



REPUBLIC OF KENYA



**Radha Motors Ltd v Kerandi & another (Legal Representatives
of The Estate of Dennis Kerandi Kerore - Deceased) (Civil Appeal
18 of 2018) [2022] KEHC 12651 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL 18 OF 2018**

**RL KORIR, J
JULY 29, 2022**

BETWEEN

RADHA MOTORS LTD APPELLANT

AND

NELSON KERORE KERANDI 1ST RESPONDENT

AGNES MORAA KERORE 2ND RESPONDENT

**LEGAL REPRESENTATIVES OF THE ESTATE OF DENNIS KERANDI
KERORE - DECEASED**

*(Being an Appeal from the Judgment of Hon. M. Nyigei Senior Resident Magistrate
in Civil Suit Number 55 of 2016 - Bomet delivered on 7th February 2018)*

JUDGMENT

1. Judgment in the trial court was delivered on February 7, 2018. The court held that the Plaintiff was 100% liable for the road accident that involved Motor Vehicle Registration No's KBH 365C and KBY 798D. In terms of quantum, the court awarded the Plaintiff general damages of Kshs 5,354,000 and special damages of Kshs 190,500.
2. Being dissatisfied with the Judgment, the Appellant via a Memorandum of Appeal dated August 7, 2018 appealed to this court on the following grounds:
 - I. That, the learned Magistrate erred in law and in fact by allowing the matter to proceed *ex-parte* on December 13, 2017 whilst the said date was in fact designated as a Mention date for purposes of taking Hearing directions.
 - II. That, the learned Magistrate erred in law and in fact by allowing the matter to proceed *ex-parte* on December 13, 2017 whilst the relevant Hearing Notice was received by the Appellant's



former advocates on record with the endorsement “Under Protest” and the said date having being fixed *ex-parte* without invitation and therefore being inconvenient to the said advocate.

- III. That, the learned Magistrate erred in law and in fact by allowing the matter to proceed *ex-parte* on December 13, 2017 whilst there was on record a Third Party Notice dated May 31, 2017 as well as a pending Notice of Motion Application dated July 18, 2017 that were both unresolved as at the date of the said hearing.
 - IV. That, the learned Magistrate erred in law and in fact by disregarding trite law in respect of the conduct of Hearings where there are pending, unresolved applications, or where a Hearing Notice for a date taken *ex-parte*, without invitation, is received with the endorsement “Under Protest”.
3. The Appellant therefore prayed that the Judgment delivered on February 7, 2018 be set aside and that the matter be remitted back to a different subordinate court for hearing.
 4. Being the first appellate court, this court has a duty to re-evaluate the evidence on record. The Court of Appeal case of *Okeno Vs Republic* (1972) EA 32 has been consistently cited as follows: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”

Selle & Another Vs Associated Motor Boat Co. Ltd and Others (1968) EA 123.

5. In this case however the appeal is not on the substantive issue of liability or quantum per se but on the procedural steps leading to the impugned judgment.

In the case of *Grace Njeri Mbugua vs Hannah Wanjiku Thong’ote* (2019) eKLR, the Court of Appeal held that:-

“At the outset, we remind ourselves that procedural rules are the backbone of justice”.

Maraga J (as he then was) in *Shashikant C. Patel v Oriental Commercial Bank* (2005) eKLR also stated:-

“We should never lose sight of the fact that rules of procedure, though they may be followed are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice.”

The Plaintiffs’ Case

6. It was the Plaintiffs’ case that their son, Dennis Kerore Kerandi died on August 25, 2014 from a road accident along Bomet-Kaplong road. That he was a fare paying passenger in Motor Vehicle Registration Number KBY 798D which collided with Motor Vehicle Registration Number KBH 365C.
7. It was the Plaintiffs case that they had suffered immense financial loss as their son used to support them financially. As a result of the death, they prayed for general damages and special damages of Kshs 191,350 against the Defendant.



