



**Mungai & 2 others v Munanji (Civil Appeal E097 of 2021)  
[2022] KEHC 12146 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12146 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E097 OF 2021  
MM KASANGO, J  
JULY 27, 2022**

**BETWEEN**

**DAVID NDUATI MUNGAI ..... 1<sup>ST</sup> APPELLANT**

**CHANIA TRAVELLERS SACCO ..... 2<sup>ND</sup> APPELLANT**

**MOSES NJOROGE MWANGI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**BERITA MUNANJI ..... RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrate's Court at Thika  
(Hon E Riany, SRM) dated May 26, 2019 in Civil Case no 481 of 2020)*

**JUDGMENT**

1. The respondent, Berita Munanji obtained interlocutory *ex parte* judgment against the appellant before the Thika chief magistrate's court. Following her formal proof, that court delivered judgment in her favour on March 25, 2021.
2. The appellant filed an application a Notice of Motion dated March 31, 2021. By that application, appellants prayed for stay of proceedings and execution of the decree and also prayed to be granted leave to file their defence to that cause out of time. The trial court delivered its Ruling to that application on May 26, 2021 dismissing that application.
3. Appellants filed this appeal against that dismissal.
4. Directions were given by this court for the hearing of this appeal by written submission and parties file their submission. When however I sat to consider parties' submissions, I was confounded by what the appellants submitted on. The appellant's submissions were as though the appeal is against the judgment of March 25, 2021 whereas, this appeal is against the judgment following the formal proof.



The memorandum of appeal clearly indicates this appeal is against the ruling of May 26, 2021. It follows that, there are no submissions in this matter on the appeal that was filed.

5. That as it may be, I had opportunity to consider the submissions filed before the trial court and the subject ruling.
6. It is clear that the appellants were served with the summons and plaint. They indeed did not deny such service when seeking the prayers for stay of proceedings and to file defences out of time. It follows that the interlocutory judgment entered for the respondent was a regular judgment.
7. The court in the case *Gulf Fabricators Vs. County Government Of Siaya* (2020) eKLR had occasion to discuss application to set aside regular judgment. That court stated:-
  63. Even if there was regular judgment on record which I find non-existent, the power to set aside *ex parte* judgment entered in default is discretionary. The principles upon which such discretion is to be exercised were set out by the Court of Appeal in Philip Kiptoo Chemwolo & Mumias Sugar Co Ltd Vs Augustine Kubende(1982-1988) KAR 1036 where it was held *inter alia*, citing with approval the English case of *Evans V Bartam*[1993] AC 473: -

“The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has prima facie defence.

The reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard, in exercise of its discretion. The principle is that witness 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 the coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”
  64. However, in *Shah V Mbogo & Another* [1967] E A It was held that:

‘The court’s discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused.’”
8. The trial court in its very well-articulated ruling considered all the principles in respect of an application to set aside interlocutory judgment and I wholly concur with the trial court’s ruling.
9. The appellant filed draft defences which were mere denial of the knowledge of the accused and denial of their liability for the accident. They however failed to explain how they were unaware of the accident when the 3<sup>rd</sup> appellant was charged with a criminal traffic offence in relation to the very accident they denied knowledge of.
10. It is also worthy to note that the appellants by their application before the trial court, they did not seek to have the interlocutory judgment set aside. How then would it have benefited the appellants if they were granted leave to file defences out of time but the interlocutory judgment remained on record.
11. In my view bearing in mind that the appellant did not submit on the appeal before court and considering the trial court’s Ruling, I find this appeal lacks merit.

## Disposition

12. For reasons set out above, this appeal is dismissed with costs.



**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 27TH JULY, 2022.**

**MARY KASANGO**

**JUDGE**

**In the presence of:-**

**Coram:**

**Court assistant:- Mourice**

For appellant:- Mr Njuguna

For respondent:- No appearance

**Court**

**Judgment delivered virtually,**

**MARY KASANGO**

**JUDGE**

