Power Base Limited v Jhpiego Kenya (Civil Appeal 664 of 2016)
[2024] KEHC 6274 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6274 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 664 OF 2016

JN NJAGI, J

MAY 30, 2024

BETWEEN

POWER BASE LIMITED ..... APPELLANT

AND

JHPIEGO KENYA ..... RESPONDENT

(Being an appeal from the ruling of Hon. DW Mburu on 17th October 2016 in Nairobi CMCC No. 1272 of 2016 delivered on 17/10/2016)

JUDGMENT

1. The respondent filed Nairobi CMCC No. 1272 of 2016 Jhpiego Kenya v Powerbase Limited where it sought to recover USD. 8,556.86 from the appellant on basis that the amount had been wrongfully credited.

2. The appellant failed to enter appearance and/or file a defense therefore an interlocutory Judgment was entered against the appellant. The matter proceeded to formal proof and Judgment was entered in favour of the Respondent.

3. Through an application dated 31st May 2016, the appellant sought for stay of execution and setting aside of the judgment delivered on 31st May 2016. The application was premised on grounds that the Judgment obtained was irregular as there was no service of summons and plaint. The application was opposed by the respondent. It was contended that service was proper.

4. The learned trial Magistrate considered the application and through a ruling issued on 7th October 2016 declined to disturb the judgment and consequential orders hence dismissed it.

5. Aggrieved by the decision of the court, the appellant appealed on grounds that:

1. The trial court failed to consider the reasons advanced for setting aside the ex-parte Judgment;
2. The trial court failed to consider the draft defence that was annexed to the application;
3. The trial court failed to consider that the application raised triable issues.
4. That the trial magistrate failed to appreciate the provisions of section 159 of *the Constitution* which negates the use of technicalities.
5. The trial magistrate failed to recognize the right of a party to be heard.
6. The trial magistrate failed to appreciate the law governing the setting aside of ex parte proceedings.

6. The Appeal was canvassed by way of written submissions.

Appellant's Submissions.

7. In support of this appeal, the appellant filed submissions and further submissions dated 28/6/2016 and 4/12/2023 respectively. It was urged on behalf of the appellant that it brought the bankers cheques No. 1XXXX7 and 1XXXX8 for a sum of Kshs 1, 066, 359.68 ready and willing to comply with the orders of the court made on 24/11/2026 but in vain as the trial court file was transferred to this court pursuant to a letter dated 2/11/2016 by the Deputy Registrar of this Court. The appellant argued that it is willing to comply with the condition of the court in order to pursue the appeal on its merit.

8. That the respondent was very much aware that the appellant was able to comply with the directions issued on 24/1//2026 but proceeded with execution bearing in mind that if the case was heard on its merit and the impugned judgment set aside the respondent had minimal chances of success and that is why it hurriedly executed.

9. It was submitted that the appellant had taken all reasonable steps to comply with Order 42 rule 6 of the Civil Procedure Rules 2010 and that it only that the lower court had declined to enlarge time within which to comply with the orders made on 24/11/2016.

10. The appellant submitted that the respondent intends to unjustly enrich itself through curable procedural technicalities. That this Court is enjoined under Article 50 of *the Constitution* to ensure that every person who has an issue that can be resolved by the court is accorded that opportunity to be heard on merit.

11. The appellant urged that although the respondent had already executed the judgment, it is proper for the case to be heard on merit and in the very unlikely event the case is dismissed then costs would adequately compensate the respondent.

12. The appellant maintained that the respondent's claim was fictitious, illegal, fraudulent and the court should not entertain it notwithstanding the fact that the judgement has already been executed. The appellant urged that this Court has unlimited powers to correct the injustice meted on it. He prayed that the appellant be granted an opportunity to be heard at the lower court on merit.

Respondent's Submissions.

13. In response, the respondent filed submissions and supplementary submissions dated 22/9/2023 and 18/1/2024. It was submitted on behalf of the respondent that the appeal was an application for setting aside ex parte judgment but disguised as one relating to alleged violation of the right to be heard.

14. Counsel submitted that the appeal had not demonstrated the principles for setting aside judgments under Order 10 rule 11 of the *Civil Procedure Rules*. Counsel submitted that setting aside of interlocutory judgments is discretionary which must be done in a judicious manner. Reliance was placed in the case of *Shah v Mbogo* (1976) E. A 116 and 123B.

15. The respondent submitted that the appellant was duly served with both sermons to enter appearance as well as pleadings but the appearance was never entered. That the person who received the documents was the receptions of the appellant.

16. The respondent urged that the annexed statement of defence did not raise any triable issues and only amounted to mere denials. It was a sham defence that did not warrant going to trial and a violation of the requirements under Order 7 Rule 5 of the *Civil Procedure Rules*.

17. It was submitted that the appellant would not suffer any prejudice as the judgment had already been settled in 2017 and that the appellant had failed to prosecute its appeal for 6 years.

18. The respondent submitted that the provisions of articles 50 and 159 of *the constitution* should not be used to rescue parties unwilling to comply with statutory provisions.

