



Kariuki & another v John Gitari Mutungu t/a Mutirithia Enterprises & 2 others (Civil Appeal 58 of 2023) [2024] KEHC 11330 (KLR) (Civ) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CIVIL
CIVIL APPEAL 58 OF 2023
CM KARIUKI, J
SEPTEMBER 26, 2024**

BETWEEN

**JULIUS WACUMA KARIUKI 1ST APPELLANT
WORRIS KIARIE NJOROGE 2ND APPELLANT**

AND

**JOHN GITARI MUTUNGU T/A MUTIRITHIA ENTERPRISES 1ST
RESPONDENT
SAMUEL WAWERU 2ND RESPONDENT
STEPHEN NGANGA 3RD RESPONDENT**

JUDGMENT

1. The Appellants were sued in Engineer SPMCC No 3 of 2020 by the Respondents jointly seeking special damages of Kshs. 348,500/-, interests and costs of the suit. In the said suit, the Respondents alleged that on 24th January 2017, the Appellants' motor vehicle Reg No KBQ011Z rammed into their business, destroying a commercial refrigerator, wooden shelves, and various assorted stock in trade. They further stated that as a result of the said accident, their businesses were significantly crippled, and they lost income.
2. The matter proceeded ex parte, and judgment was issued in favour of the Respondents. The Appellant later discovered that ex parte judgment had been entered against him when he was served with a proclamation from Tango Auctioneers, and there also existed an affidavit of service wherein a process server purported to have served them at Nakuru Main Stage.
3. The Appellant filed an application dated 7th September 2022 seeking to set aside the judgment because they were never served. In the said application, leave was sought to cross-examine the process server



- who was called and cross-examined. The court further directed parties to file and serve their written submissions, which the Appellants allegedly prepared and sent to the court for filing and served.
4. However, due to technicalities with the e-filing and court registry, the same information never reached the court file. The court further declined to mention the matter to confirm the filing of submissions before issuing a ruling date, and due to the said technicality, the Appellants' submissions were never considered.
 5. The court delivered a ruling on 2nd November 2022, dismissing the application to set aside the judgment with costs, which ruling is subject to this appeal. The Appellants appealed against the ruling based on the grounds of the appeal outlined in their memorandum dated 7th November 2022.
 6. Appellants Submissions
 7. From the grounds of appeal, the Appellants raised the following issues;-Whether the suit engineer SPMCC No 3 of 2020 had abated pursuant to Order 5 Rule (1) 6 of the Civil Procedure Rules.Whether the judgment entered on 26th January 2022 ought to be set aside.
 8. On the first issue, the Appellants asserted that upon perusal of the summons to enter an appearance on pages 62,63,64,65,66,67,68 and 69 of the record of appeal, and it is clear that the summons therein was issued on 21st January 2020, which was the same day they were presented in court for signing and the 30 days started to run.
 9. However, on pages 63, 65, 67, and 69, it is indicated as "received on 13/03/2020. The summons were thus collected for service on 13th March 2020 -53 days after they were issued. At this stage, the suit had already abated by operation of the law; thus, the judgment and proceedings were a nullity.
 10. Reliance was placed on Lemita Ole Lemein vs. Attorney General & 2 Others [2020] eKLR, Kenya Agricultural And Livestock Research Organization v Leah Okolo & Another [2022] eKLR, Order 5 Rule (1)6 of the Civil Procedure Rules, Patrick Daudi Kimuli V Katelemebo Athiani Farmers and Ranching Co. Ltd & 4 Others [2014] eKLR, Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169
 11. On the second issue, It was contended that the Appellant's failure to participate in the suit was due to non-service of the summons to enter an appearance, and they detailed several issues that were noted when the process server was summoned for cross-examination.
 12. It was reiterated that the Appellants were not served with any court documents at Nakuru Main Stage and that the same was closed on 25th March 2020 due to Covid-19 containment measures as a result of the holding of the Court in Nakuru Constitutional Petition *No 8 of 2020* consolidated with Judicial Review Application *No 8 of 2020* Uchumi 44 Travellers Sacco & 7 Others v County Government of Nakuru & 2 Others.
 13. From the decision, it is pretty clear that the process server's testimony was a lie and further highlighted the contradictions in service.Further reliance was placed on Patel vs. E.A. Cargo Handling Services Ltd (1974) E.A. 75, Shah vs Mbogo (1967) EA 166
 14. It was argued that the Respondent's counsel was given an opportunity to fill in the gaps in the process server's cross-examination in what was termed as a re-examination, and the same was irregular and unprocedural as it is settled law that only the court and a party disputing service can examine a servicing officer as was held in Shadrack Arap Baiywo vs. Bodi Bach [1987]
 15. The Appellants submitted that the affidavit of service never indicated the time of service, violating the mandatory provisions of Order 5 Rule 15 of the Civil Procedure Rules.