The Defendant's Case

8. The defendant filed a statement of defence dated 28/5/2015 denying liability. Rameez Muhammad stated that he was one of the Defendant's directors and that they dealt with the importation and exportation of new and used Japanese vehicles. It was the Defendant's case that it sold the Motor Vehicle Registration Number KBY 798D to Elijah Gathogo Mwangi on April 5, 2013 for Kshs 1,325,000 on hire purchase basis.
9. The Defendant stated that Elijah Gathogo Mwangi paid a deposit of Kshs 625,000 and there was an outstanding balance of Kshs 700,000 that was to be paid in 14 months. It was its case that Elijah Gathogo Mwangi had not paid the outstanding balance.
10. The Defendant averred that Elijah Gathogo Mwangi came with a lady known as Jane Wabai Nene and handed him a written agreement between themselves that listed them as co-owners of Motor Vehicle Registration Number KBY 798D. It was the Defendant's further case that at the time of the accident, the Motor Vehicle Registration Number KBY 798D was under the possession and beneficial use of Elijah Gathogo Mwangi and Jane Wabai Nene.
11. I have painstakingly combed through the trial court record as the appeal raises procedural issues. In the course of the proceeding, the Defendant's Counsel sought leave to issue a 3rd Party Notice which the court granted on June 28, 2017. The Hearing Date of June 14, 2017 was taken by Consent.
12. On June 14, 2017, there was no appearance by the Defendant's counsel while the Plaintiff's counsel had one witness and was ready to proceed. The trial court ordered that the matter proceed ex-parte. The Plaintiffs proceeded with their case and closed it and got a Mention date to confirm filing of submissions on 28th June 2017.

Notice of Motion Application dated June 27, 2017

13. The Defendant filed the aforementioned Application that sought to set aside the ex-parte proceedings of June 14, 2017 and that it be allowed to make a formal application for substituted service. It was its further prayer that it be allowed to give its evidence.
14. The Application was opposed by a Replying Affidavit sworn by Nelson Kerore Kerandi on August 22, 2017.
15. In a Ruling dated October 4, 2017, the trial court set aside the ex-parte proceedings of June 14, 2017 upon the Defendant paying the Plaintiff throw away costs of Kshs 15,000 within 7 days of the Ruling.

Notice of Motion Application dated July 18, 2017.

16. In this Application, the Defendant sought leave to serve the 3rd Party Notice dated May 31, 2017 by way of Substituted Service. From the record, this Application remains undetermined.
17. The matter was then fixed for Mention on December 13, 2017 and the court directed that a Mention Notice was to be issued to the Defendant. John Patrick Onyango filed an Affidavit of Service indicating that he had served the Mention Notice to the firm of Christine Kipsang & Company which was on record for the Defendant on December 10, 2017. The same was however received under protest as they indicated that the Notice was too short for them to adequately prepare and that they had other matters fixed on that particular date (December 13, 2017).
18. On December 13, 2017, it was brought to the attention of the court that the Defendant had not complied with the court's orders of October 4, 2017 as they were yet to pay the throw away costs. A



Judgment date was given by the court and Judgment was delivered on February 7, 2018 where the court found the Defendant to be 100% liable for the accident and further ordered the Defendant to pay a cumulative Kshs 5,544,500 being both special and general damages.

19. A Notice of Entry of Judgment was filed on March 26, 2018 and served upon the Defendant.
20. A Decree and Certificate of Costs was extracted for the sum of Kshs 5,646,968 and Kshs 447,432.50 respectively. Warrants of Attachment were thereafter issued by the trial court on March 27, 2018.

Notice of Motion Application dated April 3, 2018.

