Marianne Center Foundation v Mutoro (Employment and Labour Relations Appeal E171 of 2024) [2025] KEELRC 2041 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2041 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E171 OF 2024

JW KELI, J

JULY 4, 2025

BETWEEN

MARIANNE CENTER FOUNDATION .... APPELLANT

AND

ROSE ASHIONO MUTORO .... RESPONDENT

(Being an Appeal from the Ruling and Orders of the Honourable B.C. Mulema (PM) delivered at Nairobi on the 24th day of May, 2024 in MCELRC No. E355 of 2021)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling and Orders of the Honourable B.C. Mulema (PM) delivered at Nairobi on the 24th day of May, 2024 in MCELRC *No. E355 of 2021* between the parties filed a memorandum of appeal dated the 10th of February, 2025 seeking the following orders:-
   a. The Appeal herein be allowed.
   b. The Appellant be granted leave to defend the claim.
   c. The costs of the appeal be awarded to the Appellant.

Grounds Of The Appeal

2. That the Honourable Trial Magistrate erred in law and fact by failing to find that there were sufficient reasons warranting the setting aside of the ex parte judgment issued in favour of the respondent.
3. That the Honourable Trial Magistrate erred in law and fact in finding that no draft defence was annexed to the application, whereas the appellant had filed a "draft memorandum of defence" dated 31st August 2023 and that it raises triable issues which would entitle the court to grant the appellants leave to defend the suit.

4. That the Honourable Trial Magistrate erred in law and fact by ignoring and disregarding the basic principles and precedents for setting aside interlocutory judgment.

5. That the Honourable Trial Magistrate erred in law and fact by disregarding the evidence on record on entry of appearance and justifying the irregular judgment on the lack of a draft defence which was not the substratum of the respondent's request for interlocutory judgment.

6. That the Honourable Trial Magistrate erred in law and fact in failing to appreciate that the default judgment was entered in circumstances beyond the appellant's control where the initial advocate had not properly participated in the proceedings beyond filing a memorandum of appearance yet had ceased from acting.

7. That the Honourable Trial Magistrate erred in law and fact by awarding the claimant based on a contract only signed by the claimant and could not therefore be forced on the respondent who was not party to it.

8. That the Honourable Trial Magistrate misdirected herself stating that there is no evidence that the appellants had instructed the previous advocates on record yet it is on record that the advocates had filed a memorandum of appearance on behalf of the appellants.

9. That the Honourable Trial Magistrate erred in law and fact in stating that the previous advocates failed to attend court for want of instructions as retainer and bill of costs were not facts in issue in the application to set aside an interlocutory judgment.

10. That the Honourable Trial Magistrate failed to consider the evidence in its totality hence reaching a wrong conclusion of both facts and law.

BackGround To The Appeal

11. The Respondent filed a claim against the Appellant *vide* a memorandum of claim dated the 30th of December 2020 seeking the following orders:-

    a. A declaration that the claimant was wrongly dismissed.

    b. An order for the respondent to pay the claimant his terminal dues as per paragraph 7 of this memorandum of claim plus interest as from the date of termination until payment in full.

    c. Costs of this case plus interest thereon.

    d. Any other relief that this court.

    (Pages 3-4 of the ROA dated 7th March 2024).

12. Following an application by counsel for the Claimant made in open court on the 21st of February 2023 for the matter to proceed on the basis of the documents on record since the Respondent had not entered appearance, the Trial Magistrate allowed the application and gave directions for the Claimant to file submissions (page 73 of ROA).

13. The Trial Magistrate delivered judgment in favour of the Claimant on the 5th May 2023.

14. The delivery of judgment prompted the filing of an application dated 11th August 2023 by the Appellant to set aside the judgment (pages 28-32 of ROA). The application was opposed by the Claimant/Respondent vide a Replying Affidavit sworn on 4th March 2024 (pages 44-46 of ROA). The parties took directions on the filing of submissions and complied.

15. The Trial Magistrate delivered the impugned Ruling dated 24th May 2024 dismissing the application with costs (pages 78-83 of ROA).

Determination

16. The appeal was canvassed by way of written submissions. Both parties complied.

17. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co*. [1968] EA 123 that:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is 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 demeanor of a witness is inconsistent with the evidence in the case generally."

18. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang VP (As He Then Was) Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

19. The issue for determination was whether the appeal was merited.

Appellant's submission's

20. Ground 1: The trial court erred in failing to find sufficient reasons warranting setting aside the ex parte judgment. - The Judgment was delivered on 5th May 2023 and the Appellants discovered that there was a judgment against them on 2nd August 2023. They immediately made an application dated 11th August 2023 seeking to set aside the ex-parte judgment. Order 10 Rule 11 of the civil procedure rules "a court may set aside a judgment entered in default of appearance or defense if sufficient cause is shown. Musinga, JA while considering the meaning of sufficient cause in The Hon. Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011 observed as follows: -

> " Sufficient cause or good cause in law means: - the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.' See Black's Law Dictionary, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

The trial court failed to consider the facts presented by the appellant that justified setting aside the exparte judgment. The appellant was represented by an advocate Mr Kibunja, whose unavailability

was due to unforeseen circumstances-his alleged admission to a rehabilitation center. Matters of health of an advocate amounts to sufficient cause. The failure of the advocate to participate in the case was beyond the appellant's control and amounts to mistake by counsel which is valid Ground for setting aside exparte judgment.

21. The Appellant filled their application for setting aside the ex-parte judgment three (3) months after delivery of judgment and only nine (9) days after the discovery that judgment had been entered. This could not have been held inordinate delay given the circumstances of inability to access their counsel then on record. In Agip (Kenya) Limited v Highlands Tyres Ltd [2001] eKLR a delay of eight months was deemed not inordinate given the circumstances. In civil appeal no Odwesso v Nyaga alias Jason Nyaga (Civil Appeal E031 of 2020) [2024] KEHC 9123 (KLR) (Civ) (18 July 2024) J Kizito in quoting Odunga J, in Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR

> " In considering whether or not to set aside a judgement, a judge has to consider 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, ...The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or nonattendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement."

While referring to the Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, he stated

> " In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others."

In Kenya commercial bank LTD v Benjoh Amalgamated Ltd (2017) eKLR the court of appeal emphasized that the overriding principle in such application is whether there is a triable issue and if it is just to set aside the judgment in the interest of justice. The appellant demonstrated that there was a mistake of counsel, which would have would have warranted setting aside of the judgment, particularly given the unexpected circumstances surrounding the unavailability of counsel.

22. Ground 2: The trial court erred in stating that no draft defence was annexed to the application. The Appellant filed a draft memorandum of defence dated 31st August 2023 which raised substantial triable issues. The lower court finding that the appellant failed to annex a draft defence is both factually incorrect and legally misplaced. Order 10 Rule 11 CPR provides that where an exparte judgment is being challenged, a draft draft defence should be annexed to the application but the failure to do so in the exact form does not invalidate the application. The applicants filed the draft memorandum of defence separately as they were advised to do so by registry staff to avoid missing out on filing fees. The draft defence was filed but not as an annexure to the application and the fact that it existed should not have been entirely ignored by the court. It raised a triable issue seeing that the contract subject of the suit was only signed by the claimant. In Julius K. Kieru v Gilbert G. Gitachu & another [2015] KEHC

6839 (KLR) the court referred to Kenya Bus services (Msa) Limited v Mohamed Ngonia Mkusi civil appeal no 68 of 1993 which stated that;

> " In normal circumstances the court should lean towards a policy of deciding cases on their merits rather than encourage exparte judgment based on procedural technicalities. Where defence on merits has been brought to the attention of the courts however irregularly, the court should set aside judgment if the plaintiff can be compensated with costs." .

The court in Patel vs E.A Cargo Handling Services ltd (1979) E.A 75 held that the purpose of filing a draft defence is to demonstrate that the defendant has a genuine defence that warrants being heard. The appellants' memorandum of defence should have been considered based on this principle.

23. Ground 3: The trial court erred in failing to consider the principles for setting aside interlocutory judgments. The court has a wide discretion to set aside judgment and there are no limits and restrictions on the discretion of a judge except if the judgment is varied it must be done on terms that are just. The jurisdiction must be exercised judiciously and depends on a particular case. The tests for setting aside a regular judgment are- a. Defence on merits, b. Prejudice; and c. Explanation for the delay. The mistake of a counsel is a valid explanation. They made all steps necessary to locate the advocate including going to his offices and his place of residence only to be told he was sick in a rehabilitation center. The proof of those facts is difficult on the defendant as medical documents are private documents that are not accessible to third parties and even if they were cannot be produced without consent. The Trial court failed to apply the basic principles for setting aside interlocutory judgments as established in Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR) where the court of appeal reiterated the principle that an exparte judgment may be set aside if the defendant demonstrates a reasonable explanation for the default and a valid defence.