19. The respondent urged that the appeal was defective, lacked merit and ripe for dismissal with costs.

Analysis and Determination

20. This being a first appeal, this court is obligated to reassess, reevaluate and re-examine the evidence and extracts adduced before the trial court and arrive at its own independent conclusion as stipulated in Section 78 of the *Civil Procedure Act* and as expounded in the *Sielle v Associated Motor Boat Company Ltd* [1968] E.A 123, bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving an allowance to that.

21. I have re-considered the grounds in support of the appeal, the grounds in opposition thereto, the judgment of the trial court and the submissions by the respective counsels for the parties. The issues for determination are whether the appellant was served with the summons and whether its draft defence raised triable issues.

22. This court has unfettered power under Order 10 Rule 11 of the *Civil Procedure Rules*,2010 to set aside a default judgment. The Order provides that:

> "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."

23. In the case of *Mohamed & Another v Shoka* (1990) KLR 463 the court set out the principles that a court should consider in setting aside interlocutory judgment to include:

    i) Whether there is a regular judgment;

    ii) Whether there is a defence on merit;

    iii) Whether there is a reasonable explanation for any delay;

    iv) Whether there would be any prejudice.

24. The court is required to interrogate whether the impugned judgment is a regular one or an irregular one. A distinction has to be made between the two as observed in the case of *Fidelity Commercial Bank Ltd v Owen Amos Ndungu & Another*, HCC No.241 of 1998 (UR) where the court stated as follows:

> " A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the exparte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right"

25. It is well founded in law that this court will not interfere with the discretion of a judge unless it is satisfied that the trial court erred in the way it exercised its discretion. See *Hillary Rotich v Wilson Kipkore* [2008] eKLR, Nairobi Civil Appeal No. 232 of 2010). In *United India Insurance Co. Ltd v. East African Underwirters (Kenya) Ltd* [1985] EA 898, Madan, JA. (as he then was), stated that the Court of Appeal is only entitled to interfere with a decision if one or more of the following are established:

> " first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

26. The main contention by appellant was that proper service was not effected in accordance with the Civil Procedure Rules, 2010. In the case of *Shadrack Arap Baiywo V Bodi Bach* (1987) eKLR the Court of Appeal while dealing with an issue of service held thus:'

> 'There is a presumption of services 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.'

27. The process server in this case was cross-examined on his mode of service of the summons. He indicated that he visited the appellant`s offices situate at plot No.402 along Kirichwa Road, Nairobi. That he introduced himself to a receptionist who identified herself as Stacy Kamau. He informed her the purpose of his visit to serve court documents. That the lady called one of the directors, a Mr. Ndinguri over mobile phone who authorized her to accept service. That she received the documents, signed and affixed the appellant's stamp on the copy of the summons.

28. In dismissing the application to set aside the ex parte judgment, the learned trial magistrate stated that the said Stacy Kamau did not swear any affidavit denying service. That though the respondent denied that the rubber stamp appended to the summons was that of their company it did not deny the signature of the receptionist or even the fact that she was their employee. The court found that there was proper service.

29. I have considered the reasons given by the trial magistrate to find that the appellant was served with the summons. Indeed, the appellant did not deny that Stacy Kamau was their employee and nor did the appellant present her affidavit denying that she accepted service under the instructions of the Mr.

Ndinguri. In the absence of an affidavit from Stacy Kamau, the deposition by the process server that he served her after she was instructed by Mr. Ndinguri to accept service was to be believed.

30. I am therefore in agreement with the finding by the trial court that the appellant was served with the summons. It deliberately refused to appear before court.

31. The purpose of summons to enter appearance is to inform a defendant of the institution of a suit as was held by the Court of Appeal in the case of *Equitorial Commercial Bank ltd v Mohan Sons (k) ltd* (2012) eKLR citing the decision in *Nanjibhai Prabhudas & Company ltd v Standard Bank ltd* (1968) EA (k) 670 that:

> "…….we definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law.

32. I find that it is the appellant`s director who instructed the receptionist to accept the summons. The appellant was served with the summons. Service was a regular one.

33. The court in an application to set aside default judgment is required to consider whether the draft defence of the Appellant raises a triable issue. The trial magistrate in this case considered the draft defence and concluded that it did not raise triable issues and was a sham.

34. The Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR defined a triable issue as follows:

> "A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

35. The respondent in their plaint were contending that the money that is the subject of the dispute was paid to the appellant by mistake. The appellant in its defence stated that the money paid to it was properly paid as it was paid in accordance with invoices raised. That no payment was paid in error. That no reconciliation of accounts has been requested by the plaintiff.

36. In my view, the draft defence does not state the specific reason what the payment was for. The defence does not show that the matter required further interrogation of the court. It is a general defence that does not raise any triable issue. I find that the trial court was correct in holding that the defence was a sham.

37. The other issue to be considered is if there would be any prejudice on either side if the prayer to set aside default orders was granted or declined. This is a matter that was filed in 2016. It is not in dispute that the appellant has already paid back the money. In my view, it will not serve any purpose reviving the case as this can only be prejudicial to the respondent. The appellant was given an opportunity to be heard and failed to seize the opportunity. There was no violation of Article 159(2) of *the Constitution* and the right to be heard as contended by the appellant.

38. The upshot is that I find no merit in the appeal. The same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MAY 2024

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

Ms Mima for Respondent

Court Assistant – Amina

30 days Right of Appeal.