



REPUBLIC OF KENYA



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**Lukuyu v Kibasu (Civil Appeal E015 of 2022)  
[2024] KEHC 13312 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13312 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL APPEAL E015 OF 2022  
JN KAMAU, J  
OCTOBER 31, 2024**

**BETWEEN**

**KELVIN OYAVO LUKUYU ..... APPELLANT**

**AND**

**EUNICE MIDEVA KIBASU ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order of Hon S. O. Ongeru (SPM) delivered at Vihiga in Senior Principal Magistrate's Court Case No 137 of 2021 on 7th June 2022)*

**JUDGMENT**

**Introduction**

1. In his decision of 7<sup>th</sup> June 2022, the Learned Trial Magistrate, Hon S. O. Ongeru, Senior Principal Magistrate, dismissed the Appellant's Notice of Motion application dated 1<sup>st</sup> March 2022 seeking to set aside interlocutory Judgment dated 1<sup>st</sup> February 2022 and all consequential orders and leave to file his statement of defence out of time and/or the draft defence which was to be deemed to have been duly filed upon payment of the requisite fees.
2. Being aggrieved by the said decision, on 21<sup>st</sup> June 2022, the Appellant filed a Memorandum of Appeal dated 8<sup>th</sup> June 2022. He relied on five (5) grounds of appeal.
3. His Written Submissions were dated 4<sup>th</sup> April 2024. However, they did not bear a court stamp. In view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood of the Registry having omitted to stamp the same. The Respondent's Written Submissions were dated and filed on 23<sup>rd</sup> April 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

4. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred in dismissing the Appellant's said Notice of Motion application that was dated 1<sup>st</sup> March 2022 and filed on 7<sup>th</sup> March 2022.
5. The Appellant submitted that his draft Defence raised several triable issues particularly on contributory negligence which could determine liability of parties and also affect the quantum of damages. In this regard, he placed reliance on the case of Duffus, V.P in Patel vs E.A Cargo Handling Services Ltd [1974] EA 75 where it was held that defence on merit did not mean a defence that had to succeed but a triable issue that raised a prima facie defence which should go to trial for adjudication.
6. He also cited the case of Farmers Choice Company vs Dorleen Anyango Wasonga & Another [2015] eKLR where it was held that the issue of contributory negligence was a triable issue. He urged this court to consider his evidential burden to prove his case as per the Civil Procedure Rules as well as Section 109 of the Evidence Act.
7. He was categorical that he was not served with Summons to Enter Appearance and/or pleadings. He argued that the Affidavit of Service that the Respondent purportedly filed had no annexure of an mpesa message or any proof to show that the mobile number used to effect the service was registered in his name.
8. He contended that the Trial Court failed to consider his submissions and disregarded his proposal on throw away costs thus ended up delivering a Ruling that was speculative at best. He added that he had been condemned unheard and had continued to suffer loss and damage as the Respondent enjoyed the fruits of an irregular Judgment and would end up threatening him with execution of an irregular Judgment.
9. He further placed reliance on the case of CMC Holdings Limited vs James Mumo Nzioki [2004] eKLR where it was held that in an application for setting aside ex parte judgment, the court had to consider not only reasons why the defence was not filed or why the applicant failed to turn up for hearing but also whether a defence or draft defence raised triable issues.
10. He urged the court to remedy the injustice that was visited upon him by allowing the Appeal and setting aside the proceedings in the lower court and all subsequent orders and order that the matter begin de novo and that he be allowed to take part in the suit. He was emphatic that substantial loss would ensue if the Appeal herein was not allowed.
11. On her part, the Respondent submitted that there was evidence on record that the Appellant together with his Insurance Company were served with the Summons to Enter Appearance and pleadings and a Return of Service duly filed. She was categorical that the facts in the Affidavit of Service that the Appellant was served with court pleadings on 18<sup>th</sup> August 2021 and Notice of Entry of Judgment on 8<sup>th</sup> February 2022 remained undisputed.
12. She asserted that the Appellant never disputed the phone number or that her Process Server called him and he asked that he be served through his WhatsApp number. She added that he never called the said Process Server for cross-examination on the Affidavit of Service.
13. She was categorical that the averments in his affidavit in support to the Notice of Motion application that was subject of this Appeal amounted to lies and that his sole intention was to trick the court to exercise discretion in his favour.



