



**Kahoro v Mburu (Civil Appeal E026 of 2021)  
[2023] KEHC 21395 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21395 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E026 OF 2021**

**A MSHILA, J  
JULY 28, 2023**

**BETWEEN**

**VIRGINIA WAMBUI KAHORO ..... APPELLANT**

**AND**

**NAOMI MBURU ..... RESPONDENT**

*(Being an appeal against the Ruling of the Honourable court in Kikuyu Civil  
Case No. 202 of 2015 delivered on 20/01/2021 by Hon. Z.W.Gichana (PM))*

**JUDGMENT**

**Background**

1. The Plaintiff/Respondent sued the Defendant/Appellant claiming for Special Damages of Kshs. 147,006/= which arose when her motor vehicle registration number KAX 543E was extensively damaged on 5/8/2012 when the said motor vehicle was being lawfully driven along Nairobi-Nakuru Highway near Gitaru when the Appellant's driver so negligently drove motor vehicle registration number KAL 007S that it violently hit the Plaintiff/Respondent's motor vehicle registration number KAX 543E thereby causing extensive damage to the said motor vehicle as such the Plaintiff/Respondent suffered loss and damage.
2. Despite being duly served, the Defendant/Appellant failed to enter appearance within the time prescribed by law as such the Plaintiff/Respondent filed a request for judgment on 9/12/2016. Upon the trial court being satisfied that service of summons upon the Defendant/Appellant was proper, judgment in default of appearance/defence was entered in favour of the Plaintiff/Respondent as against the Defendant/Appellant as prayed together with interest and costs.
3. On 16/12/2019, the Appellant filed a Notice of Motion under Certificate of Urgency seeking for a temporary injunction against the Plaintiff/Respondent's auctioneers from disposing motor vehicle registration number KBQ 879A. On 24/12/2019, when the application came up for inter-partes



hearing, interim orders for stay of execution were granted. The same were extended on 26/2/2020 as prayed in the Appellant's application dated 26/02/2020.

4. Subsequently, the Appellant filed another application dated 9/03/2020 where she sought for stay of execution, an order setting aside the final judgment therein and an order for the release of motor vehicle registration number KBQ 879A being in the custody of Chadur Auctioneers. On 19/3/2020 an order for stay of execution of the decree and warrants pending inter partes hearing were issued.
5. On 20/01/2021, the trial court delivered its ruling in respect of the application dated 9/3/2020. The trial court found the said application unmerited and the same was disallowed with costs to the Plaintiff./Respondent. The order for stay of execution earlier granted was also set aside.
6. The Appellant being dissatisfied with the trial Court's ruling has preferred the present Appeal. In her Memorandum of Appeal, she has listed eleven (11) grounds of appeal as follows:-
  - a. The Honourable Magistrate erred and misdirected herself by failing to take into consideration the principles governing setting aside of ex parte judgment.
  - b. The Honourable Magistrate erred and misdirected herself by failing to be guided by the spirit of the provisions of sections 1A, 1B & 3A of the Civil Procedure Act.
  - c. The Honourable Magistrate erred and misdirected herself by failing to give concrete reasons on why she failed to exercise her discretion in favour of the applicant.
  - d. That the Learned Magistrate failed to consider the reasons advanced by the appellant for failure to enter appearance and file defence.
  - e. The Honourable Magistrate erred and misdirected herself by failing to take into consideration the annexed draft defence which raised triable issues.
  - f. The Honourable Magistrate erred in fact and in law in letting the respondent have her way in court even without discharging the burden of proving on a balance of probabilities that the appellant was to blame for the accident and further denying the appellant herein the opportunity to be heard.
  - g. The Honourable Magistrate erred in fact and in law by considering and allowing an application for consent judgment, yet no consent had been entered as between the parties herein. As a matter of fact the appellant herein hadn't had the opportunity to enter appearance and file defence due to the respondent's failure to serve her with the summons to enter appearance and pleadings.
  - h. The Honourable Magistrate erred in fact and in law by entering an ex parte judgment in default of appearance in favour of the respondent herein, yet no such judgment had been requested by the respondent herein.
  - i. The Honourable Magistrate erred in fact and in law in entering judgment in favour of the respondent herein, the gist of which was to blame on the appellant for damages done to the respondent's vehicle, yet as per the plaint filed by the respondent herein, it is the respondent's vehicle that failed to observe traffic rules by failing to keep distance and consequently hitting the appellant's motor vehicle from behind.



