditions over and above directing the Appellant to pay thrown away costs. In this case the Learned Judge not only awarded thrown away costs in the sum of Kshs 100,000.00 to the Respondent but directed that the Appellant deposits the tender amount of Kshs 413,900,005.00 within 45 days, notwithstanding her finding that the Appellant's intended defence and counterclaim raised triable issues and that the matter needed to go for trial on merits.

33. Whereas the nature of conditions to be imposed by the court in setting aside an *ex parte* judgement is an exercise of discretion, just like any other exercise of discretion, it must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles. See *Gharib Mohamed Gharib v. Zuleikha Mohamed Naaman* Civil Application No. Nai. 4 of 1999.

34. It therefore follows that this Court will not interfere with the exercise of its discretion by the High Court unless it is satisfied that the decision of the High Court has not been made judiciously. The Court must be satisfied that the decision is clearly wrong, because the High Court has misdirected itself or because it acted on matters on which it should not have acted or failed to take into consideration matters it should have taken into consideration and in so doing, arrived at a wrong decision in its consideration of the issues raised before it. See *Mbogo v Shah* [1968] EA 95.

35. Where therefor it is shown that the High Court's decision is based on matters that it ought not to have taken into account, this Court is entitled to interfere. In his case, what seemed to have weighed heavily on the Learned Trial Judge's mind in determining the conditions for setting aside and for directing the Appellant to deposit what, she admitted, was a "large sum of money" was the fact that the Appellant was a foreign company with no fixed assets in Kenya as well as the fact that the completion date for the

contract was 26th October, 2021 hence the Respondent may have nothing to cushion it against non-payment, in the event that it is successful. Whereas the said reasons would have been relevant in an application made under Order 39 of the *Civil Procedure Rules*, which the Respondent has relied on in opposing this appeal, that Order deals with attachment before judgement. However, the conditions precedent for granting an order under Order 39 of the *Civil Procedure Rules* are irrelevant in an application such as the one that was before the Learned Judge. An order under that Order may only be made where it is shown that the defendant's action is intended to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against the Defendant.

36. It must however be emphasised that the mere fact that a defendant is given an opportunity of defending the suit does not deprive the Plaintiff of its right to make an application under Order 39 of the *Civil Procedure Rules*. It is however inappropriate to, in effect, import the principles under Order 39 of the *Civil Procedure Rules* in determining whether or not to impose conditions for defending a suit when the matter in question does not call for application of those principles.

37. This Court, in the case of *Kenya Power & Lighting Co Ltd v Abdulhakim Abdulla Mohamed & another* [2017] eKLR took the view that: -

> "The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the Appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties...There was not even a remote suggestion that the Appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective..."

38. In conclusion, this Court stated that:

> "On the facts of this appeal, we are satisfied that as far as the order for deposit of Kshs 522,713,576/= as a condition for setting aside the default judgment is concerned, it is vitiated by serious misdirection, the taking into account of irrelevant factors, and failure to take into account relevant matters. That is enough to justify our interference with the exercise of discretion by the learned judge. Accordingly we allow this appeal and set aside the part of the order dated 7th December 2016 requiring the Appellant to deposit Kshs 522,713,576/= in an interest earning account in the names of the parties' advocates."

39. We have similarly considered this appeal and it is our view and we hold that having ordered the Appellant to pay the Respondent Kshs 100,000.00 as thrown away costs, it was an error of principle for the Learned Judge to have, in addition, ordered the Appellant to deposit Kshs 413,900,005.00. That decision was arrived at on consideration of irrelevant factors and on failure to consider relevant ones.

40. Accordingly, we allow the appeal and while we affirm the decision setting aside the judgement and directing that the matter goes to trial on merits and awarding the Respondent thrown away costs of Kshs 100,000.00, we hereby set aside the order directing the Appellant to deposit the sum of Kshs 413,900,005.00 as a condition for setting aside the ex parte judgement. We award the costs of this appeal to the Appellant.

41. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCI ARB.

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JUDGE OF APPEAL

P. NYAMWEYA

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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