



Car House Limited v Wambui (Suing as the administrator of the Estate of the Late Peter Kangethe Chege) & 2 others (Civil Appeal E276 of 2023) [2024] KEHC 13659 (KLR) (Civ) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13659 (KLR)

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

CIVIL

CIVIL APPEAL E276 OF 2023

RC RUTTO, J

OCTOBER 31, 2024

BETWEEN

CAR HOUSE LIMITED APPELLANT

AND

MARY KARANJA WAMBUI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PETER KANGETHE CHEGE) 1ST RESPONDENT

SIMON MUTURI GALUYA 2ND RESPONDENT

HAMPREY NGANGA 3RD RESPONDENT

(Being an appeal from the Ruling and or order of Hon. L. Nyabando (RM) issued on 31st March 2023 in Kikuyu Civil Case No. 126 of 2019)

JUDGMENT

Background

1. The appeal arises from the ruling of the trial court in Kikuyu Civil Case No. 126 of 2019 wherein the trial court declined to set aside the judgment in default entered and the decree issued on the 4th November 2022. The court also declined to grant leave to the Appellant to file its defence out of time.
2. The Appellant now seeks that this court allows the appeal and set aside, the ruling and orders dismissing the Application dated 31st March 2023; as well as the ex parte judgment entered and decree issued on 4th November 2022, Also, they prayed that the suit herein be set down for inter parties hearing and determination on merit.



3. The facts of the case are that the 1st Respondent sued as the administrator of the estate of the Late Peter Kangethe Chege seeking general damages, special damages of Kshs 143,602/-, costs and interest at court rates for fatal injuries sustained by the deceased following a road traffic accident along the Gitaru-Kanyariri Muhuri Centre involving Motor Vehicle Registration Number KCG 228P registered to the Appellant, owned by the 2nd Respondent, and was being driven by the 3rd Respondent.
4. Subsequently vide a request for judgment dated 30th June 2020, the 1st Respondent sought for judgment against the Appellant, together with the 2nd and 3rd Respondents for failing to enter appearance and filing a defence within the required statutory period. On 23rd November 2021, the trial court delivered judgment against the Defendants as follows liability 100%; Loss of Dependency 396,841/- Loss of expectation of life Kshs 100,000/-, Pain & Suffering Kshs 30,000/- Special Damages Kshs. 143,602/- costs and interest.
5. Later, on 2nd February 2023, the Appellant, through a Notice of Motion Application of even date, sought, inter alia, orders to set aside the default judgment and decree issued on 4th November 2022, and a stay of the decree. The Appellant also sought leave to defend the suit.
6. The trial court heard the application and in its ruling delivered on 31st March 2023, found no merit and dismissed it in its entirety.

The Appeal

7. Being aggrieved by that ruling, the appellant filed a memorandum of appeal dated 6th April, 2023 setting out ten (10) grounds of appeal as follows: -
 - i. That the learned trial magistrate erred in law and in fact in finding that proper service was effected upon the Appellant as the 1st Respondent did not prove before the Honourable court how service was conducted.
 - ii. That the learned trial magistrate erred in law and in fact by failing to grant the Appellant an opportunity to cross examine the process server where by the return of service raised a lot of issues as to whom was served as the Appellant being a company the summons should have been stamped to prove that it was received by one of the company's staff which such evidence was over looked by the Honourable Magistrate.
 - iii. That the Learned Magistrate erred in law and in fact ignoring the issues raised in the draft defence to the effect that the Appellant was not in possession of the Motor Vehicle as it had already sold the said Motor Vehicle KDB 345J.
 - iv. That the Learned Magistrate erred in law and facts by failing to grant the Appellant the opportunity to be heard and address the claim that has been brought by the 1st Respondent/ Plaintiff.
 - v. That the Learned Magistrate erred in law and fact by ignoring the evidence tendered by the Appellant proving that the Appellant had already sold the Motor Vehicle KDB 345J to one Felix Olal Maina.
 - vi. That the Learned Magistrate erred in law and fact by locking out the evidence filed by the Appellant to show that they had sold the Motor Vehicle through an authorized agent which in fact raised one of the triable issues.



