REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 418 OF 2018

BERNARD MWANGI NDUNGU.....1ST APPELLANT

HELLEN WAMBUI MUCHEMI.....2ND APPELLANT

-VERSUS-

RODRICK KARANJA NGURE.....RESPONDENT

(Being an appeal from the ruling of B.J Ofisi, RM delivered on 10th August, 2018 in Nairobi Milimani CMCC No. 486 of 2017)

JUDGMENT

1. This appeal emanates from the ruling delivered on 10th August, 2018 in **Nairobi Milimani CMCC No. 486 of 2017.** On 31st January, 2017, **Rodrick Karanja Ngure** (hereafter the Respondent) filed a suit in the lower court against **Bernard Mwangi Ndungu** and **Hellen Wambui Muchemi** (hereafter the 1st and 2nd Appellant, respectively) for damages. The suit arose from a road traffic accident that occurred on 9th June, 2014, and involving the Respondent's motor vehicle registration number **KBU 520V** and motor vehicle registration number **KBR 489X,** along Ring Road, Pangani Area with Nairobi. The 1st Appellant was sued in his capacity as registered owner of motor vehicle registration number KBR 489X whereas 2nd Appellant was sued as the driver of the said motor vehicle. The Respondent averred that while lawfully driving, controlling and or managing motor vehicle registration number KBU 520V, the 2nd Appellant had so negligently and recklessly drove, managed and or controlled motor vehicle registration number KBR 498X that she caused it to collide into motor vehicle KBU 520V resulting in extensive damages. The Respondent equally pleaded vicarious liability against the 1st Appellant.

2. On 4th December, 2017 upon request by the Respondent, interlocutory judgment was entered against the Appellants who despite having being duly served with summons had failed to enter appearance and/or file a defence within the prescribed time. The Appellants thereafter moved the lower court on 27th February, 2018 through a motion seeking to set aside the judgment against them and all subsequent orders and leave to file their statement of defence.

3. The grounds on the face of the motion were amplified in the supporting affidavit deposed by the 2nd Appellant who swore that the Appellants received the notice of entry of judgment from the Respondent's advocate on 22nd January. It was the deponent's contention the Appellants were never served with summons to enter appearance and learned of the existence of the suit upon receiving the notice of entry of judgment left with a security guard at their residence. She further deposed that subsequently, on 22nd February, 2018 the 1st Appellant instructed counsel who upon perusing the court file and affidavit of **Willis Agayi Odhiambo**, the process server, informed him that summons were allegedly personally served on the Appellants on 31st March, 2017. She denied that she or her co-Appellant ever met the said **Willis Agayi Odhiambo**. Further, she swore that the Appellants had a good defence raising triable issues.

4. The Respondent had opposed the motion through a replying affidavit sworn by counsel on record. Parties thereafter canvassed the motion by way of written submissions. By a ruling delivered on 10th August, 2018 the lower court dismissed the Appellants' motion, provoking the instant appeal which is based on the following grounds: -

> **"1. The learned magistrate erred in law and fact when he failed to take into account the totality the Appellants pleadings before the court particularly the affidavit of the 2nd Appellant dated 27th February, 2018 and the draft statement of defence annexed thereto consequently failing to find that the Appellants pleadings hereof disclosed a reasonable defence in law against the plaint which raised several triable issues with good chance of success.**

2. The learned magistrate erred in law and in fact in failing to find that the Appellants affidavits and draft statement of defence raised several fundamental triable issues/defenses in law particularly denying liability and the alleged loss by the plaintiff was caused and or attributed to the Appellants negligence of motor vehicle registration no. KBR 498X as alleged in the plaint or at all and that the Respondent claim is exaggerated, unjustified and an attempt to extort money from the Respondent.

3. The learned magistrate erred in law and fact in finding that the Appellants notice of motion dated 27th February, 2018 lacked merit despite overwhelming evidence to the contrary by the Appellants pleadings, affidavits and draft statement of defence which illustrated the contrary.

4.The learned magistrate erred in law and fact in that he failed to take in to account the Appellants submissions in respect of the matters before the court and gave more weight to the Respondents submissions.

5. The learned magistrate erred in law and fact when misdirected himself on law and judicial precedent and the matters before him consequently making an erroneous decision in law to deny the Appellants leave to defend the suit.

6. The learned magistrate erred in law and fact in failing to uphold the overriding objective of the court, the cardinal and fundamental principles enshrined in Article 159(2)e of the Constitution thereby failing to justify, fairly and equitably balance the rights and interests of parties particularly that the Appellants should not to be condemned unheard, the case should be decided on substantive justice and merits without regard to undue procedural technicalities and that the alleged prejudice suffered by the Respondent can be compensated with costs.

7. The learned magistrate erred in law and fact in failing to find that the judgment and decree passed in the suit and execution proceedings thereon were irregular, procedural, illegal, unlawful and a nullity for want of formal proof and service of requisite hearing notices to the Appellants as the claim was not a liquidated amount.

