Kimathi v Andabwa (Civil Appeal 173 of 2022)
[2025] KEHC 9512 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9512 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 173 OF 2022

EN MAINA, J

JUNE 26, 2025

BETWEEN

STEPHEN KIMATHI ..... APPELLANT

AND

DONALD TAMBASI ANDABWA ..... RESPONDENT

(Being an Appeal against the Ruling of the Honourable E. Olwande in Mavoko Chief Magistrate's Court in CMCC no. 575 of 2019)

JUDGMENT

1. The Appellant's filed this appeal seeking to set aside the ruling delivered on 27th October 2022 in Mavoko CMCC 5752019.

2. Briefly, the Appellant's case was that he filed an application dated 11th March 2022 which sought to set aside the order of the court dismissing the suit upon expiry of summons to enter appearance.

3. After considering the application, the learned Magistrate made a finding that the Appellant had not presented any material before court for exercise of its discretion in his favour and thus dismissed the application.

4. Aggrieved by the ruling, the Appellant lodged this appeal on grounds that: -

> " a. The learned trial magistrate erred in fact and in law by failing to consider that the notice for dismissal was not served upon the appellant.
>
> b. The learned trial magistrate erred in law and in fact by visiting the mistake of the process server on the appellant.
>
> c. The learned trial magistrate erred in fact and in law by failing to give the appellant a chance to be heard.

d. The learned adjudicator erred in fact and in law by dismissing the case on technicality which is against *the Constitution*.

5. The appeal was canvassed by way of written submissions.

Submissions

6. Learned Counsel for the Appellant submitted that no Notice of dismissal was served upon them and that their right to be heard was violated. Counsel contended that the mistake of the process server should never have been visited on the Appellant and urged this court to allow the appeal.

7. The Respondent was never served with Summons to enter appearance and so did not participate in this appeal.

Analysis and determination

8. I have considered the submissions on record the cases cited and the law.

9. The issue that arises for determination is whether the Appellant has presented a case to warrant the setting aside of the ruling dated 27th October 2022. Order 6 Rule 1 (1) of the Civil Procedure Rules provides that when a suit has been filed, a summons shall issue and be served upon the Defendant ordering him to appear within the specified time. Order 6 Rule 15 mandates the Process Server to annex to the original summons an affidavit of service stating the time and manner in which the summons were served.

10. Order 5 Rules 2 (2) and 7 of the Civil Procedures Rules which prescribe the shelf- life of summons to enter appearance provides as follows;

> " Rule 2(2)
>
> "Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if it is satisfied it is just to do so."
>
> Rule 7 states
>
> "Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons"

11. In the ruling dated 19th January 2022 the learned Magistrate stated that it was over 24 months since the summons to enter appearance were issued and no application had been made to extend the validity of the same and proceeded to dismiss the suit. This is a fact borne by the record. Counsel for the Appellant contended that the summons to enter appearance were served on 28th August 2019 but the process server delayed in returning the served summons and in filing an affidavit of service. However, this is not borne by the record.

12. From a reading of Order 5 Rule 7 of the Civil Procedure Rules, there is no requirement for service of any notice before dismissal of the suit. The rules states that the court may dismiss the suit without notice which is what the court did. This was reiterated by the learned magistrate in her ruling dated 27th October 2022.

13. On the issue of visiting the mistake of the process server on the Appellant, the Appellant relied on the case of Burhani Decorators & Contractors v Morning Foods Ltd and Another [2014] KEHC 656 (KLR) where the court stated:-

> " To decide on the questions posed above, I am enjoined to look at the case of Belinda Murai & Others – v – Amos Wainaina [1978] KLR 278 per Madan JA (as he then), cited with approval in the Nyeri *CA 182013* (supra), where he described what constitutes a mistake in the following terms:
>
> "A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

14. In this case there is no affidavit from the process server confirming that he in fact served the summons but forgot to file an affidavit of service. This case is therefore distinguishable from the case of Burhani Decorators & Contractors v Morning Foods Limited and Another (supra) as in that case there was a plausible explanation. Here no plausible explanation was proffered either here or in the court below.