- vii. That the Learned Magistrate erred in law and in fact by not granting the Appellant leave to file their statement of Defence which had triable issues which the Honourable court identified with fault as not triable issues.
 - viii. That the Learned Magistrate erred in law and in fact by failing to allow the Appellant an opportunity to be heard on issues of liability and service which needed cross examination to arrive at a reasonable decision.
 - ix. That the Learned Magistrate erred in law and in fact in rushing the hearing leading to miscarriage of justice.
8. The above grounds of appeal have been replicated verbatim. This court notes that grounds 3 and 5 of the Appeal makes reference to motor vehicle Registration number KDB 345 J sold to Felix Olal Maina which is not the subject of this matter. Clearly, this is an error on the face of the Appeal since it is clear the Appellant is appealing the decision of the trial court which decision the subject matter was motor vehicle registration KCG 228 P sold to the 2nd Respondent Simon Muturi Galuya.
 9. It is worth noting that in its submissions, the Appellant makes reference to the correct registration number of the motor vehicle. It is also noted that the 1st Respondent has not raised issue with the error on the description of motor vehicle, thus it is apparent that no prejudice has been occasioned to them. Consequently, invoking the provisions of section 3A of the *Civil Procedure Act* I will exercise discretion and proceed to determine the matter on its merit and with the acknowledgement that the issue involves motor vehicle registration number KCG 228P. Counsel for the Appellant is however cautioned on the need to be vigilant and meticulous in their drafting.
 10. The appeal was canvassed by way of written submissions. The Appellant's submissions were dated 27th May, 2024 while the 1st Respondent filed submissions dated 30th May, 2024. The 2nd and 3rd Respondents did not file any submissions.

Appellant's submissions

11. The Appellant reiterated the facts of the case, and submitted on three issues as follows: whether the interlocutory judgment entered on 4th November 2022 should be set aside, whether the Appellant should be granted leave to file its defence out of time, and whether the Appellant is liable for the accident.
12. On the facts of the case the Appellant submitted that on 14th March 2016, the 2nd Respondent approached it with the intention of purchasing Motor Vehicle Registration Number KCG 228P. On the same day, the vehicle was sold to the 2nd Respondent on a hire purchase basis through the Appellant's authorized agent. Consequently, the Appellant and the 2nd Respondent entered into both a hire purchase agreement and a sale agreement. The terms of the agreement stipulated that the selling price would be Kshs 1,050,000, with a deposit of Kshs 400,000 paid immediately. Additionally, it was agreed that any liability or claim arising during the term of the agreement in relation to the motor vehicle would render the hirer, the 2nd Respondent, 100% liable, accountable, and responsible to the owners.
13. The Appellant submitted that at the time of the accident on 22nd May 2016, the 2nd Respondent was still making monthly installment payments and had not yet cleared the balance to enable the Appellant to transfer ownership of the vehicle. The vehicle was in the actual and beneficial possession of the 2nd Respondent, and under the hire purchase agreement, the 2nd Respondent was liable for any claim arising from its use. The Appellant submitted that it retained the logbook of the motor vehicle as security to ensure the full purchase price was paid for Motor Vehicle Registration Number KCG 228P.



14. On the first issue of whether the interlocutory judgment entered against the Appellant should be set aside, the Appellant relied on Order 10 Rule 11 of the Civil Procedure Rules to invoke the court's discretionary power to set aside or vary such judgment and any consequential decree or order upon such terms as are just.
15. In addressing the principles for setting aside an interlocutory judgment, the Appellant cited the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75. The Appellant argued that its Draft Statement of Defence raised triable issues and that it should have been allowed to defend the suit. The triable issue, according to the Appellant, was that it had sold the subject motor vehicle to the 2nd Respondent, who was in possession of it at the time of the accident.
16. Additionally, the Appellant claimed that the summons to enter appearance was not served upon it and that it was denied the opportunity to cross-examine the process server. In seeking the court's intervention to set aside the judgment on the ground of improper service of summons to enter an appearance, the Appellant relied on the cases of *Winnie Wambui Kibinge & 2 Others v Match Electricals Limited* [2012] eKLR and *Douglas Wambua Mutula v Kenya Ports Authority* [2020] eKLR.
17. The Appellant submitted that they will suffer irreparable harm if the judgment is not set aside, as their lawful property will be sold in execution of the judgment. Furthermore, that he was unaware of the case and only became informed when their property was proclaimed by auctioneers with the intention of selling it. He cited the case of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR and *Mbaki & Others v Macharia & Another* [2005] EA 2006, which emphasize that the right to be heard is a fundamental principle of justice, and urged that it would be unjust if a party's rights were affected or prejudiced without being given the opportunity to be heard.
18. In addressing whether he should be granted leave to file its defence out of time, the Appellant submitted that they were neither in control of nor benefiting from the motor vehicle in question, despite the logbook being in their name. The Appellant relied on Section 8 of the *Traffic Act* and the case of *Jared Mwagwaro Bundi & Another v Primarosa Flowers Limited* [2018] eKLR, to urge that the actual owner, though not necessarily registered, may be more relevant for practical purposes than the party in whose name the vehicle is officially registered.
19. On the issue of whether the Appellant is liable for the accident, the Appellant relied on the case of *Elizabeth Gathoni Thuku* (suing as the legal representative of the estate of Charles Gitonga Wathuta) v *Peter Kamau Maina & Another* [2021]. Thus, he submitted that there is no valid reason to compel them to be responsible for the actions of the 2nd Respondent in relation to the subject motor vehicle, as they had no involvement in the accident in question.