24. Ground 4: The trial court ignored evidence on entry of appearance and justified judgment on lack of a draft defence. The appellant filed a memorandum of appearance through their advocates Alex Kibunja & co advocates. The trial court ignored the significance of this step which confirms the appellant's genuine intentions to participate in the proceedings. Further the advocates then on record had never filed an application to cease acting. The filing of a memorandum of appearance signifies an intention to defend, and the absence of a draft defence should not be barrier if a valid explanation exists. The supreme court of South Africa in Maponya v Machoare (CA 20/04) [2005] ZANWHC 14 (10 February 2005) stated;

> " It seems to me apposite, before dealing with the submissions made in support of the appeal to have regard to the important principle set out in Pugin v Pugin 1963 (1) SA 791 (W) at 794F-G that: "Although the entry of appearance may thereby have become irregular the plaintiff cannot ignore it and proceed as if there was no appearance at all ... and while that appearance to defend stands, documents will have to be served on the defendant himself in accordance with rules 29 and 42, which give effect to the common law principle that a person who has entered an appearance to defend cannot be condemned without being heard."

25. Ground 5: The trial court erred to appreciate that default judgment was entered in circumstances beyond the appellant's control. The trial court failed to appreciate that the appellant was prevented from defending the suit due to unavailability of their advocate then who was allegedly in a rehabilitation center. In Kerai v Haji (1987) KLR 284, the court held that an advocate's failure to act due to reasons beyond client's control, such as health issues, may constitute sufficient cause for setting

aside an exparte judgment. The court of appeal in Kariuki v Wangeci & 7 others (Civil Application E250 of 2023) [2024] KECA 1692 (KLR) (22 November 2024) (Ruling) stated

> " A full bench of this Court while allowing a reference from a decision of a single Judge of the Court in *Virginia Wambui Chege v Nyamo Waitathu* Civil Application No. Nai. 77 of 1998 (UR), expressed itself as follows:
>
>> "Since the judgement being ready which information was conveyed to them by the Superior Court's letter dated 19th February, 1998, the position therefore, procedurally at least, was that they could have lodged the record of appeal within say 60 days of 18th February, 1998 provided they had lodged a notice of appeal and provided they had copied their letter bespeaking copies of proceedings and judgement to the respondent's advocates. They did not obviously act in the interests of their client. The client, however, could not possibly have been aware of the fact of non-lodging of the notice of appeal and the non-copying of the said letter. She would assume that her lawyers would follow the relevant procedure... Whilst the learned single judge was absolutely right in saying that the lodging of notice of appeal is, per se, a simple act, we are of the view that had he considered the applicant's problems, as alluded to by the court, he would have exercised his discretion, which he undoubtedly has, to allow the application. We are of the view that the advocates for the applicant did not argue their client's application before the single judge at length and in the peculiar circumstances of the case reference allowed."
>
> While we cannot speculate as to the decision the learned single Judge would have arrived at had he considered that factor, it is clear to us that the learned single Judge failed to take into account a relevant matter which he ought to have taken into account and that entitles us to interfere with the exercise of the discretion by the learned single Judge"

26. Ground 6: The Contract subject to suit was only signed by claimant. The appellant submits that the trial court erred in law and fact by awarding the claimant erred in law and fact by awarding Claimant/ Respondent based on a contract that was solely signed by the respondent.This was a material issue as the Appellant was not party to the contract. The court should have considered this on exercising its discretion to set aside the exparte judgment. The law of contracts cap 23 requires that contracts be signed by all parties to be binding. In Rose and Frank Co. v JR Crompton & Bros Ltd (1923) 2 KB 293, Atkin, LJ stated that: -.

> " To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly." In William Muthee Muthami vs. Bank of Baroda (2014) eKLR the court observed that: - "In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

Since the contract was solely signed by the Claimant/Respondent, the appellant could not have been bound by its terms, and this issue raises a legitimate Ground for setting aside the exparte judgment.

27. Ground 7: Misdirection regarding the appellant's instruction to the advocates then on record. The trial court misdirected itself in holding that there was no evidence proving that the appellants had sufficiently instructed their advocates. The fact that the memorandum of appearance was filed by the advocates is sufficient prove of instructions. Order 9 Rule 6 of the civil procedure rules allows entry of

appearance by an advocate on behalf of a client. Further the advocates had never filed an application to cease acting meaning that they were properly on record. The issue of advocates instruction should never have come up in the ruling as bill of cost and retainer were not facts in issue. The appellant do not dispute having instructed an advocate, they did but his mistake in not filing a defence and non-attendance led to the exparte judgment.