- j. The Honourable Magistrate erred in fact and in law in entering an ex parte judgment in favour of the respondent herein, yet the respondent had not furnished any document I court to prove the existent of his claim and/or allegations.
  - k. The Honourable Magistrate erred in law in failing to give the appellant the chance to be heard and defend herself against the baseless (no documents whatsoever were furnished in court) claim of the Respondent herein.
7. The court directed the parties to canvass the appeal by way of written submissions. Hereunder is a summary of the parties respective submissions;

### **Appellants' Submissions.**

8. The Appellant submits one of the key factors to consider when setting aside an ex parte judgment is whether the Defendant has a defence on merit. The trial magistrate was faulted for failing to consider whether the draft Defence raised triable issues. Reliance was placed on among other cases the case of *Mureithi Charles & another vs Jacob Atina Nyagesuka* (2022) eKLR. It was submitted that the trial court failed to give reasons why she failed to exercise discretion in favour of the Appellant. The Appellant contended that her reasons for failing to enter appearance were not considered. In any case, it was submitted that the delay would have been remedied by thrown away costs. Reliance was placed on the case of *William Ntomauta M'Ethanga sued as M'Mauta Nkari vs Baikiamba Kirimania* (2017) eKLR. The Appellant submits that her defence raised triable issues as such the trial court erred in dismissing the same. The trial court's award was said to be erroneous as the same was not supported by any documents.
9. This court was urged to give the Appellant a chance to prosecute her case by setting aside the ruling made by the trial court.

### **Respondent's Submissions**

10. The Respondent submitted that the trial court considered the principles governing setting aside of ex parte judgment. The Appellant was said to at all times attempting to prevent the ends of justice as such could not be aided by the overriding objective in the Civil Procedure. Reliance was placed in the case of *Kenya Commercial Bank vs Kenya Planters Co-operative Union* (2010) eKLR. The trial court was said to have analyzed all the issues as well as giving its reasons why it exercised its discretion against the Appellant/Defendant. Similarly, the trial court was said to have considered the reasons advanced by the Appellant for failing to enter appearance where the Appellant was said to have refused to cross examine the process server and the burden to proof that service was defective lay squarely upon the Appellant/Defendant. Reliance was placed in the case of *Shadrack arap Baiywo vs Bodi Bach* (1987) eKLR. The draft Defence was said to raise no triable issues that could warrant setting aside of the regular judgment. Reliance was placed in the case of *Kenya Orient Insurance Limited vs Cargo Stars Limited & 2 others* (2017) eKLR. It was also submitted that the Respondent had proved her case to the satisfaction of the trial court as she had filed receipts and invoices paid out by ICEA Lion Insurance Company. In any case the Appellant failed to challenge the claim as such judgment was entered against her. Moreover, the investigation carried out by the police concluded that the Appellant's vehicle was to blame for the accident.



## Issues for Determination

11. Having considered the appeal and the written submissions filed by both parties. The only issue framed for consideration is whether this court should set aside the ruling by the trial court and allow the Appellant's Notice of Motion dated 9/03/2020.

## Analysis

### Whether this court should set aside the ruling by the trial court and allow the Appellant's Notice of Motion dated 9/03/2020.

12. The law governing setting aside of ex-parte judgments is provided for under Order 10 Rule 4 (1) and (2) of the [Civil Procedure Rules](#), 2010 which provide as follows:

“4(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

13. On the other hand, Order 10, rule 11 of the Civil Procedure Rules, provides that:-

“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.”

14. This therefore, means that a court has the discretion to set aside an ex-parte judgment. In the case of *Kenya Commercial Bank Ltd -v- Nyantange & Another* (1990) KLR 443 Bosire J, (as he then was) held that:

“Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”

15. The court must consider the following elements in exercising its discretion on whether to set aside an ex-parte judgment. The court must consider the nature of the defence, the period of delay in making the application to set aside, any prejudice the Plaintiff is likely to suffer if the default judgment is set aside, and the overriding objective.
16. The discretion to set aside an ex-parte judgment should be exercised bearing in mind the principles of natural justice to avoid condemning a party unheard but the same should not be applied to assist an otherwise indolent party whose conduct is intended to delay the ends of justice. See the case of [Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd](#) [2018] eKLR.



