



**Njoroge v Smith (Miscellaneous Application E642 of 2023)
[2024] KEHC 5251 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E642 OF 2023**

A MABEYA, J

APRIL 30, 2024

BETWEEN

JOHN KIBATHA NJOROGE APPLICANT

AND

GRACE WANJIRU KIMANI SMITH RESPONDENT

RULING

1. Before Court is an application dated 25/8/2023. The same was brought under Article 159 of the Constitution, Section 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 51 Rule 15 Civil Procedure Rules.
2. The application sought orders to vary or set aside the ex-parte orders issued on 9/8/2023. Those orders granted leave to the respondent to file a suit against the applicant out of time, and that the respondent's application dated 18/7/2023 be struck out for want of jurisdiction.
3. The grounds for the application were set out on the face of the Motion and in the affidavits sworn by John Kibatha Njoroge and that sworn by Pavin Nkatha Nturibi both dated 25/8/2023. It was the applicant's case that the respondent filed a suit against him in CMCC No. E910 of 2022 but was dismissed for want of jurisdiction vide ruling delivered on 26/5/2023.
4. That the applicant later discovered that the respondent had filed a Miscellaneous Application seeking leave to file a suit against him out of time. That the respondent filed an affidavit of service sworn by Mathew Mutsotsi alleging that the application had been served on the applicant's advocate vide email on 24/7/2023.
5. It was contended that the applicant's advocate did not trace that email and neither did the applicant. That all the respondent attached was a printout of an email with not proof that the same was sent. It



was further contended that there was no attached delivery receipt confirming service. That the subject matter of the suit was identical to the one dismissed in the Chief Magistrate's Court as it related to the sale agreement dated 16/12/2016. It was also contended that the draft plaint annexed to the Miscellaneous Application was the exact plaint filed in the earlier suit that was dismissed.

6. It was finally contended that this Court had no jurisdiction to extend time to file a suit relating to a contract or other causes of action other than tort. That the miscellaneous application ought to have been dismissed for want of jurisdiction.
7. The respondent did not file a response to the application and the allegations raised therein remained un-contravened.
8. I have considered the application before Court. It seeks that this Court's orders of 9/8/2023 be reviewed and set aside. The main issue for determination is thus whether those orders ought to be set aside as prayed.
9. The law on setting aside of *ex parte* orders is found under Order 12, rule 7 of the [Civil Procedure Rules, 2010](#) which provides thus: -

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
10. This provision is amplified by Order 51, rule 15 which provides that the Court may set aside an order made *ex parte*. In setting aside *ex parte* orders, the Court must be satisfied of one of two things, namely, either that the respondent was not properly served or that the respondent failed to appear in Court at the hearing due to sufficient cause. (See – *Philip Ongom, Capt v Catherine Nyero Owota* Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003)).
11. Mulla, [The Code of Civil Procedure](#) has illuminated the grounds for setting aside an *ex parte* decree and what constitutes sufficient cause for setting aside an *ex parte* order. Essentially, setting aside an *ex parte* order is a matter of the discretion of the court. In [Esther Wamaitha Njibia & two others v Safaricom Ltd](#) [2014] eKLR, the court held *inter alia* that;

"The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd.*) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice(see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali.*) It also goes without saying that the reason for failure to attend should be considered."
12. It then follows that the decision whether or not to set aside an *ex parte* order is discretionary. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah v Mbogo & Another* [1967] EA 116.
13. The applicant's main contention was that the miscellaneous application was never served on him. I have however considered the affidavit of service dated 2/8/2023. Attached therein was a mention



notice dated 18/7/2023 and email correspondence dated 2/8/2023. The email was sent to the applicant directly as well as to the applicant's advocate and the same is evident from the attachment.

14. There was also attached a letter dated 24/7/2023 sent to the applicant's former advocate confirming whether they still had instructions to represent him in the current matter. Though the applicant contended that the application was never served on him, the evidence on record tells a different story. I note that neither the applicant nor his advocate denounced the email addresses used.
15. I also note that the applicant did not seek to cross-examine the maker of the affidavit of service in order to sufficiently prove that service was not effected. In *In re MWO (Minor)* [2021] eKLR, the court held that: -

“This is a matter in which the Appellant disputed service. The Affidavits of Service in question indicated the dates, times and places where service was effected and also indicated the person served. If the Appellant disputed the averments in the said Affidavit as service then he ought to have summoned the process server for cross-examination in order to challenge the averments made by said process-servers.

16. Further, in *Shadrack Arap Baiywo v Bodi Bach* [1987] eKLR, the Court of Appeal held as follows: -

“There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”

17. In the instant suit, the applicant merely disputed the contents of the affidavit of service but took no steps to challenge and/or controvert the said averments. This he ought to have done.
18. In the circumstances, I find that by failing to have the process server summoned to be cross-examined on his affidavit of service, the applicant failed to discharge the burden of proof to dislodge the affidavit of service filed by the respondent. The Court was thus correct in finding that the applicant was validly served but chose not to participate in the proceedings and the respondent's miscellaneous application was lawfully allowed. I find no justification in setting aside the orders of 9/8/2023 on that ground.
19. The other contention was that the orders of 9/8/2023 be set aside as the court lacked jurisdiction to allow extension of time. It was the applicant's case that pursuant to Section 27 of the *Limitation of Actions Act*, the Court only has jurisdiction to extend time for actions founded on torts of negligence, nuisance or breach of duty. That the instant claim was founded on breach of contract thereby ousting this Court's jurisdiction to grant such orders.
20. In *Oadi Odhiambo v Gateway Insurance Co. Ltd* Civil Appeal No. 37 of 2013 eKLR the Court of Appeal observed: -

“Under Section 27 (1) of the *Limitations Act*, time to file a suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort.”



21. In an application for extension of time, the Court not only considers whether the application comes within the ambit of Section 27, but also the explanation for delay. In *YH Wholsalers Limited v Kenya Revenue Authority* [2021] eKLR, the Court held that: -

“What is required at this stage is not a merit evaluation of the case, but the applicant must bring himself within the grounds in section 27 and to also, an explanation for the delay. Lord Green MR said it all in *Hilton v Sultan S. Team Laundry*;

“But the statute of limitation is not concerned with merits, once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights.”

22. The matter before Court being purely contractual, this Court is bound by the dictum of the Court of Appeal in the case of *Oadi Odhiambo v Gateway Insurance Co. Ltd* Civil Appeal No. 37 of 2013 (eKLR). That being the case, the extension of time in a case of contract would be contrary to the law. Fraud on the part of the applicant was not pleaded to have brought the matter within the confines of tort.

23. In the circumstances, I find that the application having not been defended is merited and I allow the same as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE

