



Kamau & another (Suing for and on Behalf of the Dependants and Estate of Nahashon Kamau Njoroje) v Waweru & another (Civil Appeal 145 of 2016) [2023] KEHC 22750 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 145 OF 2016
PM MULWA, J
SEPTEMBER 28, 2023**

BETWEEN

DAMARIS WAMBUI KAMAU 1ST APPELLANT

DANIEL MUNGAI NJOROGE 2ND APPELLANT

SUING FOR AND ON BEHALF OF THE DEPENDANTS AND ESTATE OF NAHASHON KAMAU NJOROGE

AND

ROBINSON EVANS WAWERU 1ST RESPONDENT

KIRETHI GENERAL CONTRACTORS CO. LTD 2ND RESPONDENT

(Being an appeal from the Ruling of Hon. C. A Muchoki delivered on 9th February 2016, in Thika Chief Magistrates Civil Suit No. 847 of 2010)

JUDGMENT

1. The Appellants sued the Respondents in the subordinate court jointly and severally seeking special and general damages under the *Law Reform Act* and the Fatal Accident Act arising from a road traffic accident that occurred on 4th February 2008, where the deceased was lawfully walking as a pedestrian along Thika-Nairobi road near Waki stage when the driver of Motor vehicle KAB 084L drove and carelessly managed the motor vehicle and caused to loose control and veer off the road and knocked down the deceased.
2. The firm of Onyoni Opini & Gachuba Advocated filed a memorandum of appearance, and statement of defence both dated 19th April 2011, for the 1st and 2nd Respondents. In the statement of defence, the Defendants denied the occurrence of the accident. The 2nd Defendant denied being the registered owner of the motor vehicle KAB 084L. The defendants attributed the occurrence of the accident to



circumstances beyond the control of the driver and attributed the negligence to the deceased for causing the accident. The doctrine of res ipsa loquitor was denied.

3. According to the trial court record, the matter proceeded for full trial and judgment was delivered. However, only a copy of the decree is in the file. It is not clear when the judgment was delivered.
4. The Appellants proceeded to proclaim the 2nd Respondent's goods prompting the 2nd Respondent to file the Notice of Motion application dated 21st August 2015, seeking to stay the execution and set aside the judgment and for leave to be granted to file a defence and memorandum of appearance out of time, and a further order seeking to examine the process server who served summons upon the 2nd Respondent.
5. In the application the 2nd Respondent disputed service of the summons and the plaint. It alleged the subject motor vehicle was sold by public auction in 1999. The 2nd Respondent contended it was wrongly sued as a party as it did not possess the ownership of the subject motor vehicle. It denied knowing the 1st Respondent; and that it stood to suffer irreparable loss as the appellants have issued a proclamation notice to Devcon offices.
6. The subordinate court in its ruling of 9th February 2016, allowed the application set aside the judgment and all consequential orders and granted the 2nd Respondent time to file its defence.
7. Aggrieved by the decision of the trial court the Appellants filed the memorandum of appeal dated 3rd March 2016 citing the following grounds:
 - i. That the Honourable magistrate erred in law and in fact in allowing the Defendant's application against the weight of the evidence adduced.
 - ii. That the Honourable magistrate erred in law and in fact in setting aside judgment by claiming the same to be ex-parte judgment yet it was a judgment that had been delivered after full hearing of the parties.
 - iii. That the Honourable magistrate erred in law and in fact, in allowing application yet no leave was sought by the applicant's advocates to come on record in a matter where there was a judgment against the defendant.
 - iv. That the Honourable magistrate erred in law and fact in failing to consider the Respondent's submissions and replying affidavit and failed to appreciate that there exists a statement of defence for the 2nd defendant.
 - v. That the Honourable magistrate erred in law and in fact, in allowing the applicant to file another statement of defence yet there exists one on record for the 2nd Defendant. This is highly irregular as the applicant has two statements of defence on record represented by two different law firms.
8. It was proposed to ask that the ruling dated 9th February 2016 be set aside and the judgment of the subordinate court be reinstated, and the costs of the appeal be awarded to the appellants.
9. The appeal was heard, by way of written submissions. Both parties filed written submissions. The Appellants filed submissions on 27th March 2023 while the 2nd Respondent filed submissions on 21st June 2023.



