



REPUBLIC OF KENYA



Narogi Service Station Limited v Samuel Muraguri Mwangi t/a Mraggs (Civil Appeal 44 of 2016) [2024] KEHC 2803 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 44 OF 2016
DKN MAGARE, J
MARCH 15, 2024**

BETWEEN

NAROGI SERVICE STATION LIMITED APPELLANT

AND

SAMUEL MURAGURI MWANGI T/A MRAGGS RESPONDENT

(Being an appeal from the Ruling of Principal Magistrate's Court at Karatina dated 18/7/2016 in Karatina CMCC No. 40 of 2013 by Hon. F. W. Macharia - PM)

JUDGMENT

1. It is unfortunate that the matter this old is still in our system.
2. The appeal is from the decision of the F. W. Macharia (PM) given on 18/7/2016 in Karatina CMCC 40/2013. The Appellant raised 9 grounds as doth:
 - a. That the learned magistrate erred in law and fact in failing to make a finding on whether Order 9 of the [Civil Procedure Rules](#) was complied with before hearing proceeded exparte.
 - b. That the learned magistrate misconstrued the issues for determination as the main issue was whether Gathiga Mwangi & Co. Advocates were served with the Notice of Withdrawal of Advocates and as such whether the firm of Advocate was properly on record for the Appellant.
 - c. That the learned magistrate misdirected herself in law in refusing the appellant an opportunity to offer its defence for the suit to be determined on merits.
 - d. That the learned magistrate misdirected herself in law in determining the matter on technicality contrary to the express provisions of the law and or adequately consider Article 159 of the [Constitution](#) of Kenya as the Appellant had water tight defence as Narogi New Service Station Oils & Others was a separate legal entity from Narogi Service Station Limited.



- e. That the learned magistrate erred in law in failing to appreciate the principles of natural justice that no party ought to be condemned unheard.
 - f. That the learned magistrate erred in law and fact by proceeding in a matter *ex parte* where the said Nahashon Wachira did not seek leave to put in further documents in this case.
 - g. That the learned magistrate erred in law in making the decisions she made without considering the matter properly and assign good reasoning for her decision.
 - h. That the learned magistrate erred in law and fact in making her decision without considering all the evidence, pleadings, fact and law before her and ignored her paramount duty as well as her inherent powers of doing substantial justice in the matter having regard to all circumstances of the case.
 - i. That the learned trial magistrate in her consideration of the law, facts, and submissions by the parties before her, misdirected herself and erred in law coming to her decision on wrong principles and failing to make a finding on every issue raised by the parties thus worked hardship to the Appellant that occasioned a miscarriage of justice.
3. It is important to note that only the defendant was a limited liability company. The claim in the plaint was for Kshs.1,940,730/= arising from the supply of fuel between 15-27/9/2011. The defendant filed defence through Gathiga Mwangi & Co. Advocates.
 4. On 4/11/2016 the defendant sought to set aside the judgment entered on grounds that they were not served. They stated that they were invited to take a date. He gave a chronology of events. They learnt of a judgment on 27/4/2016. The matter proceeded in the absence of the defendant. The service was allegedly effected upon an advocate for Nahashon Wachira Maina. Judgment had been entered on the basis of the notice of Appointment by a director Nahashon Wachira Maina.
 5. A replying affidavit was filed by George Morara Gori stating that paragraph 2-10 were correct. They stated that they received a notice to act in person. They had no business to incorporate an advocate who had been fired. It was their case that the said director was served on 7/10/2015.
 6. They stated, further Nahashon Wachira Maina was served but did not attend court. To contextualize, problematize, and conceptualize the problem, it is important to have the document filed set herein in full;

“Please Enter Appearance for the Defendant herein Narogi Service Station Limited, whose address for service is care of M/S Gathiga Mwangi & Co. Advocates, Sohan Plaza, Second Floor, P O Box 1904, NYERI.”

7. At no time was there a Notice of Change of Advocates from Gathiga Mwangi and company advocates. The notice filed by Nahashon Wachira Maina was as follows: -

“Notice to act in person

Order 9 rule 8 of the *civil procedure rules*

I Nahashon Wachira Maina, id no xxxx p.o box yy Karatina do hereby withdraw the services from Gathiga Mwangi and company advocates and shall henceforth be acting in person.

All correspondences to be drawn to me through the aforementioned address

Signed



8. The court below, Hon Florence Wangari Macharia, as then she was, heard the Defendant’s application to set aside the ex parte proceedings and judgment. The court proceeded to dismiss the application with costs. This was the genesis for the Appeal herein

Analysis

9. The question for this court is only one. Was the defendant now Appellant served for hearing that resulted in the impugned judgment? The question will be answered by Order 9 Rule 5 which provide: -

“5. Change of advocate [Order 9, rule 5.] A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or app 5. Change of advocate [Order 9, rule 5.] A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

10. I have not seen a notice of change of advocates, from the firm of Gathiga Mwangi & Co. Advocates. A person who filed a notice to act in person is not a party to this suit. Though stated to be a director, at no time did the company appoint a new advocate. The notice to act in person was by a person who is not party to the case. Nahshon Wachira Maina is not a party to the suit. He cannot act in person. Even if notice of change was filed, it becomes effective upon service on the advocate so removed.

11. Nonservice upon Gathiga Mwangi is admitted. This makes all proceedings from the date the Respondent ceased serving the firm of Gathiga Mwangi null and void. The same with Notice to Act in Person. The proceedings are thus null and void. There is nothing one can do to save void proceedings. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

12. Under the he principal of Nemo dat quod non habet, one cannot withdraw services from a person he has not given instructions. The said firm was acting for the Appellant and not Nahashon Wachira Maina. He could not withdraw services from them. He also needed to serve that document.
13. I need not go into other issues. The defendant’s advocate on record was not served. The proceedings leading to the judgment are a nullity. It does not matter that there are admissions. This was not



judgment on admission by the company. In this regard the house of lords decision in *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 suffices.

14. The court was plainly wrong in dismissing the Appellant's application. The matter proceeded without involving the defendant. It is irrelevant that a director was served.
15. There was an advocate on record. It is only that firm that should be served. Consequently, I find the appeal merited and I allow the same with costs.

Determination

16. In the circumstances, I make the following orders;-
 - a. The appeal is allowed.
 - b. The judgment and decree of the court given by Hon. F. W. Macharia (PM) as then was, on 24/12/2015 is set aside in toto with costs of the application dated 4/5/2016.
 - c. The Respondent shall bear any auctioneers costs, if any.
 - d. Costs of Kshs.180,000/= to the Respondent for the appeal.
 - e. The primary file be returned to the Chief Magistrate's Court at Karatina for hearing and disposal.
 - f. The lower court be mentioned on 14/4/2024 to take directions on hearing.
 - g. The Notice to Act in Person by Nahashon Wachira Maina is struck out.
 - h. The suit must be concluded by 15/3/2025, failing which it shall stand dismissed with costs.
 - i. This file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF MARCH, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Makura for the Respondent

Court Assistant – Millicent Thaithi

KIZITO MAGARE

JUDGE

