



**Chemutai v Wekesa & another (Suing as the Personal Representative
of the Estate of Phylis Naliaka Wafula – Deceased) (Civil Appeal
06 of 2023) [2024] KEHC 15301 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 06 OF 2023
RPV WENDOH, J
NOVEMBER 28, 2024**

BETWEEN

JOEL CHEMUTAI APPELLANT

AND

ANNA NAFULA WEKESA 1ST RESPONDENT

JUSTUS WAMALA ONGOM 2ND RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PHYLIS
NALIAKA WAFULA – DECEASED**

JUDGMENT

1. By the Memorandum of Appeal dated 13/3/2023, the appellant, Joel Chemutai seeks to set aside the ruling of the Kitale Senior Principal Magistrate’s Court delivered on 13/2/2023, dismissing the appellant’s application dated 19/10/2022 by which the appellant sought to set aside the default Judgment entered against the appellant and leave to file a defence.
2. The background of the appeal is that by an amended plaint dated 19/11/2020, the Respondent (plaintiff in lower court) had sued the appellant (Defendant in retrial court) and another for special, general damages for pain, suffering and loss of amenities under the *Fatal Accidents Act* (Cap 32), *Law Reform Act* (26) plus costs and interest. It is contended the appellant and another were not served with summons to enter appearance and plaint but that false affidavits of service were filed by the Respondent to the effect that the appellants and another had been served and failed to enter appearance as a result of which Judgement was entered for the Respondents, and the Respondents began execution proceedings through warrants of attachment; that the appellant became aware of the case at that stage and instructed their counsel to file the impugned application dated 19/10/2022 which was dismissed for lack of merit and hence provoked this appeal. The appeal is premised on eight grounds of appeal. The appellant prays that the appeal be allowed and Ruling of Hon. Mutai SPM dated 13/2/2023 be



set aside in its entirety; that the default Judgment entered against the appellant and all consequential orders be set aside and the main suit be heard and determined on merit, and lastly that the appellant be granted unconditional leave to file defence out of time, list of documents and witness statements.

3. The grounds of Appeal can be condensed into the following issues identified by the parties.
 1. Whether the appellant was served with the summons to enter appearance;
 2. Whether the application dated 19/11/2022 was filed timely;
 3. Whether the appellant's draft defence raises triable issues;
 4. Whether the orders sought can be granted.
 5. Who bears the costs of this appeal?
4. Mr. Kimani, Counsel for the applicant filed written submissions dated 30/07/2024. As regards the issue of service, Counsel submitted that on the application dated, 19/10/2022 the Respondent filed a replying affidavit to which was annexed two (2) affidavits of service sworn by Godfrey Masinde Sitati Process Server, stating that the appellant (2nd defendant) was served with summons on 2/6/2021 at Laini Moja near Green café within Kitale town and that he served Mr. Mwemeke (1st defendant), outside the Kitale Law courts on the same date. The appellant denies having been in Kitale on either 2/6/2021 or 1/10/2021, a fact he deponed to in his further affidavit of 9/11/2022. It is also denied that Mwemeke has ever set foot in Kitale and the phone number allegedly indicated 0770xxxxxx does not belong to him; that the affidavit of services contradict the handwriting on the summons in which Mwemeke was allegedly served on 27/1/2021 at line moja at 16.15 hours.
5. To emphasize the fact that the appellant was not served, it was submitted that the description given of the appellants (defendants), shows that the process server did not know who to serve; that the appellant was described as working as a driver for the 1st defendant, Mwemeke in Kitale, while the said Mwemeke was said to be carrying on business in Kitale but that in actual fact, Mwemeke lives in Bukwa District in Uganda and the said Mwemeke is father to Miss Mwemeke Advocate who practices in Kitale and she has confirmed that he resides in Uganda and denies that the phone No. 0770xxxxxx belongs to him and that the respondents have failed to prove that the said number belongs to Mwemeke;
6. That in any event, by the time of the accident, Mwemeke had sold the subject vehicle to a third party and had filed an application dated 10/11/2022 in this matter, seeking to be struck out as 1st defendant but the said application has not been heard to date and the Respondents have never opposed it.
7. On the issue of notice, Counsel also submitted that his office was not served with Notice of delivery of the Ruling
8. On the second issue, whether the default Judgment should be set aside. Counsel relied on Order 10 of Civil Procedure Rules which allows for setting aside or variation of Judgments. He also relied on Article 50(1) of *the Constitution* which guarantees right to fair hearing by a party to a suit which right cannot be limited by dint of Article 25 (c) of *the Constitution*. Counsel also cited on Article 159(2) (d), Section 1A and 1B which enjoins the courts to administer justice without undue regard to technicalities and Section 3A *Civil Procedure Act*, that grants the court inherent jurisdiction to make orders as may be necessary for the ends of justice or prevent an abuse of the court process.
9. He relied on the decisions of Gerita Nasipondi Bukunya & 2 others VS. Attorney General (2019) eKLR, Wachira Karani V. Bildad Wachira (2016) e KLR; David Gicheru V. Gicheha Farms Limited and another (2020) eKLR where the courts underscored the need for all parties to a suit being given an opportunity to be heard.



10. Counsel also relied on the decision of David Kiptanui Yego and 134 others V. Benjamin Rono and three (3) others where the court identified the tenets that courts should consider in setting aside interlocutory Judgments as being;
 1. Whether the Judgment is regular;
 2. Whether there is a defence on merit;
 3. Whether time is reasonable explanation for the delay and lastly,
 4. Whether there would be any prejudice
11. Based on the decision of Mwala V. Kenya Bureau of Standards (2001) EACL 148 Counsel submitted that the Judgment was irregular for want of proper service.
12. On the question whether the draft defence raises triable issues, It was Counsel's submission that he has indicated in the defence that a collision occurred between two motor cycles and the pillion passenger on KMEK 350 TVS got injured; that it is not the appellant who caused the accident. He urged the court to find that the Judgment is irregular for want of service of summons and the failure to serve notice of entry of Judgment.
13. As regards the filing of the application dated 19/10/2023 timely, Counsel submitted that they learned of this suit in October 2023 when the warrants were issued for sale of the suit motor vehicle and hence there was no delay and that costs should follow the event in terms of section 27 *Civil Procedure Act*.
14. The Respondents opposed the appeal through submissions dated 20/3/2024. Relying on the Case of Butt V. Khan (1981) eKLR 340, Counsel submitted that an appellate court will not interfere with the decision of the trial court unless it has been shown that the court proceeded on wrong principles of law and arrived at the wrong decision; that the appellate court is not bound by findings of a fact of the trial court as was stated in Peters V. Sunday Post Ltd (1958) EA 424 P429; see also Ephantus Mwangi & Another V. Duncan Wambugu (1983) 2 KCA 100. Counsel urged this court to exercise its powers under section 78 of the *Civil Procedure Act* and arrive at its own independent decision.
15. On the question of service, Counsel argued that service was properly effected on 2/6/2021 as evidenced by the affidavit of service on record filed on 11/8/2021, sworn by Godfrey Masinde Sitati. He submitted that the appellant was not denied the right to be heard but was served and he refused or ignored to enter appearance and defend the suit; that in the application dated 19/10/2022, the appellant never raised any objection regarding validity of the affidavit of service but merely denied service. It is their submission that the appellant was duly served as evidenced by the affidavit of service.
16. As to the timeous filing of the application dated 19/10/2022, it was submitted that the Judgment was entered against the appellant on 14/3/2022 and it was not filed till seven months later on 19/10/2022 and no explanation was given why the delay and the application is an afterthought and a ploy to delay the Respondent from enjoying the fruits of his judgment.
17. Whether the defence raises triable issues, it was submitted that the appellant has admitted that the said accident did occur and that in the affidavit of 19th October, 2022, he admitted to have caused the accident (paragraph 6) hence the defence does not raise triable issues. Counsel urged that the trial court in dismissing the appellant's application exercised its discretion based on the evidence tendered; that



no evidence was offered by the appellant to the trial court and the court was not convinced by the appellant's explanation.