16. It was argued that the draft defense was compared to the judgment and not the plaint, and the same was prejudicial and amounted to the Appellant being condemned unheard. That the judgment in question was entered based on a one-sided story and uncontroverted evidence. It was asserted that the draft defense raises triable issues that can only be settled and determined after a proper hearing has been conducted, and each party is allowed to adduce evidence to tilt the scales of probability in their favor.
17. The Appellants stated that the judgment was entered against a dead person who was allegedly made aware of the suit five months after his death. However, the court proceeded with the hearing, satisfied that all parties had been served as stated in the false affidavit of service. That the said judgment was irregular as was held in the case of Turibu Mberia, Mutuma Mberia & Kaviria M'mbirithia (Legal Representative of M'mbirithia M'thiringa) v Margaret Kiinge [2018] eKLR
18. In conclusion, it was averred that the Appellant's failure to enter appearance and defend the case was due to non-service of the summons to enter appearance and that the draft defense raised triable issues and the judgment was irregular as the suit had abated by operation of the law. They urged the court to allow the appeal and make orders setting aside the trial court's judgment delivered on 26th January 2022 and prayed for the costs of the appeal.

Respondent's Submissions;

19. At grounds (1), (2), and (3) of the memorandum of appeal, the trial Magistrate is faulted by the Appellants for arriving at the finding in her ruling that the Appellants had been correctly served with the summons to enter appearance and for relying on the oral testimony and the affidavit evidence of the Court Process server.
20. As in all first appeals, the jurisdiction of the appellate court is to reappraise all the evidence and matters of law, re-examine the same in fresh and exhaustive scrutiny, and arrive at its independent conclusion. This duty is captured by Section 78 of the *Civil Procedure Act*, which espouses the role of the first appellate court, which is to "... re-evaluate, reassess and reanalyze the extracts of the record and draw its conclusions". This position has been reiterated and buttressed in the abundance of case law, including by the Court of Appeal in the case of Peter M Kariuki – versus – Attorney General [2014] eKLR.
21. As gleaned from the lower court typed proceedings, which are to be found on pages 149, 150, and 151 of the record of appeal, the court process server was cross-examined on application by the appellants, and during his cross-examination, he was very emphatic. He gave a detailed account, as averred in his affidavit of service, on how he arrived in Nakuru on 22/12/2020 at about 11.30 a.m. and met with the 1st Respondent (herein), who had pointed out the 2nd Appellant (herein), who was the driver to the accident motor vehicle at the old Nakuru- Ndunduri Ol-Kalou bus stage.
22. According to the evidence of the court process server, the Appellants herein were well known to the 1st Respondent, having interacted during the accident at Kipipiri police station, where they even had a meeting to try and resolve the issue. The 2nd Appellant had subsequently pointed out the office of the 1st Appellant, which was situated just across the road in an unnamed building generally known as the Gikomba building. The 1st Appellant was consequently served with the court summons and accepted service on behalf of his co-defendant in the primary suit.
23. The Court Process server was emphatic in his oral testimony and was not shaken during cross-examination. Consequently, we respectfully submit that the demeanor of the court process server, as observed by the trial Magistrate, was consistent with the affidavit evidence contained in the affidavit of service and, hence, the ruling of the trial Magistrate declining the Appellants' application.