8.The learned magistrate erred in fact and law in upholding the prima facie erroneous and illegal judgment/decree jointly and severally against the Appellants despite undisputed evidence and acknowledgment by pleadings that the said decretal amount was payable by Appellants Insurer, AIG Kenya Insurance Co. Ltd by reason of Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Law of Kenya.

9. The learned magistrate impugned decision is erroneous in fact, law and judicial precedent on the matters that were before him and a serious gross miscarriage of justice.

10. The learned magistrate erred in law in entering judgment against the Appellant on liability and damage thereby occasioning a miscarriage of justice." (sic)

5. The appeal was canvassed by way of written submissions. Counsel for the Appellants while placing reliance on the decision in **Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR, among others,** submitted that the draft defence and affidavit in support of the motion before the lower court raised triable issues and as such the Appellants ought to have been allowed to defend. The Appellants faulted the lower court for giving undue regard to procedural technicalities and cited Article 159(2)(d) of the Constitution, Section 1A of the Civil Procedure Act, and several decisions including **Sabei District Administration v Gasyali & Others (1968) E.A 300** as cited with approval in **James Wanyoike & 2 Others v CMC Motors Ltd & 4 Others [2015] eKLR**, and **Pithon Waweru Maina v Thuku Mugiria [1983] eKLR** in emphasizing the right to be heard**.**

6. Regarding the Appellants' failure to enter appearance, counsel asserted that the summons to enter appearance were not served on them as purported by the process server and he cited **Philip Ongom Capt. v Catherine Nyero Oweto (Civil Appeal 2001/14) [2003] UGSC 16**; **Mbaki & Others v Macharia & Another (2005) 2 E.A. 206** and **Philip Chemwolo & Another v Augustine Kubende [1982-88] KLR** in urging the exercise of the court's discretion in favour of the Appellants in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. The court was therefore urged to allow the appeal.

7. The Respondent for his part emphasized that personal service was effected upon the 1st Appellant who indicated that he had authority to accept service on behalf of the 2nd Appellant. It was pointed out that the Appellants' motion in the lower court was supported by an affidavit deposed by the 2nd Appellant whereas only the 1st Appellant could competently confirm whether summons had been served on him, and moreover, neither controverted the contents of the affidavit of service nor sought to cross examine the process server on the contents thereof.

8. Counsel also argued that the affidavit in support of the motion did not comply with the provisions of Order 1 Rule 13 of the Civil Procedure Rules as no authority to the deponent thereof by the 1st Appellant was attached. Citing **Job Kiloch** (supra), and **Magunga General Stores v Pepco Distributors Ltd (1987) KLR 150,** counsel submitted that the Appellants' draft statement of defence did not raise a single issue deserving of judicial consideration as it constituted general and unsubstantiated denials. In conclusion, while relying on **Kenya Commercial Bank Limited v Nyataige & Another (1990) eKLR** the Respondent's counsel asserted that the Appellants were not deserving of the court's exercise of its discretion and the appeal ought to be dismissed in its entirety, noting that the Respondent stood to be prejudiced if the judgment were set aside, and the matter subjected to full hearing.

9. The court has perused the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See **Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11** and **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278.**

10. The Court of Appeal stated in **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** that:

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.**

11. The motion before the lower court was expressed to be brought under section 1A, 1B, 3A & 63(e) of the Civil Procedure Act and Orders 22 Rule 25 and 45 Rule 1 & 2 of the Civil Procedure Rules. The lower court in dismissing the motion stated inter alia that:

> **"The issue for determination is whether the Applicant can be granted the orders sought in the application…have read the affidavit of service by Willis Agayi Odhiambo, a licensed court process server. I am convinced that service of the summons to enter appearance and notice of entry of judgment was properly effected to the defendant/applicants.**
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> **I have also considered the rival submissions and read the proposed statement of defence and find that it does not raise triable issues. It is my considered view that the Plaintiff did his part by keeping the Defendants abreast of the progress of the matter. Any lapse of the Applicants part cannot be visited on the plaintiff as he is entitled to enjoy the fruits of the judgment he obtained regularly hence I find to reason to upset it.**
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> **In the upshot the notice of motion application dated 27th February, 2018 is unmerited, therefore it is dismissed with costs to the Plaintiff/Respondent."** (sic)

12. Evidently, the Appellants had in their motion invoked the wrong provisions of the Civil Procedure Rules. Based on the prayers therein, the motion ought to have been anchored on the provisions of Order 10 Rule 11 which provides that: -

> **"Where 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."**

13. The grant or refusal to set aside or vary such judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. Therefore, in considering this appeal, the Court is guided by the principles enunciated by Court of Appeal in **Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR** stated:

> **"This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Mbogo v Shah, (supra):**
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> **"A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice".**
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> **See; United India Insurance Co. Ltd v. East African Underwriters (K) Ltd [1985] E.A 898: -**

14. The object of the discretion conferred by Order 10 Rule 11 was stated in the case of **Shah –vs- Mbogo and Another [1967] E.A 116**:

> **"The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."**

15. In **Bouchard** ***International (Services) Ltd vs. M'Mwereria [1987] KLR 193 as*** *cited with approval in* **Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR; Platt JA** in the former had this to say regarding the exercise of the discretion:

