



**Board of Management Highway Secondary School v Mwangi (Appeal
62 of 2022) [2024] KEELRC 13282 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13282 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 62 OF 2022
K OCHARO, J
NOVEMBER 28, 2024**

**BETWEEN
BOARD OF MANAGEMENT HIGHWAY SECONDARY SCHOOL . APPELLANT
AND
CHARITY WANGUI MWANGI RESPONDENT**

*(Being an Appeal against the Ruling and Order of Honourable Ms.M. W. Murage
delivered on the 25th day of October 2021 in the Milimani Commercial Chief Magistrate's
Court at Nairobi in Employment and Labour Relations Cause No. 626 of 2018)*

JUDGMENT

1. The appeal herein emanates from a dismissal of the Appellant's application to set aside an *ex parte* judgment, by the Learned trial Magistrate, in the hereinabove stated case. In the suit, the Appellant had sought reliefs anchored on the cause of action, unfair termination, and others independent of the cause of action. The suit proceeded by way of a formal proof on account of non-appearance by the Appellant, culminating to a default judgment on 17th July 2020.
2. By its application dated 28th August 2020, the Appellant approached the Lower Court seeking *inter alia* setting aside the default judgement and leave to file a statement of defence out of time. The Learned trial Magistrate heard the application on merit and rendered herself on the same through her ruling dated 25th October 2021, declining the application.
3. When the matter came up before this Court for directions on 16th March 2023, this Court ordered that the appeal be canvassed by way of written submissions, and gave timelines for the parties to file their respective submissions.
4. Both parties complied with the directions. The Judgment herein is with the benefit of the submissions, therefore.



The Application and Response before the Trial Court.

5. From the material placed before this Court, inclusive the ruling by the Trial Magistrate, it isn't difficult to discern that the application before the Lower Court was premised on the following vital grounds;
 - I. That there was no service on summons to enter appearance on the Appellant and therefore the entry of the judgment against it was irregular.
 - II. The Appellant had a defence with triable issues.
6. The Respondent opposed the application anchored on the grounds that there was proper service and that the Appellant hadn't demonstrated that it had a defence with triable issues.

The Appeal.

7. Aggrieved by the decision of the Trial Court, the Appellant filed the present Appeal, setting forth three [3] principal grounds. That the Learned Trial Magistrate erred in law and fact:
 - a. In finding that the service of summons and court process upon the Respondent was proper.
 - b. In failing to consider the written submissions by the Respondent.
 - c. When she came to the conclusion that the Respondent chose not to defend the suit.
8. On the above grounds, the Appellant prayed for orders that: -
 - a. This Appeal be allowed.
 - b. The Ruling by the Learned trial Magistrate be set aside and leave be granted to the Appellant to file a response to the claim in the lower court matter.

Appellant's Submissions

9. The Appellant submitted that the service of the summons to enter appearance wasn't proper. The process server alleged that he served the summons on Patrick Maritime. The Principal of the Appellant school denied knowing Patrick Maritime. Further, the existence of a position, Principal accountant. There wasn't a signature of the alleged recipient, on the summons. The Learned trial Magistrate failed to interrogate these vital issues.
10. It was further submitted that the principles to be considered in an application to set aside an ex parte judgment were elaborately set out in the case of Mbogo vs Shah [1968] EA 93, 95.
11. It was argued that there has to be differentiation between a regularly and irregularly entered judgments for how courts approach applications regarding their setting aside, is radically different. To support this point, the Appellant placed reliance on the decision in James Kanyita Nderitu & Another vs Marios Philatos Ghikas & Another [2016] eKLR.
12. Relying on the case of *Mercantile Insurance Co. Limited & Another versus Prep Safaris International Limited & Another* [2012] eKLR; *Nairobi High Court Civil Case No. 436 of 2011*, the Appellant argued that where there has been no proper service of summons to enter appearance, the ex-parte judgment must be set aside as a matter of right ex-debito justitiae. There is no discretion on the Court not to.
13. The Court should find that service of summons wasn't established and set aside the ex-parte judgment aside ex-debito justitiae.



