



**Kamba & another v Mogaka (Civil Appeal E011 of 2020)
[2024] KEHC 16122 (KLR) (Civ) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16122 (KLR)

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

CIVIL

CIVIL APPEAL E011 OF 2020

JM NANG'EA, J

DECEMBER 19, 2024

BETWEEN

LEONARD MUNYAO KAMBA 1ST APPELLANT

**THE REGISTERED TRUSTEES OF AFRICAN BROTHERHOOD
CHURCH 2ND APPELLANT**

AND

CLINTON ONYIEGO MOGAKA RESPONDENT

(Being an appeal against the ruling and order of the Chief Magistrate's Court at Machakos (Hon.A. C. Kibiru-CM) delivered on 7/10/2020 in CMCC NO. 27 of 2019)

RULING

Grounds of Appeal

1. This appeal challenges the said Honourable magistrate's ruling by which the 2nd appellant's Notice of Motion application dated 25/10/2021 seeking inter alia an order setting aside proceedings and judgement in the suit as well as leave to defend the suit, was dismissed with costs. Aggrieved by that decision, the appellants lodged this appeal on grounds that the court has condensed into three as hereunder:
 1. That the learned magistrate misdirected himself by holding that the application was unprosecuted on account of failure to file submissions yet the applicant's submissions dated 10th January 2022 bore the court's stamp indicating receipt thereof on 18/1/2022.
 2. That the learned magistrate erred in law and fact by finding that no prejudice would be occasioned by dismissal of the Motion for stay of proceedings.



and

3. That the learned magistrate erred in law and fact by holding that the 2nd appellant was served with pleadings in this suit purportedly selected as a test suit for unrelated suits thereby condemning him unheard.

Brief Background to the appeal

2. The respondent sued the appellants, jointly and severally, in the lower court for inter alia general and special damages over a road traffic accident allegedly involving the appellants' motor vehicle registration number KBA 812 K and another motor vehicle registration number KCN 912 T in which the respondent was travelling. In a resulting collision between the two vehicles the respondent attributed to negligent driving of the appellants' vehicle, the respondent suffered bodily injuries that provoked the suit.
3. The 2nd appellant is said to have failed to enter appearance and/or file defence. Hearing of the suit was subsequently conducted in the absence of the 2nd appellant and judgement was entered for the respondent. The Notice of Motion dated 25/10/2021 that was dismissed by the trial court was then brought.
4. In dismissing the application, the learned trial magistrate noted that there is no dispute as to service of the suit documents and further that the appellant's failure to file submissions on the application meant that the application was unprosecuted. The lower court further found that the 1st appellant did not show any prejudice he would suffer were the application to be disallowed.

Guiding Principles

5. It is trite that the appellate court has the duty of re-assessing the evidence and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. 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
 - iii. 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."

Analysis and Determination

6. It would appear that Counsel did not file their submissions on this appeal. Be that as it may, the 2nd appellant contends that the default judgement was irregular for the reason that he was not served with the suit documents and so it is implied that the default judgement ought to be set aside ex debito justitiae. Indeed this is the law as held in many cases including the judicial determination in *Mwala vs*



Kenya Bureau of Standards EA LR (2001) 1 EA 148 and Nakuru HCCC NO. 82 of 2002 (Kabutha vs Mucheru) which took the position that where Summons to Enter Appearance was not properly served or at all such an application should be granted as a matter of course.

7. The issues arising for determination, therefore, are:
 - (a) Whether the impugned default judgement is a regular one.
 - (b) If the ex-parte judgement is regular, whether the 2nd appellant has otherwise shown that it has a defence on the merits.
 - (c) The orders commending themselves to the court.
8. The court has unlimited discretion to set aside or vary an ex-parte judgement. The discretion is judicious and not capricious, the intention of the court being to do justice regard being had to the facts and circumstances of a particular case before the court (see the judicial decision in International Air Transport Association & Another vs Roskar Travel Limited & 3 Others (Civil Case E457 of 2020) {2022} KEHC 200(KLR) (Commercial & Tax (17th March 2022 (Ruling). This manner of exercise of the court's discretionary power is also stressed in the famous case of Shah vs Mbogo.
9. Whereas the 1st appellant avers that the suit documents were not served upon him, there is return of service at page 36 of the Supplementary Record of Appeal showing that the subject Church's Pastor known as Mutua was served with the suit documents. In the circumstances, the 1st appellant cannot be heard to say that they were not aware of the suit. If service of the suit documents was disputed an application could have been made to cross-examine the Process Server to clear any doubts (see Order 5 Rule 16 of the Civil Procedure Rules 2010 and the Court of Appeal decision in Kisumu CACA NO. 15 of 2010 (Amayi Okumu Kasiaka & 2 Others vs Moses Okware Opari among many other legal authorities). This right was not exercised.
10. In Patel vs East Africa Cargo Limited (1974) EA 75 it was stated that the defendant must give a plausible reason for failure to enter appearance and/or file defence within the required time if leave is to be granted to defend the suit. No good cause is shown for the appellants' failure to defend the suit.
11. The impugned judgement is thus regular and issue (a) is accordingly determined in the affirmative.
12. As regards Issue (b), it is trite law that an ex-parte judgement may still be set aside if the defendant demonstrates triable issues usually by means of a draft defence. No such proposed defence is exhibited. There is accordingly no good cause warranting grant of the reliefs sought.

Determination

13. Whether or not the appellants had filed submissions on the application in question does not change the fact that the court process was duly served. Whereas I agree with the appellants that failure to file submissions does not mean that an application is unprosecuted contrary to the lower court's ruling, the trial court nevertheless considered the application on its merits and gave its decision dismissing the same.
14. In the result, this appeal lacks merit and is dismissed with costs to the respondent.

J. M. NANG'EA, JUDGE.

JUDGEMENT DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024

In the presence of;

The 1st appellant's advocate, absent



The 2nd appellant's advocate, Ms Some Advocate for Ms Kitur Advocate

The respondent's advocate, Ms Gicharu Advocate

J. M. NANG'EA, JUDGE.

