



**Vishak Construction Company Limited v Ingundia (Appeal 44 of 2019)
[2024] KEELRC 13228 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13228 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 44 OF 2019
B ONGAYA, J
NOVEMBER 27, 2024
FORMERLY HCCA 50 OF 2015**

BETWEEN

VISHAK CONSTRUCTION COMPANY LIMITED APPELLANT

AND

DOMINIC INGUNDIA RESPONDENT

*(Being an Appeal from the Ruling and Order of the Hon. T. S. Nchoe (Mr.),
Ag. Senior Resident Magistrate (SRM), delivered on 6th February, 2015)*

JUDGMENT

1. The appellant filed a memorandum of appeal dated 10.02.2015 through the firm of Iseme Kamau & Maema Advocates. It appeals against the trial court's Ruling delivered on 06.02.2015 (by Hon. T. S. Nchoe (Mr.), Ag. SRM) on the following grounds:
 1. That the Learned Magistrate failed to consider and determine the issues raised by the appellant in its notice of motion application dated 25.09.2014.
 2. That the Learned Magistrate erred in law and in fact in failing to find that no proper service of summons to enter appearance was effected on the appellant.
 3. That the Learned Magistrate erred in law and in fact in failing to find the affidavit of service on the basis of which the default judgment was entered and resultant proceedings taken was riddled with factual mistakes and misrepresentations as to render it incapable of providing service.
 4. That the Learned Magistrate erred in law and in fact in failing to allow for cross-examination of the process server who purportedly effected service of summons to enter appearance.



5. That the Learned Magistrate misguided himself by only considering the fact that “the Affidavit of service was detailed” as a basis for concluding that the appellant was aware of the proceedings and dismissing the appellant’s application dated 25.09.2014.
 6. That the Learned Magistrate erred in law in failing to set out the issues for determination, determine the same and give reasons for his decision.
 7. That the Learned Magistrate erred in law and in fact in failing to set aside the judgment, proceedings taken ex parte and default judgment in the matter ex debito justitiae.
 8. That the Learned Magistrate erred in law in failing to find that the appellant had a reasonable defence which raised several triable issues which ought to be canvassed in a full trial.
 9. That the Learned Magistrate erred in law in failing to grant leave to the appellant to defend the claim.
 10. That the Learned Magistrate erred in law and in fact in failing to apply the correct principles for setting aside the judgment, proceedings taken ex parte and default judgment.
 11. That the Learned Magistrate misguided himself regarding the principles applicable in an application for setting aside a judgment, proceedings taken ex parte and default judgment and/ or failed to consider the same at all.
 12. That the Learned Magistrate failed to exercise his discretion in a judicial manner on the basis of known principles of law and practice.
2. The appellant prayed that the appeal be allowed and the Court do order that:
- a. The ruling and consequential orders of Hon. T.S. Nchoe (Mr.), Ag. SRM made on 06.02.2015 be set aside in their entirety and in its place there be an order allowing the appellant’s application dated 25.09.2014.
 - b. Costs of this appeal be awarded to the appellant.
3. On the proceedings before the trial court, the appellant filed the notice of motion application dated 25.09.2014 seeking for orders of stay of execution of the decree, judgment issued on 26.06.2014, warrants of attachment and sale issued on 18.09.2014, and any other consequential order issued by the Court. The said application also sought orders for the plaintiff’s process server, Patrick Njue, to be summoned for purposes of cross-examination on his affidavit of service commissioned on 10.04.2013, and that the Court sets aside the judgment made on 26.06.2014, proceedings and default judgment against the applicant and resultantly, the applicant be granted leave to defend the suit. The said application was premised on the grounds that since the decree had been issued against Vishak Construction Company Limited whereas the named party was Vishak Builders Limited, there was as such no judgment and decree capable of execution against the applicant. Furthermore, the applicant had never been served with summons to enter appearance to enable it file a defence and as such, the judgment, proceedings and default judgment entered against it ought to have been set aside ex debito justitiae.
4. In addition, after parties before the lower court agreed to dispose of the application dated 25.09.2014 by way of written submissions, the Court delivered its ruling on 29.01.2015 ordering that: The affidavit of service in my view is very detailed and I hold the view that the defendants have been fully aware of the proceedings herein but failed to enter appearance. Litigation must come to an end. Reasons whereof the application is dismissed with costs. The Learned Magistrate then issued an Order on 29.09.2014



5. The appellant was dissatisfied with the trial court's ruling and thus filed the current appeal. It also filed a record of appeal dated 21.11.2017 that was admitted on record.
6. The parties filed their respective submissions. The Court returns as follows:
 - a. In the ruling delivered on 29.01.2015, the trial court found that the affidavit of service showed sufficiently that the summons and the plaint had been served. The trial Court then dismissed the application without considering the other well-known principles on setting aside an ex-parte or interlocutory judgment.
 - b. The appellant in the application dated 25.09.2014 had exhibited an elaborate defence raising serious triable issues. Even if the summons had been properly served, it appears to the Court that the appellant would be liable to pay the thrown away costs and the thereafter allowed to defend the suit. To that extent, the submission that the trial court misdirected itself or did not consider at all the principles for setting aside the judgment as had been prayed for is upheld.
 - c. It is submitted for the respondent that the execution has proceeded and been concluded so that granting the appeal and reopening the trial afresh would be an academic exercise. The respondent has submitted that the Court granted a stay of execution of the trial Court's decree for 14 days and the application was to be served for interpartes hearing on 02.03.2015. There after the stay orders lapsed and upon several mentions, the appellant failed to attend Court. The execution proceeded due to the appellant's inaction and accordingly, the sum of Kshs. 996, 995.00 deposited in Court was released to the respondent. Thus, the appellant has slept on its rights and the moot appeal should be disallowed. The Court finds for the respondent that the inaction by the appellant rendered the appeal moot and it operates as a bar to reopening the suit for a fresh trial before the trial Court.
 - d. To balance justice for parties there will be no costs of the appeal.

In conclusion, the appeal is hereby dismissed with no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 27TH NOVEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