Having considered the appellant's grounds of appeal, the rival submissions of Counsel and this being a first appeal, it is the duty of this court to review all the evidence adduced before the lower court and satisfy itself that the decision was well founded. This principle was enunciated in the case *Selle & another V. Associated Motors Boat Company Ltd and others* (1968) EA 123 where the court said ".....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court..... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions through, it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....."

18. The parameters within which this court can interfere with the finding of the trial court were further enunciated in *Butt V. Khan* (1981) (349) where the court held "The appellate court cannot interfere with the decision of the trial court unless it is shown that the Judge (Magistrate) proceeded on the wrong principles of law and arrived at erroneous estimates of the damages".
19. Armed with the above principles, the first issue I will consider is whether the service of Summons on the appellants (Defendants) was proper if at all service was effected. I have keenly observed the affidavits of service annexed in the Replying Affidavit at page 43 and 45. Both Affidavits are sworn on 11/8/2021 and as respects the appellant, formerly 2nd defendant, Godfrey Masinde, the process server deponed that he served him on 2/6/2021 at 4.00p.m. at Line Moja, opposite Green café within Kitale by tendering a copy of summons which he accepted and appended his signature. However, I have seen and agree with the appellant's contention that contrary to the above affidavit Anna Wafula Nekesa filed a replying affidavit to the application dated 19/10/2022 and annexed a copy of summons allegedly signed by the appellant (2nd defendant) It indicates that it was served on 1/10/2020. The appellant has vehemently denied being served. It is either the appellant was served on 2/6/2021 or 1/10/2020. The two documents which refer to the same event i.e service of summons on the Appellant are totally contradictory and cannot be relied upon
20. The same scenario applies to the service of the 1st defendant William Mwemeke. Whereas the process server deponed in the affidavit of service dated 11/8/2021 that he served him on 2/6/2021 at 1.30p.m. at Kitale Law courts, after calling him on his phone, the summons annexed thereto indicate that they were signed on 27/1/2021 at line Moja opposite Salvation Army church at 6.45 hours. The two key documents in service of summons on the 1st defendant are contradictory. The question then is when and where were the summons served if at all? The only conclusion that this court can come to is that either the service on the appellant was not proper or that it was not done at all and the documents that were exhibited were made up or falsified. The court finds that there is doubt as to whether the appellants were served at all.
21. In the impugned application, the issue of want of service had been raised by the appellant in his supplementary affidavit dated 9/11/2022 at paragraphs 8 and 9 thereof. It was not correct for the Respondents to allege that this issue was raised in this appeal as an afterthought.
22. In light of the court's finding, should the court set aside the Judgment and all the consequential orders? A party's right to fair trial is guaranteed under Article 50 (1) of *the Constitution* and by dint of Article 25 (c) of *the Constitution*. That right cannot be limited. It is the duty of this court to ensure that justice is done to both parties. The case of *Wachira Karani V. Bildad Wachira* (2016) e KLR was quoted in *David Gicheru V. Gicheha Farmers Ltd & Another* (2020) where the court said. "The fundamental



duty of the court is to do justice between the parties. It is in turn fundamental that to do that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter”.

23. The Supreme Court of India in Sangram Singh V. Election Tribunal Kotech Air 1955 5C 664 at 711 was cited in Gerita Nasipondi Bukunya case (Supra) when the court said “There must be ever present to the mind the fact that our Laws of procedure are grounded on the principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them”.

24. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte Judgment for default of appearance and defence. The setting aside of default judgment is an exercise of the court’s discretion which must be exercised judiciously See Mbogo V. Shah (1968) IEA 93. The above case was cited “in Pithon Waweru Maina V. Thuka Mugiria (1983) eKLR where Kneller JA observed as follows;

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

25. Arising from the above quote the principles for setting aside judgment are

1. Whether the Judgement is irregular
2. Whether there is a defence on merit
3. Whether there is explanation for any delay
4. Whether by prejudice will be suffered.

