Kahunyo & another v Wanjiru & another (Civil Appeal E073 of 2023)
[2024] KEHC 15600 (KLR) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15600 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E073 OF 2023

AC BETT, J

NOVEMBER 29, 2024

BETWEEN

KENNETH KAHUNYO ..... 1ST APPELLANT

JOE KUBAI KARANJA ..... 2ND APPELLANT

AND

RUTH WANJIKU WANJIRU ..... 1ST RESPONDENT

JOSEPH KIHARA KARONJI ..... 2ND RESPONDENT

(Being an Appeal from the judgement delivered on 28th April 2022 by Hon. V.A Ogutu (RM) in Thika CMCC NO. 226 of 2018)

JUDGMENT

Introduction

1. The appeal before me is against the ruling and/or order made by the learned Senior Resident Magistrate, delivered on 7th October 2022, where the Appellants' Notice of Motion dated 15th August 2022, seeking to set aside the ex-parte judgement entered against them, was allowed on condition that the Appellants do pay the Respondents a sum of Kshs. 3,000,000/= within 30 days, failure to which the Respondents would be at liberty to proceed with the execution. The grounds of appeal are as hereunder: -

    a. That the learned trial magistrate erred in law and in fact by setting highly oppressive conditions/terms for the setting aside of the ex-parte judgement entered against the Appellants.

    b. That the learned trial magistrate erred in law and fact in failing to consider and to give a reasoned ruling on the application to set aside ex-parte judgement on the known principles of law guiding applications of that nature.

c. That the learned trial magistrate erred in law and in fact in failing and/or neglecting to address the issue of non-service of the summons to enter appearance, pleadings and notice of entry of judgement upon the 1st Appellant yet there was nothing on record alleging service of any such document.

d. That the learned trial magistrate erred in law and fact in rendering a conclusive finding at the interlocutory stage on issues that ought to have been determined at a proper hearing.

e. That the learned trial magistrate erred in law and in fact by ordering the 2nd Appellant to pay the Respondents the sum of Kshs. 3,000,000/= before he could file his statement of defence as a pre-condition for being afforded an opportunity to defend his case.

f. That the learned trial magistrate erred in law and in fact by prematurely finding that the Appellants had no defence to the Respondents claim before the matter had proceeded to full hearing and the appellants heard on their defence.

g. That the learned trial magistrate erred in law and in fact and he misdirected himself in failing to appreciate the principles of just and fair hearing.

h. That the learned trial magistrate erred in law and in fact by shifting the burden of proof from the Respondents to the Appellants.

i. That the learned trial magistrate erred in law and in fact by finding that the ex-parte judgement was regular.

j. That the learned trial magistrate erred in law and in fact in finding the draft defence filed by the Appellants raises no triable issues while acknowledging at the same time that the court's award on Quantum stands to be challenged.

k. That the learned trial magistrate erred in law and in fact in failing to set a nominal sum for throw away costs as a condition for setting aside the ex-parte judgement.

l. That the learned trial magistrate decision occasioned a miscarriage of justice.

m. That the learned trial magistrate acted on wrong principles of law.

2. This appeal was canvassed by way of written submissions by both parties. This being the first appeal, I am aware of the duty of a first appellate court as was set out in Peters Vs. Sunday Post Limited [1958] EA 424 where the court expressed itself thus:-

> " First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

Background

3. The background of the matter is that by a plaint dated 9th March 2018, the Respondents herein sought compensation in the form of general and special damages, costs and interests. The cause of action arose

from a road traffic accident that was said to have occurred on 12th November 2016, at about 6:30 a.m., along Kahawa West Road, Eastern Bypass.

4. The 1st respondent herein, who was the wife of the deceased, averred in the plaint that she was having a morning walk with the deceased on the footpath/pavement along the Ruiru-Kahawa West Road, Eastern By-pass when the 2nd appellant herein, drove the motor vehicle so carelessly, negligently and without due regard to pedestrians on the footpath/pavement and as a result of which it hit the deceased near Kenyatta University construction site and thereby causing his death.

5. The 1st Respondent sought compensation for special damages amounting to Kshs.599, 790/= being the expenses she incurred in planning the funeral of the deceased and the legal expenses for filing the application for the letters of administration Ad Litem and the succession cause. She further sought general damages under the *Fatal Accidents Act* and the *Law Reform Act*. She filed various documents to support her claim and drew the court's attention to the fact that the 2nd Appellant herein had pleaded guilty to the offence of causing death of the deceased and another person by dangerous driving, at the Chief Magistrate's Court, Kiambu in Criminal Case Number 1619 of 2016.

