



REPUBLIC OF KENYA



**Saroya v Dass (Civil Appeal E207 of 2023) [2024] KEHC 7825 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7825 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL E207 OF 2023**

**DKN MAGARE, J**

**JUNE 27, 2024**

**BETWEEN**

**ANAM BASHIR SAROYA ..... APPELLANT**

**AND**

**RUKIYA DASS ..... RESPONDENT**

*(Being an appeal from the entire Ruling of Hon. J. B. Kalo (CM) delivered on 26th July 2023 at Mombasa in CMCC No. 687 of 2020 between Rukiya Dass vs. Anam Bashir Saroya)*

**JUDGMENT**

1. This is an appeal from the decision of the Hon. J. B. Kalo, given on 26<sup>th</sup> July 2023 in Mombasa CMCC E207 of 2023.
2. This matter was slated for Judgment in December 2023. The same was not delivered as a confusion arose, since I was given another file HCCA 207 of 20223, that is Aero Marine Cargo Versus Cars United Kingdom Ltd. The one filed later was a Miscellaneous Application disguised as an appeal. I delivered the ruling therein and both files were taken to archives.
3. I have been alerted of the error. I apologise to the parties for the oversight. Parties also advised that there is a related file Mombasa HCCA No 41 of 2023, which file I shall deliver judgment shortly.
4. Turning to this matter, the appellant filed appeal on 7/8/2023 and set forth 5 grounds: -
  - a. That the learned trial magistrate erred in law and in fact by arriving at a decision in the impugned ruling that the appellant was served with summons to enter appearance where affidavit of service filed in court doesn't sufficiently describe how the defendant was identified thereby summarily deciding the issue at the preliminary stage thereby denying the appellant the opportunity to be heard and the suit be decided on its merits.



- b. That the learned trial magistrate erred in law and in fact by relying on the testimony of the process server who clearly indicated that the plaintiff did not point out the defendant during the service of summons thereby arriving at the wrong decision.
  - c. That the trial magistrate erred in law and in facts by failing to appreciate the fact that the court process server during cross-examination by the advocate clearly indicated that he left out vital information in his affidavit of service thereby arriving at a wrong decision.
  - d. That the learned magistrate erred in law and in fact by relying on the testimony and an affidavit of service of the process server who failed to indicate the details of the security guard who purported to have called the appellant for purpose of service yet the affidavit indicated that there were more than on guard during the purported service.
  - e. That the learned magistrate erred in law and fact by arriving at a decision without considering the fact that parties in the suit had reached an agreement and a notice of withdrawal filed in court by the advocate on record and as such, the lower court matter ought to be considered as settled.
5. The Ruling was a short one to the effect that the court has considered the application. In the interest of justice, time for compliance with the orders of 25/5/2023 is hereby extended by 21 days. This is to ensure that the appeal filed by the defendant is not declared nugatory.
  6. The order related to a period for compliance for which the respondent was to comply with stay orders. The other orders are not the subject of this appeal.
  7. The order given is a discretionary one. The court is under duty not to set aside the lower court discretion unless the exercise of discretion was not judicious. 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.
  8. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
  9. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the law lords held by as follows:-

“.. 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
  10. It has not been shown that the discretion was not judicious. In the circumstances the appeal herein is baseless. I proceed to dismiss the same in limine with costs of 55,000/=.



## **Determination**

11. The court makes the following orders: -

- a. The appeal herein lacks merit and is accordingly dismissed.
- b. Costs of Ksh. 55,000/= to the respondent payable within 30 days, in default execution do issue.
- c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27<sup>TH</sup> DAY OF JUNE, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

