



**Bakaki 101 Travellers Sacco Ltd v Wambugu & another (Civil Appeal 106 of 2021) [2024] KEHC 7602 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7602 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 106 OF 2021**

**FR OLEL, J  
JUNE 26, 2024**

**BETWEEN**

**BAKAKI 101 TRAVELLERS SACCO LTD ..... APPELLANT**

**AND**

**SAMUEL MWANGI WAMBUGU ..... 1<sup>ST</sup> RESPONDENT**

**ALBANUS KIHO KIILU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement delivered by Honourable H Onkwani Principal Magistrate in Mavoko CMCC No.1335 of 2018 delivered on 3rd June 2021)*

**JUDGMENT**

**A. Introduction**

1. This appeal arises from the ruling/order of Hon. H. Onkwani, Principal Magistrate dated 3<sup>rd</sup> June 2021, where he refused to set aside the interlocutory judgment and subsequent decree entered as against the Appellant and further to grant the Appellant leave to file their statement of defence out of time.
2. The 1<sup>st</sup> respondent had filed the primary suit as against the Appellant and 2<sup>nd</sup> respondent in this appeal and claimed compensation for injuries sustained in a self-involving road traffic accident which occurred on 23<sup>rd</sup> May 2018 along Mombasa road at Sabaki area involving motor vehicle registration Number KBR 282K, which he alleged was driven recklessly and negligently as a result of which the said motor vehicle veered off the road and over turned, causing him to suffer bodily injuries.
3. The 1<sup>st</sup> respondent counsel did file his affidavit of service dated 23<sup>rd</sup> January 2020 set out how he did effect service upon the Appellant and in consequence whereof interlocutory judgment was entered as against the said Appellant on 29<sup>th</sup> January 2020. Eventually the matter proceeded for formal proof on 3<sup>rd</sup> September 2020 and judgment entered in favour of the 1<sup>st</sup> respondent herein on 28<sup>th</sup> October 2020.



4. The appellant averred that they were served with notice of entry of judgment on 4<sup>th</sup> December 2020, upon which they filed their application seeking to set aside the interlocutory judgment and subsequent proceedings on the basis that they were not served with summons to enter appearance. Upon consideration of the same the trial Magistrate did find that the same was not merited and hence dismissed the same.
5. Being wholly dissatisfied as against the said Ruling/Order the appellant did file this appeal and raised the following grounds of appeal;
  - a. The learned principal magistrate erred in law and facts in dismissing the Appellants Application dated 07.012. 2020 to set aside an interlocutory judgment entered in favour of the 1<sup>st</sup> respondent-the then plaintiff.
  - b. The learned principal magistrate erred in fact and in law by failing to consider the applicable provisions of the law regarding service of summons on a corporation.
  - c. The learned principal magistrate erred in fact and law by finding that there was proper service upon the Appellant.
  - d. The learned principal magistrate completely disregarded the Appellants further affidavit, submissions and Authorities cited and thus fell in error.
  - e. That the learned principal Magistrate erred in law and fact by considering extrinsic material, issues and assumptions not tendered as evidence and which could only be canvassed in substantive hearing of the case.
  - f. The learned principal Magistrate erred in law and fact in coming to conclusion that the draft defence did not raise any triable issues.
  - g. That the learned principal Magistrate erred in law and facts in dismissing the Appellants Application and denying the Appellant a chance to be heard before a court of law and thus disregarded the constitutional safeguards and tenets of natural justice.
  - h. That the learned principal Magistrate erred in law nd facts in disregarding the principles applicable in setting aside interlocutory judgement thus exercising her discretion wrongly.
  - i. That the principal Magistrate’s ruling and orders were without legal basis and thus were bad in law.
  - j. That the principal Magistrate’s ruling and orders were against the weight of the evidence tendered on record and therefore bad in law.