Appellant's submissions

10. Counsel submitted the 2nd Respondent was represented by the firm of Onyoni Opini & Gachuba Advocates, and that the court record bears witness of representation during proceedings in the trial court. Mr Wahome submits the 2nd Respondent failed to adduce evidence that the company ceased operations years ago and that there was a merger with Devcon group of companies; and there was no proof of the sale of the subject motor vehicle by public auction.
11. Counsel submitted the trial magistrate erred in considering the evidence adduced in the submissions. Counsel contended the 2nd Respondent is trying to obstruct and delay justice as the judgment was delivered on 25th August 2014 while the current application was filed on 21st August 2015 a period of one year should not be considered as an unreasonable delay.
12. Counsel further submitted the supporting affidavit to the application dated 21st August 2015 contained contradictions in that paragraph 1 stated the deponent was the director of the 2nd Respondent and in paragraph 4 he deponed that the 2nd Respondent ceased acting and was merged with Devcon Group of companies. Counsel argued that a non-existing company could not give instructions.
13. It was submitted that Devcon group of companies was aware of the proceedings of the suit at the trial court and defended the same under the name Kirethi General Contractors Ltd and as such the decretal amount ought to be recovered from Devcon group of companies. Counsel contended that pursuant to a merger and acquisition the liability of Kirethi General Contractors was transferred to the Devcon group of companies. That Section 3(1)(2) of the Transfer of Business Act, Cap 500 Laws of Kenya provides that “whenever the business of one company is transferred to another, notwithstanding anything to the contrary in the agreement, the transferee shall become liable for all liabilities unless due notice had been given on accordance to the Act.”
14. Counsel argued that both defences consisted of mere denials and the two had glaring similarities. They deny the 2nd Respondent was the registered owner of the Motor vehicle KAB 084L. That the defence is a sham and raises no triable issues.
15. Mr. Wahome argued that Order 10 Rule 11 of the Civil Procedure Rules is only applicable where a defendant has not entered appearance and or defaulted in filing a defence. That in the current appeal, the 2nd Respondent defended the suit in the trial court and thus the trial court erred in setting aside the impugned judgment that it was obtained ex-parte.
16. It was argued for the Appellants that the de facto advocate failed to seek leave from the court to come on record for the 2nd Respondent after judgment has been delivered as required under Order 9 Rule 9 of the Civil Procedure Rules. Neither was consent obtained from the previous advocates before the application was filed.
17. In conclusion counsel urged the court to find that the application dated 21st August 2015 ought to be dismissed and pleaded with the court to set aside the ruling of the trial court dated 9th February 2016.

2nd Respondents submissions

18. Mr. Kimwere counsel for the 2nd Respondent submitted that the appeal herein is incurably defective as the Appellant failed to include a copy of the impugned judgment in the record of appeal. He submitted that at the hearing in the trial court only the 1st Respondent's evidence was adduced and not the 2nd Respondent's.



19. According to counsel the parties were not candid enough to inform the trial magistrate the motor vehicle had been disposed of 10 years ago. No evidence was tendered in the trial court to show the relationship between the 1st and 2nd Respondent. That the 2nd Respondent did not instruct any advocates to act on its behalf and only became aware of the matter when auctioneers proceeded to proclaim goods belonging to the 2nd Respondent.
20. Counsel submitted the Appellants had failed to demonstrate how the trial magistrate failed to consider and appreciate the proceedings in the trial court. And that the Appellants ought to have done due diligence before taking out proceedings against a party who was not part of the said suit or proceedings as it were.
21. He urged the court to dismiss the appeal.

