



**Al-Husnain Motors Limited v Saya (Suing as the Legal Representative of  
the Estate of the Late Micky Amunga Eshiunwa) (Civil Appeal 44 of 2011)  
[2023] KEHC 26197 (KLR) (Civ) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26197 (KLR)

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

**CIVIL**

**CIVIL APPEAL 44 OF 2011**

**JN NJAGI, J**

**NOVEMBER 29, 2023**

**BETWEEN**

**AL-HUSNAIN MOTORS LIMITED ..... APPELLANT**

**AND**

**DAVID ESHIUNWA SAYA (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF THE LATE MICKY AMUNGA ESHIUNWA) ..... RESPONDENT**

*(Being an Appeal from the ruling of Hon. P. Nditika (MR) Senior Resident Magistrate, in  
Milimani Resident Magistrate's Court Civil Suit No .5770 of 2007 delivered on 12/1/2011)*

**JUDGMENT**

1. The Respondent herein filed suit against the Appellant and a co-defendant vide a plaint dated 22<sup>nd</sup> April 2002 claiming general and special damages after the respondent's kin died in a road traffic accident in a vehicle allegedly belonging to the appellant. The Appellant was allegedly served with summons to enter appearance and did not do so and an ex parte judgment was entered against it on 3/11/2016. After execution against it commenced, the appellant filed an application dated 29/5/2007 seeking to set aside the ex parte judgment on the grounds that the summons to enter appearance and the plaint were not served on them. The application was opposed by the Respondent on the ground that the appellant was duly served with the summons. Vide a ruling delivered on 12<sup>th</sup> January 2011, the trial court dismissed the application which dismissal provoked the present appeal.
2. The grounds of appeal are that: -
  1. The learned Magistrate erred in law and in fact by failing to appreciate the law as it stands.
  2. The learned Magistrate erred in law and in fact by failing to apply the Law.



3. The learned Magistrate erred in law and in fact by failing to consider the submissions of the 1<sup>st</sup> Defendant.
4. The learned Magistrate erred in law and in fact by considering issues which were never raised by the plaintiff's Advocate.
5. The learned Magistrate erred in law and in fact by sinking into the arena of conflict and hence failing to act as an impartial arbiter.
6. The learned Magistrate erred in law and in fact by failing to appreciate the fact that a party is entitled to be represented by an advocate of its own choice.
7. The learned Magistrate erred in law and in fact by misrepresenting the provisions of the constitution of Kenya as pertain to the right to legal representation.
8. The learned Magistrate erred in law and in fact by failing to find that the Appellant was not represented by an advocate of its own choice.
9. The learned Magistrate erred in law and in fact by failing to appreciate that the Appellant never instructed the advocates who purported to act for it in the lower courts.
10. The learned Magistrate erred in law and in fact by failing to find that the was never served with summons to enter appearance or the plaint in the lower court's proceedings.

### **The Evidence at the Trial Court**

3. By an affidavit dated 29/5/2007 sworn by Mohamed Afzal the managing director of the Appellant contended that the Appellant was never given an opportunity to participate in the proceedings before the trial court as it was never served with the summons to enter appearance and the plaint. That the advocates M/S Kimani & Michuki Advocates who purported to act for them in that matter were never instructed by the appellant. Therefore, that all pleadings filed by the said advocates are incompetent and should be struck out.
4. The Appellant contended that the notice of change of advocates dated 5th February 2004 which replaced M/S Hudson Wafula & Co Advocates with M/S Kimani and Michuki Advocates was misleading, illegal and incompetent. The Appellant further averred that it had never given instructions to either M/S Hudson Wafula & Co Advocates or M/S Kimani & Michuki Advocates to act for it in that matter before the trial court.
5. It was the Appellant's case that when the 2<sup>nd</sup> Defendant in the trial court was served with summons he must have taken them to his employer the then beneficial owner of the said motor vehicle who in turn took the summons to United Insurance who instructed M/S Kimani & Michuki Advocates to defend the matter. That M/S Kimani & Michuki Advocates must have proceeded to inadvertently file a joint defence for the Appellant herein without instructions from the appellant.
6. The Appellant also contended that they had a strong defence to the suit since the suit motor vehicle had been sold by the Appellant hence they could not be vicariously liable.
7. In response, the Respondent filed a replying affidavit sworn by Anne W. Keya dated 20/8/2007 wherein she contended that the Appellant was duly served with both the plaint and summons to enter appearance by registered post on 28<sup>th</sup> July 2003 and on 30<sup>th</sup> March 2004. That the defence counsel in response filed a memorandum of appearance and a defence upon which the Respondent did a reply to defence on 1/4/2004.



