



Mwiruri & another v Oyiengo & another (suing as administrators of the Late Noel Benedict Muka Oyiengo) (Civil Appeal E281 of 2022) [2024] KEHC 16755 (KLR) (Civ) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 16755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E281 OF 2022
NIO ADAGI, J
JULY 31, 2024**

BETWEEN

BENSON GITONGA MWIRURI 1ST APPELLANT

TIMOTHY MBARIO IGERIO 2ND APPELLANT

AND

JACKSON JONAH OYIENGO 1ST RESPONDENT

BEATRICE OWADE MUKA 2ND RESPONDENT

**SUING AS ADMINISTRATORS OF THE LATE NOEL BENEDICT MUKA
OYIENGO**

*(Being an Appeal from the Ruling of Hon. H. M. Nyaga (CM) in
Milimani Nairobi CMCC. No. E1098 of 2017 delivered on 5/4/2022)*

RULING

Background:

1. The main suit was brought by way of a Plaintiff dated 15/02/2017 and filed in court. The Respondents sued the Appellants for negligence and sought general damages under the *Law Reform Act* Cap 26 Laws of Kenya and *Fatal Accidents Act* Cap 32 Laws of Kenya, special damages, costs and interests. This was after issuance to them the demand letter and Statutory Notice that had not been acted upon.
2. That upon filing of the suit, summons was extracted, attached to the Plaintiff and other pleadings and served upon the Appellants by one Joseph Romino Adede a duly authorized Process Server of the High Court.



3. After lapse of the statutory period for the Appellants to enter appearance, the request for judgement was made by the Respondent's Advocates on the 22-01-2018 accompanied by an Affidavit of Service sworn by the said process server who deponed that he served the summons of appearance to the Appellant at West Coast Offices where service was accepted and further informed that the suit motor vehicle belonged to their company.
4. It was on the basis of the affidavit of service by the process server that the default judgment was entered against the Appellants herein on 7th May 2021
5. The Appellants filed an application dated 24th January 2024 seeking among other orders to set aside the interlocutory judgment entered by the court on 7th May 2021 and for leave to enter appearance and to file a Statement of defence out of time so as to defend the suit. This application was disallowed by Hon. H.M Nyaga, CM in a ruling rendered on 5th April 2024.
6. Being dissatisfied by the said ruling, the Appellant/Applicants' have filed a Memorandum of Appeal dated 5th May 2022 wherein they have raised 10 grounds of appeal as follows:--
 1. That the Learned Magistrate erred in law and in fact by holding that the Notice of Motion application dated 24th January 2022 brought by the Appellants did not have merit thereby disallowing their prayer for leave to the Appellants/Applicants to set aside the ex parte Judgment and decree dated 7th May 2021 and consequently be allowed to defend the matter on merit.
 2. That the Learned Magistrate erred in law and in fact by neglecting the evidence tendered by the Appellants and holding that they were not entitled to have the ex parte judgment set aside by inferring proper service of summons from a letter referring to the accident report.
 3. That the trial Magistrate erred in law by holding that the insurance representative swearing the affidavit rendered the application incompetent yet the right arises from subrogation and thus exposed the Appellants to the risk of being condemned unheard against the overriding objective of the Civil Procedure Rules;
 4. That the Learned Trial Magistrate erred in law by failing to appreciate that the draft defence raised a triable issue and that pleadings could be amended and the draft defence was open to such amendment. By disallowing the Appellants' application to set aside the ex parte judgment and file their defence, the Learned Trial Magistrate also denied them a chance to later amend their defence to reflect the possibility of a finding of full liability against the Plaintiff.
 5. That the Trial Magistrate erred in fact and law by not considering that the court had discretion to exercise its inherent jurisdiction and determine the application in the best interest of justice and ought to have allowed the Appellants /Applicants to be heard on merit
 6. That the Learned Magistrate erred in law and fact and totally misdirected himself in finding that the application was not merited without giving any cogent reasons for the same.
 7. That the learned Magistrate misdirected himself in the issues that were for determination before him and hence made a wrong determination in the circumstances.
 8. That the Learned Trial Magistrate erred in law by making such 30orders as they are unprocedural in law and will gravely prejudice the Appellants;



