



REPUBLIC OF KENYA



**Al-Riaz International Limited & another v Munini (Civil Appeal
E058 of 2023) [2024] KEHC 16969 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E058 OF 2023
F WANGARI, J
NOVEMBER 28, 2024**

BETWEEN

AL-RIAZ INTERNATIONAL LIMITED 1ST APPELLANT

REHAN RIAZ MALIK 2ND APPELLANT

AND

MUEMA MUNINI RESPONDENT

*(Being an Appeal against the Ruling of the Hon. D.W. Mburu Senior Principal
Magistrate delivered on 9th March 2023 in Mombasa CMCC No. 1746 of 2016)*

JUDGMENT

1. The Appellant being dissatisfied with the above stated ruling preferred this appeal. The Appellant preferred 5 grounds of appeal namely;
 - a. The Appellants was punished for the mistakes of his advocate
 - b. The court failed to find that the Appellant will not suffer loss that cannot be mitigated by way of compensation
 - c. The court erred in finding that the firm of Mutisya Mwanzia & Ondeng Advocates is not properly on record
 - d. The erred in law by failing to allow the application dated 12/01/2023
 - e. The court erred by arriving into a decision that is against the weight of evidence and the law.
2. Directions were taken that the appeal be disposed of by way of written submissions, where all parties duly complied and relied on various decisions in support of their rival positions. I have duly considered the said submissions together with the various cited authorities.



3. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123).
4. This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
5. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, decree, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise, I will carefully revisit the record.

Analysis and Determination

6. I have considered the application, response, submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the trial court erred in law in disallowing the application dated 7/82020. Corollary to this finding is the issue of costs.
7. The Respondent was the Plaintiff in the primary suit sued the Appellants (Defendants in the primary suit) for Kshs. 2,300,000 being the money paid towards the purchase of a motor vehicle sold to the Plaintiff by the Defendants, and which the Defendant illegally repossessed and sold to a third party.
8. The Defendants did not file their defence prompting the Plaintiff to request for judgment in default of defence. The same was endorsed and ex-parte judgment dated 18/11/2021 was issued. The Defendants filed an application dated 05/06/2017 seeking to set aside the ex-parte judgment. The application was allowed.
9. The matter proceeded for hearing and the Plaintiff's case was heard. The defence did not appear for hearing and the defence case was closed and judgment was entered in favour of the Plaintiff. The Defendants filed an application dated 12/01/2023 seeking to set aside the judgment and re-open the defence case. The application was dismissed via a ruling dated 09/03/2023. Having been dissatisfied with the ruling, the defendant filed this appeal.
10. The principles involved in setting aside ex parte judgment are set out in the case of *Patel v East Africa Cargo Handling Services Limited* (1974) EA 75, where the court held as follows;

“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 condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
11. The first ex parte judgment in the lower court was endorsed on 28/02/2017 and set aside on 03/08/2017. The second ex-parte judgment was delivered on 18/11/2021. The Appellant made the application to set aside the said judgment and he be allowed to defend the suit via a Notice of Motion dated 12/01/2023, about one year 2 months after the delivery of judgment. The Honourable



Magistrate declined to exercise the discretion of the court in setting aside of the ex-parte judgment for the second time.

12. It is a constitutional right of every party to be heard in every litigation but the same must not be abused. (See *Union Insurance Co. of Kenya Ltd. V Ramzan Abdul Dhanji* C.A Civil Application No. 179 of 1998). The Appellant blamed his advocate for the failure to defend the suit in the lower court and only came to know of the status of the matter when the Notice to Show Cause was issued against him.
13. It has been held that as much as the mistake of an advocate should not be visited upon the client, however, the litigant also has a duty in following up on the progress of his case. In *Savings & Loan Ltd v Susan Wanjiru Muritu* Nairobi Milimani HCC 397/02, it was held as follows;

“A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”
14. Having considered the above, and considering that the Appellants had been granted another opportunity to defend their suit, but failed to do so, I find that the court correctly applied the principles in setting aside ex parte judgment, while declining to grant the orders as sought for by the Appellants.
15. On the issue as to whether the current firm of advocates for the Appellants were properly on record, the Respondent had not taken issue with the same. I need not make a determination on the same.
16. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the Civil Procedure Act. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR.
17. The Respondents having been dragged into these proceedings over 7 years since the first ex-parte judgment was set aside, I find it only fair to award costs.
18. Following the foregoing discourse, the upshot is that the following orders do hereby issue;
 - a. The appeal lacks merit and hereby dismissed.
 - b. Costs to the Respondent.
 - c. File is hereby closedOrders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF NOVEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

Monari Advocate h/b for Omwenga Advocate for the Appellant

Chege Advocate h/b for Mwanzia Advocate for the Respondent

Brian, Court Assistant