21. In this application, leave was granted by the court for the firm of Ngonze & Ngonze Advocates came on record for the Defendant in place of Christine Kipsang & Co Advocates. The court further granted Stay of Execution of the *ex-parte* Judgment delivered on February 7, 2018 as well as the resultant Decree and other consequential orders. The court further enjoined the Plaintiffs from interfering with the Defendant's peaceful and quiet use of all their movable properties subject of the Proclamation of Attachment of Movable Property dated March 29, 2018. These orders were granted pending the hearing and determination of the aforementioned Application.
22. The Application was opposed by the Plaintiff who swore a Replying Affidavit through Nelson Kerore Kerandi. The same was dated April 26, 2018.
23. In a Ruling dated July 2, 2018, the court ruled that it was unable to determine the Application dated July 2, 2018 as it would be tantamount to the court sitting on an appeal on a decision of a fellow magistrate which would be improper. The court further stated that it would be proper that the applicant pursue an appeal in the High Court. This is the genesis of the present Appeal before me.
24. In an Order issued on August 18, 2020, Onger J ordered as follows:-
 - I. That the application for stay of the Decree in the lower court is allowed and time for filing the appeal is extended by 45 days from August 6, 2020.
 - II. That stay of execution of the Decree in the lower court is also granted pending the hearing and determination of the impending appeal.
 - III. That the proclamation of attachment/repossession/distrain of the Applicant's movable property dated 7/8/2018 be and is hereby lifted and the applicant to pay Auctioneer's charges, if any.
 - IV. That the respondent be compensated by an award of thrown away costs of this application assessed at Kshs 50,000 to be settled within the next 30 days from the date hereof in default, the respondent shall be at liberty to execute for recovery of the said thrown away costs notwithstanding the pendency of the intended appeal.
 - V. That the memorandum of appeal filed herein be deemed to have been filed within time upon payment of the filing fee.

Notice of Motion Application dated August 20, 2020.

25. In the aforementioned Application, the Respondents sought to stay the orders of the High Court issued on August 6, 2020 pending the hearing and determination of that application. They also wanted to incorporate the security of Kshs 3,500,000 to secure the hearing and determination of the Appeal. That the said security be held in the joint account of M/S Mose Nyambega & Co Advocates and Ngonze & Ngonze Advocates at Co-operative Bank University Way Branch.



26. The Appellant filed Grounds of Opposition dated August 31, 2020 in which it was agreeable to have the sum of Kshs 3,500,000 deposited in a joint interest bearing account in the joint names of the advocates for the Applicant and the Respondent until the Appeal was heard and determined.
27. Having dispensed with the interlocutory applications, I now turn to the substantive issues raised in the appeal which was canvassed through written submissions.

The Appellant's Submissions.

28. The Appellant submitted that the Respondent's advocate on an *ex-parte* basis, fixed the matter for directions on December 13, 2017. That the Appellant was given one day to attend the said matter which was being heard in Bomet and the Appellant's advocate was domiciled in Mombasa. It was its further submission that the Notice was too short.
29. It was the Appellant's submission that they took too long to issue the Mention Notice. That they fixed the Mention date on November 17, 2017 but only served the Mention Notice on December 9, 2017. The Appellant submitted that the Respondents conferred jurisdiction upon themselves as they altered the order of the court as the Mention was for directions and not taking of a Judgment date. That the proceedings of December 13, 2017 were irregular and that the court did not have jurisdiction to turn a date for issuance of directions to a hearing date.
30. The Appellant submitted that there was no Hearing Notice that was served for the hearing of the case on December 13, 2017 and it relied on Order 12 Rule 2 of the [Civil Procedure Rules](#).
31. It was the Appellant's submission that the trial court acted outside its jurisdiction by reviving the evidence that was taken on June 14, 2017. It relied on the case of [Owners of Motor Vessel "Lilian S" Vs Caltex Oil \(K\) Ltd](#) (1989) eKLR to support this submission. They also relied on the case of [Wachira Karani Vs Bildad Wachira](#) (2016) eKLR.
32. The Appellant submitted that the trial court occasioned it great injustice as it ordered it to pay over Kshs 6,000,000 without according it an opportunity to defend itself. That justice was not seen to have been done. It was its further submission that the trial court ignored the documents presented before it which indicated that the Appellant did not have control of the Motor Vehicle Registration Number KBY 798D. It relied on the case of [Superfoam Limited & Another Vs Gladys Nchororo Mbero](#) (2014) eKLR and [Nancy Ayemba Ngaira Vs Abdi Ali](#) (2010) eKLR to support its submissions.
33. It was the Appellant's submission that if the Appeal was allowed, there would be no prejudice suffered by the Respondents as all parties would have an opportunity to be heard and that the final Judgment would be based on the relevant evidence adduced before it. That if the Appeal is disallowed, the Appellant would be left with the responsibility of paying over Kshs 8,000,000 for an accident that it knew nothing about.
34. The Appellant requested that the security of Kshs 3,500,000 deposited with the advocates for the Respondents and the Appellants former advocates i.e. Ngonze & Ngonze Advocates be released to its current advocates.

The Respondent's Submissions.