9. That the Learned Trial Magistrate erred in fact by failing to scrutinize/evaluate the Appellant's Pleadings and submissions tendered in support to their application and to correctly relate them to the case law and thereby failed to arrive at a fair ruling;
 10. That the Learned Magistrate erred in law in failing to uphold the doctrine of precedent.
7. The Appellants prays for Orders that:
- (i) That the Honourable Court allows this appeal;
 - (ii) That the ruling and orders delivered on 05/04/2022 be set aside and be substituted with an order allowing the Appellant's application dated 24/01/2022;
 - (iii) That the matter be placed for retrial before a different magistrate other than Honourable H.M. Nyaga Chief Magistrate.
 - (iv) Costs of the Appeal be awarded to the Appellants.
8. Parties canvassed the appeal by way of written submissions. The Court has had the opportunity to read through the detailed submissions of the Parties in support of their respective positions as well as the attached cited authorities.

Issues for determination:

9. Having considered the trial court record, the grounds of appeal and submissions for and against this appeal and the cited cases, this court is of the view that the only issue for determination is whether the learned trial Magistrate erred in disallowing the Appellant's application dated 24/01/2022 and that this appeal should be allowed.

Analysis and Determination

10. As noted earlier, the ruling delivered on 05/04/2022 by the Learned Magistrate was in respect of the Application dated 24/01/2022. The application sought the setting aside of the *ex parte* judgement entered in default of appearance together with the consequential orders thereto and for leave to file a Memorandum of Appearance and a Statement of defence.
11. It is the Appellants' position that they learnt of the existence of the suit on 18/1/2022 when the Respondent sent Auctioneers to proclaim the Appellants' goods. That neither the Appellants nor their insurers were served with Summons to enter appearance and thus the *ex parte* judgment dated 07/05/2021 condemns them unheard. That the Appellants' insurers missed an opportunity to retain an advocate to defend the Appellants in adherence to the policy agreement between them and the Appellants.
12. They further submit that they have a viable defence which raises triable issues for determination by the court and are ready and willing to participate in the matter and have it determined justly and meritoriously. The Appellants state that there was no unreasonable, inordinate or inexcusable delay in the bringing of the application.
13. They pray the appeal be allowed.
14. The Respondents, on the other hand, submits that default judgment entered by the court is regular as the Appellants failed to enter appearance within the stipulated timelines. That in the affidavit of service of Joseph Romino Adede, the process server narrated how he traced the Appellants by going to the



Police Station where the accident was reported wherein, he got information about the whereabouts of the Appellants as the owners of the motor vehicle that had caused the accident.

15. That having established the location of the Appellants, the process server then travelled to Mombasa where he visited West Coast Offices and effected service of summons to the Appellants and thereafter swore an Affidavit of service to that effect which upon perusal clearly shows that indeed the appellant was served with the pleadings and summons to enter appearance.
16. The Respondent points out that it is worth to note that the allegations that there was no service of summons is being advanced by the insurance company and not the Appellants themselves. Legal officer of the Insurance company who has sworn the supporting affidavit to the application cannot speak on behalf of their insured and deny service without an affidavit sworn personally by their insured.
17. The Respondent also contend that the defence does not raise triable issues that may warrant this court to interfere with the Ruling and discretion of the trial court. That the Appellants have denied everything including ownership of the motor vehicle and the occurrence of the accident which clearly shows that their statement of defence is a mere denial of everything that is stated in the Plaintiff. The documents produced and served upon Appellants indicate that the motor Vehicle involved in the accident belonged to the 1st Appellant as shown by the NTSA copy of records and the police abstract.
18. What is clear from the appeal herein, is that, it is in regard to invoking the trial court's exercise of its discretionary powers. Order 10 Rule 11 of the Civil Procedure Rules, empowers the Court to set aside or vary a default judgement entered under Order 10 (in default of Appearance or Defence) and any consequential decree or Order upon such terms as are just.