Analysis and determination

22. This being a first appeal, this court is obliged to reassess, re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent conclusion as stipulated in Section 78 of the *Civil Procedure Act* and as expounded in the *Sielle vs Associated Motor Boat Company Ltd [1968] E.A 123*, bearing in mind the fact that I neither heard nor saw the witnesses as they testified and therefore giving an allowance to that.
23. I have perused the record of appeal and the trial court file, and it is important to point out there is no copy of the impugned judgment. The Appellants seek to have the judgment of the trial court reinstated but have failed to avail a copy of the impugned judgment in the Record of Appeal, only a copy of the decree has been availed.
24. Having looked at the trial court record and having considered the grounds of appeal and submissions for and against this appeal, the main issue for determination is whether the trial magistrate erred in law and fact when, by his ruling dated 8th February 2016, he allowed the 2nd Defendant/Respondent's application for setting aside ex-parte judgment in default of appearance and defence.
25. The 2nd Respondent avers it was not a party to the suit as it was wrongly sued having sold the subject motor vehicle through public auction in the year 1999, the ownership had changed in the year 2004. It further avers that it was not served with the summons to enter appearance and thus not accorded a fair hearing.
26. The issue as to set aside or not to set aside an ex-parte judgment is a matter of the court's discretion, and in any case, the court must be given satisfactory reasons or grounds explaining why the party or parties were unable to file their papers within the stipulated time. The 2nd Respondent gave the reason that service was not made upon it and that it was unaware of the proceedings of the matter until when the Appellant proceeded to proclaim its goods. The 2nd Respondent also disputes engaging counsel to defend it in the matter.
27. The 2nd Respondent also submits that it will suffer prejudice if the Appellants are allowed to proclaim its goods as it will be condemned unheard.
28. In the administration of justice, the courts are guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act*. The courts have the discretionary power to set aside ex- parte judgment with the main aim being that justice should prevail on all parties. The courts ought to look at the statement of defence and if the same raises triable issues.



29. In *Mwala vs 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.”
30. Further in *Frigonken Ltd vs Value Park Food Ltd, HCC No. 424 of 2010*, the High Court stated: “If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”
31. The trial court in setting aside its judgment opined the draft defence raises many triable issues; *the constitution* provides for a right to a fair hearing and it was in the interest of justice that it allowed the 2nd Respondent’s application.
32. It is a trite law that the court’s power to set aside its judgment is exercised with the view of doing justice to the parties. In order to set aside a regular judgment, the court must be satisfied that the defence raises triable issues. The trial court did satisfy itself that the defence raised triable issues and allowed the 2nd Respondent to defend the suit. I have perused the trial court file and I do not find an affidavit of service of summons plus evidence of service on the 2nd Respondent. The Appellant has not demonstrated that indeed service was properly effected on the 2nd Respondent.
33. In the absence of the evidence demonstrating service on the 2nd Respondent, I am not persuaded that the 2nd Defendant/Respondent herein was properly served. Counsel for the 1st Respondent did not also prove that he was instructed to act for both Defendants/Respondents.
34. Further, I am not persuaded that the trial magistrate erred in considering the triable issues and setting aside the judgment. In the circumstances therefore, I am not convinced that the impugned judgment ought to be reinstated.
35. In *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR*, the court held that: “It’s an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the Court in the expeditious disposal of cases.”
36. I have had the benefit of reading through the draft defence, and in my opinion, it raises triable issues. It is therefore in the interest of justice if all parties are heard fully on merit. I take due consideration that justice is better served when all parties to a dispute are accorded an opportunity to be heard on merit to enable each of them to ventilate their issues.
37. I have taken note of the issues raised by the 2nd Respondent in that it was not a party to the accident and the subject motor vehicle was sold before the accident happened.



38. The Appellant contended that the 2nd Respondent failed to seek the rules of engagement of a counsel post-judgment as set out under Order 9 Rule 9 of the Civil Procedure Rules. In the circumstances having established that no evidence has been adduced to demonstrate that the 2nd Respondent appointed counsel to represent it in matter, and having established that no service was effected to the 2nd Respondent and in the interest of justices, guided by the provisions of *the constitution* where a party is entitled to representation of counsel; this court finds the above provision does not apply in the instant case.
39. For the above reasons, I make orders as follows:
- a. The appeal herein is bereft of merit and is dismissed.
 - b. The trial court ruling of 9th February 2016, setting aside the judgment is upheld and the 2nd Respondent is allowed to defend the suit.
 - c. The lower court file is to be remitted back to the trial court for compliance and for directions on the hearing of the matter on priority basis.
 - d. Costs of the appeal are awarded to the 2nd Respondent.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU

THIS 28TH DAY OF SEPTEMBER 2023.

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P. M. MULWA

JUDGE

In the presence of:

Kinyua/ Duale – Court assistant

Ms. Kimathi h/b for Mr. Ambani - for the Appellants

NA - for the Respondents