1st Respondent's submissions

20. The 1st Respondent narrowed down the grounds of appeal to one key issue: whether the Appellant was properly served with the summons to enter an appearance, as well as the 1st Respondent's pleadings.
21. It was the 1st Respondent's submission that the pleadings were properly served upon the Appellant, and that Waqas Badar, the Appellant's director, received the pleadings on 28/8/2019. An affidavit of service was sworn on 30/6/2020, confirming that Catherine Nyokabi Kinyanjui personally served the Appellant with the summons dated 31/5/2019 and the plaint dated 10/5/2019. The director of the Appellant acknowledged receipt of the documents by signing the back of the pleadings, clearly



- indicating his name and the date of service. The 1st Respondent further submitted that the Appellant failed to enter appearance, which led to the entry of default judgment.
22. The 1st Respondent relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules and the principles for setting aside an ex parte judgment, as established in *Esther Wamaitha Njihia & 2 Others v Safaricom Ltd and [James Kanyoota Nderitu & Another v Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015](#)* eKLR. Additionally, they made reference to *Phillip Kiprotich Tuitoek v Edna Jebiwott Kiplagat & 2 Others [2020]* eKLR.
 23. The 1st Respondent submitted that the contents of the affidavit of service were never contested or challenged by the Appellant in the trial court. Therefore, it is evident that the Appellant was properly served but neglected and failed to take any action, such as filing a defence or a memorandum of appearance, within the stipulated period. The 1st Respondent contended that the Appellant's claim of ignorance of the proceedings is self-defeating.
 24. In arguing that allowing the Appellant's application would result in duplicative work and a waste of the court's time, the 1st Respondent relied on the case of *Mark Bushuru Angalia v Frodak Kenya Limited [2020]* eKLR and *Thorn PLC v Macdonald [1999]* CPLR 660.
 25. The 1st Respondent further submitted that the trial court took all relevant issues into consideration and correctly declined the application to stay the execution process and have the matter reopened for hearing. He prayed that the Appeal be dismissed.

Analysis and Determination

26. 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-analyse the Record of Appeal and make its own conclusions. See the case of *Selle vs Associated Motor Boat Company Limited (1986)* E.A 123.
27. I have considered and analyzed the pleadings and the evidence adduced before the trial court by the parties to this appeal, the submissions in this appeal and it is my view that the main issue for determination is whether the trial court properly exercised its discretion in dismissing the Appellant's application to set aside the ex parte judgment and to be granted leave to file their defence.
28. Order 10 rule 11 of the Civil Procedure Rules 2010 gives the Court unfettered discretion to set aside an ex-parte judgment that was entered in default of appearance and defence. In *Thorn PLC-V Macdonald (1999)* CPLR as cited in *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021]* eKLR the Court of Appeal highlighted the following guiding principles in the exercise of this discretion:
 - a. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
 - b. Any failure by the defendant to provide a good explanation for the delay is a factor to be considered but is not always a reason to refuse to set aside;
 - c. Primary considerations are whether there is a defence with real prospect of success and that justice should be done; and
 - d. Prejudice, or the absence of it, to the claimant also has to be taken into account.
29. Also, see the case of *Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019]* eKLR which buttresses the above principles.
30. It is clear from the aforesaid cases that the court has the power to set aside an ex-parte judgment and allow the appellant to file a suitable defence. However, such leave is not granted as a matter of course.



The court must be satisfied that a good explanation has been offered for setting aside the judgment and may impose such terms as it deems appropriate under the circumstances. This is because such action would definitely be taking a Plaintiff back in time causing delays in the conclusion of the case.

31. I therefore have a duty to delve into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it and arrive at my own independent conclusion having in mind that the trial court had the advantage of hearing the parties.
32. The impugned ruling by the trial court was delivered on 31/3/2023 dismissing the application to set aside the ex parte judgment. It equally, denied the Appellant an opportunity to defend the suit on merit. In doing so the trial court stated: -

“Further, the 1st Defendant has only stated that they were not aware of the matter. I am not persuaded by the reasons advanced herein. The Plaintiff has clearly demonstrated that the 1st Defendant was served. Timelines and court procedures must be adhered to in order to respect the sanctity of the law. Neglecting and/or refusing to participate in court proceedings only to come later and cry foul must be frowned up. In the circumstances, I find that service was properly effected. No sufficient grounds have been advanced to warrant granting of the orders sought. In view of the foregoing, I find that the applicant’s application dated 2/2/2023 is devoid of merit and the same is hereby dismissed with no orders as to costs.”

