



**Mogo Auto Limited v Wasonga (Suing as the administrator of the  
Estate of Victor Wasonga Opiyo - Deceased) & another (Civil Appeal  
E010 of 2023) [2023] KEHC 25829 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25829 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E010 OF 2023  
DO OGEMBO, J  
NOVEMBER 22, 2023**

**BETWEEN**

**MOGO AUTO LIMITED ..... APPELLANT**

**AND**

**MIRIAM AKINYI WASONGA (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF VICTOR WASONGA OPIYO - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH RADERO OPIYO (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF VICTOR WASONGA OPIYO) - DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. P.J. Nandi, Principal  
Magistrate Bondo Law Courts in PMCC No. E78 of 2022 dated 17-3-2023)*

**JUDGMENT**

- 1 The Appellant was sued by the respondents Miriam Akinyi Wasonga and Joseph Radero Opiyo (as administrators of the estate of the Late Victor Wasonga Opiyo) in the lower court for General Damages, special damages, costs and interests under both the [Fatal Accidents Act](#) and the [Law Reform Act](#).
- 2 The appellant did not enter appearance. Neither did the appellant file a defence. An interlocutory judgment was accordingly entered against the appellant upon application by the Respondents. The appellant (Defendant) later filed an application seeking to set aside the interlocutory judgment, which application was dismissed. The appellant has been aggrieved by the said decision of the trial court and has appealed to this court.
- 3 The memorandum of appeal filed by the appellant herein and dated March 28, 2023, raises the following grounds of appeal:



- a. That the learned trial magistrate erred in law and in fact by dismissing the appellant's application dated February 9, 2023.
  - b. That the learned trial magistrate misdirected himself and misapplied the law by failing to appreciate that the appellant's draft defence raised a prima facie defence which ought to have gone to court for adjudication.
  - c. That the trial magistrate misapplied the law by failing to apply his discretion on such terms that were just to the parties herein especially the appellant who was ready and willing to defend the suit.
  - d. That the trial magistrate misdirected himself in failing to appreciate that no prejudice that could not be compensated by costs was to be suffered by the Respondent herein while dismissing the application.
  - e. That the trial magistrate misapplied the law by failing to appreciate that a mistake by a party should not be tantamount to a party suffering the penalty of not having its case heard on merit.
  - f. That the trial magistrate erred in fact and in law in failing to appreciate that the appellant was ready and willing to defend its case given an opportunity by the trial court.
  - g. That the trial magistrate failed in law and in fact in failing to appreciate that the appellant's application was filed without undue delay.
  - h. That the trial magistrate failed in law and in fact in failing to appreciate that the appellant adequately explained the reason for the delay in entering appearance and filing defence before an *ex parte* judgment was entered in favour of the Plaintiff.
  - i. That the trial magistrate erred in fact and in law by superficially treating the application dated 9/2/2023, annexures therein and submissions on the said application thus arriving at a wrong conclusion in law.
  - j. That the trial magistrate erred in law and fact by placing over reliance on the would be prejudice to be suffered by the Respondent when indeed the appellant was ready and willing to put the Respondent to the position she was before the *ex parte* judgment was entered.
  - k. That as a result of the foregoing the trial magistrate erred in law and in fact in finding the appellant's application was not worthy of the orders sought.
- 4 The appellant has prayed that this appeal be allowed, the ruling set aside and the application dated February 9, 2023 be allowed with costs to the appellant. This appeal is opposed.
  - 5 The parties canvassed this appeal by way of written submissions. Both parties duly filed their sets of submissions.
  - 6 In the submissions of the appellant, it was submitted that the main issue herein is whether the learned trial magistrate erred in dismissing the application despite the annexed defence which raises triable issues. That this court made the finding on the basis that there were no triable issues. Counsel relied



on the case of *Ramji Megji Gudka Ltd v Alfred Moffat Omondi Michira and 2 others* [2005]eKLR in which the Court of Appeal observed;

“In dealing with the issue of triable issues, we must point out that even 1 triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has not merit and is indeed a sham.”

7 The appellant further relied on *Giciern Construction Ltd v Amalgamated Trade and Services*, LLR No. 103(CAK).

8 That from the statement of defence annexed (paragraph 3, 4 and 12), it is clear that the appellant was merely financier and not a beneficial owner or the person in control of the motor cycle when it caused the accident. And that this in itself is a triable issue, and that this appeal is merited and ought to be allowed.

9 The Respondents, on the other hand, submitted that the appellant has abandoned all other grounds and submitted only on the issue of whether there is a triable issue. It was submitted that the trial court rightly found that the appellant had rightly been served with summons but did not tender any evidence. That the court interrogated the draft defence and found same to be mere denial. That the judgment herein is regular and ought not to be set aside.

10 Counsel relied on *William Maina Macharia and another v Francis Barchuro and others*, Civil Suit No. 172 of 2014, that;

“If there is no proper or any service of summons to enter appearance to the suit, the resultant 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.”

11 The Respondents submitted that the judgment herein is regular because summons and all documents related to the matter was duly filed and served, a fact not disputed.

12 It was further submitted that the intended defence raises no triable issues as at the time of the accident, the owner of the motor cycle was the appellant pursuant to the latest NTSA records about the said motor cycle. And that the defence is a mere denial of all evidence including that there had been an accident, and a fatal one at that. Counsel requoted the same William Maina Macharia case, that:

“The court is guided by the constitutional principles of the right of party to be heard but the right should not create injustices and prejudice to others.”