> **"The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or 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...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely**

a prima facie *defence which should go to trial or adjudication*. *The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.* …..It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes *hearing, than the judge who acts* ex parte... *Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction".*

16. The Appellants denied service of summons, but as correctly pointed out by the Respondent, the 1st Appellant who, according to the process server received the summons inexplicably eschewed swearing an affidavit in support of the motion. And the 2nd Appellant for her part did not deny that her co-Appellant had authority to receive summons on her behalf. Thus, to my mind, it is beyond disputing that on the basis of the affidavit of service on record, and whose maker the Appellants eschewed cross-examining, service of summons was duly effected upon the Appellants but they failed to enter appearance or file defence. And further that in view of their default, a regular interlocutory judgment could have been properly entered against them, pursuant to the provisions of Order 10 Rule 6 of the Civil Procedure Rules (CPR). I use the phrase *"could have been properly entered"* advisedly, because in fact, what was entered was a final judgment.

17. The Respondent's claim as presented in the plaint before the lower Court was one for material damage, founded on the tort of negligence. Thus, even though a specific sum was pleaded therein, the claim was not a liquidated claim as envisaged under Order 10 Rules 4 and 5 of the CPR and in respect of which a final default judgment could properly be entered, as happened. A reading of Rules 4 to 9 of Order 10 of the CPR to my mind leaves no doubt that final judgment can only be properly entered in respect to liquidated claims. At paragraph 1109 of **Halsbury's Laws of England, 4th Edition Vol. 12** it is stated that:

'In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated…

A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic.'

18. Ringera J (as he then was) defined a liquidated claim as anticipated in Rules 4 and 5 of Order 10 CPR in **Trust Bank Limited V Anglo African Property Holdings Limited & 2 Others HCCC No. 2118 of 2000** in the following terms:

"A claim does not become a liquidated demand simply because it has been quantified. To qualify as a liquidated demand, the amount of a claim must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic. I adopt the following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE RULES [1985] VOLUME 1, at page 33;

'A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand", but constitutes "damages"…."

The words "debt" or "liquidated demand" do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure".

19. The applicable Rules in this instance were Rules 6 and 7 of Order 10 of the CPR which are in the following terms:

"Interlocutory judgment [Order 10, rule 6.]
6.Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. Interlocutory judgment where several defendants [Order 10, rule 7.]
Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders. (Emphasis Added).

20. The record of the lower court shows that upon a request for judgment being made by the Respondent, final judgment was entered on 4th December 2017 and a decree issued on 17th January 2018, followed by warrants of attachment. This was irregular; only an interlocutory judgment could properly have been entered in this instance, and the suit thereafter set down for formal proof.

21. The Court of Appeal stated in **Giro Commercial Bank Ltd v Ali Swaleh Mwangula [2016] eKLR** that: -

"Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10

> **Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff's claim."** (Emphasis added).

See also **Gemstaviv Limited v Kamakei Ole Karia & 5 others [2015] eKLR.**

22. The final judgment entered was therefore irregular, and cannot stand on that account alone, notwithstanding the fact that the Appellants defaulted by failing to file their defence within the stipulated period. It is further my considered opinion that, on the test prescribed in **Magunga General Stores v Pepco Distributors Ltd (1987) KLR 150,** the Appellants had demonstrated before the lower court that they had a reasonable defence, and ought to have been allowed to defend. To give meaning to their constitutional right to be heard in respect of which the Court of Appeal, though dealing with the right to be heard on appeal, observed in Vishva **Stone Suppliers Company Limited v RSR Stone 92006) limited (2020) eKLR** that**:**

> **"Turning to the request to allow applicant to exercise his now undoubted constitutionally, underpinned right of appeal the position in as crystalized by case is as set in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding *inter alia* that:**
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> > **(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;**
> >
> > **(ii) the right to be heard is a valued right; and**
> >
> > **(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;..."**

23. In the result, the Court finds that in rejecting the Appellant's motion the lower court proceeded from error having failed to appreciate that the default judgment against the Appellants was irregular, and that the discretion it was exercising was intended to avoid injustice and hardship arising from such irregularity. The Court therefore wrongly exercised its discretion. This Court is satisfied that the appeal herein is merited, and it is allowed. The order of the lower Court dismissing the Appellants' motion dated 27th February 2018 is hereby set aside and the Court substitutes therefor an order allowing the prayer seeking the setting aside of the judgment entered on 4th December 2017, the decree, and other consequential orders. Anticipating that there may occur administrative delays in remitting the original record to the lower court, this Court grants the Appellants 21[Twenty-one] days within which to file their defence statement. The costs of the motion dated 27th February 2018 and of the appeal are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY IN NAIROBI ON THIS 14TH APRIL, 2022

C.MEOLI

JUDGE

In the presence of:

For the Appellants: Mr Muhuyu h/b for Mr Litoro

For the Respondent: Ms Muguku h/b for Mr Ochieng

C/A: Carol