6. The appellants herein failed to enter appearance and/or file a defence within the prescribed period and a judgement in default was entered on 2nd May 2018.

7. When the matter came up for formal proof on 17th February 2022, the 1st Respondent urged the court to adopt her witness statement dated 9th March 2018. She made an application to amend the plaint to include the sum of Kshs 25,000 as part of the funeral expenses making the total special damages add up to Kshs. 624,790/= and the same was allowed.

8. The 2nd Respondent herein, being the brother of the deceased, adopted his witness statement dated 9th March 2018 and stated that he incurred the sum of Kshs. 512,140/= as funeral expenses and a further Kshs. 25,000/= on photography which came later.

9. The court entered judgement vide a judgement dated 28th April 2022 and found the liability to be 100% jointly and severally against the Appellants. The court awarded a sum of Kshs. 5,267,994.70/= plus costs and interests. This sum was broken down as follows: -Pain and suffering kshs. 50,000Loss of expectation of life Kshs. 100,000Loss of dependency Kshs. 4,609,644Special damages Kshs. 508,350Total Kshs. 5,267, 994.70/= plus cost and interest.

10. Aggrieved by the said judgement, the Appellants herein filed an application dated 15th August 2022 under a Certificate of Urgency, seeking an order to set aside the said judgement and to be granted unconditional leave to file their statement of defence.

11. The said application was allowed vide a ruling dated 7th October 2022 on the condition that the 2nd Appellant pays a sum of Kshs. 3,000,000/= within 30 days from the date of the ruling and in compliance with the first condition, the 2nd Appellant was to file and serve his statement of defence within 7 days.

13. The Appellants were aggrieved by the said orders and proceeded to file the instant appeal.

Submissions

14. The Appellants submit that all the grounds for appeal may be summed up and submitted as one, that unless a review of the orders dated 7th October 2022 is made, they shall continue to suffer prejudice, loss, and damage. The Appellants further submit that they are in danger of being condemned unheard, thus offending the doctrine of equity and the principles of natural justice. The Appellants posit that the grounds upon which they had made the application were plausible in that they averred that they

had not been served with the Summons to enter Appearance hence rendering the proceedings irregular. They averred that the application had been brought without undue delay and that their appeal ought to succeed, and the orders dated 7th October 2022 be set aside.

15. The Respondents in their submissions dated 3rd October 2024, summarize the grounds of appeal raised by the Appellants to three main issues:-

    i. Whether the learned magistrate erred in upholding the lower court's decision in allowing the ex-parte judgement against the Appellants.

    ii. Whether the learned magistrate erred in holding that the Appellant's draft defence raised no triable issues.

    iii. Whether the learned magistrate erred in upholding the conditions and terms for setting aside the ex-parte judgement.

16. On the first issue, the Respondents submit that the power of the court to grant or refuse an application to set aside or vary a judgement or any consequential decree or order, is discretionary. They submit that the discretion is wide and unfettered, however, like all judicial discretion, it must be exercised judiciously. They rely on the case of Real Time Company Limited v Equity Group Foundation & another [2022] KEHC 15313 (KLR) where the court held that:-

> " The discretion to set aside an ex-parte judgment is intended to be exercised 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 cause of justice."

They contend that the trial magistrate was not wrong in finding that the ex-parte judgement was regular and thus upholding the same in its ruling. They further submit that the Appellant's appeal is brought as a means of denying the Respondents the enjoyment of the fruit of their judgement.

17. They advance that the court's ruling thoroughly reviewed the evidence placed before it and observed that indeed summons to enter appearance were duly served upon the Appellants and an Affidavit of Service sworn to that effect. They further posit that it was noted that a Demand letter and a Notice of Intention to Sue were served upon the Appellants and their insurer before the matter was filed in court. They contend that the Appellants were duly served with the Summons to Enter Appearance, but they chose to ignore them and thus failed to enter appearance. They posit that the failure to attend court and defend the proceedings at the trial court was as a result of willful negligence and thus the appeal lacks merit and should be dismissed with costs to the Respondents.

