



**Ndune v Onsongo (Civil Appeal 11 of 2021)
[2023] KEHC 18566 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 11 OF 2021**

**SM GITHINJI, J
APRIL 25, 2023**

BETWEEN

ISAAC NDUNE APPELLANT

AND

PAUL MUCHOMA ONSONGO RESPONDENT

*(An appeal from the ruling of Hon. S.K Ngii SRM at Mariakani,
made in SRMC 134 of 2017 delivered on 18th December, 2020)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mokaya & Onyambu Advocates for the Appellants

Mr Akong'o for the Respondent

1. This appeal arises from the ruling of Hon S.K Ngii a Senior Resident Magistrate in Case No 134 of 2017 delivered on December 18, 2020. The appellant raised the following grounds in his memorandum of appeal dated February 5, 2021; -
 1. That the learned magistrate erred in law and fact by erroneously dismissing the appellant's application without considering the relevant applicable law.
 2. That the learned magistrate erred in law and in fact in failing to consider and appreciate that the appellant had a good defence on merits as against the respondent's case.
 3. That the learned magistrate erred in law and in fact in failing to follow and apply the law on the cited several decided case laws.



4. That the learned magistrate erred in law and in fact in misapprehending the applicable rules, principles and the law on the nature of the application before court thus arriving at an erroneous decision in dismissing the appellant's application.
2. The appellant urged the court to set aside the impugned ruling and in turn allow the dismissed application. A brief history of what transpired at the lower court is that, following interlocutory judgment delivered therein on August 22, 2018, the respondent filed a declaratory suit against the appellant's insurer, Madison Insurance Company Limited on May 20, 2019. While that suit was still pending, counsel for the insurance company moved the court *vide* a notice of motion dated November 5, 2020 seeking orders to set aside the *ex-parte* judgment and leave to defend the suit. That application was dismissed *vide* the impugned ruling dated December 18, 2020. The trial magistrate observed that the judgment was a regular one; that the application was filed unexplainably late and that the defence did not raise any triable issues. It is that ruling that prompted this appeal.
3. The appeal was canvassed by way of written submissions which I summarize as hereunder.

Appellant's Submissions

4. Regarding the first ground, counsel for the appellant submitted that the trial magistrate failed to consider the wide and unfettered discretion guaranteed under order 1 rule 11 of the [Civil Procedure Rules, 2010](#). That dismissing the said application was tantamount to condemning the appellant unheard. Counsel relied on the cases of [Gulf Fabricators v County Government of Siaya](#) [2020] eKLR; and [Patel v E.A Cargo Handling Services Limited](#) [1974] E.A.
5. On the second ground, counsel urged the court to find that his defence was arguable. Counsel further relied on the case of [James Kanyita Nderitu and another v Marios Philotas Gbikas and another](#) [2016] eKLR to argue the last two grounds.

Respondent's Submissions

6. Counsel for the respondent identified one issue for determination and that is whether the trial magistrate exercised his discretion judiciously in dismissing the appellant's application. Counsel submitted that order 10 rule 11 gave the court discretion to allow or dismiss the application. That an appellate court should not therefore interfere with the trial court's discretion unless it is proved that the discretion was not exercised judiciously as it was held in [Shah v Mbogo](#) [1967] EA 116; and in [United India Insurance Co. Ltd v East African Underwriters Kenya Ltd](#) [1985] EA.
7. Counsel further submitted that the trial magistrate correctly formulated the issues for determination since a court faced with an application to set aside ought to first satisfy whether an impugned judgment is a regular or irregular one, and thereafter, if it is regular, consider the reason for the delay if any and whether the defence raises triable issues. Counsel relied on the case of [K-Rep Bank Limited v Segment Distributors Limited](#) [2017] eKLR.
8. On whether the appellant's defence raised triable issues, counsel cited the case of [Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd and Michael Rono](#) [2015] eKLR; and [Raghbir Singh Chatte v National Bank of Kenya](#) [1996] eKLR.

Analysis and Determination

9. The following issues arise for determination; -
 - i. Whether the trial magistrate considered the relevant laws or misapprehended the rules and relevant laws in dismissing the application.



