



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 688 OF 2017**

**NEW AGE DEVELOPERS & CONSTRUCTION LIMITED.....APPELLANT**

**VERSUS**

**SAMUEL WAMBUGU KAHIGA.....RESPONDENT**

**(Being an appeal from the ruling of Hon. Obura (Mrs) (PM) delivered on 28<sup>th</sup> March 2017 in Civil Suit No. 7188 of 2015 before the Chief Magistrate's Court in Nairobi)**

**JUDGEMENT**

**BACKGROUND:**

1. The appeal is against a ruling made by Hon. Obura (PM) on 20/3/2017 in a notice of motion dated 18/10/2016 in which the appellant sought to set aside a default judgment under Order 11 of the Civil Procedure Rules. The same was opposed by the respondent.
2. After hearing the same the trial magistrate dismissed the application with costs.
3. The decision aforesaid attracted the instant appeal challenging same. The appellant set out 8 grounds of appeal namely:-
  - a. **That the learned trial magistrate erred in law and fact by dismissing the notice of motion application dated 18<sup>th</sup> October 2016.**
  - b. **That the learned trial magistrate erred in law and fact by declining to set aside the default judgment entered against the appellant on 1<sup>st</sup> February 2016 yet the reasons advanced in support thereof were meritorious.**
  - c. **That the learned trial magistrate erred by failing to appreciate that the appellant's explanation for the failure to enter appearance were sufficient or reasonable and deserted exercise of discretion in its favour.**
  - d. **That the learned trial magistrate erred by failing to appreciate that the appellant's failure to enter appearance and file statement of defence in time was a result of inadvertent mistake caused by delayed transmission of summons to enter appearance to its insurers by the insurance brokers.**
  - e. **That the learned trial magistrate erred by failing to appreciate that the discretion to set aside default judgment is wide and not limited only to instances where default judgment was**

irregularly obtained.

f. That the learned trial magistrate erred in law and fact by denying the appellant an opportunity to be heard on merit.

g. That the learned magistrate erred in law and fact by failing to appreciate that the appellant's draft defence raised triable issues deserving of trial.

h. That the learned trial magistrate erred in law and fact by failing to appreciate that setting aside the subject default judgment would not occasion to the respondent any prejudice which cannot be compensated by law of costs.

4. Parties were directed to canvass appeal via submissions.

#### **APPELLANT'S SUBMISSIONS:**

5. It is not in contention that indeed the appellant was served with the summons to enter appearance. In an affidavit dated 18th October 2016 sworn by Ms. Martha Mumbi Muthee in support of the application seeking to set aside the default judgment.

6. In brief summary the deponent avers that appellant had a policy of insurance with APA Insurance Ltd covering claims against or arising from injuries allegedly sustained in the course of duty. The summons served upon it was then forwarded to its broker's i.e. K-Bima Insurance Agency for onward transmission to APA Insurance Ltd who would thereafter instruct advocates to defend the suit as per the terms of the insurance policy.

7. The appellant therefore had reasonable expectations that the brokers would immediately forward the same to the insurance company and have its interests protected. It is the delay by the brokers in forwarding the summons that put the appellant in this predicament.

8. In *Wel-Con Limited vs China National Aero-Technology International Engineering Corporation & Another* [2017] eKLR the court held as follows:

***“Absence of an explanation alone must however not divest the court of its discretion to set aside a default judgment and ensure that the ends of justice are met. The court’s discretion to set aside judgment is not to be conditioned on the explanations advanced for the delay or default.”***  
(Emphasis ours).

9. In *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another* [2016] eKLR, the Court of Appeal held that:

***“In a regular default judgment, the appellant 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 an appellant 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 appellant 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 vs Shah (Supra), Patel vs E.A Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another vs Kubende [1986] KLR 492 and CMC Holdings vs Nzioki [2004] 1KLR 173.”***  
(Emphasis ours).

