



Vehicle and Equipment Leasing Ltd v Kamwaro & another (Civil Appeal E109 of 2023) [2023] KEHC 21546 (KLR) (Civ) (18 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21546 (KLR)

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

CIVIL

CIVIL APPEAL E109 OF 2023

AN ONGERI, J

AUGUST 18, 2023

BETWEEN

VEHICLE AND EQUIPMENT LEASING LTD APPELLANT

AND

PHILIP MEELI OLE KAMWARO 1ST RESPONDENT

KAMAL NOMAL ABDUL 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. B. J. Ofisi (SRM) in SCCC no. E1876 of 2022 delivered on 10/2/2023)

JUDGMENT

1. The respondent was sued by the appellant in SCCC No 1876 of 2022 seeking special damages of Kshs 185,930 for damages occasioned to the respondent's motor vehicle Registration No KCC 999K by the Appellant's motor vehicle Registration No KFC 292D prime mover.
2. The claim was settled by the respondent's insurer and the SCCC No 1876 was filed by the respondent's insurer for the recovery of its outlay under the insurance principle of subrogation.
3. The appellant failed to enter appearance or file a defence and an interlocutory judgment was entered dated 4/10/2022.
4. The appellant filed an application dated November 21, 2022 to set aside the exparte judgment and all consequential orders but the Trial court dismissed the said Application on 10/2/2023.
5. The Applicant has appealed to this court against the dismissal on the following grounds;
 - a. That the Trial court failed to consider that the Appellant's defence raises triable issues.



- b. That the Trial court failed to accord the Appellant an opportunity to be heard hence visiting the mistakes of the insurer upon it.
 - c. That the Trial court failed to consider that the Notice of entry of judgment was not served upon it as required by Order 22 Rule 6 of the CPR.
 - d. That the Trial court failed to Registration No KBF 292D Subaru S. Wagon registered in the name of Naomi Muthoni Chege and not the 1st respondent's motor vehicle Registration No KCF 292D which is a prime mover.
 - e. That the Trial court erred in law in holding that the judgment was regular and failed to appreciate all the evidence and failed to appreciate that the Appellant's motor vehicle Registration No KCF 292D was not involved in the accident and that the same was leased to Manara Ltd located in Mombasa and that it was not in Nairobi at the time of the accident.
6. The sole issue for determination is whether the application for review should be allowed.
 7. The Trial court considered the Application dated November 21, 2022 for review and setting aside the exparte judgment and decree dated 4/10/2022 .
 8. The Trial court also considered the responses to the Application and the submissions by the parties and found that the Appellant did not establish the grounds of review of its judgment and decree dated 4/10/2022.
 9. The Trial court found that there was no dispute that the summons were served upon the Appellants and further that the reasons advanced for failure to enter appearance and file a defence were not plausible.
 10. In the case of *Pindoria Construction Ltd vs. Ironmongers Sanytaryware* Civil Appeal No 16 of 1976 it was held as follows;

“It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice...”
 11. The Trial court found that the application for review did not meet the threshold for grant of the orders of review and setting aside of exparte judgment and decree.
 12. In the case of *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR Justice Odunga, (as he then was), held as follows;

“That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah vs. Mbogo & another* [1967] EA 116.”
 13. I find that the trial court was right in dismissing the application for review it appeared to the Trial court that the reasons advanced were not plausible and therefore it was deliberately sought to obstruct or delay the course of justice



14. In the circumstances, I find that the Trial court was right in dismissing the Application for review in view of the strict time lines laid down for the Small Claim to finalize matters.

15. The appeal here be and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