35. The Respondents submitted that the Ruling delivered on October 4, 2017 was conditional. That the Application was allowed on condition that the Appellant pay the Respondent throw away costs of Kshs 15,000 and in default, the matter was to revert to the earlier status. It was the Respondents



submission that the Appellant refused to comply with the orders of the court and was therefore in breach of Sections 1A (1), (2) & (3) of the *Civil Procedure Act*.

36. It was the Respondents submission that after failure of the Appellant to comply with the directions issued on October 4, 2017, the matter progressed and the same was fixed for Mention on December 13, 2017. That the Mention Notice was served upon the Appellant and that both parties had legal representation in court on December 13, 2017 when the Judgment date was allocated.
37. The Respondents submitted that an advocate held brief for advocate Kipsang and that the said advocate was comfortable with the Mention date of December 13, 2017 thus the same would be convenient to advocate Kipsang.
38. It was the Respondents' submission that litigation must come to an end and that the Appellant was keen on circumlocution in a bid to deny the Respondents their fruits of Judgment. They further urged the court to look at the conduct of the Appellant in defending its case. That the purported 3rd Party who purchased the Motor Vehicle from the Appellant vide an agreement dated May 12, 2014 was not a substantive party to this suit. It was the Respondents further submission that the purported purchaser was paying in instalments and he had not finished the payments.
39. The Respondents submitted that the 3rd Party was an afterthought. That if the Appellant intended to enjoin a third party under Order 1 Rule 15, he would have filed the Third Party Notice within 14 days but the court entertained him. It was the Respondents' submission that the Appellant failed to comply with the court's orders and directions.
40. It was the Respondents' submission that the sum of Kshs 3.5 million in the joint account of Ngonze & Ngonze Advocates and Mose Nyambega & Co Advocates at Co-operative Bank of Kenya Limited at University Way branch be released to Mose Nyambega & Company Advocates for onward transmission to the Decree Holders.
41. The Respondents relied on the *Civil Procedure Act*, the *Constitution* of Kenya, *Nancy Musili Vs Joyce Mbete Katisi* (2019) eKLR and *Masita Musa Onwonga Vs Raflo Services Company Limited & Another* (2022) eKLR to support their submissions.

Analysis and Determination.

42. I have considered the Record of Appeal dated January 28, 2022, the Appellant's Written Submissions dated February 18, 2022, and the Respondents Written Submissions dated March 13, 2022 and I find that the Appeal raised one issue for my determination being; whether the default Judgment given on February 7, 2018 was irregular and ought to be set aside.

A. Whether the default Judgment given on February 7, 2018 was irregular and ought to be set aside.

43. Order 10 Rule 4 (1) of the *Civil Procedure Rules*, 2010 provides as follows:

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs”.



However, Order 10 Rule 11 of the Civil Procedure Rules, provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside as follows:

“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.”

44. From the reading of the aforementioned provisions, a court has the discretion to set aside a default judgment. In the case of *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75, the Court of Appeal held that: -

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

45. The principles for the setting aside of ex parte judgment were stated in considered by the Court of Appeal for East Africa case of *Mbogo Vs Shah* (1968) EA 93,95 as follows:

“Two questions arise on this appeal. The first is the circumstances which would justify a Judge granting an application made under O.9, r. 10, to set aside a judgment entered ex parte; the second is the circumstances in which this Court, as a Court of Appeal, would interfere with the exercise of the discretion of a Judge made on any such application.

Dealing with the first question, it is quite clear that the Judge has discretion under O. 9, r. 10, but of course he has to exercise that discretion judicially. In *Kimani v. McConnell* [1966] E.A. 547), HARRIS, J., dealing with the question as to the circumstances to be borne in mind by a judge on an application under that rule, said this (ibid. at 555G):

In the light of all the facts and circumstances both prior and sub-sequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

46. Of particular interest to this Appeal are the proceedings of December 13, 2017. The background to the proceedings has already been elaborately discussed. The Plaintiffs attended the registry in the absence of the Defendant on November 17, 2017 and took a Mention date of December 13, 2017 and the Mention was scheduled for directions. The Plaintiffs mischievously served the Hearing Notice upon the Defendants on December 11, 2017, which was a day to the Mention considering that December 12, 2017 was a public holiday. The Defendant’s advocate quite rightly received the Mention Notice under protest.