18. The Respondents further rely on the case of K-Rep Bank Limited V Segment Distribution Limited (2017) eKLR where the court quoted with authority the case of Patel Vd. East Africa Cargo Services Ltd (1974) EA 75 where the court stated thus: -

> " 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 wide discretion given to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

19. They further submit that the ex-parte judgement was regular and setting it aside would deny them the fruits of their judgment.

20. On the second issue as to whether the learned magistrate erred in holding that the Appellant's draft defence raised no triable issues, the Respondents submit that the trial magistrate could not be faulted for holding that the draft statement of defence held no triable issues since it contained mere denials despite the fact that the 2nd Respondent was the one who was driving the motor vehicle KBJ 216 T and was charged for the offence of causing death of the deceased person and another person by dangerous driving.

21. The Respondents rely on the case of Crown Healthcare Vs Jamu Imaging Centre Limited (2021) eKLR where the learned judge cited with approval the case of Chitram Vs Nazari where Madan JA expressed the view that: -

> " For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning"
>
> In the same case, Chesoni Ag. JA, observed that: -
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> "Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions ... It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially."

22. The Respondents further rely on Section 47A of the *Evidence Act* which states that:

> " A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

23. Banking on the above authorities and provisions of the law, the Respondents submit that since the 2nd Appellant admitted to being guilty of the offence of causing death by dangerous driving, the Appellants could not have any plausible defence towards the Respondent's claim and that their plea of the alleged contributory negligence on the part of the deceased could not arise.

24. On the third issue on whether the learned magistrate erred in upholding the conditions and terms for setting aside the ex-parte judgement, the Respondents submit that despite the Appellants claiming that the payment of the sum of Kshs. 3,000,000/= is oppressive, they have failed to demonstrate how the said orders are oppressive.

25. They submit that the Appellant's intention in bringing the instant application is to delay and/or frustrate the 1st Respondent from enjoying the fruits of her judgement.

26. The Respondents relied on the case of Mureithi Charles & Daniel Kimutai Cheruiyot v Jacob Atina Nyagesuka [2022] eKLR where the court cited with authority the case of Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others [2004] eKLR where Ojwang, J held that:

> " The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure."

27. The Respondents submit that the Appellants have defied two orders, an order dated 26th October 2022 where the court issued a conditional order of stay on condition that the Appellants deposited the decretal sum to the court and an order dated 7th October 2021 where the Appellants were ordered to pay Kshs. 3,000,000/= to the Respondents after which leave to file and serve their statement of defence was allowed and therefore pre-trial would follow.

28. The Respondents submit that since the Appellants are yet to comply with the said orders, it is clear that the Appellants intend to frustrate the 1st Respondent and deny her the fruit of her judgement. The Respondents rely on the case of MN Vs TAN & Another [2015]eKLR where the court stated: -

> " A valid court order has to be obeyed or complied with regardless of how aggrieved a party is about it. The order has the force of law. It is not a mere wish or proposition. Disobedience or non-compliance with it attracts severe consequences. It would appear to me that the appellant believes that the orders of 30th July 2013 are not valid, and has explained why he has chosen to disregard or disobey them. Yet he is bound to obey the orders for as long as they are still in force. He has no choice, he cannot decide when and how to obey or comply with them.
>
> The appellant has applied to the court for a discretionary relief, yet he is not ready to obey the orders that he is seeking relief against it. He has therefore come to court with unclean hands. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law."

29. The Respondents lastly submit that since the Appellants have never satisfied the aforesaid orders so as to allow the setting aside of the ex-parte judgement and decree, their appeal should consequently fail and/or be dismissed with costs to the Respondents.

Analysis

30. I have considered the foregoing, the submissions filed on behalf of the parties herein and the authorities relied upon and I find that the germane issue to be determined is as follows: -

    a. Whether the trial magistrate exercised his discretion judiciously

31. It is trite that the decision as to whether or not to set aside an ex-parte judgement is discretionary and this was well enunciated in Shah Vs Mbogo & Another (1967) EA 116 where it was held that:-

> " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

32. Further, the court in CMC Holdings Ltd vs. Nzioki [2004] KLR 173 stated as follows:-

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle."

33. In Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976 it was held that:

> " It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and therefore as a result there has been injustice"

34. It is evident that where the court is faced with an application to set aside an ex parte judgement, it ought to first establish whether the ex-parte judgement was regular or irregular.

