



REPUBLIC OF KENYA



**Muriu v Musyoka (Civil Appeal E326 of 2024)
[2024] KEHC 17259 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 17259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E326 OF 2024**

**F WANGARI, J
MARCH 20, 2024**

BETWEEN

MOSES MARIGI MURIU APPELLANT

AND

LINET MBINYA MUSYOKA RESPONDENT

JUDGMENT

1. This is an appeal arising from the ruling of Hon. Gatambia Samuel Ndungu, Resident Magistrate and an Adjudicator, delivered on 04/09/2024. The Claimant/ Respondent filed a Statement of Claim dated 12/06/2023 praying for judgment against the Respondent/ Appellant for Kshs. 650,000 being payment of a loan advanced to the Appellant in year 2022.
2. The Appellant is said to have been served with the summons and pleadings but failed to enter appearance nor file his Response to the Statement of Claim. Default judgment was entered in favour of the Claimant/ Respondent for the amount claimed with costs and interest from 29.08/2023 being the date of judgment.
3. Decree of Kshs. 733,068 was issued and execution proceedings commenced. It is when a warrant of arrest was issued and brought to the attention of the Appellant, that the Notice of Motion dated 31/07/2024 was filed by the Appellant. In the Supporting Affidavit, it was deponed that the summons and pleadings were never served upon him and that he was being denied his constitutional right to be heard. He prayed that he be allowed to file his defence which had triable issues. A draft Response to the Statement of Claim was annexed to his application.
4. The Respondent/ Claimant filed a Replying Affidavit dated 12/08/2024. She opposed the application by the Appellant stating that it was made in bad faith. The draft defence was said to be just a mere denial with no triable issues. She annexed the various Affidavits of Service as proof of service from date of filing



suit to the date for NTSC before the trial court. Copies of WhatsApp mobile application messages were filed as annexures, in respect to Phone No. +254708511266 said to belong to the Appellant.

5. In response to the Replying Affidavit, the Appellant/ Respondent filed a Supplementary Affidavit which is undated. He still deponed that he had not been served with the Claimant's documents. He took issue with the annexures being the alleged screenshots of the WhatsApp messages as per paragraph 3 of the Affidavit. All he prayed was to be given a chance to defend the suit.
6. The parties filed their respective submissions. In the ruling dated 04/09/2024, the trial court dismissed the said Notice of Motion for lack of merits, with each party bearing its own costs. The Appellant having been dissatisfied with the said ruling, filed the Memorandum of Appeal dated 02/10/2024. In summary, the grounds for the appeal were that the trial Magistrate erred as hereunder;
 - i. Holding that service was duly effected upon the Appellant.
 - ii. Holding that the contemplated response by the Appellant was a mere denial and couldn't dislodge the Plaintiff's case.
 - iii. Improperly exercising his discretion by denying the Appellant his inherent right to be heard before judgment is passed against him.
7. The appeal was canvassed by way of written submissions. Only the Appellant complied by filing his written submissions dated 29/01/2025.

Analysis

8. I have considered the evidence on record and the submissions filed by the Appellant. The issue for determination is whether the trial court erred in dismissing the Notice of Motion dated 31/07/2024.
9. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
10. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
11. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”



12. The ruling by the trial court was based on the discretionary powers on whether or not to set aside the ex parte judgment. Order 10 rule 11 of the Civil Procedure Rules provides as follows;

“Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
13. Just like any other discretion, the power herein must be exercised judiciously and not whimsically. Among the grounds raised by the Appellant is lack of service of summons.
14. Service of summons and pleadings is so critical as this would inform the other party of the existence of the suit. In the case of *Yalwala v Indumuli & Another* [1989] eKLR, the Court of Appeal succinctly stated as follows: -

“...Service of process is so crucial a matter in litigation that courts including Deputy Registrars must encourage the best of service; i.e. personal service. It may not always be possible for the contents of the summons to be translated or explained to defendants. A defendant who is served personally has an opportunity to put questions to and seek clarification from the Court Process Server about the summons. The Return of Service under Order 5 rule 6 (1) of the Rules enjoins court process servers to make service on defendants or respondents. That is the primary task. It is not expecting too much of court process servers to try and try again to serve the defendant before embarking on the other means of service...”
15. As stated herein above, the Respondent raised issues on the screenshots purported to be of his mobile phone. I have perused through the said screenshots. The proof of delivery of messages in WhatsApp messages is indicated by the two ticks after the message. Whether the message has been read or not is another issue. In some WhatsApp settings, the indicator that the message has been read is two blue ticks. In this case, the annexures are in black and white. It's not possible to tell the settings of the recipient's phone. Further, in some messages, it is not indicated the date when the message was sent. The doubts created convinces the court to exercise its discretion in favour of the Appellant.
16. Having stated as above, considering the Respondent had ex-parte judgment entered in her favour, the appeal shall be allowed on condition that the decretal sum be deposited under terms as shall be issued herein below.
17. On the issue of costs, the same shall follow the outcome of the main suit.
18. The upshot of the foregoing, is that the court renders itself as hereunder;
 - i. That the appeal has merits and is hereby allowed on the following terms;
 - a. That the Ruling delivered on 04/09/2024 and subsequent orders are hereby set aside, and suit reopened, on condition that the decretal sum of Kshs. 733,068 be deposited in an escrow account in the name of both counsels' o record within the next 30 days.
 - b. That in default of (a) above, the orders of this court shall be vacated, and the orders of the lower court shall be reinstated and execution process to proceed.
 - c. That in compliance of (a) above, the Response to Statement of Claim filed shall be deemed to be properly on record.
 - ii. That the matter be placed before another adjudicator other than the trial court for purposes of directions on the hearing within next 45 days.



iii. Costs of the appeal to follow the outcome of the main suit.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF MARCH, 2024.

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F. WANGARI

JUDGE

In the presence of;

M/S Kitoo Advocate h/b for Mr. Mugambi Advocate for Appellant

Mr. Lisansa Advocate h/b for Shimaka Advocate for the Respondent

M/S Salwa, Court Assistant