47. From the record, it was clear that both parties were represented in court on December 13, 2017 ie Advocate Kusa who held brief for Advocate Mose for the Plaintiff and Advocate Koech who held brief for Advocate Kipsang for the defendant. It was brought to the attention of the court that the Defendant had not complied with the court’s order of paying the Plaintiff the throw away costs. As a result, the Plaintiff prayed for a Judgment date.

48. It is my finding that it was unprocedural that a Mention date for directions was turned into a Hearing. This is so because when the trial court gave a Judgment date, it was implied that the *ex-parte* proceedings



that had been set aside had been revived. I am persuaded by the case of *Republic Vs Anti-Counterfeit Agency & 2 others Ex-Parte Surgippharm Limited* (2014) eKLR where Odunga J observed that: -

“First and foremost, it is clear that the matter was coming up for mention for directions rather than for hearing. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties’ consent to the hearing.”

49. I am bound by the decision in the case of *Central Bank of Kenya Vs Uburu Highway Development Ltd & 3 Others* Civil Appeal No 75 of 1998, where the Court of Appeal held that: -

“Where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties.”

50. Further, it behoves this court to pay deference to the constitutional dictate on the right to a fair hearing provided under Article 50 (1) of the *Constitution* that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial body”.

51. The regularity or irregularity of a Judgment was discussed in the Court of Appeal case of *James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another* (2016) eKLR, where it was held that: -

“From the outset, it cannot be gainsaid that a distinction has always existed between a 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 appearance 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 factors 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shab* (supra), *Patel v EA Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).

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”.

52. It is my finding that the Judgment delivered on February 7, 2018 was regular. However, it was a product of breach of the Rules. The Defendants were served with Summons to Enter appearance dated May 14, 2015, the Plaint, Plaintiffs List of Witnesses, Plaintiffs Witness Statements and the Plaintiff's List of Documents all dated April 21, 2015. The Defendants thereafter filed their Defence, their List of Documents, and Witness Statements all dated May 28, 2015. Both parties actively participated in the case before they hit the first bump which was the *ex parte* proceedings leading to the impugned judgment which has been adequately discussed above. Guided by the authority above, it is my finding that the *ex parte* judgment entered by the trial court ought to be set aside. I must point out that the power to set aside a default judgment is exercisable by the trial court and that therefore the trial court in this case was in error to decline to hear the Applicant's application for setting aside the default judgment.
53. The Appellant has complained under Ground 3 of his Memorandum of Appeal that there was a pending Notice of Motion Application dated July 18, 2017. The main prayer of the said Application was for leave to serve the Third Party Notice dated May 31, 2017 by way of substituted service. It is true from the record that the Application was not heard. However, on June 28, 2017, the Defendant's Application dated June 27, 2017 that sought to set aside the *ex parte* proceedings came up for hearing. In the presence of both advocates for the Plaintiff and the Respondent, the trial court certified the matter urgent. The Defendant was also granted leave to serve the 3rd party by way of substituted service. It is therefore not clear to me what remained to be heard in this Application.
54. The Court's power to set aside a Judgment is exercised with a view of doing justice between the parties. In the case of *David Kiptanui Yego & 134 Others Vs Benjamin Rono & 3 Others* (2021) eKLR, Omondi J held to which I agree and fully associate myself with that: -
- “The discretion of a court to set aside or vary *ex parte* judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice”.
55. In the end, it is my finding that the suit before the lower court should be heard and determined on merit. The Appeal dated August 7, 2018 therefore succeeds.
56. The Judgement in Bomet Civil Suit Number 55 of 2016 delivered on February 7, 2018 is set aside in its entirety. The matter is remitted back to the Magistrate's Court for a fresh and expeditious hearing.
57. The Appellant though successful is denied the costs of the Appeal owing to the circumstances of this appeal. Each party shall therefore bear their costs.

Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JULY, 2022.

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R. LAGAT-KORIR

JUDGE



Judgement delivered in the presence of Ms Randa holding brief for Mr. Gikandi for the Appellant, No appearance for Mr. Mose Nyambega for the Respondent and Kiprotich (Court Assistant).