14. The Appellant further submitted that the Learned trial Magistrate, erred by not considering its submissions on the application, thus getting into a wrong conclusion that it hadn't demonstrated that it had a defence with triable issues. Issues to be raised in the defendant's defence can be brought out in any manner, and not necessarily by way of a draft defence. To support this point reliance was placed on the case of Job Kiloch vs- Nation Media Group Limited, Salaba Agencies Limited & Michael Rioro [2015] eKLR. Issues that could go to the Appellant's defence were raised in the submissions, including that the Respondent was retired upon attaining the age of sixty years and therefore the claim on unlawful termination could not arise and that the Respondent belonged to a pension scheme and therefore the claim for service pay was unfounded. The Learned trial Magistrate didn't consider them.
15. The Learned Trial Magistrate failed to consider the fact that some of the reliefs sought by the Appellant i.e. compensation for rest days worked-KSHS. 662,892, Public holidays worked [between 2012-2014]-KSHS. 98,538, and Leave allowance arrears for 10 years – KSHS. 180,882.00, were all time barred by operation of section 3[2] of the *Public Authorities Limitation Act*.

Respondent's Submissions

16. The Respondent submitted that the Appellant was served with the summons to enter an appearance which summons were received by the Appellant's Principal on 22nd July 2019. The Appellant didn't enter appearance and file a response within the requisite period, hence the formal proof and subsequent default judgment.
17. The Appellant disputed the service of the summons to enter an appearance. Yet, it was very clear from the affidavit of service that its former Principal, Patrick Martim received the process. The Appellant didn't make an application to examine the process server. There is often a qualified presumption in favour of a process server. To support this point, reliance was placed on the case of Shadrack Arap Baiyo v Bodi Bach [1987] eKLR, and M B Automobile V Kampala Bus Service, [1966] EA 480.
18. Per section 109 of the *Evidence Act*, the burden of proof lay on the Appellant to prove non-service of the summons to enter appearance on it. It didn't discharge this burden.
19. The Learned Magistrate was perfectly entitled to reach the conclusion she did. She took into account all relevant matters. Considering the material that was placed before her, it cannot be held that she erred in concluding as she did, regarding service.
20. The Appellant was under a duty to demonstrate in its application to set aside that it had a defence with triable issues. It didn't annex any draft to the application. Absent of the same, the Learned Magistrate was right when she declined the application on that ground among others. The judgment that the Appellant was seeking to set aside was a regular Judgment that can only be set aside when there is material establishing that there is a defence on merit. To buttress this submission, reliance was placed on the case of Patel V East Africa Handling Services Ltd [1974] EA 75.

Analysis and Determination

21. This being a first Appeal, I am obligated to reconsider the material that was placed before the Learned, re-evaluate the same, and draw my own conclusions. See Selle -vs- Associated Motor Boat Co. [1968] EA 123, and (Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270.
22. In my view, the determination of this appeal revolves around one principal issue; was there service of the statement of claim and summons to enter an appearance on the Appellant? I now turn to consider the same.



- 23. As indicated hereinabove, the Respondent submitted that the court process was served on the Appellant through the former Principal. This submission isn't in sync with the Learned Magistrate's finding. She found that the recipient of the court process was Patrick Martim, a Finance Principal. This raises doubt regarding the actual service of the summons. Further, it was common cause that though the summons is stamped they do not bear the signature of the recipient. In my view, this heightens the doubt. As a result, I hold that the Learned Trial Magistrate erred in finding that there was service of summons to enter appearance on the Appellant.
- 24. Consequently, I find that the Judgment was irregular. It is hereby set aside. The Appellant's appeal is hereby allowed. The Learned Trial Magistrate's order dismissing the Appellant's application dated 28th August 2021, is set aside. As such, the application is allowed and the Appellant granted leave to file and serve a Statement of Response to the claim before the lower court within 21 days of this Judgment.
- 25. The Respondent shall bear the costs of this appeal.

READ, DELIVERED AND SIGNED THIS 28TH DAY OF NOVEMBER 2024

OCHARO, KEBIRA.

JUDGE

In the presence of:

..... for Appellant

.....for Respondent

