



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngumi & another v Nyaga (Civil Appeal 184 of 2019)  
[2024] KEHC 8209 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 184 OF 2019  
JK NG'ARNG'AR, J  
JUNE 26, 2024**

**BETWEEN**

**SAMUEL NGUMI ..... 1<sup>ST</sup> APPELLANT**

**MARTIN NJUGUNA KURIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RACHAEL GAKII NYAGA ..... RESPONDENT**

*(Being an appeal against the ruling of the Honourable Court delivered on 20/11/2019  
IN CMCC NO. 95 of 2018 Gatundu by Hon. Nganga; Senior Resident Magistrate)*

**JUDGMENT**

1. This judgment determines the appellants appeal brought vide the memorandum of appeal dated 21/11/2019. The appeal is against the ruling dated 20/11/2019 delivered by Hon. Nganga SRM.
2. The respondent who was the plaintiff before the trial court pleaded that she was injured following a road traffic accident that occurred on 19/4/2017 along Thika superhighway when she was lawfully traveling in motor vehicle KAV 571L as a passenger. She averred that the defendant therein or his driver/ agent/servant drove motor vehicle KBG 602R carelessly and caused it to ram into motor vehicle KAV 571L which she was on board and an accident occurred wherein she sustained serious injuries.
3. The appellants failed to file a defence despite service and interlocutory judgment was entered on 25/10/2018 triggering the applicant to file an application dated 6/6/2019 seeking to set aside the interlocutory judgment. Vide ruling dated 24/7/2019, the trial court allowed the application on condition that the appellant's defence be filed within 7 days, the appellant to deposit Kshs. 370,907.50/= in court within 21 days of the ruling, and the appellant to pay Kshs. 20,000/= as throw away costs within 21 days of the ruling. In clause 'f' thereof, it was ordered that failure to comply with those conditions would lead to an automatic vacation of the orders and execution to issue.



4. The appellants failed to comply and instead filed an application dated 6/9/2019 seeking that the conditions be reinstated and the primary suit proceeds for full hearing on grounds that the appellant had complied with the conditions of 24/7/2019. Vide ruling dated 20/11/2019, the trial court found that the appellant failed to comply by filing the defence outside the 7 days period, deposited Kshs. 370,907/= in the court revenue account instead of the deposit account, and even then, it was deposited outside the 21 days period. The trial court also held that the ruling of 24/7/2019 was clear that in the event of default, the order setting aside the interlocutory judgment would automatically lapse and execution would issue. The court thus dismissed the application and ordered the amount deposited in court to be released to the respondent herein and vacated the ruling dated 24/7/2019.
5. The appellants were dissatisfied with that ruling and filed the instant appeal complaining that; the trial court erred in dismissing the application despite the evidence on record, the trial erred in vacating stay of execution orders of 24/7/2019, the trial court erred in denying the appellants an opportunity to defend themselves in the primary suit, and that the trial court erred in finding that the respondent was entitled to general damages without granting the appellant a chance to be heard. The appellants thus prayed that the appeal be allowed with costs, the ruling of 20/11/2019 be set aside, the funds deposited in the lower court to stand as security for stay of execution of exparte judgment, the throw away costs be deemed as duly paid, and the suit in the lower court be heard with the participation of the appellants.
6. None of the parties submissions were on record at the time of writing this judgment.
7. I have considered the entire record. The main issue for determination is whether the ruling of 20/11/2019 ought to be set aside.
8. I have considered the entire record. Vide the ruling dated 24/7/2019, the trial court noted that despite properly being served, the appellants deliberately failed to defend the suit and only awoke up from their slumber when the respondent served them with execution proceedings. Nevertheless, the court allowed the application to set aside the interlocutory and final judgment and gave the appellants a chance to defend the suit on various conditions already outlined above. The appellants failed to comply and moved court to reinstate the conditions and the prayer was declined.
9. I take note that the appellants do not deny that though they filed the defence and paid the deposit, they did so outside the strict timelines imposed by court. It is trite that court orders are not made in vain. The orders of 24/7/2019 were very clear. Clause 'f' thereof provided that: -  

“ Failure to comply with any of the orders issued in (b). (c) and (d) above, the orders of setting aside the exparte judgment issued in (a) above by this court shall automatically be vacated and execution to issue.”
10. In blatant ignorance of those orders, the appellants complied outside the timelines. There was no effort to make the respondent or court aware, even by way of letter, that the payments were being worked on albeit late. There was no effort taken to excuse the late compliance. There was no explanation tendered before the trial court or even before this court why the filing of the defence or payment of deposit was done outside the time limit. What could have been easier that filing an already drafted defence within 7 days? The conduct of the appellants demonstrate indolence and bad faith on their end and it is doubtful whether there was ever any intention to defend the suit. Equity aids the vigilant and not the indolent. Having been given an opportunity to comply despite that service was properly effected and the appellants ignored the suit and failed to defend themselves, it was expected that the appellants would have jumped at the opportunity to defend themselves and comply with the court orders.



11. I have carefully read the ruling of 20/11/2019. I agree with the trial court's finding that the appellants were allowed to file the defence out of time and they ought to have strictly complied with the conditions set by court. In any case, the decision whether or not to set aside interlocutory or ex-parte judgment is discretionary and was never as a matter of right. The same was held in Kenya Commercial Bank Ltd vs Nyantange & Another (1990) KLR 443 Bosire J, (as he then was) held that: -

“Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”

12. The trial court properly exercised its jurisdiction in the ruling of 24/7/2019 and set aside the interlocutory judgment with clear conditions in line with Order 10 of the Civil Procedure Rules 2010. The appellants failed to comply with those conditions and the orders setting aside the interlocutory judgment were vacated with good reason and justification. I see no reason to disturb the finding of the trial court. It has been almost five years since the impugned ruling was delivered. It would be prejudicial to direct that the trial to start afresh despite that the respondent has been sitting on judgment for years unable to execute. It is time for the respondent to enjoy the fruits of her judgment.

13. The upshot is that the appeal is found to be unmerited and the same is dismissed with costs to the respondent assessed at Kshs. 35,000/=.

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It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE, 2024.**

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**J.K. NG'ARNG'AR, HSC**

**JUDGE**

**In the presence of:-**

Oriache for the Appellant

Wangeme for the Respondent

Court Assistant- Peter Ong'idi

