



**Masscon Construction Company Limited v Emojong (Appeal
E174 of 2024) [2025] KEELRC 164 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 164 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E174 OF 2024
M MBARŪ, J
JANUARY 30, 2025**

**BETWEEN
MASSCON CONSTRUCTION COMPANY LIMITED APPELLANT
AND
DAN ESKE EMOJONG RESPONDENT**

JUDGMENT

1. The appeal arises from the judgment delivered on 16 August 2024 in Mombasa CMELRC E112 of 2021. The appellant is seeking that the judgment be set aside, the Notice of Motion dated 20 March 2024 be allowed, the appellant be allowed to defend the claim on merit, and the court to issue any other orders deemed fair and just.
2. The appeal is on the grounds that;
 1. The learned magistrate erred in law and fact on the issue of delay by the defendant by failing to appreciate that the reason why the application to set aside the judgment was delayed was that the applicant only became aware of the matter when it was served with the Warrants of Attachment by the respondent on 6 March 2024. However, the hearing was done without the appellant's knowledge and presence, and the judgment was delivered on 25 May 2023.
 2. The learned magistrate erred in law and fact by failing to pronounce herself on the issue of proper service of summons to enter an appearance by counsel but instead held that counsel previously represented the defendant in the matter. Yet, the applicant in its application dated 20.03.2024 demonstrates that the matter proceeded without the knowledge and the presence of the applicant.
 3. The learned magistrate erred in law and fact by holding that the primary consideration to set aside a judgment is whether there is a defence with a real prospect of success and that justice should be done yet failed to pronounce herself on the applicant's draft response to the claim



and failing to appreciate that the said draft response raised serious triable issues that would have significantly affected the judgment consequently condemning the applicant unheard by denying the applicant the right to a fair hearing which is guaranteed under article 50(1) of the [constitution](#).

4. The learned magistrate erred in law and fact by holding that prejudice to the claimant also has to be taken into account when deciding on whether or not to set aside a judgment she failed to pronounce herself on the issue of prejudice and demonstrate how the claimant would be prejudiced should the judgment be set aside and especially when the claimant himself failed to demonstrate any prejudice that would be occasioned to him in the event the judgment is set aside.
3. The respondent remained absent from all the attendances. Despite service and notices being issued, the respondent did not file any submissions.
4. The appellant submitted that the judgment delivered on 16 August 2024 and the ruling delivered on 20 March 2024 should be set aside and the appellant allowed to defend the claim. The appeal is that on 23 February 2021, the respondent filed the Memorandum of Claim claiming terminal and contractual dues against the appellant. The matter proceeded in the absence of the appellant, and judgment was delivered on 25 May 2023 in favour of the respondent with an award of Ksh. 368,400 plus costs and interests. Aggrieved, the appellant filed an application dated 20 March 2024 seeking to set aside the judgment since summons had not been served and hence was unaware of the proceedings. The application was dismissed on 16 August 2024. The trial court held that the application had been filed a year after the judgment. The appellant was condemned unheard contrary to article 50(1) of the [constitution](#).
5. The appellant submitted that the trial court did not correctly interrogate the fact that there was no service of summons. There was a draft response to the claim, which was not considered, and this was prejudicial to the appellant.
6. The trial court's findings that there was a delay in applying to set aside the judgment was incorrect since the appellant only became aware of the suit upon service of the Warrants of Attachment. In the case of *Alderman Limited v Shah & 3 others* [2022] eKLR, the court held that whether a default judgment is regular or irregular would determine whether setting aside the judgment would be set aside at the court's discretion. In a regular default judgment, the respondent is served but fails to enter an appearance or file a response for one reason or another. Such a party can move the court to set aside the default judgment. In an irregular judgment, judgment is entered against a respondent who has not been served with a summons. Such matters must be addressed, and the party must be allowed a fair chance to have a hearing where there is a good response.
7. In this case, there was an irregular judgment where summons were not served. It is only fair that the appellant is allowed a fair hearing, and there is a draft response with triable issues. The respondent claimed he was a foreman but a casual employee, and the claims were without merit. He claimed that he was paid Ksh.700 per day and not Ksh.21, 000 per month, the facts of which are contested and only fair that the appellant be heard on its case. In the case of *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, the court held that in addressing an application seeking to set aside a judgment, the court must consider the facts and circumstances of the case and the respective merits. In this case, the draft response raises triable issues.
8. If the appellant is allowed the right to a hearing, there will be no prejudice against the respondent. The appellant is willing to pay throwaway costs of Ksh.30 000 plus auctioneer costs of Ksh.50 000 to have the matter heard afresh.



