



**Mutune v Wambui & another (Civil Appeal E203 of 2020)
[2023] KEHC 21719 (KLR) (Civ) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21719 (KLR)

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

CIVIL

CIVIL APPEAL E203 OF 2020

AN ONGERI, J

AUGUST 24, 2023

BETWEEN

LYDIA MUTUNE APPELLANT

AND

MIRIAM WAMBUI 1ST RESPONDENT

PETER THUKU 2ND RESPONDENT

*(Being an appeal from the ruling of Hon. M. W. Murage (CM)
in Milimani CMCC no. 8658 of 2016 delivered on 26/8/2020)*

JUDGMENT

1. The respondent file CMCC no. 8658 of 2016 seeking special damages of ksh.438,843.00 together with costs and interest against the appellant in respect damages of motor vehicle registration KBV xxx belonging to the respondent when it was involved in accident with the appellant's motor vehicle registration no. KAC xxx.
2. The appellant failed to enter appearance or file a defence upon being served with the respondent's plaint dated 16/3/2017 and the respondent applied for interlocutory judgment which was entered on 24/8/2017.
3. The appellant filed an application dated 8/2/2018 seeking to set aside the interlocutory judgment entered on 24/8/2017 but the said application was dismissed on 2/7/2017 for non attendance by the appellant's representative.
4. The appellant filed another application dated 9/7/2018 seeking to set aside the dismissal order of 2/7/2018 but the said application was also dismissed on 23/3/2019 for lack of merit.



5. The firm of Onyango & Awya filed an application dated 4/11/2019 seeking leave to come on record and also orders setting aside the interlocutory judgment entered on 24/8/2017 and the said application was dismissed on 26/8/2020.
6. This appeal is against the ruling delivered on 26/8/2020 which was seeking to set aside the interlocutory judgment entered on 24/8/2017.
7. The appeal is based on the following grounds;
 - i. That the learned magistrate failed to take into account issues of law and fact material to the application, and thus arrived at a finding that was against the interest of justice and the principles of equity.
 - ii. That the learned magistrate, while making a finding on the appellant's application, misdirected herself in law and fact in not considering and/or disregarding the principles for setting aside an interlocutory judgment.
 - iii. That the learned magistrate, while making a finding on the appellant's application erred in finding that the appellant was guilty of laches.
 - iv. That the learned magistrate while making a finding on the appellant's application erred in finding that the appellant was abusing the court process.
 - v. That the learned magistrate, while making a finding on the appellant's application erred in not exercising her discretion judiciously in the interest of justice.
 - vi. That the learned magistrate, while making a finding on the appellant's application, erred in awarding costs against the appellant; and
 - vii. That the learned magistrate erred in law and fact by failing to make any and/or proper pronouncement and/or finding on the merit of grounds adduced in the application.
8. The parties filed written submissions which I have duly considered.
9. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
10. In the current case, the interlocutory judgment was entered for failure to enter appearance or file a defence.
11. The issues for determination in this appeal are as follows;
 - i. Whether the trial court failed to consider the principles for setting aside the interlocutory judgment.
 - ii. Whether the appellant had a defence that raised triable issues.
 - iii. Who pays the costs of this appeal?
12. On the issue as to whether the trial court failed to consider the principles for setting aside interlocutory judgments, I find that the court has a discretion to set aside the interlocutory judgments.



13. In the case of *Sebei District Administration -v- Gasyali & others* (1968) EA 300 Sheridan J. observed as follows;

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”

14. The court had to consider whether the appellant had a defence that raised triable issues.

15. I also find that the respondent had to show that they would suffer prejudice that cannot be compensated by an award of damages.

16. I allow the appeal on the following terms;

- i. That the interlocutory judgment be and is hereby set aside.
- ii. That the appellant’s defence be deemed as properly filed.
- iii. That the case be heard and finalized within 90 days of this date.
- iv. That the appellant to pay the respondents thrown away costs of kshs.30,000.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