## **B. Submissions**

### **Appellant submissions**

6. The appellant filed their submissions on 10<sup>th</sup> January 2024, wherein they submitted that they were a corporate body and service of summons had not been properly effected on them as envisaged under provisions of Order 5 Rule 3 as read together with Order 5 Rule 15 of the [Civil Procedure Rules 2010](#). Further the secretary upon whom service was effected, was a stranger to them and had never been an official of the Appellant Company. Unfortunately, the learned Magistrate did ignore all these facts and failed to take into consideration the same. Therefore, the alleged service of summons upon them was defective and the said interlocutory judgment ought to have been set-aside exdibito justicea. Reliance



was placed in the case of *Rapando v Constantine Ouma & 6 Others* [2004] eKLR, *Total Kenya Limited v Supa Haulier Limited* [2002] eKLR, & *Hussein Dairy Limited v Michael Osinde* [2018] eKLR

7. The appellant further faulted the learned Magistrate for placing the onus on them to prosecute their case (defence case) at the Application stage, yet the issues raised could only be canvassed during substantive hearing of the suit after the interlocutory judgment had been set aside. They had sold the said motor vehicle way before the said accident occurred and had attached the sale agreement to rebut the allegation as to ownership of the suit motor vehicle. This was a triable issue that could not be determined preliminarily during consideration of the application. Reliance was made to the case of *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] eKLR, *Securicor Kenya Ltd v Kyumba Holding* Civil Appeal No 73 of 2002 and the case of *Joel Muga Opinja v East Africa Sea Food Ltd* [2013] eKLR. To buttress the point that logbook *prima facie* proves ownership of a motor vehicle, but the said presumption was rebuttable.
8. The final issue raised was that the trial magistrate wrongly denied the appellant a chance to be heard on merit, which went against the tenets of natural justice by misapplying the principles applicable for setting aside interlocutory judgement. Reliance was made to the case of *Mbogo and Another v Shah* [1968] EA 93 at 96 & *Sebei District Administration v Gasyali and others* [1969] on circumstances that the court ought to intervene and/or interfere with the discretion of the Trial court and set aside *ex parte* judgment.
9. The court was urged to find that the appeal was merit and allow it as prayed to give the appellant leeway to prosecute its case.

### **Respondent's Submissions**

10. The 1<sup>st</sup> Respondent filed his submissions on 2<sup>nd</sup> February 2024 and submitted that the trial court was justified in dismissing the said application and this was done, after the trial magistrate had evaluated the evidence on record and arrived at the finding that the service of summons was proper as the appellants chairperson had been reached via his mobile number 0721582545 which the appellant had not denied belonged to him. Reliance was made to the case of *Rayat Trading Co Limited & Tetezi House Limited* [2018] e KLR.
11. It was submitted that the appellant having been dully served with summons to enter appearance intentionally and majestically refused to enter appearance and that the court was also enjoined to protect the interest of the 1<sup>st</sup> respondent. It was further submitted that no evidence had been placed before this appellant court to warrant interference with the discretion of the trial court and the 1<sup>st</sup> respondent thus prayed that this Appeal be dismissed with costs.

### **C. Analysis & Determination**

12. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

13. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

14. The only issue for determination in this appeal is whether the trial Magistrate correctly considered and applied the principles applicable in set aside interlocutory judgment.

15. Order 5 Rule 3 of the *Civil Procedure Rules, 2010* provides that;

“subject to any other written law, where the suit is against a corporation the summons may be served;

- a. On the secretary, director or other principle officer of the corporation; or
- b. If the process server is unable to find the officers of the corporation mentioned in rule 3(a)-
  - i. By leaving it at the registered office of the corporation;
  - ii. By sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
  - iii. If there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
  - iv. By sending it by registered post to the last known postal address of the corporation.

16. It is also mandatory that the process of service of summons do comply with the following and the same must be stated in the affidavit of service:

- “(a). The time when service was effected on the said person.
- (b). The manner in which summons was served.
- (c). The name and address of the person identifying the person served.
- (d). The place where service was effected.
- (e). If there is no personal service, the person serving must indicate the relationship between the person served and the person summons are directed at in a precise manner.
- (f). Indicate that he required his/her signature in order to validate any purported service.”