8. The Respondent averred that the Appellant was represented by the firm of M/S Kimani & Michuki Advocates upon instructions of the insurers, M/S United Insurance Company Limited.
9. It was the Respondent's case that proof of service was ascertained by the trial court before the hearing since the hearing date was fixed ex-parte.
10. The Respondent contended that M/S United Insurance Ltd were served with a third-party notice which they duly responded to prior to the appointment of the law firm on record.
11. The Respondent averred that it was doubtful whether the Appellant had a strong defence because it never attended court on the hearing date despite being served with a hearing notice.

### **Trial Court's Ruling**

12. In dismissing the application dated 29<sup>th</sup> May 2007 the trial magistrate stated that the Appellant was properly served and that it was clear that the firm of M/S Kimani & Michuki were handling all the matters relating to United Insurance Company. That the said firm of advocates filed a defence on behalf of the Appellant. That it was false for the Appellant to allege that they did not know the said firm of advocates.
13. This Court on 21<sup>st</sup> July 2022 directed that the Appeal be canvassed by way of written submissions.

### **Appellant's Submissions**

14. The Appellant submitted that it was never served with summons to enter appearance and a copy of the plaint contrary to the provisions of Order 5 of Civil Procedure Rules. It submitted that it only became aware of the suit when auctioneers visited its show room for purpose of execution.
15. The Appellant submitted that it is a limited liability company and no service of summons was effected on it as per Order 5 rule 3 of the CPR as to service of corporates. It submitted that there is no affidavit of service on record to show that the Appellant was served properly or even served at all.
16. The Appellant submitted that the record shows that the summons to enter appearance were issued on 1<sup>st</sup> August 2002, and expired on 31<sup>st</sup> July 2003 without being served. They further submitted that the Respondent filed an application for extension of the validity of the summons on 31<sup>st</sup> July 2003 and there is no evidence that the validity was extended.
17. The Appellant submitted that it is trite law that summons can only be extended during their lifetime before they expire. The Appellant contends that the proceedings against it in the trial court and the judgment delivered thereafter was irregular and ought to be set aside. They relied on the case of Agigreen Consulting Corp Limited v National Irrigation Board [2020] eKLR where the court stated that:

“Under Order 10 rule 11 of the Civil Procedure Rules, the court has unfettered discretion to set aside judgment on such terms as it deems fit and just (see Shah v Mbogo and Another [1967] EA 116). Since the service disclosed in the Affidavit of Service was not in accordance with Order 5 rule 10 of the Civil Procedure Rules, it was irregular hence the court is entitled to set aside the judgment as a matter of right. In James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR, the Court of Appeal explained the nature and effect of an irregular judgment as follows:

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with



summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

18. In the same case the Court also held that:

“The manner of service of summons on a Corporation is set out in Order 5 rule 3 of the Civil Procedure Rules which states as follows:

3. Subject to any other written law, where the suit is against a corporation the summons may be served –
  - (a) on the secretary, director or other principal officer of the corporation; or
  - (b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a) –
    - i. by leaving it at the registered office of the corporation;
    - ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
    - iii. if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
    - iv. by sending it by registered post to the last known postal address of the corporation. [Emphasis mine]
6. From the aforesaid provisions, the Summons must, in the first instance, be served, “on the secretary, director or other principal officer of the corporation”, before resorting to other modes of service. The Affidavit of Service is clear that the Summons was not effected on any of the principal officers of the Company nor was any explanation given why the Process Server resorted to serving the Summons on the receptionist who was not a principal officer of the corporation. Moreover, the Process Server does not disclose whether the “Receptionist” had authority to accept service of Summons on behalf of the principal officers of the Defendant. It must be recalled that default judgment is entered on the basis of an affidavit of service which must, on its face show, that service has been effected in accordance with the applicable rules. In this case, I find and hold that the Process Server did not comply with Order 5 rule 3(a) of the Civil Procedure Rules in effecting service on the Defendant.”