28. Ground 8: Misdirection regarding failure of advocate to attend court. The trial court incorrectly assumed that the failure of the previous advocate to attend court was due to lack of instructions. The appellant had clearly instructed the advocate and the absence of attendance was due to circumstances beyond the appellant's control, specifically the advocate's health and being in a rehabilitation center. This was not what the appellants had anticipated. The court In Julie Migare v Co-operative Bank of Kenya [2009] eKLR

> " The Applicant should under the above circumstances have been served in person, since the Respondents knew that the counsel – Sheila Mugo, was no longer available to be served with such a Notice. I am convinced, from the evidence on record that when Sheila Mugo left the address "c/o Kipsang & co" the applicant had no information as to what was happening, especially the fact that the interlocutory judgment, by this court, vide Ransley J, was subject to formal proof. These matters, I find, came to the applicant only after her current Advocates perused the file, by which date it was too late and the suit had been dismissed for want of prosecution. The law is that mistakes of an advocate should not be visited upon the litigant. To fail to reinstate the suit herein would be condemning the applicant for the mistakes of her counsel who left without informing the applicant of what was happening and the status of the case which had been entrusted to her by the Plaintiff/Applicant. .... Even if Sheila Mugo received the Replying Affidavit, the bottom line is that Sheila Mugo had abandoned the Applicant and did not pass on such information to the Plaintiff. Should the litigant be punished for that?"

Respondent's submissions

29. The Honourable magistrate did make a finding that service of summons to enter appearance was properly done out of the reason that the appellant did appoint an advocate to Act on their behalf a clear indication that service of summons was properly effected upon the appellant and judgment in default was properly granted. The appellant sat on their laurels by failing to file defence to the claim within the requisite time as a matter of fact the same advocate attended to the matter in the lower court through an advocate holding his brief as demonstrated on pages 71-73 of the record of appeal. The appellant has continuously sought to blame the previous advocate on record for the failure to file the defence and generally defend the suit it is our submission that the Honourable Magistrate properly found that the advocate appearing for the respondent may not have had instructions to defend the suit. As a matter of principle and at all material times a suit belongs to the litigant, in this case the Appellant who was at all times expected to be diligent in pursuing the said suit. An advocate is a mere agent whom in the absence of any instructions to prosecute and/or defend the suit, cannot purport to act in the absence of such instructions this was position was clearly emphasized in the case of Savings & Loan Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCC NO.397 OF 2002, the court stated thus:

> " Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole Ground of a mistake by counsel of the litigant on account of such advocate's

failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favor, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favor of such a litigant." [own emphasis)

The appellant in the foregoing matter was indolent and there is no evidence on record that she made follow up on progress in respect to the progress of the lower court matter. As a matter of fact, the Appellant was only prompted into action when the respondent herein sought to execute Judgment in the lower court matter. Indolence is aptly captured in the conduct of the appellant.

30. The Appellant's submission that they were advised to pay for a defence even with there knowledge that they were doing so after Judgment in default of a defence had already been delivered, bespeaks of the height of unforgivable ignorance on the part of the Appellant. The Appellant is represented by an advocate who ought to be aware of the basic rules of procedure and practice prevailing especially in circumstances as the foregoing, It is basic requirement that when judgment has been entered in default of defence that leave is sort before one contemplates filing a defence. The application to set aside judgment and proceed with the leave to file a defence is a mere desperate attempt by the appellant to deny the claimant enjoy the fruits of the judgment while it is not in dispute that the Honourable court should balance the rights of the claimant from proceeding to timeously conclude the suit and the right of the defendant to be heard this should not occasion an injustice upon the claimant this was the position in the celebrated case of; SHAH v MBOGO & ANOTHER [1967]6.A, the Court of Appeal for Eastern Africa held that:-

> " Applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused"

31. The Honourable trial magistrate similarly made a sound finding that the appellants application did not raise triable issues worth considering for trial. The appellant did not attach a draft defence for the Honourable Magistrate to assess whether there were triable issues are disclosed or not. While failing to attach a defence is in itself not fatal, non-disclosure of any triable issues leaves the court with no basis as to which triable issues can be ascertained. The Honourable magistrate properly made the finding that the application itself did not disclose any triable issues triable issues can be ascertained even from the application and supporting affidavit without the benefit of a draft defence but the Notice of motion filed by the appellant did not disclose any triable issue. The allegation to the effect that the contract of employment was only signed by the respondent and not the appellant was never an issue in the lower court. The test in assessing triable issues is well settled the issue need not have chances of succeeding but an issue that merits the court's further interrogation this was restated in OB Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR, the court stated as follows:-

> " Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner." What then is

a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term "triable" as, subject or liable to judicial examination and trial".