Courts have held that they will set aside a judgment that is irregular.

26. In Mwala V. Kenya Bureau of Standards (2001) IEA 148, the court stated as follows; “To all I should add my own views that a distinction is to be drawn between a regular and irregular exparte judgment where the judgment sought to be set aside is a regular one then all the above considerations as to the exercise of discretion should be born in mind in deciding the matter. Where on the other hand the judgment sought to be set aside is an irregular one for instance one obtained either where there is no proper service or any service at all of the summons to enter appearance or when there is a memorandum of appearance but was inadvertently overlooked, the same ought to be set aside not as a matter of discretion but ex debit justitiae for a court should never countenance an irregular judgment on its record”

27. The same observation as above was made in James Kanyiita Nderitu V. Marie Philotas Ghikas & another (2016) eKLR where the Court of Appeal said “in an irregular Judgment, on the other hand, Judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside or debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into consideration of whether the intended defence raises triable issues.”

28. In this case, the service of summons on the appellants is questionable and I found it to be improper, and suspect such that it does not amount to service at all. In my considered view the judgment is irregular and it is for setting aside.



Should the appellant have leave to file defence?

29. Although it is not necessary to consider whether the appellant has a defence that raises triable issues, I will go ahead and do so, In Sebei District Administration VS. Gausali & others 1968 EA 300, the court observed; “The nature of the action should be considered. The defence if one has been brought to the notice of the Court however irregular should be considered. The question as to whether the plaintiff can reasonably be compensated by cost for any delay occasioned should be considered and finally think it should always be remembered that to deny the subject a hearing should be the last resort of the court.
30. The appellants had annexed a draft defence to the impugned application. At paragraph 4 of the draft defence, it is pleaded that though an accident occurred on the material date, it was between a motor cycle KMEK 354 TVS and another motor cycle that overtook the defendant’s vehicle and they collided. At paragraph 6, the defendant/appellant denied involvement in the accident. In addition, it was drawn to the court’s attention that the 1st defendant Mwemeke filed an application dated 10/11/2022 seeking stay of the execution and striking him out of the case as 1st defendant. This is because he alleges to have sold the subject vehicle on 9/7/2018 to a third party who in turn sold to another and hence he has no knowledge of the accident. In my view, the issues raised by the appellant and 1st defendant are issues that need to be canvassed at a hearing to determine whether the accident was between the appellant’s vehicle and a motorcycle, or motor cycle and another and also to determine whether the vehicle still belonged to the 1st defendant at the time of the accident or it was sold and therefore the new owner should be the defendant party to be sued if necessary.

Was there delay in filing application dated 19/10/2022

31. The appellant contended that they moved this court with speed Once they learnt of the Judgment after execution had commenced. It is the appellant’s contention that they were not aware of the Judgment till there were threats to execute by attaching the subject vehicle that they came to learn of it. If the appellant had no notice of Judgment, he could not have filed the application dated 19/10/2022 earlier. The court having found that the appellant and the defendant may not have been served, the court will believe that the applicant acted with diligence in filing the application dated 19/10/2022, when it did and there was no proof of delay. It is not everything that the Respondent never confirmed whether or not they complied with order 22 Rule 6, i.e. the requirement of notice in of default Judgment on the appellants. In the end, I find the application was filed timeously.
32. Whether prejudice will be suffered: given the circumstances, of this case, if the ruling dated 13/2/2023 is not set aside, the appellant will suffer injustice having been denied a chance to be heard. In the end, I find that the appeal is merited. I grant the following orders.
1. The appeal is allowed;
 2. Leave is granted to the appellant to file/serve defence within fourteen (14) days hereof;
 3. The Respondent will bear costs of the appeal and the lower court.

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

R. WENDOHO.

JUDGE

Judgment delivered virtually in the presence of

Appellant - No appearance



Respondent - No appearance

Court Assistant - Juma/Hellen