15. Section 1A and 1B of the *Civil Procedure Act* provide set down the overriding objective of the *Civil Procedure Act* and states as follows:

> " 1A (1) The overriding objective of this Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.
>
> (2) The court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in Sub-section (1).
>
> (3) A party to Civil Proceedings or an Advocate for such party is under a duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.
>
> 1B For the proposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:-
>
> (a) The just determination of the proceedings;
>
> (b) The efficient disposal of the business of the court;
>
> (c) The efficient use of the available judicial and administrative resources;
>
> (d) The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties and,
>
> (e) The use of suitable technology."

16. In essence, the overriding objective enjoins this court to ensure a fair, just and level playing field for parties coming before it. In the case of Madison Insurance Company Limited v David Wambua; Jackson Mulinge Maingi & another (Interested Parties) [2021] KEHC 9604 (KLR), the court cited with approval the holding of Lord Woolf in Swain v. Hillman[200] 1All ER 91:

> " It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice."

17. In the case of Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] KECA 480 (KLR) the Court of Appeal stated:

> " In conclusion, we wish to observe that "O2 principle" which must of necessity turn on the facts of each case is a double faced and for litigants to thrive under its shadow they must place themselves on the "right side". In the circumstances of this matter, the applicant is clearly on the "wrong side" and for this reason the principle must work against it.
>
> The advent of the "O2 principle" in our opinion, ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings; ensures the efficient use of the available judicial and administrative resources of the courts; and results in the timely disposal of the proceeding at a cost affordable by the respective parties. That culture must include where appropriate the use of suitable technology. It follows therefore that all provisions and rules in the relevant Acts must be "O2" compliant because they exist for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of the powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In our view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail our redesigning approaches to the management of the court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.
>
> The "O2 principle" is certainly not going to be a magic potion capable of solving all our problems in the civil justice system. Instead it is a challenge to every court in every matter that comes up before it. The best design for each matter will be determined on a case to case basis; and above all the attainment of the objective at least in the short term will depend on the skills, innovativeness and the commitment of the courts including the Rules Committee, which in our view has a special role in assisting the courts attain the objective by, for example, undertaking a continuous review of the rules so as to retain those that would serve the interests of the objective and shed off those that hinder the objective. In the long term, we believe that best practices and precedents will emerge for use and improvement by future generations.
>
> It seems to us that in the exercise of our powers under the "O2 principle," what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are "O2" compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the "O2 principle" could easily become an unruly horse. For this reason, we would

like to reiterate here what this Court observed in the case of Mradura Suresh Kantaria v Suresh Nanalal Kantaria(supra):-

"While the enactment of the of the "double OO principle" is a reflection of the central importance the court must attach to case management in the administration of justice we wholly endorse the holding in the Australian case of Puruse Pty Limited v Council Of The City Of Sydney[2007] NSWLEC 163 where the Court underscored that in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable foundation."

18. The Appellant blames the process server for his predicament but he has not demonstrated that in fact the summons had been served before they expired. He has not given any explanation of what action he had taken in the case before it was dismissed. It is my finding that the material he has placed before this court, cannot assist this court to exercise its discretion in his favour and neither does it aid the objective of the *Civil Procedure Act* and Rules. In other words, I agree with the ruling of the learned magistrate that the Appellant is not deserving of the discretion of this court.

19. Every person involved in litigation, whether it is a party, an Advocate or the court, is enjoined by Sections 1A and 1B of the *Civil Procedure Act*, to ensure that the interest of justice is achieved through a just determination of the proceedings, efficient disposal of the court's business, efficient use of the available judicial and administrative resources and the timely disposal of proceedings at an affordable cost which the Appellant took for granted and hence must take responsibility for and suffer the consequences of his indolence.

20. The upshot is that I find no merit in this appeal and the same is dismissed. There shall be no order for costs.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIvERED vIRTUALLY ON THIS 26TH DAY OF JUNE, 2025.

E. N. MAINA

JUDGE

In the presence of:

Geoffrey – Court Assistant

No attendance by Counsel on either side.