It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.The allegation that the previous advocate on record was indisposed thus giving reason for not filing the defence within the required period remains undemonstrated. Further, it was not raised during the hearing of the said application in the lower court.

32. The appeal filed herein is defective, incompetent and not tenable in the eyes of the law. This is out of the fact the record of appeal filed by the appellant does not comply with the provisions of Section 79B of the Civil Procedure Act as read together with Order 42 rule 2 of the Civil Procedure Rules. Section 79B of the Civil Procedure Act provides; S. 79

> " Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of decree or order appealed against excluding such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order."

Order 42 rule 2 of the Civil Procedure Rules Provides;

> " Where no certified copy of the decree or order appealed against is filed with the Memorandum of the Appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order and the court need not consider whether to reject the appeal summarily under Section 79 B of the Act until such certified copy is filed."

The foregoing provisions are coached in mandatory terms and compliance with the same is not on a discretionary basis but on compulsory terms. The appellant has not filed an order from the lower court giving rise to the appeal hereto. Order 42 Rule 13. It is clear from order 42 Rule 13 that before an appeal goes for hearing the judge should be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party, that is to say;-

a. A Memorandum of Appeal

b. The pleadings.

c. The notes of the trial court made at the hearing;

d. The transcript of any official shorthand notes

e. All affidavits maps and other documents put in the evidence before the magistrate.

f. the judgment, order or decree appealed from, and where appropriate the order (if any) giving leave to appeal.

33. The court has held that the issue of non-compliance with the aforesaid provisions is a jurisdictional issue and must be determined in limine. That was the case in the case of; Harj Construction Co. Ltd v Karanja & another (Civil Appeal E291 of 2022) [2024] KEHC 9354 (KLR) where the Hounourable Judge did state The Respondent's counsel further posits that the failure to include a decree in the record of Appeal is a fatal omission that should lead to the dismissal of the appeal. The court is minded to ask if the failure by a party to annex a copy of the decree a jurisdictional question? This court finds that in

indeed it is a jurisdictional question that must be determined in limine. In Kisumu Civil Appeal No 27 2020 Lucas Otieno Mesaye v Lucia Olewe Kidi (2022) eKLR Ombwayo J, held that:-

> " the appellant herein has not attached a copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs to the respondent"

In view of the foregoing the respondent urged the court to assess whether it has jurisdiction to entertain the appeal. In Owners of Motor Vessel Lillian's v Caltex Oil (K) Ltd [1989] eKLR The Court of Appeal Nyarangi, J had this to say:-

QUOTE{startQuote "}

Jurisdiction is everything. Without t it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of Law should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Decision

34. At the outset, the court finds that the trial court's finding that the respondent had not instructed advocate was not true as there was a memorandum of appearance with Ms Alex Kibunja & associates advocates appointed (page 15 of ROA). The respondent had served the said law firm appointed by the appellant with its pleadings, meaning the Respondent was aware that the appellant was represented.

35. The appellant submitted there was a filed defence. I perused the entire record and did not find any draft defence as alleged, whether filed independently or with the application before the lower court. In the submissions the appellant stated it filed draft defence dated 31st August 2023. The court on perusal of the record of appeal did not find the said defence. The trial court found that in absence of the draft defence there no disclosure of triable defence issues. The court agreed with the respondent that the test in assessing triable issues is well settled. The defence need not have chances of succeeding but an issue that merits the court's further interrogation as restated in OB Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015]eKLR, where the court stated as follows:-

> " Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner."

What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, subject or liable to judicial examination and trial". The appellant even in the application before the trial court did not disclose any defence.

36. Having not found the alleged filed draft defence on record of appeal or in the application, I evidently have no basis to interfere with the finding in the ruling by the trial court and the judgment. I upheld a decision cited by the appellant in Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR) where the court of appeal reiterated the principle that an exparte judgment may be set aside if the defendant demonstrates a reasonable explanation for the default and a valid defence. I am further guided by principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang VP (As He Then Was) Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected

> itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

The instant advocate knew the existence of the draft defence or disclosure of triable issues was the main issue before trial court leading to dismissal of the appellant's application and on alleging it existed on record, it behoved the appellant to produce the alleged filed defence before the appellate court. The issue of contract allegedly signed by the respondent only, now raised in the appeal is of no value, the issue having not have been canvassed before the trial court. The issue cannot be raised for the first time in the appeal. In the upshot, I find no basis to interfere with the finding of the trial court.

Conclusion

37. The appeal is dismissed. To temper justice with mercy, the respondent having been let down by his advocates, I make no order as to costs. The file is closed.

38. 30 Days stay is granted.

39. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Ms. Ndiritu

Respondent: Jumba