- ii. Whether the appellant's defence raises triable issues.
- iii. Whether the appeal is merited.

Whether the trial magistrate considered the relevant laws or misapprehended the rules and relevant laws in dismissing the application.

10. In his submissions, the appellant talks about order 1 rule 11; order 11 of the [Civil Procedure Rules](#) actually provides for proceedings against the government and case management respectively. It must be noted that the appropriate provision on setting aside judgment under the [Civil Procedure Rules](#) is order 10 rule 11 which reads; -

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

11. The above provision gives the court of first instance unfettered discretion to set aside such a judgment like the present one. It follows therefore that this court sitting on appeal should exercise some caution in interfering with the discretion granted to the lower court save for only when it is demonstrated or shown that the exercise of discretion was done injudiciously or was based on a wrong principle. Suffice to say that the burden to demonstrate this lies on the party alleging the same. (See *Shah v Mbogo* [supra]).

12. In the case of [Mohamed & another v Shoka](#) (1990) KLR 463 the court set out the tenets a court should consider in an application for setting aside interlocutory judgment to include:

- i) Whether there is a regular judgment;
- ii) Whether there is a defence on merit;
- iii) Whether there is a reasonable explanation for any delay;
- iv) Whether there would be any prejudice.

13. Further, in the case [Mwala v Kenya Bureau of Standards EA LR](#) (2001) 1 EA 148, the court stated;

“To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne 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 or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”

14. A cursory perusal of the impugned ruling indicates that the trial magistrate indeed was guided by the above principles in his analysis and determination. In the circumstances, I find that the trial magistrate relied on the relevant provisions and principles to arrive at his conclusion.

15. On whether the trial magistrate misapprehended the law, I will now turn to the facts leading to the judgment and ruling. The respondent, vide a plaint dated March 21, 2017 had sued the appellant for general and special damages for injuries suffered as a result of a road traffic accident. The respondent was travelling as a passenger on motor vehicle registration number KMDP 073Y when the appellant's



driver on motor vehicle registration number KTWA 472W negligently knocked down the vehicle carrying the respondent.

16. Summons to enter appearance dated March 22, 2017 were issued against the appellant who failed to enter appearance despite service. Proof of service is evidenced by the affidavit sworn on February 14, 2018 by advocate Lilian Mwangi, and leave granted by the trial court to effect service by registered post. In the said affidavit, it is evident that the summons were posted on December 20, 2017 at 11.07a.m. In the circumstances, like the trial court, I am convinced that service was properly effected.
17. The effect of which is that the interlocutory judgment was a regular one. It was the appellant's duty therefore to demonstrate that he has met the conditions set out in the *Mohamed & another v Shoka case* [supra]. It must first be noted that the application to set aside was filed on November 5, 2020, approximately two years after judgment was entered. The appellant averred therein that he only became aware of the judgment after the insurance was notified. It should not be lost that the declaratory suit was filed in May 2019. It would then be proper to assume that the appellant became aware of the judgment in May 2019. The appellant did not give any reasons why he had to wait until November 2020 to file his application. In the foregoing, I agree with the trial magistrate that the delay was unreasonable and unexplained.
18. The appellant submitted that it had a good defence and that certainly is another consideration or a factor in exercise of court's discretion in setting aside a judgment entered in default of appearance and defence. I have considered the draft defence exhibited by the appellant and I find it wanting for reasons that the same consists of mere denials and general statements on particulars of negligence which in my view hardly raises triable issues.
19. It should be noted that the court's power to set aside a judgment is exercised with a view of doing justice between the parties. This is the reason why the court is clothed with such unfettered discretion to set aside as it was held in *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal* (2014) e KLR. The court stated that the purpose of clothing the court with discretion to set aside *ex-parte* judgment is:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”
20. Having failed to satisfy the above requirements for the reasons advanced above, the appellant really has no basis to fault the decision of the lower court. The upshot is that this appeal is unmerited and is hereby dismissed with costs to the respondent.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25TH DAY OF APRIL, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Mokaya for the Appellant

Mr Akong'o for the Respondent