24. At grounds (4) and (5) of the memorandum of appeal, the Appellant's main complaint is hinged on the lower court finding in the ruling that the Appellant's draft defense disclosed NO TRIABLE issue as to justify the re-opening of the matter for litigation by the parties de novo.
25. In particular, the trial magistrate is faulted for failing to consider the alleged weight of the Appellants' draft defense, which, according to the respondents, had merely denied the liability of the accident, but according to the Appellants, the trial magistrate had denied them a chance to be heard and defend the case no merits.
26. Undoubtedly, it is now trite and, inarguably, the principles of setting aside a regular judgment have now been settled by this honorable court, which is inter-alia:
 - a. Whether the Applicant's draft defense has raised triable issues and:
 - b. Whether the Applicant has demonstrated a plausible explanation as to the default in entering an appearance and filing a defense.
27. From the particulars of the accident subject of the primary suit, it is evident that the accident motor vehicle had lost control and rammed into the respondents' shop premises, causing extensive damage for which the respondents were seeking compensation from the Appellants. Therefore, since the said accident was self-involving, arising from the Appellants' motor vehicle losing control and resulting in extensive damage to the business premises of the respondents, there would be no gain saying that a mere denial of liability in the Appellants' draft defense raised NO TRIABLE issue as the respondents' (stationary) business premises cannot be apportioned liability for the accident.
28. According to the 1st Appellant, is the Co-defendant, namely Michael Gitahi Wambugu, with whom they were jointly registered as owners of the accident motor vehicle and on whose behalf the 1st Appellant had accepted service of the summons to enter appearance on 22/12/2020 had allegedly died on 18/7/2020.
29. The Appellants, therefore, hold an erroneous position at ground (6) of the memorandum of appeal that the entire primary suit had abated arising from the death of their Co-defendant and, consequently, faults the trial magistrate for failing to set aside the judgment on record on that round.
30. The respondents rely on the explicit provision of Order 24 Rule 1 of the Civil Procedure Rules, which is quoted here below:

Order 24
Death and Bankruptcy of Parties
[Order 24, rule 1] No abatement by pay's death if right survives.

 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
31. Accordingly, the death of the Appellants' Co-defendant in the primary suit did not cause the primary suit to abate because the cause of action had survived and continued as against the surviving defendants (the Appellants herein) pursuant to the explicit provision of Order 24 Rule 1 of the Civil Procedure Rules.
32. It, therefore, follows that the trial magistrate had correctly interpreted the provision of Order 24 Rule 1 of the Civil Procedure Rules and cannot be faulted as sought by the Appellants.



33. On the grounds (7) of the memorandum of appeal, the trial Magistrate is accused by the Appellants of allegedly failing to consider the grounds raised in the Appellants' supporting affidavit dated 7th September 2022. Nothing could be further from the truth.
34. In all fairness to the trial magistrate, the Appellants' failure to file their submissions within the timelines set by the court and within which period the respondents had complied by filing their written submissions cannot be grounds to fault the ruling of the trial Magistrate on appeal.
35. In fact, on page 158 of the record of appeal, the trial magistrate noted the non-compliance on the part of the Appellants.
36. Analysis and Determination
37. I have considered the foregoing, the submissions filed on behalf of the Appellants herein, and the authorities relied upon in support thereof. It is my view that the main issue for determination is whether the trial magistrate erred in law and fact in dismissing the Appellant's application dated 7th September 2022.
38. Courts have the discretionary power to set aside *ex parte* judgment, with the main aim being that justice should prevail. The discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence, and excusable mistake or error. (See *Shah vs. Mbogo & Another* [1967] EA 116 & *Patel -v- E.A. Handling Services Ltd* (1974) E.Z. 75) The courts are empowered by Order 10 Rule 11 of the Civil Procedure Rules to set aside an *ex parte* judgment for default of appearance and defense.
39. Further, in *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR, the Court of Appeal laid down the principles applicable under the rule mentioned above as follows: -
- Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the broad discretion given it by the rules. *Patel v E.A. Cargo Handling Services Ltd* [1974] E.A. 75 at 76 C and E
- Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. However, it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA
- Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge, in exercising his discretion, has misdirected himself in some matter and, as a result, has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93."
40. The Appellants argued that their failure to enter appearance and defend the case was due to non-service of the summons to enter an appearance, that the draft defense raised triable issues, and that the judgment was irregular as the suit had abated by operation of the law. They urged the court to allow the appeal and make orders setting aside the trial court's judgment delivered on 26th January 2022 and prayed for the costs of the appeal.