10. On whether annexed defence raise triable issues, the respondent's/plaintiff's contention/allegations were as follows:

- i. That he was an employee of the appellant at the material time.*
- ii. That he was injured during the course of employment.*
- iii. That the injury was as a result of the negligence of the plaintiff.*
- iv. That he was entitled to compensation for the alleged injuries.*

11. In turn the appellant's annexed draft statement of defence (MMM-1) which averred as follows:

- i. That the respondent/plaintiff was not its employee at the material time.**
- ii. That having not been an employee he would not have been injured at work and on duty.**
- iii. That negligence would therefore not arise where there was no contract of employment or where the injury is contested.**

12. In *Weld-Con Limited (Supra)* the learned Judge held as follows:

***“It is not for me to hold a mini-trial now. I need only be satisfied that on the face of the proposed defense, it is not a sham but a reasonable one. I have returned the verdict that it is not a sham.”***

13. On whether the appellant was entitled to a fair hearing on merit, the court should always consider that any judgment entered neither upon the merits nor by consent is subject to the court's wide discretion to set aside.

14. In *Sebel District Administration (Supra)* the court opined as follows:

***“...It should always be remembered that to deny the subject A hearing should be the last resort of a court.***

***It is wrong under all circumstances to shut out A from being heard. A should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.”***

15. In *Pithon Waweru Maina vs Thuka Mugiria [1983] eKLR* it was held:

***“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court.”***

16. No prejudice would have been occasioned upon the respondent had the court made an order setting aside the judgment. An order for costs at reasonable rates should have sufficed.

#### **THE RESPONDENT'S SUBMISSIONS:**

17. In its submission, the appellant has relied on the case of *Mbogo vs Shah* where the court held that:

- i. “I think it is well settled that this court will not interfere with the exercise of its discretion by inferior court unless it is satisfied that its discretion is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or**

**because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

18. In her ruling dated 30<sup>th</sup> March, 2017 **Hon. Obura (Mrs) (SRM)** also recognized this principle and stated as follows:

**“The court’s discretion to set aside ex parte judgment ought to be exercised judicially to avoid injustice or hardship resulting from accident, inadvertence or excusable delay or mistake (Patel vs E.A Cargo Handling Services [1974] EA 75). It is not aimed at assisting a party who has deliberately sought to delay or subvert the course of justice.”**

19. Thus it is upto this court to determine whether the learned magistrate’s decision fell within the above mentioned principle.

20. On whether the leaned magistrate exercised her discretion judiciously, ground 1,2,3,4,5 and 8 relate to the learned magistrate’s failure to exercise her discretion in favour of the appellant.

21. In her ruling, the learned magistrate observed that there was no dispute that summons to enter appearance was served. The learned magistrate noted that although the /appellant claimed they forwarded the summons to enter appearance and the plaint to the insurance broker who were to forward them to the insurer this claim is unsubstantiated and is not backed by any proof.

22. Indeed, the appellant made this averment but did not attach any evidence to this effect. To the very least they should have attached correspondences to substantiate their claim. This is what the learned magistrate observed in her ruling and rightfully concluded that the appellant took the matter lightly until judgment had been entered. He submitted that the learned magistrate exercised her discretion judiciously.

23. On whether the appellant’s defence raised triable issues, the learned magistrate in her ruling considered these issues. She referred to the draft defence marked ‘MMM-1’. The learned magistrate noted that the/appellant denied that the plaintiff/respondent was its employee or was injured at work.

24. In response, the respondent on its replying affidavit produced a DOSH 1 Form showing clearly that the appellant filed the said form and even took the respondent to hospital.

25. The learned magistrate noted in her ruling that the/appellant did not deny this claim. Further the appellant did not suggest that the respondent was to blame for the accident or attribute it to any other factor.

26. The appellant would have at least sought leave to file a supplementary affidavit and explain this glaring discrepancy. It left it as it was and the learned magistrate correctly held that there were no triable issues and the defence was a mere denial of liability.