17. Firstly, the court is required to look at the draft Defence to determine whether the same raises triable issues. This position was held in the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR page 1036 where the Court of Appeal held that:-

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani -v- MC Connell* (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.”

18. Similarly, the court before setting aside a regularly obtained judgment, should also consider whether the Applicant made the application to set aside without unreasonable delay and the reasons given why they seek to set aside the ex-parte judgment.
19. In the matter herein the main issue in contention is whether the Appellant was properly served with summons to enter appearance. The Respondent contends that the Appellant was properly served with summons to enter appearance by one Mathew Mburu Njaramba who in his Return of Service gave a detailed account of how he met with the Appellant whom he handed a copy of the Summons to Enter Appearance, Plaintiff and its accompanying documents. The draft Defence by the Appellant was said to be unmerited. The Overriding Objective set out in the Civil Procedure was found not to apply in the case herein as the Appellant was found to have been indolent as such obstructing the ends of justice.
20. The Appellant vehemently, denied the claim that she had been properly served and attributed the same as sufficient reason for her failure to appear in court.. Moreover, the draft Defence she contended raised triable issues as she denied being vicariously liable for the actions of her driver while at the same time alleging contributory negligence. She also averred that the Respondent would not suffer any prejudice if the ex-parte judgment was set aside as she would still have an opportunity to prove her case. In the end, the court was urged to exercise its discretion and to set aside the ex-parte judgment against the Appellant.
21. The Appellant’s first contention is that she was never served with the Summons to Enter Appearance. This court this averment to be untruthful on the part of the Appellant. The Process Server in his Affidavit of Service gave a very detailed account of how he met with the Appellant and her daughter and effected service of the Summons to Enter Appearance, the Plaintiff and its accompanying documents. It is safe to say that the Appellant chose to ignore the said Summons and only acted when her vehicle was taken away by the auctioneers. Her explanation for failure to enter appearance is found to be unsatisfactory and the same does not justify to be sufficient cause.
22. Refer the case of *PMM vs JNW* (2020) eKLR where the court therein quoted the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others* Civil Appeal No. 147 of 2006 where the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

“It is difficult to attempt to define the meaning of the words “sufficient cause.” It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant.”

23. The trial court being satisfied that proper service had been effected upon the Appellant which she chose to disregard, rightfully went ahead to enter an ex-parte judgment once the Respondent had filed



her request for judgment. This court is therefore satisfied that the judgment entered was a regular and proper service having been effected.

24. The issue of regular judgment was addressed in the case *Mwala -v- Kenya Bureau of Standards* EA LR (2001) 1 EA 148, where 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.”

25. The trial court having vacated the order for stay granted, the Respondent was at liberty to attach the Appellant’s motor vehicle registration number KBQ 879A and rightly did so vide warrants of attachment and sale dated 29<sup>th</sup> January, 2021 and subsequently the same was auctioned on 10/02/2021 by Chador Auctioneers for Kshs. 400,000/=. The Respondent avers that the proceeds did not satisfy the decretal amount of Kshs. 235,456/= as the same went towards recovery charges as such she is keen on realising the decretal amount.
26. A cursory glance at the draft Defence provided by the Appellant this court notes that it consists of mere denials. The Appellant denies each and every allegation as averred by the Respondent.
27. It is this court’s considered view that setting aside the ex-parte judgment will prejudice the Respondent as she has been keen and diligent in prosecuting her case whilst the Appellant has been nothing but indolent as evidenced by the court record. The Respondent deserves to enjoy the fruits of her judgment. In any case this case has been in court since 2015, at one point litigation must come to an end.
28. In regard to the overriding objective, both parties are required by Section 1A and 1B of the *Civil Procedure Act* to assist the Court in the just, efficient and expeditious disposal of cases. The matter herein has dragged for far too long. Justice delayed is justice denied as such the Respondent herein should be allowed to realise her judgment without further injunctive orders.

### **Findings And Determinations**

29. From the afore-going this court finds that the appeal to be devoid of merit and it is hereby dismissed with costs to the Respondent.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 28<sup>TH</sup> JULY, 2023.**

**A.MSHILA**

**JUDGE**

**In the presence of :-**

Mourice Court Assistant

Ondieki for the Respondent

N/A for the Appellant