33. This court has carefully considered the facts presented by the Appellant in seeking to set aside the ex parte judgment. The grounds advanced by the Appellant are twofold; first that the summons to enter appearance and pleadings were not served upon it. Second, that the draft defence attached to the application raises triable issues. The triable issue pointed out is that the subject motor vehicle had been sold to the 2nd Respondent at the time of the accident and in accordance to its hire purchase agreement, the 2nd Respondent was liable for any claims arising in the subsistence of the hire purchase agreement.
34. The provisions of Order 10 Rule 11 of the Civil Procedure Rules grant the court of first instance broad discretion to set aside or vary a judgment entered in default of appearance. The law also allows the trial court to impose any terms it deems appropriate. As an appellate court, this Court typically exercises restraint in interfering with the lower court’s discretion, except when it is demonstrated that such discretion was exercised injudiciously or based on incorrect principles. The decision in *Shah vs Mbogo* (1968) EA 93 illustrates this principle well, and I find no need to elaborate further. It is sufficient to state that the burden of proof in demonstrating that the trial court improperly exercised its discretion always rests with the party making the allegation.
35. I have perused the evidence of service on record which service the 1st Respondent states that it was properly done upon the Director of the Appellant. The Affidavit of Service sworn on 30th June, 2020 by one Catherine Nyokabi Kinyanjui, explains that service was effected to Waqas Badar who introduced himself as a director of the company and informed the process server that he would pass it to his Kenyan co-director. This court notes the Appellant’s assertions that they were not given an opportunity to cross examine the process server. Nothing in the court record suggests the Appellant’s interest in cross examining the process server.
36. This court also finds that the Appellant has not substantiated the assertions that they were not served, they merely state that they were denied an opportunity to cross examine the process server yet nothing in the court records show that such request was made and denied by the trial court. In that regard, therefore, the ground that the Appellant were not accorded an opportunity to cross examine the process server is not tenable and must fail.



37. The second reason that was advanced to support the setting aside of the judgment is that the defence raises triable issues which must be considered. This court takes note that the learned trial magistrate did not consider this argument.
38. A perusal of the Draft defence filed shows that the Appellant sets out the following triable issue; that as the time of the alleged accident the subject motor vehicle had been sold through an authorized agent and did not belong to the Appellant.
39. The Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR defined what constitutes a triable issue as “A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
40. The court finds that the issue of ownership of the motor vehicle raises a triable issue, it is one that calls for judicial determination. In the Court of Appeal’s decision in *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR it was stated that:-

“The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence is filed already or if a draft defence is annexed to the application, raises triable issues. The case of *Tree Shade Motors Limited vs D T Dobie & Company (K) Limited & Joseph Rading Wasambo, Civil Appeal No 38 of 1998* was a case on an application to set aside a default judgment. However, the legal principles are the same as in a case where an ex parte judgment is obtained for nonappearance of a party at the hearing of his case. In that case this Court stated as follows:-

“The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff claim. Where a draft defence is tendered with the application to set aside the default judgment, the Court is obliged to consider it to see if it raises a reasonable defence to the plaintiff’s claim. If it does, the defendant should be given leave to enter and defend.”

41. In this regard, guided by the above authority, I will not shut out the Appellant from ventilating its defence as it raises a triable issue and it would not be in the interests of justice to deny the Appellant an opportunity to be heard. The prejudice that the 1st Respondent would suffer for the delay in the conclusion of the case can be compensated by way of costs.
42. In that regard, I do allow the appeal and make the following orders;
- a. The Ruling delivered on 31st March 2023 is hereby set aside and is substituted with an order allowing the Notice of Motion Application dated 2nd /February/2023.
 - b. The ex-parte judgment entered on 23/11/2021 and all consequential orders are hereby set aside.
 - c. The Appellant is given 14 days from the date hereof to file its defence.
 - d. The Appellant shall pay to the Respondent throw away costs in the sum of Kshs 20,000/= within fourteen (14) days from the date of this ruling.



- e. In the event the Appellant fail to comply with order (c) and (d) hereinabove, the Respondent will be at liberty to move the Court for appropriate orders.
- f. Each party to bear its own costs for the Appeal.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER 2024

For Appellant:

For Respondent:

Court Assistant:

