



**Maisha Steel (EA) Limited v Mwosa (Appeal E27 of 2023)  
[2024] KEELRC 2373 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2373 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E27 OF 2023  
NJ ABUODHA, J  
SEPTEMBER 27, 2024**

**BETWEEN**

**MAISHA STEEL (EA) LIMITED ..... APPELLANT**

**AND**

**JOSEPH MUKONZO MWOSA ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon C.K. KISINGIANI, Principal Magistrate delivered in Ruiru Senior Principal Magistrates Court Employment Cause No. E010 of 2021)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 14<sup>th</sup> March, 2023, the Appellant appeals against the Ruling of Hon. C.K Kisingiani Principal Magistrate delivered in Ruiru in Employment Cause No. E010 of 2021.
2. The Appeal was based on the grounds that:
  - i. The Honourable Magistrate erred in law and in fact in dismissing the application against the weight of the evidence.
  - ii. The Honourable Magistrate erred in law and in fact by improperly exercising her discretion.
  - iii. The Honourable Magistrate erred in law and in fact by failing to give due regard and weight to the failure to call the process server before rendering the decision.
  - iv. The Honourable Magistrate erred in law and in fact by dismissing the consent that had been entered between the parties to compromise the application dated 13<sup>th</sup> October, 2022.
3. The Appellant prayed that the appeal be allowed with costs and Judgment and orders of the lower court made on the 2<sup>nd</sup> March, 2023 be set aside and be substituted with the following order:



- i) That the ex-parte Judgement delivered on 10<sup>th</sup> May, 2022 be set aside.
  - ii. That the Appellant be granted unconditional leave to defend Employment Cause no. E010 of 2021.
  - iii) That the matter be reverted to the Senior Principal Magistrate's Court at Ruiru for hearing before any magistrate other than C.K Kisingiani.
4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Claimant filed written submissions dated 10<sup>th</sup> March, 2024. On the issue of whether the Court erred in dismissing the consent entered by the parties, the Appellant submitted that the Appellant filed an application to set aside the interlocutory/ex parte judgment that had been delivered by the Court on 10<sup>th</sup> May, 2022.
6. The Appellant submitted that the application was placed for hearing severally and finally on 23<sup>rd</sup> January, 2023 the parties informed the Court that they had a consent to record on the terms on which the application would be allowed.
7. It was the Appellant's submission that in refusing to record the consent that was entered by the parties to compromise the application the trial magistrate acted contrary to the constitutional prescript, as set out in Article 159, which mandates the Courts to promote alternative dispute resolution. The Appellant relied on the case of *Geoffrey Asanyo & others v. Attorney General (Petition No. 21 of 2015)*.
8. It was the Appellant's submission that the Court elevated its need to issue a decision in the matter over the rights of the parties to reach a mutual amicable resolution of the application thus the Court erred in law and as such the present appeal should be allowed on this ground given the grave error that was committed by the Court.
9. It was the Appellant's submission that the decision of the trial court in refusing to set aside the ex parte judgment which was an irregular judgment as the summons, pleadings and Notice of entry of judgment were never served upon it, was erroneous.
10. Further, the Appellant submitted that in its application it had sought to cross examine the process server, Charles Juma, to verify the contentions set out in his affidavit of service and when the matter came up on 19<sup>th</sup> October, 2022 the Appellant's counsel sought for summons to be issued to the process server which was duly done.
11. The Appellant submitted the next hearing date on 24<sup>th</sup> November, 2022 the Respondent's advocates indicated that they were unable to get the process server and thereafter the parties reached a consent and the issue of the process server was overshadowed.
12. The Appellant submitted that the Respondent's purported service of the pleadings and summons was not true since no affidavit of service was filed or adduced in relation to the alleged service of the notice of entry of judgment.
13. The Appellant relied on the case of *Shadrack Arap Baiywo v. Bodi Bach [1987] eKLR* and submitted that if the fact of service is denied, it is desirable that the process server should be put into the witness box and an opportunity of cross examination given to those who deny the service.
14. It was the Appellant's submission that the failure to call the process server meant that the presumption of service could no longer hold and the contents of the Affidavit of Service became null and void in the



absence of cross examination on the contents. The sum total of the foregoing was that there was no evidence that service was ever effected in the matter in accordance to Order 5 of the Civil Procedure Rules, 2010.

15. In Conclusion the Appellant submitted that the judgment rendered was not regular and should be set aside ex debito justitiae.

