



REPUBLIC OF KENYA



**Wanjohi v Githiomi (Civil Appeal E350 of 2020)
[2022] KEHC 11187 (KLR) (Civ) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11187 (KLR)

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

CIVIL

CIVIL APPEAL E350 OF 2020

JK SERGON, J

MAY 31, 2022

BETWEEN

CHARLES WAMBUGU WANJOHI APPELLANT

AND

MICHAEL NJUKI GITHIOMI RESPONDENT

(Being an appeal against the ruling and order of Honourable B.J. Ofisi (Mrs.) (Principal Magistrate) delivered on 9th November, 2020 in MILIMANI CMCC no. 6791 of 2018)

JUDGMENT

1. At the onset, the respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated July 23, 2018 and sought for reliefs against the appellant in the nature of general and special damages plus costs of the suit and interest thereon, arising out of a road traffic accident involving the motor vehicle registration number KBZ 934V alleged to belong to the appellant, and the motor vehicle registration number KAS 076U being at all material times driven by the respondent. The claim is for negligence.
2. Subsequently, upon the request of the respondent, an ex parte interlocutory judgment was entered against the appellant on January 28, 2019 and the matter proceeded for formal proof. Upon close thereof, final judgment was delivered in favour of the respondent and against the appellant on May 29, 2020.
3. Consequently, the appellant filed the Notice of Motion dated July 1, 2020 and sought to set aside the ex parte judgment and further sought for leave to file his statement of defence out of time. The Motion was opposed by the respondent.



4. Upon hearing the parties on the aforesaid Motion, the trial court dismissed the Motion with costs vide the ruling delivered on November 9, 2020.
5. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through his memorandum of appeal dated December 8, 2020 the appellant put in the following grounds:
 - i. The learned trial magistrate erred in law and in fact in dismissing the appellant's application dated July 1, 2019 which finding was against the height of the evidence on record.
 - ii. The learned trial magistrate erred in law and in fact in denying the appellant an opportunity to defend himself in the lower court which is against the appellant's constitutional rights.
 - iii. The learned trial magistrate erred in law and in fact in finding that the respondent was entitled to general damages without granting the appellant an opportunity to be heard.
6. This court gave directions for the parties to file written submissions on the appeal. However, it is apparent from the record that at the time of writing this judgment, only the submissions by the respondent were available for this court's reference.
7. In his brief submissions, the respondent argues that there is evidence of service of the summons to enter appearance and the pleadings, upon the appellant and hence the interlocutory judgment is regular.
8. The respondent further argues that the appellant did not bring forth any proper explanation for his failure to file his statement of defence within the stipulated timelines and hence the trial court acted correctly in dismissing his application.
9. For all the foregoing reasons, the respondent is of the view of that the appeal must fail.
10. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to dismiss the appellant's application seeking to set aside the interlocutory judgment and further seeking for leave to file his statement of defence out of time. I will therefore deal with the grounds of appeal contemporaneously.
11. In the Motion dated July 1, 2020 the appellant averred that upon receiving the summons to enter appearance and pleadings, the then advocate for his insurer (Directline Assurance Company Limited) took steps to file the memorandum of appearance and statement of defence on January 14, 2019 only to discover that the interlocutory judgment had already been entered on January 28, 2019.
12. The appellant blamed the erstwhile advocate for the failure to enter appearance and/or file the defence in good time.
13. It is the assertion of the appellant that the draft statement of defence which was annexed to the Motion raises triable issues which ought to be heard on merit, and that the respondent does not stand to be prejudiced if the orders sought therein are granted.
14. In his replying affidavit to the Motion, the respondent stated that though the respondent's insurer was all along aware of the existence of the suit at all material times, it took no steps to enter appearance and file the statement of defence in good time.
15. The respondent stated that the interlocutory judgment was regularly entered and that there is no evidence of a statement of defence being filed.



16. Upon hearing the parties on the Motion, the learned trial magistrate analyzed that the appellant was duly filed with the requisite documents and hence he has not met the threshold for granting the orders sought in the Motion, consequently dismissing the Motion.
17. Upon my re-examination of the material, I note that the question of service of summons and the pleadings is not disputed.
18. This therefore brings me to the subject on whether the appellant's draft statement of defence raises triable issues.
19. Upon my perusal of the impugned ruling, I note that the learned trial magistrate did not specifically address her mind to this subject despite noting that it was a condition for consideration when it came to applications seeking to set aside interlocutory judgments.
20. In determining whether or not to set aside an ex parte/default judgment, a court is required to consider whether a party has a defence which raises triable issues, even where service of summons is deemed to have been proper.
21. In so saying, I cite with approval the rendition in the case of *Tree Shade Motors Ltd v D.T. Dobie & another* (1995-1998) IEA 324 relied upon in *M/S Jondu Enterprises Limited v Spectre International* [2019] eKLR thus:

“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”
22. Furthermore, the phrase 'triable issue' was defined by the Court of Appeal in the case of *Ternic Enterprises Limited v Waterfront Outlets Limited* [2018] eKLR thus:

“...a triable issue” is an issue which raises a prima facie defence and which should go to trial for adjudication.”
23. The court went on to appreciate that:

“The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend.”
24. From my study of the appellant's draft statement of defence, I observed that he is denying the particulars of negligence pleaded in the plaint, further pleading that any negligence that occurred was occasioned by the respondent, the particulars of which have been set out in the statement of defence.
25. In my view therefore, I am satisfied that the appellant's statement of defence raises triable issues which can only be adequately ventilated at the hearing of the suit.
26. In considering whether to set aside a default judgment, a court of law is also required to ascertain whether the respondent stands to be prejudiced. I equally note that the learned trial magistrate did not delve into this subject in her analysis.
27. In my view and upon my re-examination of the pleadings and



material tendered before the trial court, there is nothing to indicate that the respondent would be prejudiced in a manner that cannot be adequately compensated by way of costs, if the interlocutory judgment is set aside.

28. Upon taking into account all the foregoing factors hereinabove, I am convinced that it would be a proper exercise of my discretion to interfere with the impugned ruling and to grant the appellant the opportunity of defending the claim, upon setting aside the interlocutory judgment.
29. In the end the appeal is allowed.. consequently:
- i. The ruling delivered on November 9, 2020 is hereby set aside and is substituted with an order allowing the Motion dated July 1, 2020.
 - ii. The interlocutory judgment entered on January 28, 2019 and all consequential orders/proceedings are hereby set aside and the suit is hereby reinstated.
 - iii. The appellant is granted leave to file and serve his statement of defence within 14 days from today's date.
 - iv. Costs of the Motion dated July 1, 2020 to abide the outcome of the suit.
 - v. In the circumstances of this appeal, a fair order on costs is to order which I hereby do that each party to bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

