



**Excellent Logistics Limited v Mwaura & Wachira Advocates (Commercial Appeal E072 of 2024)  
[2025] KEHC 12465 (KLR) (Commercial and Tax) (1 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E072 OF 2024  
JWW MONG'ARE, J  
SEPTEMBER 1, 2025**

**BETWEEN**

**EXCELLENT LOGISTICS LIMITED ..... APPELLANT**

**AND**

**MWAURA & WACHIRA ADVOCATES ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. A. Nyoike, SPM dated 8th July 2022 at the Magistrates Court at Milimani, Nairobi Civil Case No. No.E607 of 2023)*

**JUDGMENT**

**Introduction and Background**

1. The Appellant has through its Memorandum of Appeal dated 22<sup>nd</sup> March 2024, challenged the subordinate court's ruling delivered on 21<sup>st</sup> March 2024 that dismissed the Appellant's application to set aside an interlocutory judgment entered on 20<sup>th</sup> September 2023. The suit in the subordinate court was filed by the Respondent against the Appellant on 26<sup>th</sup> July 2023. The Appellant did not enter an appearance or file a defense, leading to the interlocutory judgment on 20<sup>th</sup> September 2023 awarding the Respondent Kshs.4,760,000.00/= plus costs and interest.
2. The Respondent commenced execution proceedings against the Appellant as Warrants of Sale of Property and Attachment of movable property were issued on 17<sup>th</sup> November 2023 and the Appellant's properties were proclaimed on 20<sup>th</sup> November 2023. On 21<sup>st</sup> November 2023, the Appellant filed an application seeking orders to inter alia stay execution of the interlocutory judgment, set it aside altogether and grant leave to the Appellant to file its Statement of Defence.
3. The Respondent responded to the application and both parties filed written submissions to the same and after the subordinate court's consideration, the Ruling was delivered where the application was



dismissed hence the present appeal which has also been canvassed by way of written submissions. I will be making relevant references to the said submissions in my analysis and determination below.

### **Analysis and Determination**

4. The Memorandum of Appeal raises seven grounds of appeal to wit;- that the trial magistrate failed to consider the Appellant's evidence and submissions, leading to a wrong decision; that the trial magistrate erred by not considering that the Respondent applied for interlocutory judgment while negotiations were ongoing, thus failing to disclose this fact, that the Ruling infringes on the Appellant's fundamental right to a fair hearing as per Article 50 of *the Constitution*, by denying them an opportunity to defend themselves; that the trial magistrate wrongly exercised discretionary powers and failed to consider the merits of the Appellant's Statement of Defence; that the trial magistrate failed to find that the Appellant had sufficient evidence to support their application and that the Ruling constitutes a miscarriage of justice and an abuse of court process.
5. From the above, I note that the Appellant is impugning a discretionary decision of the subordinate court. It is not lost to me that this court, as an appellate court, will not interfere with the decision of the trial court unless it is satisfied that in exercising the discretion, the trial court has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the trial court has been clearly wrong in the exercise of the discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KECA 39 (KLR)).
6. In its submissions, the Appellant has identified the following issues for the court's determination:  
SUBPARA a.  
Whether the Appellant was served with Summons to Enter Appearance and Pleadings.  
SUBPARA b.  
Whether the Interlocutory Judgment is irregular.  
SUBPARA c.  
Whether the Appellant has a triable Defence that ought to be heard on merits.  
SUBPARA d.  
Whether the Respondent can lawfully demand Kshs.4,750,000.00/= as legal fees without taxation.  
SUBPARA e.  
Who pays the costs of the Appeal.

#### Service of summons

7. The Appellant disputes the service of summons on 2<sup>nd</sup> August 2023, highlighting inconsistencies in the Affidavit of Service regarding the time of service compared to the attached email. That there is no acknowledgment from the Appellant for the receipt of summons attached to the Respondent's Affidavit of Service and that the same states that the Appellant acknowledged a Demand Letter, not the Summons to Enter Appearance. The Appellant submits that the service was defective as the Respondent failed to provide an Electronic Mail Service delivery receipt as required by Order 5 Rule 22(B)(2) (4) of the Civil Procedure Rules and that the email provided by the Respondent lacks a date, making it impossible to determine when it was served.



