



REPUBLIC OF KENYA



KENYA LAW
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**Owade v Meraba (Civil Appeal E178 of 2023)
[2024] KEHC 11781 (KLR) (Civ) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E178 OF 2023

AM MUTETI, J

SEPTEMBER 25, 2024

BETWEEN

PATRICK LUMUMBA OWADE APPELLANT

AND

ROBERT MOKUA MERABA RESPONDENT

*(Being an Appeal against the ruling of the learned
SRM Judith Omolo delivered on the 8th March 2023)*

JUDGMENT

Introduction

1. The appellant seeks to overturn the learned Honourable Magistrate's ruling delivered on the March 8, 2023 in which the Magistrate declined to set aside a default judgement.
2. The appellant in his memorandum of appeal dated the 10th March 2023 raises 10 grounds of appeal to with: -
 - a. The learned magistrate erred in law and fact by failing to appreciate the constitutional right of appellant to a fair hearing in this matter.
 - b. The learned magistrate erred in law and fact by summarily dismissing appellants draft deface annexed to the application on the erroneous basis that the accident had been admitted by the appellant.
 - c. The learned magistrate erred in fact and in law by failing to appreciate that the service was allegedly effected on the appellant at a time he was busy with his political campaigns and that he missed out on the message that was sent on his phone.



- d. The learned magistrate erred in law and in fact in finding that the defence had no probability of success and yet the appellant had clearly explained that the Respondent largely contributed to the accident and was the author of his own misfortunes.
- e. The learned trial magistrate erred in law and fact by summarily dismissing the appellants draft defence at this stage.
- f. The learned magistrate erred in law and fact by failing to appreciate the cardinal principles of the law relating to setting aside an ex-parte judgement in that to deny a party his day in court should not be a decision where thrown away costs a compensatory.
- g. The learned trial magistrate erred in law and in fact in failing to look at the entire replying affidavit, submissions and authorities quoted by the applicant.
- h. The learned trial magistrate erred in law and fact by failing to appreciate that the appellant was a layperson who needed guidance on the Court on matters of service.
 - i. The learned trial Magistrate erred in by law and fact in find that the draft defence was not valid without hearing the case inter-partes.
- j. The learned magistrate erred in law and fact by failing to strike out the replying affidavit sworn by Erick Ouma Agumba advocate which deponed on contested matters on.

Analysis

3. The appellant submits that the learned Honourable Magistrate unfairly denied him the right to be heard.
4. The memorandum of appeal brings out the complaint by the appellant as being that the learned Honourable Magistrate in failing to allow the application disregarded the fact that the Appellant was a lay person who deserved guidance on Court matters and procedures generally.
5. It is important to note that the Appellant does not deny service of summons. In his third ground of Appeal he states: -

“The learned Honourable Magistrate erred in fact and in law by failing to appreciate that the service was allegedly effected on the Appellant at the time he was busy with his political campaigns and that he missed out the message that was sent to his phone.”
6. The ground is clear that a message was sent to him through his phone but he missed it due to political campaigns.
7. The essence of one having a mobile phone is that he moves with it whenever he goes and it is a natural expectation that he who owns a mobile phone, uses it and has unlimited access to it anywhere anytime. That is a matter of common notoriety that this Court takes judicial notice of under Section 60 of the [Evidence Act](#).
8. If a person elects not to open his phone and check out his messages or looks at the messages and disregards them that is entirely his problem.
9. The service of Court process by way of WhatsApp messages is a recognized mode of service. The appellant does not dispute that the number used was his and therefore the messaged reached him.



10. The Court is thus left to consider what then are the guiding principles in setting aside default judgement, and if at all the appellant has satisfied the said principles.
11. In determining this Appeal, the Court is guided by decision of the Court in David Koome Matugi VS APA Insurance Ltd (2021) eKLR where the Court held: -.....

Under Order 10 rule 11 of the Civil Procedure Rules, the court has unfettered discretion to set aside judgment on such terms as it deems fit and just (see Shah v Mbogo and Another [1967] EA 116). Even where the party applying had been served- like is the case here- the court would still have discretion to set aside ex parte orders in the interest of justice. Is this such case for the exercise the unfettered discretion to set aside ex parte orders herein?

12. The applicant must be able to demonstrate that the failure to enter appearance or file a defence was an excusable error or mistake in order to succeed in an application for setting aside.
13. Secondly, the applicant must also be able to demonstrate that the defence raises triable issues.
14. In this Appeal the appellant has disclosed that he was busy with political campaigns and that is why he was not able to file his defence in time. The admission in his memorandum of appeal cannot be ignored.
15. The question that arises is, are political campaigns to be regarded as a reasonable excuse for one not to comply with set timelines under the civil procedure? It cannot be so. In fact, those that seek leadership positions must understand better the essence of statutorily set timelines.
16. The excuse by the Appellant cannot meet the test of excusable mistake or error.
17. The affidavit in support of the application for setting aside by the appellant at paragraph 16 indicates that the appellant received a report on his phone of the judgement.
18. The appellant maintains also that his defence raises triable issues thus he should be heard.
19. I have closely perused the affidavit in support of the application for setting aside and in it there is denial of service upon him of both the plaint and summons.
20. The memorandum of Appeal however contradicts that position by trying to advance the reason that he was busy with political campaigns. Clearly the appellant was not candid with the lower Court and this Court as well. He who seeks equity must do equity. The appellant was not candid with the Court below and before this Court he comes with dirty hands.
21. It would have served him better had he chosen a straight path in approaching the Court. It should be pointed out that for this Court to interfere with exercise of discretion by a Magistrate, this Court should be satisfied that the exercise of discretion was improper.
22. In Mbogo Vs Shah (1976) EA Harris, J held that in setting aside ex-parte order the Court is to ensure that it is only done: -

“To avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”

23. The appellant in this matter has not been forthright in presenting his case. Setting aside being an equitable remedy, the appellant has failed to persuade this Court that he should be allowed to drink from the pure waters of equity.



24. To interfere with the exercise of discretion is not a light matter
25. The appellant would have to persuade this Court that there was a material misdirection by the trial Court or that the Court misapplied some principle of law. The appellant has not been successful in his attempt to do so.
26. Whereas the defence may appear to have some triable issues raised in it there is no cogent reason given as to why it was not filed within time. The appellant has not demonstrated an excusable mistake or error to draw the sympathy of this Court.

Conclusion

27. In the end I find that the appellant has failed to persuade this Court to interfere with the exercise of discretion by the trial Magistrate.
28. The appeal has not established any excusable mistake or error on his part in failing to file a defence in time. He has been less than candid with this Court.
29. The appeal is hereby dismissed with costs.
30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.

HON. A.M MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Mundia Mwangi & Co. Adv. Absent

Ms Wambui for the Respondent

Appellant