13 The Respondent has pleaded that this appeal be dismissed with costs.

14 I have considered the submissions made by the 2 parties on this appeal. I have also considered the ruling of the trial magistrate issued on March 17, 2023. The appellant seeks to have the said ruling of the court set aside basically on one ground. That it has a defence which raises triable issues which the court ought to have given it the opportunity to ventilate. The appellant has pointed out paragraphs 3, 4 and 12 of the draft defence as depicting the existence of such triable issues.



15 Paragraph 3 of the draft defence reads;

“The particulars of paragraphs 3 of the plaint are denied and the Plaintiff is put to strict proof. Specifically, the Defendant denies that it was the rider of the suit motor cycle KMFL 260R, Boxer, BM, through their employee.”

16 And Paragraph 4 of the draft defence referred to reads;

“Further and without prejudice to the foregoing, the Defendant avers that ownership of the suit motor cycle KMFL 260R, Boxer, BM100, vests in one Ezekiel Akuro Okunya and not the Defendant as the Defendant is merely a financier of the said suit motor cycle.”

17 Lastly, paragraph 12 of the draft defence reads;

“Further and absolutely without prejudice to the generality of the foregoing, the Defendant avers that he is not a beneficial or actual owner of the said motor cycle.”

18 Order 10 rule 11 of the [Civil Procedure Rules](#) gives directions on the setting aside of *exparte* judgment and it goes;

“Where a 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.”

19 The above provision places a burden on the applicant seeking to have the *exparte* judgement set aside to give cogent reasons that would justify the setting aside of the *exparte* judgment entered. In this case, there is no dispute on the fact that the Plaintiffs (Respondents) served the Defendant (appellant) with summons to enter appearance. The Plaintiffs similarly served the Defendant with the Plaint, relevant statements, Affidavits and copies of documents or evidence the plaintiffs case was based on. On failing to enter appearance and or file defence to the Plaintiff claims, And on application by the Plaintiffs, the *exparte* interlocutory judgment was entered against the Defendant. The said judgment was therefore regularly entered.

20 The appellant has not given either before the trial court, or before this court, any good reasons for its failure to enter appearance and or defend the case. The appellant has pursued only 1 ground in support of this appeal. That it has an arguable defence that the trial court ought to have given it the opportunity to canvass ([Ramji Megji Gudka v Alfred Moffat Omundi Michira & others](#) [2005]eKLR. It is clear from the ruling of the trial court that it considered this fact when it considered the case of [Philip Kiptoo Chemwolo and Another v Augustine Kubende](#), CIA No. 103 of 1984 in which the Court of Appeal held;

“The court has unlimited discretion to set aside or vary a judgement entered in default of appearance upon such terms as are just and in light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani v MConnell* (1968) 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.”

21 The trial court went further to consider more decisions of the superior court, including [Tree shade Motor Vehicle Ltd v. D.T. Dobbie Co. Ltd](#), CA No. 38 of 1998, that even when the *exparte* Judgement is regular, the court ought to consider the draft defence to see if it contains a valid or reasonable defence (see also *Patel v E.A. Cargo handling Services Ltd* (1974)EA 75.



- 22 This court is well guided by the above authorities. The court has already reproduced above the relevant paragraphs 3, 4 and 12 of the draft defence on which the appellant relies as constituting trial issues. A close look at the said paragraphs depict a general denial of the appellant that it was the registered owner of the accident motor cycle at the time of the said accident (paragraph 4, 12). At paragraph 3, the appellant even denies that the accident ever took place as claimed by the Plaintiff.
- 23 On the other hand, this court notes that among the documents filed by the Respondents (Plaintiff) in support of their case are a police abstract clearly confirming that the accident occurred on the material date and time. The Plaintiff further filed a copy of records from the NTSA regarding the ownership of the motor cycle KMFL 260R as at 10-5-2022. Same clearly confirm that as at the date of the accident on 25-4-2022, the registered owner of the accident motor cycle was Mogo Auto Limited, the appellant herein.
- 24 The issue therefore is whether in view of this evidence presented by the Plaintiff, the statement of defence as filed by the Defendant (appellant) raises any triable issues. I think not. The same is mere denial in the face of evidence filed and served by the Plaintiff (Respondents). I therefore agree with the trial magistrate that the appellant has not shown sufficient cause that would justify the setting aside of the exparte judgment regularly and properly entered in favour of the Respondent.
- 25 The consequence is that this appeal, based on the ground that the appellant has raised triable issues in his draft defence worthy of consideration, falls flat and fails. I accordingly find no merit in this appeal of the appellant dated March 28, 2023. I dismiss the same wholly. Costs of this appeal are awarded to the Respondents.
- 26 Orders accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**D.O. OGEMBO**

**JUDGE**

**22.11.2023**

**Court:**

Judgment read out in Open court in the presence of Mr. Ouma for appellant and Mr. Odinga for Respondents.

**D.O. OGEMBO**

**JUDGE**

**22.11.2023**

**Ouma:**

We require the proceedings.

**Court:**

Certified copies of the Proceedings and judgment to be supplied to the parties on payment of the requisite fees.

**D.O. OGEMBO**

**JUDGE**

**22.11.2023**