27. On conclusion, in view of the foregoing can it be said really that:-

*(a) The learned magistrate’s decision was clearly wrong because she misdirected herself; or*

*(b) She acted on matters which she should not have acted; or*

*(c) She failed to take into consideration matters which she should have taken into consideration and in doing so arrived at a wrong conclusion.*

## **ISSUES**

28. After going through the pleadings, proceedings and the submissions, I find the issues are; whether the trial magistrate was justified in rejecting to set aside default judgement? If above in affirmative what are the conditions for setting aside the default judgement? What is the order as to costs?

## ANALYSIS AND DETERMINATION

29. The Court's power in considering an Application to set aside an interlocutory judgment is discretionary. As held in the case of; *Patel vs E.A. Cargo Handling Services Ltd (1974) EA 75*:-

**“There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment 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 conditions on itself to fetter the wide discretion given it by the rules.”**

30. In the same vein, the Court in the case of; *Shah vs Mbogo (1967) EA 166*, held that:-

**“This 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”**

31. However, the discretion of the Court must always be exercised judicially with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to consider is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit. It therefore calls for interrogation of the Applicant's case as to whether it raises any triable issues.

32. In the case of; *Patel vs E.A. Cargo Handling Services Ltd (1974) (Supra)* the Court held that:-

**“That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie defence which should go to trial for adjudication.’**

33. Similarly in the case of; *Tree Shade Motors Ltd vs D.T. Dobie & Another (1995-1998) IEA 324*, it was held that:-

**“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 showed a reasonable defence on the merits, the court could set the ex-parte judgment aside**

34. It is not in contention that indeed the appellant was served with the summons to enter appearance. In an affidavit dated 18th October 2016 sworn by Ms. Martha Mumbi Muthee in support of the application seeking to set aside the default judgment.

35. In brief summary the deponent avers that appellant had a policy of insurance with APA Insurance Ltd covering claims against or arising from injuries allegedly sustained in the course of duty. The summons served upon it was then forwarded to its broker's i.e. K-Bima Insurance Agency for onward transmission to APA Insurance Ltd who would thereafter instruct advocates to defend the suit as per the terms of the insurance policy.

36. The appellant therefore submits that it had reasonable expectations that the brokers would immediately forward the same to the insurance company and have its interests protected. It is the delay by the brokers in forwarding the summons that put the appellant in this predicament.

37. In her ruling, the learned magistrate observed that there was no dispute that summons to enter appearance was served. The learned magistrate noted that although the /appellant claimed they forwarded the summons to enter appearance and the plaint to the insurance broker who were to forward them to the

insurer this claim is unsubstantiated and is not backed by any proof.

38. Indeed, the appellant made this averment but did not attach any evidence to this effect. To the very least they should have attached correspondences to substantiate their claim. This is what the learned magistrate observed in her ruling and rightfully concluded that the appellant took the matter lightly until judgment had been entered. He submitted that the learned magistrate exercised her discretion judiciously.

39. On whether the appellant's defence raised triable issues, the learned magistrate in her ruling considered these issues. She referred to the draft defence marked 'MMM-1'. The learned magistrate noted that the /appellant denied that the plaintiff/respondent was its employee or was injured at work.

40. In response, the respondent on its replying affidavit produced a DOSH 1 Form showing clearly that the appellant filed the said form and even took the respondent to hospital.

41. The learned magistrate noted in her ruling that the/appellant did not deny this claim. Further the appellant did not suggest that the respondent was to blame for the accident or attribute it to any other factor.

42. The appellant would have at least sought leave to file a supplementary affidavit and explain this glaring discrepancy. It left it as it was and the learned magistrate correctly held that there were no triable issues and the defence was a mere denial of liability.

43. In the case of *Mbogo vs Shah* the court held that:

**“I think it is well settled that this court will not interfere with the exercise of its discretion by inferior court unless it is satisfied that its discretion is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

44. On conclusion, in view of the foregoing can it be said really that:-

(a) *The learned magistrate's decision was clearly wrong because she misdirected herself; or*

(b) *She acted on matters which she should not have acted; or*

(c) *She failed to take into consideration matters which she should have taken into consideration and in doing so arrived at a wrong conclusion.*

45. The answer is in negative. Thus **the court finds that the appeal has no merit and same is dismissed with no orders as to costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**