### **Respondent's Submissions**

16. On the other hand, the Respondent filed written submissions dated 14<sup>th</sup> May, 2024 and on the issue of whether there was consent entered on the 23/11/2022, it was the Respondent's submission that when the parties Advocates appeared in court on the 23/11/2022, there was an indication that they had negotiated on how to compromise the Application dated 13/10/2022. However, the same was not adopted by the Court to be deemed as consent entered.
17. The Respondent submitted that while declining the parties' intention to record consent stated that; the Court heard the suit and delivered a judgment on 10/05/2022 hence the same could not be set aside by consent.
18. The Respondent submitted that from the Court's word it was clear that parties never entered any consent and that there existed no consent on record.
19. It was the Respondent's submission that the Appellants further faults the learned Trial Magistrate for failing to call the process server for cross examination yet the Honourable Court issued summons to the process server on the 19/10/2022.
20. The Respondent submitted that however, when the directions were being taken on how to hear the Application dated 13/10/2022 it was clear that the Appellant abandoned the need to call the process server.
21. The Respondent submitted that despite the Application being the Appellant's, they opted to take directions on how to dispose it without leading the court on the need to summon the process server for cross examination.
22. On the issue of whether the trial magistrate erred in law and fact in dismissing the appellant's application dated 13/10/2022, the Respondent submitted that in setting aside judgment, the gist of Order 10 rule 11 was that it gave the court the unfettered discretion to set aside or vary judgment entered in default of appearance.
23. The Respondent relied on the case of James Kanyiiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR while submitting on circumstances which the court is bound to take into account in determining whether or not to set aside a default judgment.
24. The Respondent submitted that in dismissing the Appellants application the learned trial Magistrate extensively put on paper her reasons as shown in the record of appeal.
25. It was the Respondent's submission that failure to annex a draft defence to an application to set aside a default judgment is fatal to such an application. The Appellants in their application dated 13/10/2022 seeking to set aside regular judgment failed to annex a draft defence to enable the learned magistrate determine whether the same raised any triable issues.
26. The Respondent relied on the case of Ezekiel Kebondo Muhindi v Legato City & Country Getaways [2021] eKLR while submitting that an application for setting aside ex parte judgment, the Court must



consider not only the reason why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has reasonable defence.

27. The Respondent relied on the case of *International Air Transport Association & another v Tusmo Travel Tours & Cargo Limited & 2 others (Civil Case E419 of 2020)* [2021] eKLR in submitting that the Appellant's failure to annex a draft defence to sanctify and/or persuade the Honourable Court that it raised triable issues the same was fatal to their application seeking to set aside a regular ex parte judgment.
28. The Respondent submitted that the judgment that the Appellant was seeking to set aside had already been executed and the decretal sum paid to the Respondent.

### **Determination**

29. The decision whether or not to set aside ex parte judgement is discretionary. Order 10 Rule 11 gives the court power to set aside a default judgment which provides as follows;

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

30. The Court explained the purpose of setting aside ex parte default judgment in *Shah v Mbogo & another* [1967] EA where it was held 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 therefore be refused.”

31. The circumstances in this case were that the Appellant in its application had sought to cross examine the process server, Charles Juma, to verify the contentions set out in his affidavit of service. However, the Respondent’s advocates indicated that they were unable to get the process server and thereafter the parties reached a consent and the issue of the process server was overtaken by events. This court notes that no consent was recorded by parties since a default judgment could not be set aside by consent by parties alone without involving the court which entered it. The same consent which parties wanted to enter into was within the discretion of the court hence the Appellant’s assertions that the trial court ought to have allowed them agree was baseless.
32. The court agrees with the Appellant that if the fact of service was denied, it was desirable that the process server be put into the witness box and an opportunity of cross examination be given to those who deny the service.
33. Taking the foregoing in to account the Appellant ought to have responded to the issues raised in the affidavit of service in question in its supporting affidavit to prove that it was never served with summons apart from examining the process server. On this court agrees with the observations of the trial court on this issue of service and holds that indeed there was a regular judgment in place.
34. This court notes that there are factors which govern the court while exercising its discretion in an application to set aside a default judgment. The Court of Appeal in *James Kanyiiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR set out the factors to take in to account as follows: -

The court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other.

35. The court has looked at the Application by the Appellant dated 13<sup>th</sup> October,2022 which sought to set aside the Judgment delivered on 10<sup>th</sup> May,2022. The Appellant never attached any draft defence to enable the trial magistrate determine if the defence raised triable issues. The same application was filed five months after the court's ruling and the Appellant did not explain why they took long to make their application to set aside the court's ruling.
36. It is also clear that the orders sought were discretionary and this court being the first Appellate court must be very well convinced to disturb the discretion of the trial court. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA it was held that:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
37. As stated above case, it has not been demonstrated that the trial magistrate misdirected himself in law; that he misapprehended the facts; that he took account of considerations of which he should not have taken account; that he failed to take account of considerations of which he should have taken account, and that his decision, albeit a discretionary one and is plainly wrong.
38. The trial magistrate properly raised the issue of the Appellant never disputing service in his supporting affidavit after the process server gave the chronology of events in his affidavit of service. The same having not been denied this court notes that the Appellant was properly served but chose to do nothing until auctioneers came for them to execute the decretal sum herein.
39. In addition, the Respondent submitted that the orders the Appellant was seeking were already overtaken by events since the decretal sum had already been paid to the Respondent. This therefore means the court should not give orders in futility if the issue has since been resolved.
40. Consequently, I find no merit in this appeal. The same is hereby dismissed with no orders as to costs.
41. It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