8. On its part, the Respondent contends that the issue of service is an afterthought because it was not denied before the trial court and was not an initial ground of appeal and that the Appellant's affidavit acknowledges being served and admits they did not enter an appearance or file a defense, allegedly due to ongoing settlement negotiations. The Respondent thus maintains that the Appellant was duly served.
9. I am in agreement with the Respondent that going through the grounds of appeal that I have summarized above, it is indeed correct that the issue of service of the summons and pleadings is not part of the memorandum of appeal and has been introduced in the Appellant's submissions. Courts have consistently held that issues not raised in the Memorandum of Appeal but introduced in written or oral submissions are not properly before the court and will not be determined unless leave is sought and granted. This principle is rooted in the need for clarity in pleadings and to avoid prejudicing the Respondent (see *Ng'ang'a v Njabani* [2024] KEHC 2290 (KLR))
10. In any case, I note that in the Ruling, the subordinate court found that the Appellant had admitted to being served with the summons as well as the claim. I further agree with the Respondent that as per its application before the subordinate court, the Appellant expressly stated that it was served with the pleadings but that the parties were pursuing an out of court settlement. The learned magistrate was therefore correct in the finding that the Appellant had admitted to being served with the summons and pleadings.

### **Reasonable Defence**

11. As the Appellant was admittedly served with the summons and pleadings and admittedly failed to file a defence within time, it follows that it was regular for the learned magistrate to enter the interlocutory judgment as sought by the Respondent. However, even where the judgment is regular, the court may yet proceed to set aside the judgment if justice of the case demands, particularly where the defendant demonstrates that it has a good defence and any prejudice caused by setting aside may be assuaged by an award of costs (see *Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another* [1998] KECA 40 (KLR))
12. The Appellant asserts they had a reasonable draft Statement of Defence which raises triable issues that the trial court failed to consider. The Respondent responds by submitting that their claim before the trial court was for a liquidated sum as legal fees and that the Appellant, in their draft defense admitted the claim, stating they "admit the contents of Paragraph 5 and 6 of the Plaint only to the extent that the said negotiated amounts as at June 2022 for an array....". Further, that the Appellant also did not deny indebtedness in their supporting affidavit and since the Appellant admitted the claimed sums, there are no triable issues left, and the trial court correctly found that the Appellant had not demonstrated payment.
13. In the Ruling, the learned magistrate noted that the Appellant had admitted the debt and failure to clear payments which were for legal services rendered. Going through the defence, it is indeed correct that the Appellant admits being indebted to the Respondent. Whereas the Respondent disputes the level of indebtedness in the said defence, it expressly admits to owing the said sums claimed by the Respondent and claims to have paid a certain amount for the same in its application without any proof. As such, I am in agreement with the Respondent's submissions that with this admission and lack of proof evidencing payment, there is nothing left for trial, meaning the Appellant's defence discloses no triable issue.
14. I also note that the Appellant has stated that it did not deem it necessary to file a defence as the parties were engaging in negotiations for an out-of-court settlement. However, it has always been stated time



without number that time does not stop running merely because parties are engaged in out of court negotiations. The Appellant ought to have sought leave to extend time to file its defence if negotiations were likely to delay compliance (see Kenya Ports Authority v Baharini Oil Supply Services Limited & 2 others [2024] KECA 1907 (KLR))

15. Having found that the Appellant had no arguable defence, it follows that its application to set aside the interlocutory judgment was not merited and collapsed at that point. The issues raised by the Appellant that the Respondent cannot lawfully demand their legal fees without taxation is an afterthought and a contradiction of their own admission of the debt.

### **Conclusion and Disposition**

16. In the upshot, the Appellant's appeal lacks merit and it is dismissed with costs to the Respondent. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2025.**

.....

**J.W.W. MONGARE**

**JUDGE**

In The Presence Of

1. Mr. Osoro for the Appellant.
2. Mr. Oketch for the Respondent.
3. Amos - Court Assistant

