



Peckerwoods Limited v Trendy Consulting International Ltd (Civil Appeal 54 of 2020) [2024] KEHC 326 (KLR) (Civ) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 54 OF 2020
AN ONGERI, J
JANUARY 26, 2024**

BETWEEN

PECKERWOODS LIMITED APPELLANT

AND

TRENDY CONSULTING INTERNATIONAL LTD RESPONDENT

*(Being an appeal from the ruling of Hon. D. O. Mbeja (SRM)
in Milimani CMCC no. 10179 of 2018 delivered on 10/1/2020)*

JUDGMENT

1. On 5/2/2019, an ex parte judgment was entered in favour of the respondent against the appellant in default of entering appearance or filing a defence by the appellant.
2. The appellant filed a notice of motion dated 23/9/2019 seeking to set aside the ex parte judgment on the basis that the appellant was not served with the summons to enter appearance or file a defence.
3. The trial court found that the appellant was served with the summons as guided by the affidavit of service.
4. The appellant's application dated 23/9/2019 was allowed reluctantly and the appellant was ordered to file their defence within 21 days from the 10/1/2020 and to pay the Auctioneers outstanding fees and in default execution to issue for the entire decretal sum.
5. The appellant filed this appeal against the said ruling on the following grounds;
 - i. That the honourable magistrate erred in law and fact by setting stringent conditions when allowing the defendant's application dated 23rd September, 2019 considering the weight of the facts and evidence adduced.



- ii. That the honourable magistrate erred in law and fact in holding that service on the defendant was proper.
 - iii. That the honourable magistrate erred in law and fact in holding that ex parte judgment was obtained regularly.
 - iv. That the honourable magistrate erred in law and fact by ordering the defendant to deposit the entire decretal amount in court before they are given an opportunity to file their defence and present their case in full.
 - v. That the honourable magistrate erred in law and fact by not appreciating the requirements of service on a corporation.
 - vi. That the honourable magistrate erred in law and fact by failing to consider that the defendant's defence raises triable issues.
 - vii. That the honourable magistrate erred in law and fact in holding that the defendant should pay the auctioneers costs before they are given an opportunity to file their defence and present their case in full.
 - viii. That the honourable magistrate erred in law and fact in failing to appreciate that the defendant's application dated 23rd September, 2019 would not have unduly prejudiced any of the parties.
6. The parties filed written submissions which I have duly considered. The Appellant submitted that the Respondent filed the primary suit on 16th November 2018 on allegation that it had entered into a sale agreement with the Appellant in August 2018 for the delivery of a computer, thermal printer, cash drawer, software, installation, networking and barcode.
 7. The Respondent alleged that it had paid for the items but they were not delivered.
 8. The Appellant submitted that the Ex parte judgment should be set aside and the Appellant be allowed to defend the suit for reasons that the summons were allegedly served at Commonwealth House while the registered office of the Appellant is at Sonalux House and further that the name of the secretary who was served with the summons has not been stated.
 9. The Appellant relied on Order 5 rule 3 of the [Civil Procedure Rules](#) which states as follows;

“Subject to any other written law, where the suit is against a corporation the summons may be served on the secretary, director or other principal officer of the corporation”
 10. The Appellant submitted that the conditions upon which the ex parte judgment was set aside were unreasonable and punitive.
 11. The Respondent submitted that this appeal is incompetent since it does not contain the order appealed from. Further that, that is not a mere procedural issue but a jurisdictional point.
 12. The Respondent relied on the case of [Old East African Trading Company Vs Jetha](#) 23 EACA at page 964 where it was held that where no order or decree has been extracted at the time of filing the appeal, there was nothing to appeal from and the Court has no jurisdiction to hear that appeal.
 13. The Respondent also submitted that this Court is bound by the doctrine of judicial precedent to dismiss this appeal for being incompetent for failure to attach the order or decree appealed from. The



- Respondent relied on the case of *National Bank of Kenya Ltd Vs Wilson Ndolo Ayah* [2009] KLR 762 where it was held that the High Court has no discretion to depart from the doctrine of precedent.
14. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court.
15. The issues for determination in this appeal are as follows;
- i. Whether the service of summons upon the appellant was proper.
 - ii. Whether this appeal is competent.
 - iii. Whether the trial court was right in imposing conditions for setting the *exparte* judgment.
 - iv. Whether the appellant should be granted leave to defend the suit.
 - v. Whether the defence raises triable issues.
16. On the issue as to whether service upon the appellant of the summons to enter appearance was proper, I find that it not in dispute the summons were served at Commonwealth House while the registered office of the Appellant is at Sonalux House and further that the name of the secretary who was served with the summons has not been stated.
17. I find that the default judgment which was entered herein was irregular. In of *Frigonken Ltd V. Value Park Food Ltd*, HCC No. 424 of 2010, the High Court stated as follows;
- “If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae*. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process”.
18. In the case of *Kabutha V. Mucheru* HCC No. 82 of 2002 Nakuru (Musinga J, (as he then was) expressed the principle as follows;
- “ [with] respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an *exparte* judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.”
19. In the circumstances, the irregular judgment herein ought to have been set aside as a matter of right.
20. On the issue as to whether the appeal should be struck off for being incompetent for failure to attach the order appealed against, I find that the case relied on by the Respondent of *National Bank of Kenya Ltd v Ayah* [2009] KLR 762 was dealing with an illegality while the current case is on improper service of summons.



21. I find that it is true that the courts have consistently held that pleadings drawn and filed by an unqualified person were liable to be struck out. In *National Bank of Kenya Ltd v Ayah* (Supra), the Court of Appeal explained the position as follows;

“ [It] was public policy that Courts should not aid in the perpetuation of illegalities. A failure to invalidate an act by an unqualified Advocate was likely to provide an incentive to repeat the illegal Act; the interests of the innocent party should not be swept under the carpet in appropriate cases.... The innocent party has remedies against the guilty party to which he may have recourse”.

22. However, the current case is not dealing with an illegality but a procedural technicality. Failure to attach the order appealed against is not an illegality. Article 159(2)(d) calls upon the courts to ensure that justice is administered without undue regard to procedural technicalities.

23. The trial court having set aside the exparte judgment should have allowed the appellant to defend the suit unconditionally since there is evidence that the service of summons was not proper.

24. The trial court was wrong in imposing stringent conditions for setting aside an irregular judgment.

25. The Trial court should have considered whether the respondent would suffer prejudice that would not be compensated by an award of costs.

26. I find that it is in the interest of justice that the appellant be granted an opportunity to be heard on merit since the service of summons was not proper.

27. I allow this appeal on the following conditions;

- i. That the applicant pays thrown away costs of kshs.20,000 before the suit is set down for hearing.
- ii. The defendant is granted a unconditional leave to defend the suit and shall file a defence within fourteen days from the date of this judgment.
- iii. That the Respondent is granted leave to file any reply to the defence within 14 days thereafter.
- iv. That the suit be fully prosecuted within 90 days of this date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF JANUARY, 2024.

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A. N. ONGERI
JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