35. On deciding whether an ex-parte judgement was regular or irregular, the court in the case of James Kanyiita Nderitu & Hellen Njeri Nderitu v Marios Philotas Ghikas & Mohammed Swaleh Athman [2016] KECA 470 (KLR) stated as follows:-

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other..."

36. In the instant Appeal, the Appellants, claim that they were not served with the Summons to Enter Appearance, pleadings, or Notice of Entry of Judgement and that there is nothing on the record alleging service of any such document upon them.

37. I have perused the Affidavit of Service on record, dated 21st May 2018 and sworn by one Paul Kamau Mwania who is a licensed court process server. In the Affidavit of Service, the process server gives a detailed account of the events that transpired before he finally served the 2nd Appellant herein with the Summons to Enter Appearance together with copies of the plaint, witness statements, and list of documents. The process server does not aver that he informed the 2nd Appellant that he was also serving

him on behalf of the 1st Appellant. There is no other affidavit of proof of service of summonses on the 1st Appellant, who is considered to be the owner of the suit motor vehicle. In a replying affidavit dated 23rd August 2022 filed in response to the Appellant's application to set aside the ex parte judgement, the 1st Respondent averred that the process server who was entrusted with the task of serving the documents to the Appellants had stated that the 2nd Appellant indicated that he was the owner of the suit motor vehicle and so the 1st Appellant had no interest in the same. This averment was a departure from the process server's averment in his affidavit of service earlier referred to.

38. Order 5 rule 7 of the Civil Procedure rules provides that:-

> "Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."

39. From the affidavit of service, it is not clear what relationship the Appellants had with each other at the time of service of the summonses upon the 2nd Appellant. It is also curious that the 2nd Appellant is said to have made a remark to the process server that the 1st Appellant had no interest in the motor vehicle yet went ahead to receive summonses on his behalf. In view of the aforesaid remarks by the 2nd Appellant, there is a real possibility that the 2nd Appellant did not hand over the summons to enter appearance to the 1st Appellant. The 1st Appellant averred that he learnt of the judgement when he was notified by his insurer. The conclusion that I draw from all this is that there was no proper service of the summons to enter appearance on the 1st Appellant, and, therefore, the ex parte judgment entered herein on 28th April 2022 was irregular on the 1st Appellant. I must hasten to state that it is trite law that where an interlocutory ex parte judgement is found to have been irregular, as is the case herein for the 1st Appellant, it ought to be set aside as a matter of right for it is trite law that no party should be condemned unheard.

40. The Court of Appeal in Yooshin Engineering Corporation v Aia Architects Limited [2023] eKLR enunciated this position and stated:-

> "What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise."

41. In regard to the 2nd Appellant, I find that service of summons was duly effected upon him as stated in the affidavit of service. It is instructive to note that the 2nd Appellant did not personally swear the affidavit in support of the application to set aside the ex parte judgment submitted by the Respondents, the affiant is an advocate for the parties. The practice of advocates filing depositions on contested facts that are only within the knowledge of their clients is undesirable for obvious reasons. It has often been stated by the courts that parties should not descend into the arena of conflict. The Appellant's advocate is not in a position to disprove service of summons upon the 2nd Appellant in the face of the return of service on record. I therefore find that the judgement against the 2nd Appellant was regular.

42. On the issue of issuance of a condition to set aside an ex-parte judgement, such condition would only be warranted in a case where judgement was regularly entered against an Appellant seeking to set aside the said judgement.

43. The court observed in the case of Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR as follows:-

> " Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

44. Further, the Court of Appeal in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 expressed itself as follows:-

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them."

45. The trial court, having properly found that the judgement entered against the 2nd Appellant was regular, failed to exercise its discretion in the right manner by ordering that 2nd Appellant should remit the sum of Kshs.3,000,000/= directly to the Respondent before filing his statement of defence. In order to protect the interests of both parties, the trial magistrate ought to have ordered that the sum of Kshs.3,000,000/= be deposited in a joint interest earning bank account in the names of the advocates of the parties.

Determination

46. The upshot is that the appeal is allowed in respect of the 1st Appellant to the extent that this court finds that the judgement entered against him was irregular. The Appellants are granted fourteen days from the date of this judgment to file and serve their defence. The Order of the trial court of 7th October 2022, as against the 2nd Appellant is also set aside and substituted with the order that that that the sum of Kshs 3,000,000/= be deposited in a joint interest earning bank account in the names of the advocates of the parties.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF NOVEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Parties

Court Assistant: Polycap