14. She also pointed out that the Appellant filed his application on 7<sup>th</sup> March 2022 which was six (6) months after service of the said Summons to Enter Appearance. She added that the Appellant admitted that he had knowledge of the case before formal proof hearing on 30<sup>th</sup> November 2021 but still did not move the court until three (3) months after the said date. She asserted that he moved the court one (1) month after the entry of Judgment on 8<sup>th</sup> February 2022 and had not given any valid reason to explain the delay in filing of his application to set aside the ex parte Judgment in his said Support Affidavit.
15. She contended that as she was a fare paying passenger in his Motor Vehicle and the accident was self-involving, the Trial Court correctly noted that there was no serious triable issue to be considered by the court. She added that the Appellant had come to court seeking equitable remedies. She submitted that he who came to equity had to come with clean hands and not be indolent.
16. In this regard, she relied on the case of *Langat & Another vs Muchai* [2022] KEHC 3117 (KLR) where it was held that a litigant who failed to be candid with the court did not deserve the court's discretion being deployed to her benefit.
17. She further averred that the mere fact that the Trial Court came to a different finding did not mean that it did not consider his submissions. She invoked Order 10 Rule 11 of the Civil Procedure Rules and argued that in exercising discretion under the said provision, the court had to be convinced that it was just to set aside the Judgment as the discretion of court did not operate in a vacuum but on legal principles.
18. To buttress her point, she placed reliance on the case of *Muthuri vs City Gas Limited* [2022] KEHC 65 (KLR) where it was held that an appellate court would not interfere with the discretion of a judge unless it was satisfied that in exercising discretion, a judge had misdirected himself in some matter and as a result arrived at a wrong decision. She also cited the case of *FMS vs MAS* [2020] eKLR where it was held that the only limit to the powers and discretion of the court was that the same had to be exercised judicially in order to avoid abuse of the court process.
19. It was her contention that the Appellant had not laid a basis for the appellate court to fault the Ruling of the Trial Court. She averred that although she was involved in the accident in June 2021 and Judgment delivered in February 2022, she had not enjoyed the fruits of her Judgment. She argued that the Appellant's application was a delaying tactic and it was prejudicial to her.
20. A perusal of the proceedings of the lower court showed that on 30<sup>th</sup> September 2021, the Respondent filed an Affidavit of Service dated 19<sup>th</sup> August 2021 evidencing service of Summons to Enter Appearance upon the Appellant herein. The WhatsApp printed message together with his photograph were annexed thereto.
21. This court noted his argument that the Respondent failed to prove whether or not the phone number 0740082246 was his. However, on 14<sup>th</sup> July 2021, his insurer, Directline Assurance Company Ltd was informed of the said suit vide Statutory Notice dated 14<sup>th</sup> July 2021. In its letter dated 20<sup>th</sup> August 2021, his insurer sought to be furnished with the documents that the Respondent wished to rely on in the suit. In the mind of this court, he was not candid in asserting that he was not served with the Summons to Enter Appearance and pleadings.
22. The above notwithstanding, courts must restrain themselves from shutting out parties summarily without hearing their disputes on merit. Unless a defence was a sham, vexatious, frivolous and an abuse of the court process, a party to a civil litigation ought not be deprived of his right to have his day in court and have the suit determined in full trial.



23. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice. The court should therefore act cautiously and carefully consider all facts of the case without rushing to embarking on striking out a defence which raises triable issues.
24. With this in mind, this court perused the draft Appellant's Defence dated 28<sup>th</sup> February 2022 and noted that he denied the Respondent's claim in specificity and particularity all the way from Paragraph (2) to Paragraph (16) therein.
25. It was apparent to this court that his Defence could not be termed as a mere denial, sham, an abuse of the court process, vexatious or frivolous or that it was likely to prejudice, embarrass or delay the fair trial of the suit as the Respondent had contended. The issues that it raised were triable and substantive.
1. The court was also required to consider if the opposing side would suffer any prejudice if the orders sought were granted. This court did not see any prejudice that the Respondent would suffer or was likely to suffer if the Appellant herein pursued its constitutional right to be heard on merit. If there was prejudice, then she did not demonstrate the same. However, if there was any prejudice, then the same could be compensated by way of payment of costs.
  2. The Trial Court entered interlocutory Judgment against the Appellant herein on 30<sup>th</sup> September 2021. He filed the application to set the said ex parte judgment aside on 7<sup>th</sup> March 2022. This was about five (5) months and nine (9) days. Although there was a delay in filing the said application, the delay was not so inordinate and/or unreasonable. It could be excused purely to do substantive justice.
  3. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Appellant be given an opportunity to have its case heard on merit as he would suffer prejudice if he was denied an opportunity to fully present his case.
  4. The power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) was well captured in Section 3A of the Civil Procedure Act Cap 21 (Laws of Kenya) that states that: -  
  
"Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice (emphasis court) or to prevent abuse of the process of the court."
30. Having said so, it was the Appellant's responsibility to have followed up to check on its matter. Failure to do so showed that he was indolent. He could therefore not be allowed to go scot free and had to pay throw away costs to the Respondent herein to compensate her for being taken back in litigation when she was expected to have presumed that there would be no further litigation in view of the long period the Appellant had taken to move the court.

## **Disposition**

31. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated 8<sup>th</sup> June 2022 and filed on 21<sup>st</sup> June 2022 was merited and the same be and is hereby allowed in the following terms: -



1. That the decision of the Learned Trial Magistrate, Hon S. O. Onger, Senior Principal Magistrate that was delivered on 7<sup>th</sup> June 2022 in which he dismissed the Appellant's Notice of Motion application dated 1<sup>st</sup> March 2022 and filed on 7<sup>th</sup> March 2022 seeking to set aside interlocutory judgment dated 30<sup>th</sup> September 2021 be and is hereby set aside and/or vacated. The effect of this decision was that the Appellant's Notice of Motion application that was dated 1<sup>st</sup> March 2022 and filed on 7<sup>th</sup> March 2022 be and is hereby allowed in terms of Prayers Nos (2), (3) and (4).
  2. It is hereby directed that the lower court file be returned to Vihiga Principal Magistrates Court and placed before the Head of Station on 12<sup>th</sup> November 2024 for further orders and/or directions on the hearing of this matter de novo before any court other than that of the Learned Trial Magistrate, Hon S. O. Onger, Senior Principal Magistrate.
  3. In view of the fact that the Appellant has taken back the Respondent to re-litigate and thus suffer costs, he is hereby directed to pay the Respondent throw away costs in the sum of Kshs 30,000/= within forty five (45) days from the date of this Judgment failing which the Respondent will be at liberty to commence legal proceedings for the recovery of the same in the normal manner.
  4. Each party will bear its own costs of this appeal.
32. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 31<sup>ST</sup> DAY OF OCTOBER 2024**

**J. KAMAU**  
**JUDGE**