It 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.”

19. This being a first appeal, this court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either way. That was the pronouncement of the court in the case of Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR. The court held that a first appellate court has a duty to re-evaluate, re-assess and re-analyze the record and make its own conclusions.
20. The circumstances in which an appellate court can upset the exercise of discretion of a trial court were laid down by the Court of Appeal in Mbogo and Another v Shah [1968] EA and further in the case of Wachira Karani v Bildad Wachira (2016) eKLR, wherein the court had the following to say:

Mulla, the Code of Civil Procedure (2) has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgment/decree. Essentially, setting aside an ex parte judgment is a matter of the discretion of the court. In the case of Esther Wamaitha Njihia & two others v Safaricom Ltd (3) the court citing relevant cases on the issue held inter alia: -

"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 Service Ltd (4) 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; It also goes without saying that the reason for failure to attend should be considered.”

21. In *Francis Wambugu v Babu Owino & Others*, SC Petition No. 15 of 2018, on the issue of an appellate court entertaining an appeal founded on exercise of discretion of the trial court, it was stated:

“(76) In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court’s decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court’s judicial independence and exercise of discretion.”

22. It appears from the record that the main ground in support of the application before the trial court was the fact that the Appellants were never served with the summons to enter appearance.

23. In *Gulf Fabricators v County Government of Siaya* [2020] eKLR, Aburili J. while appreciating the importance of service of summons to enter appearance and which decision I find persuasive held that; -

“...It must be appreciated that service of summons to enter appearance and plaint upon the Defendant in a suit is crucial. In addition, before the court can be asked to proceed and grant leave to the plaintiff to apply for interlocutory judgment and before such interlocutory judgment leading to formal proof hearing in unliquidated claims is entered and or issued, the court must be satisfied that summons to enter appearance and plaint were properly served upon the defendant, as stipulated in the law...”

24. The trial court in its ruling, found that there was proper service and that the Appellants herein failed to enter appearance. As I have noted, the setting aside of interlocutory judgment is a discretionary power and which this court cannot interfere with, unless on grounds well set by law. The issue being service of summons to enter appearance, I have perused the affidavit of service of the said summons and I note that the deponent/ process server, one Joseph Romino Adede explained how he served the summons upon the Appellants at their offices at West Coast Offices in Mombasa where service was accepted.

25. The affidavit in support of the application sworn by one Linda Njenga on 24/01/2021 who depones to be the legal officer of the Appellants Insurer does not deny that the Appellants offices are located where the process server indicated to have served. I agree with the learned trial magistrate that denial of service cannot be made by the insurance company which is not a party to the suit and hence could not be served directly. In addition, the Appellants have not deponed any affidavit either admitting or denying service of summons to enter appearance upon them.

26. I wish to add that Linda Njenga has no locus standi to depone to controversial issues of fact touching on service of Summons to enter appearance. The purpose of an affidavit is to depone to facts which the deponent know of his knowledge, information and belief.

27. In the instant appeal, a perusal of the affidavit of service clearly shows that indeed the appellant was served with summons to enter appearance and this court finds that service was properly effected.



28. On whether the defence raises triable issues the court has perused the draft statement of defence that was annexed to the application. The same consists of mere denials save for paragraph 6 that has attributed negligence to the deceased, the particulars whereof are set out therein. It is my considered view that the issue of who between the driver of motor vehicle KBS 960V/ZE 0582 and the deceased was to blame, the police abstract indicate that the 2nd Appellant Timothy Mbario Igerio was charged for causing death by dangerous driving in traffic case No. 98 of 2015 although the outcome of that case is not on the record. By so finding, this court is alive to the fact that an acquittal on a criminal charge is not per se basis for a civil liability. However, this court finds that the deceased cannot be expected to rebut the allegations of contributory negligence for the accident.
29. In the premises aforesaid, it is my considered view that the appeal herein has no merits and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF JULY 2024.

NOEL I. ADAGI

JUDGE