19. The Appellant also cited the case of Pecker Woods Limited v Bank of Africa Kenya Limited [2021] eKLR to support its submissions.
20. The Appellant submitted that it did not instruct the firm of M/S Hudson Wafula & Co Advocates or M/S Kimani & Michuki Advocates to act for it in the lower court. That the firm of M/S Kimani & Michuki Advocates proceeded to inadvertently file a joint defence without instructions from them.
21. The Appellant submitted that the suit motor vehicle was insured by United Insurance Company and it was a well-known fact that the firms of M/S Hudson Wafula & Co Advocates and M/S Kimani & Michuki Advocates used to defend all their matters.
22. It further contends that it was not an insured of United Insurance with respect to the suit motor vehicle as it had sold the same to one Evanson Karanja Muiyoro and had no further interest in the same.
23. The Appellant submitted that due to the mistake and confusion, the lower court was prevented from ascertaining or enquiring into whether the appellant had been served as the mistake gave the wrongful impression that the appellant was represented by an advocate.
24. It was the Appellant's submission that the judgment entered against it was irregular, null and void and should be set aside. It further submitted that if the judgment against it is set aside the Respondent will not be prejudiced in any way as he will still have his judgment against the other Defendant.
25. The Appellant cited the case of Edward Juma Ongeso v Francis N. Kinuthia & another [2005] eKLR where the court found that the advocate had been appointed by the insurance company and not the defendant and proceeded to set aside the judgment. The Appellant submitted that the setting aside of an irregular judgment is not discretionary and the same is amenable for setting aside in liminer.

### **Respondent's Submissions**

26. The Respondent formulated four issues for determination;
  1. Whether the Appellant was served with summons to enter appearance;
  2. Whether the appellant adduced sufficient cause to warrant their purported failure to enter appearance on time;
  3. Whether the appellant was represented by an advocate at trial;
  4. Whether the Appellant has a defence that raises triable issues.
27. On the first issue the Respondent submitted that the Appellant was duly served with summons to enter appearance in Civil Suit 5770/2002 and it duly entered appearance by appointing the firm of M/S Kimani & Michuki who filed a joint statement of defence. That the service of summons upon the Appellant is clearly demonstrated by the contradiction in the appellant's submission where they contend that they were not served with any summons and on the other hand they argue that summons were not duly effected upon them as a corporate.
28. The Respondent argued that the Appellant never sought to have the deponent of the affidavit of service cross-examined and therefore the Appellant cannot fault the trial court for holding the presumption



that service had been effected. He cited the case of David Koome Matugi v APA Insurance Limited [2021] eKLR where the court stated that:

“(27) Quite illuminating eminent work by Chitale and Annaji Rao; The Code of Civil Procedure Volume II page 1670 that:

There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service. [Underlining mine for emphasis]”

29. On the second issue the Respondent submitted that the Appellant had not met the required legal threshold for the court to exercise its discretion in favour of an applicant who seeks to set aside an ex parte judgment. He cited the case of Joswa Kenyatta vs Civicon Limited [2020] eKLR and the case of Wachira Karani Vs Bildad Wachira [2016] eKLR.
30. The Respondent submitted that the Appellant did not explain how it became aware of the proceedings in the trial court. He further submitted that where a party denies service, it befalls on them to clearly aver how they became aware of the existence of the matter otherwise the deduction to be made is that they have all along been aware of the existence of the matter.
31. On the third issue the Respondent submitted that it was proper for the insurer to instruct an advocate for the Appellant as it is the insurer who bears the liability on behalf of the insured as per provisions of Section 10 of the Insurance (Motor Vehicle Third Party) Act. The Respondent relied on the case of Ruth Kavindu & another v Josiah Mbaya Mantu & another [1976] eKLR.
32. The Respondent argued that it was the appellant's name that appeared in the registration documents of the subject motor vehicle at the time of the accident and also the insurance policy. The Appellant submitted that these are prima facie evidence that the Appellant was the owner of the subject motor vehicle and was insured as the owner.
33. The Respondent submitted that under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, an insurer only takes up a matter on behalf of the insured upon the insured informing the insurer of the occurrence of the accident and the demand made against it. He further submitted that the only person who could instruct the insurance company was the appellant.
34. On the issue of whether the Appellant had a defence that raises triable issues, the Respondent argued that it was upon the Respondent to prove that it was not the owner of the said motor vehicle since the Motor Vehicle Records showed the Appellant as the sole registered owner. He relied on Section 8 of Traffic Act which creates a rebuttable presumption that a person whose name a vehicle is registered is the owner of the vehicle. He further relied on the case of Nyaga John Wanjohi & another v Japheth Kimathi Mutungi & another [2020] eKLR to buttress his argument.
35. It was the respondent's argument that no sale agreement or any transfer instrument had been produced by the Appellant to show that the suit motor vehicle was indeed transferred to another person. He further argued that the Appellant did not allege that the insurance policy was transferred to any new owner who then paid the requisite premiums.