9. As noted above, the respondent has not submitted anything.

Determination

10. This is a first appeal, and the court is allowed to reevaluate the entire record and independently analyze the findings with conclusions.
11. Without any responses or submissions by the respondent, the court is left with the Record of Appeal and the submissions by the appellant.
12. The appellant's case is that the judgment delivered on 25 May 2023 and the ruling delivered on 16 August 2024 are irregular and without merit and should be set aside. That summons to enter appearance was not served, and the application seeking to set aside the judgment was dismissed without proper cause.
13. The respondent filed his Memorandum of Claim before the lower court on 23 February 2021.
14. The record filed is the Affidavit of Service by Gordon Odhiambo Onyango, who avers that on 15 September 2021, he was instructed by the respondent's advocates to serve summons upon the appellant. He avers that;

... On 15 September 2021 ... he visited the respondent's offices along Nyerere Avenue, within Mombasa County ... he served the secretary who declined to access service.
15. Through the Affidavit of Service dated 21 April 2021, Gordon Odhiambo Onyango aver that on 24 February 2021, he avers that;

... I visited the respondent's office along Nyerere Avenue in Mombasa County and served the Director Umesh Patel, the director.
16. The letter of Authority filed by the appellant in support of the application dated 20 March 2024 is by Umesh Karsan Ladhani, a director of the appellant.
17. Through an Affidavit of Service filed in court on 28 November 2022, the respondents' Advocate avers that the court directed service upon the appellant through courier service. This was effected through the postal service. There are no details as to which address this was posted, and there is no record of the postal address used to reach the appellant.
18. The appellant is a corporate.
19. The rules applicable in 2021 were the Employment and Labour Relations Court (Procedure) Rules, 2016, which required service to be effected upon the appellant's entity at its registered offices, as held in *Agigreen Consulting Corp Limited v National Irrigation Board* [2020] KEHC 3507 (KLR).
20. The Process Server, Gordon Odhiambo Onyango, only suggests that he attended along Nyerere Avenue, within Mombasa County. The person noted as secretary is not defined as the company secretary or the officer of the appellant holding such office.
21. Nyerere Avenue in Mombasa County is an expansive street that extends for 2.7 kilometres. The appellant could not be traced generally along such an expansive area.
22. The appellant only entered an appearance on 21 March 2024 and appointed its advocates. The case is that the appellant only became aware of the proceedings upon service of the Warrants of Attachment. It immediately filed an application dated 20 March 2024 seeking to set aside the judgment for being



irregular as no service of summons was effected upon the appellant by the respondent. The appellant was unaware of the proceedings and was denied a fair chance to respond to the claim.

23. The appellant supported the application with Umesh Karsan Ladhani's Supporting Affidavit, which also attached a draft response to the claim.
24. On the record, there is no reply to the application dated 20 March 2024.
25. Again, the respondent's absence does not render justice to the matter. The court denied crucial materials.
26. On the record, there was no service of summons upon the appellant to allow them to enter an appearance and be able to defend the claim before the trial court. In the case of James Kanyiita Nderitu & Hellen Njeri Nderitu v Marios Philotas Ghikas & Mohammed Swaleh Athman [2016] KECA 470 (KLR), the court held that a judgment is irregular if a respondent is not served with the summons to allow them to enter appearance or file a response. Such should be set aside upon good response, and the parties should be heard on the merits. See Patrick Omondi Opiyo t/a Dallas Pub v Shaban Keah & Milsons Management [2018] KECA 545 (KLR) and Makomere v Isigi [2024] KECA 1807 (KLR).
27. In this case, the court finds that the trial court's ruling delivered on 16 August 2024 failed to take into account the fact that the appellant was not served with the summons. Hence, all other factors considered should have zeroed in on this fact. Addressing other matters of prejudice was secondary.
28. The appellant attached a draft response that demonstrates a plausible response to the claimant and should be addressed on the merits.
29. Accordingly, the appeal is with merit. The ruling delivered on 16 August 2024 in Mombasa CMELRC E112 of 2021 is hereby set aside together with all consequential orders thereto. This affects the judgment delivered on 25 May 2023, which is set aside to allow the appellant to file its response to the respondent's claim. Parties shall revert to the trial court to take hearing directions. On this basis, each party bears its costs.
30. Mention before the trial court on 12 February 2025.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.

M. MBARŪ

JUDGE