17. In *Rapando v Constantine Ouma & 6 others* (2004) eKLR, Justice M Warsame, had this to say regarding return of service;

“However, it is mandatory that the person serving must state in a return of service the following;

- i. Time when service was effected on the said person.
- ii. The manner in which summons was served.
- iii. The nature and address of the person identifying the person served.
- iv. The place where service was effected.
- v. Whether the person serving is known to the person served.
- vi. If no personal service, the person serving must indicate the relationship between the person served and the person summons were directed at in a prise matter.
- vii. Must indicate that he required his/her signature in order to validate any purported service as that is the mandatory requirement of the order V rule 15 and failure to adhere to the same would lead to rejection of such irregular service.” (sic)

18. Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The Court ought to look at the draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the applicant’s defence raises triable issues. In *Patel -v- E.A. Handling Services Ltd* (1974) EZ 75 and *Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd* CA 38 of 1998 and *Mania -v- Muriuki* (1984) KLR 407 the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.

19. In the case *Mohamed & Another -v- Shoka* (1990) KLR 463 the Court set out the tenets 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.

20. The issue of regular judgment was addressed in the case *Mwala -v- Kenya Bureau of Standards* EA LR (2001) 1 EA 148, where the court stated;

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set



aside not as a matter of discretion, but ex debito justice for a court should never countenance an irregular judgment on its record.”

21. The 1<sup>st</sup> respondent filed his affidavit of service dated 23.01.2020, where his advocate deponed that on 26<sup>th</sup> March 2019, he went to Kiambu town, and contacted the appellants secretary on phone no 072886276 and agreed to meet at Kiambu stage at about 2.30pm. After explaining the purpose of the visit, the said secretary gave him the phone number of the chairman one Mr.Fredrick Karanja Mwangi, - phone number 0721582545. He spoke to him, and he came and accepted service of summons on behalf of both the 1<sup>st</sup> and 2<sup>nd</sup> defendant, but refused to sign.
22. The Respondent strenuously denied these averments, through their supplementary affidavit where they denied ever being served with the said summons. The averred that the 1<sup>st</sup> respondent had not given details as to the name of the secretary called, and the said person (Phone no 0728862762) was not known to them. Further as at 29<sup>th</sup> March 2019, their secretary was one Mr.Joseph Waichuhi Gathuku of phone Number 0722723871 and chairman was one Mr Joseph Chege Njuguna of cell phone Number 0726070138. It was also to be noted that that they also did not know the 2<sup>nd</sup> respondent and therefore could also not have accept service on his behalf.
23. Further the appellant averred that the person allegedly served one Mr.Fredrick Karanja Mwangi, had never been their chairman or an official of the appellant company, but as pleaded in the draft statement of defence was the person who had bought the suit motor vehicle from the appellant company and thus could not accept service on their behalf as he was not the corporation secretary , director and/or principal officer of the corporation.
24. The law is that service of summons upon a corporation maybe effected on the company secretary, director or other principle officer of the corporation. The is expressly provided for under provisions of Order 5 rule 3(a) of the civil procedure rules. The appellant as expressly denied that the person served one Mr Fredrick Karanja Mwangi was their chairman, but the purchaser of the suit motor vehicle and therefore the beneficial owner thereof.
25. The fact therefore remains that the appellants chairman Mr Joseph Chege Njuguna of cell phone Number 0726070138 and secretary one Mr Joseph Waichuhi Gathuku of phone Number 0722723871, were never served with summons and without much ado, the subsequent interlocutory judgment must be held to be irregular and be set aside ex debito justiciea. See Hussein Dairy Limited v Micheal Osinde (2018) eKLR where purported service on persons who were not principle officers of the Appellant was considered improper.

#### **D. Disposition**

26. The upshot is that this Appeal is merited. The ruling/Order of Hon H. Onkwani, Principal Magistrate dated 3<sup>rd</sup> June 2021 and delivered in Mavoko CMCC No 1335 of 2018 is hereby set-aside and the Appellants Application dated 7<sup>th</sup> December 2020 is allowed in terms of prayer (2) and (3) thereof.
27. The Appellant is granted leave to file their statement of defence within the next 14 days from the date of delivery of this Judgement.
28. Since the primary matter was filed in 2018, I do direct that the same be mentioned before the chief Magistrate -Mavoko Court, for allocation and it be heard on priority basis within the next 90 days.
29. Each party will bear their own costs of this Appeal.
30. It is so ordered.



**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF JUNE 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 26<sup>th</sup> day of June, 2024.

In the presence of;

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