36. The Respondent submitted that the Appellant has no defence to the issues averred to by the plaintiff.
37. The Respondent argued that should this court set aside the judgment entered on 3/11/2006 then the Respondent is entitled to throwaway costs in the sum of Ksh.100, 000/=. He relied on the case of Government of Tana River & another v Hussein Fumo Hiribae [2021] eKLR.

### **Analysis and Determination**

38. This being a first appeal, this court is obliged to reassess, reevaluate and reexamine the evidence and extracts 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 it neither heard nor saw the witnesses as they testified and therefore giving an allowance to that.
39. I have considered the record of the trial court, the grounds of appeal and the submissions by the respective counsels for the parties. The issue for determination is whether the trial magistrate erred in law and fact when he dismissed the Appellant's application for setting aside *ex parte* judgment in default of appearance and defence.
40. Order 10 Rule 11 provides for setting aside of judgment entered under Order 10. This position was canvassed by the Court of Appeal in CA No. 6 of 2015 James Kanyita Nderitu V Maries Philotas Ghika & Another [2016]eKLR where it was held:

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates



our entire justice system. (See *Onyango Oloo V Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

41. Similarly, in the case of *Frigonken Ltd V. 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”.

42. In the current case, the Appellant contends that it was never served with the summons to enter appearance and the plaint and that it only learnt of the proceedings when the Respondent showed up to execute. It is therefore clear that their argument is that the judgment by the trial court was an irregular judgment.

43. To determine whether the judgment was regular or irregular, it is important to interrogate whether there was service/proper service on the appellant. The appellant contends that the summons to enter appearance were issued on 1<sup>st</sup> August 2002 and expired on 31<sup>st</sup> July 2003 without being served. They also contend that the application to extend the validity of the summons was filed on 31<sup>st</sup> July 2003 and there was no evidence that the validity of the summons was extended. I have looked at the chamber summons dated 29<sup>th</sup> July 2003 and I am convinced that the application to extend the validity of the summons was made before they expired since they were to expire on 31<sup>st</sup> July 2003. The appellant’s contention that the application to extend the validity of the summons was made on the 31<sup>st</sup> of July 2003 after the summons had expired is not factual.

44. As noted in the case of *David Koome Matugi v APA Insurance Limited* (*supra*) there is a presumption of service as stated in a process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. The same position was adopted by the court of Appeal in the case of *Shadrack arap Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986* [1987] eKLR.

45. From the above jurisprudence it is clear that the affidavit of service by the process server is considered sufficient evidence of service unless the same is rebutted by the other party. In the present case, I have carefully perused the record of appeal and I have noted that there is no sworn affidavit of service indicating that the summons to enter appearance was served on the appellant. I therefore hold that the Appellant was not served with summons to enter appearance. The purpose of summons to enter appearance is to inform a defendant of the institution of a suit. In this regard I am guided by the decision in the case of *Equitorial Commercial Bank ltd v Mohan Sons (k) ltd* (2012) eKLR where the



Court of Appeal in citing the decision in Nanjibhai Prabhudas & Company ltd v Standard Bank ltd (1968) EA (k) 670 stated that:

“.....we definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law.”

46. Order 10 Rule 11 provides for setting aside of judgment entered under Order 10. In Ali Bin Khamis V. Salim Khamis Korobe & 2 Others, [1956] 23 EACA 195, it was held inter alia, that an order made without service of summons to Enter Appearance is a nullity which must be set aside ex debito justitiae.
47. Based on the foregoing, it is my finding that the ex parte judgment entered against the Appellant without them being served with summons to enter appearance was an irregular judgment and the same ought to be set aside ex debito justitiae and I so order. I will then not venture into whether the intended defence raises triable issues since the judgment is set aside as of right and not as a matter of discretion.
48. Costs are usually at the discretion of the court and in any event, in favour of the party who is successful. Considering that it is the trial court in this case which was at fault in entering judgment against the Appellant before ascertaining that they were served with summons to enter appearance, I order each party to bear its own costs to the appeal.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2023**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Njogu for Appellant

Mrs Keya for Respondent

Court Assistant – Amina

30 days Right of Appeal.