41. In the instant matter, the Appellants contended that the Appellant's failure to participate in the suit was due to non-service of the summons to enter appearance, and they detailed several issues that were noted when the process server was summoned for cross-examination. It was reiterated that the Appellants were not served with any court documents at Nakuru Main Stage and that the same was closed on 25th March 2020
42. However, having thoroughly perused the record on the issue of service of summons on the Appellants, I agree with the trial magistrate that service was effected correctly on the Appellants. From the trial record, the process server -gave a comprehensive account of how he went to Nakuru and effectively served the Appellants. The 1st Appellant accepted service on behalf of the second defendant despite knowing that he was dead, information which he did not relay to the process server.
43. Instructively, as a general rule, the death of a plaintiff does not cause the suit to abate if the cause of action survives. Order 24 Rule 3(1)(2) and Order 24 Rule 7 (2) of the Civil Procedure Rules, provide as follows;

3.

- (1) Where one of two or more plaintiffs dies, and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
- (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

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- (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit that has abated or to set aside an order of dismissal; and, if it is proved that any sufficient cause prevented him from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

44. Accordingly, I concur with the trial magistrate that if one of the parties was deceased, then his estate had locus in the law of challenging the judgment, and if the suit had indeed abated, then it would only affect him, a finding which the trial magistrate went on to make by holding that:-

“I have looked at the death certificate, and it shows that the deceased died on 18th July 2020. Moreover, since the plaintiff did not make an application for substitution, the suit against the second defendant abated by 18th July 2021, and it does not affect the proceedings herein.”



45. Having settled on the same, I am afraid I have to disagree with the Appellant's argument that the judgment was irregular. In the case of *Tree Shade Motor Limited vs. DT Dobie Co Ltd* CA 38/98, the court held that even when ex-parte judgment was lawfully entered, the court should look at the draft defense to see if it contains a valid or reasonable defense. In my considered view, the trial magistrate dispensed of this obligation and concluded that the Appellants raised no reasonable defense but mere denials, a finding that I agree with.

46. In *Times U Savings and Credit Co-Operative Society Limited v Njuki & Another* [2022] KEHC 3012 (KLR), the court stated as follows:-

“It is therefore clear from the provisions above that the court has the power to set aside the interlocutory judgment and allow the Appellant herein to file a suitable defense. However, such leave is not to be granted as a matter of course. The court must satisfy itself that there is a good explanation that has been offered to set aside such judgment and upon such terms that it would deem fit in the circumstances for the reason that such action would definitely be taking a plaintiff back in time, causing a delay in the conclusion of her case especially where the matter had proceeded to formal proof and a judgment given.”

47. Accordingly, and guided by the above-sited authorities and the analysis of the matter before the magistrate's court, I am not persuaded that the Appellants have made out for the granting of the discretionary orders to set aside the ex parte judgment dated 26th January 2022 and therefore make the following orders;

- i. The appeal is dismissed in its entirety with costs.

JUDGMENT, DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 26TH DAY OF SEPTEMBER 2024

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CHARLES KARIUKI

JUDGE

