

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 155 OF 2016

MOMUL TEA FACTORY.....APPELLANT

VERSUS

RENT A FINE CAR LIMITED.....1ST RESPONDENT

HENRY MURIITHI NYAGAH.....2ND RESPONDENT

JUDGEMENT

(Being an appeal from the ruling of the Resident Magistrate TS Nchoe (Mr) delivered on 13th November, 2015 in Milimani CMCC No. 1210 of 2014)

The appellants herein were the defendants in lower court in which the respondents sued for the recovery of 383,615 being damages suffered following a collision between motor vehicle registration No. KBP 763 owned by the respondents and motor vehicle registration No. KBM 365P owned by the 1st appellant and driven by the 2nd appellant at the time of the accident.

The accident is said to have taken place along state house road, Nairobi. The respondent blamed the accident on the negligence of the 2nd appellant herein. The record shows that the appellants were served with summons to enter appearance but defaulted. The respondents then applied for judgment which was entered on 18th September, 2014. Thereafter the appellants filed an application dated 11th March, 2015 seeking to set aside the said judgment. That application was heard and dismissed on 13th November, 2015 giving rise to the present appeal.

The Memorandum of Appeal on record has raised several issues the thrust of which is that, the appellants were denied the right to be heard in total disregard to Article 50 of the Constitution; and that the lower court erred in law and fact in holding that the application to set aside the *ex parte* judgment had no merit, yet the defence raised triable issues that needed to be addressed and only a full trial was necessary to do so.

The lower court, the appellants submitted, failed to appreciate that the failure by the appellants to file their defence was inadvertent and that omission could be remedied by an award of costs. In any case, no prejudice was going to be occasioned to the respondent if the application was allowed. Some blame was also attributed to the insurance company that had covered the appellants' motor vehicle in the failure to take up the defence. There was also the dispute as to the model of vehicle involved in the accident.

Parties have filed their submissions and cited some authorities which I have considered. As required of me, I have evaluated the evidence in the lower court with a view to arriving at independent conclusions.

The court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex parte* judgment. In the case of **James Wanyoike and 2 others vs CMCC Motors Group Limited and 4 others (2015) e KLR** the court identified tests that are applicable in setting aside *ex parte* judgments. These are whether or not there is a defence on merit; whether or not there will be any prejudice to the respondent and what explanation for any delay has been given.

The appellants admitted service of summons to enter appearance. The steps taken thereafter have also been given showing their determination to defend the claim. They believed the insurance company would take up the matter. The admission in itself is a credible indicator in that regard.

On the other hand, the respondents' judgment cannot be said to be irregular. The appellants having defaulted after service of summons, the court was in order to enter judgment on the application by the respondent. However, the reasons for inaction having been given, and the draft defence having identified several triable issues, the appellants ought to have been given a chance to be heard. That they were locked out, is an affront to Article 50 of the constitution.

I must observe that, where there is a regular judgment, as in this case, the court will not usually set aside the judgment unless it is satisfied there is a defence on the merits. This does not mean a defence that must succeed. What it means is that, there is an issue which raises a *prima facie* defence and which should go to trial for adjudication. – see **Patel vs. EA Cargo Handling Services Limited**. In the impugned ruling, the court did not address all these factors. In fact, none of these requirements were addressed.

I am inclined to allow this appeal, which I hereby do, and order that the lower court file shall be remitted to allow the appellants file their defence in the lower court. This being an old case, the lower court shall endeavour to hear the matter expeditiously. The appellant having admitted default on its part shall pay the respondent all the costs occasioned by this appeal.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE