REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 318 OF 2010

FARMERS CHOICE COMPANY LIMITED……..……APPELLANT

VERSUS

DORLEEN ANYANGO WASONGA and JOSEPH OHITO NJENGA

(Suing as the administrators of the estate of HARRISON

WASONGA (Deceased)……...RESPONDENT

JUDGMENT

This appeal arises from the Ruling and Order of Hon. A. O. Aminga, Resident Magistrate at Limuru delivered on 13th July, 2010 dismissing the appellant's Chamber Summons application dated 10th November, 2010 in Civil Case No. 39 of 2010.

The appellant, Famers Choice Company Limited was the defendant in the Lower Court whereas the Respondents herein Dorleen Anyango Wasonga and Joseph Ohito Njenga were the Plaintiffs suing on behalf of the estate of the deceased Harrison Wasonga Abira (deceased). The Plaint dated 15th February, 2010 alleges that on or about the 19th day of February, 2007 at 7.30 am or thereabouts, the deceased Harrison Wasonga Abira was lawfully walking along Nairobi-Naivasha Road completely off the road when the defendant's authorized driver, agent or servant so negligently drove, managed and or controlled the Motor Vehicle Registration Number KAU 479S Isuzu lorry that he caused it to veer off the road and knock down and fatally injure the deceased.

The Plaintiffs blamed the accident on the negligence of the defendant's driver, setting out particulars of negligence. They also set out particulars of loss and damages as well as dependency. The record shows that the defendant was served with summons to enter appearance on 17th February, 2010 by Winslaus Murenga, a licensed Court process server.

On 18th March, 2010 vide a request for judgment dated 10th March, 2010 the Plaintiff's advocate G.G. Mbaabu & Company Advocates requested for judgment in default of appearance within the stipulated period.

The interlocutory judgment in default of appearance was entered on 31st March, 2010. The defendant entered an appearance on 9th April, 2010.

By a Chamber Summons dated 26th April, 2010 filed on 6th May, 2010 the defendant through the law firm of Kiarie Kariuki & Associates sought to set aside the interlocutory judgment entered on 31st March, 2010 and leave to file its defence in terms of an annexed draft marked A' out of time.

The application was predicated on the ground that:-

i) There was delay at the defendant's offices in instructing the advocates to enter appearance and defence on its behalf.

ii) The granting of the order sought will not occasion any prejudice to the Plaintiff.

iii) It is in the interest of justice and fairness that the defendant be allowed to defend the suit herein so that the sui9t can be determined on its merits.

iv) There has been no unreasonable delay in bringing the application.

The said application was further supported by the sworn affidavit of Dinah M. Ogulla and the annextures. In her affidavit, the deponent who is the Manager – Legal Department of the Defendant's insurers – Jubilee Insurance Company Limited deposed that indeed Summon to Enter Appearance were served upon their insured on 17th February, 2010 and they immediately forwarded the said Summon to Enter Appearance to their Insurance Brokers Messrs Eagle Africa, who in turn did forward to the Insurance Company on 26th February, 2010 as shown by a Memo Annexture DMO1.

That upon receipt of the said summons to enter appearance, they embarked on the investigation into circumstances surrounding the occurrence of the accident. They then did instruct the advocates on record on 1st April, 2010 who when they tried to locate the Court file to peruse but could not trace it as the same was not available only to learn that it was pending before the Magistrate for endorsement of interlocutory judgment and the Magistrate was not available. They only managed to peruse the Court file on 9th April, 2010 when they filed the Memorandum of appearance, only to learn that in fact, judgment had been entered on 31st March, 2010 against the defendant in default of appearance. She further deposes that the defendant has a good defence that raises triable issues and that if the judgment is not set aside, the defendant will be greatly prejudiced for being condemned unheard.

The Plaintiff vigorously opposed the defendant's application through an affidavit sworn by Dorleen Anyango Wasonga contending that the application was incompetent. Further, that there was admission of service of summons to enter appearance on 17th February, 2010 and no reasonable explanation had been offered for the failure/delay in filing the Memorandum of appearances and defence since the Plaintiff's advocate had send to Jubilee Insurance Company a demand notice regarding the material accident on 16th April, 2007 which insurance company had even engaged the then plaintiff's advocates Wariuki & Company Advocates in negotiations including calling for documentation.

She maintained that it is not true that the Insurance was investigating the accident in 2010, which accident occurred in 2007 and they were made aware. That the Court should not be blamed for late filing of the Memorandum of appearance and that the application was not made in good faith. Further, that the Jubilee Insurance not being parties to the suit cannot purport to have their legal Manager swear an affidavit on behalf of the defendant as they have no ***locus standi*** in the suit.

That application was heard by way of oral submissions on 22nd June, 2010 and on 13th July, 2010 the Magistrate delivered a Ruling dismissing the application with costs. Being dissatisfied with the Ruling and order dismissing the application by the appellant, the appellant filed this appeal on 11th August, 2010 setting out 7 grounds of appeal in their Memorandum of Appeal namely:

1. The Learned Magistrate erred in law and in fact by holding that the Chamber Summons application dated 26th April, 2010 brought by the appellant did not have merit thereby dismissing it

with costs.

2. The Learned Magistrate erred in law and in fact in failing to find that the appellant's failure to enter appearance and defence within the time stipulated in the law was curable.

3. The Learned Magistrate erred in law and in fact by neglecting the evidence tendered by the appellant and holding that it was not entitled to have the Interlocutory Judgment against it set aside and that Justice would be served if the defendant is allowed to cross-examine the Plaintiff witnesses at the formal proof hearing.

4. The Learned Magistrate erred in law by making such orders as they are unprocedural and inconsequential in law since the Court cannot make any finding of contributory negligence when there is no pleading on record to support it.

5. The Learned trial Magistrate erred in law by failing to appreciate that pleadings could be amended and the draft defence was open to such amendment. By disallowing the defendant's application to set aside the Interlocutory Judgment and file its defence, the Learned trial Magistrate also denied the defendant a chance to later amend its defence to reflect the possibility of a finding of full liability against the Plaintiff as new information indicates that the Plaintiff was disturbed in the mind and was on a suicidal mission.

6. The Learned trial Magistrate erred in fact by failing to scrutinize/evaluate the evidence tendered in support of the application by the appellant and to correctly relate them to the case law cited to him and thereby failed to arrive at a fair ruling.

7. The Learned Magistrate erred in law in failing to uphold the doctrine of precedent.

The appellant prays that the ruling of the trial Magistrate be set aside and the Court to allow this appeal setting aside the Interlocutory Judgment entered on 31st March, 2010 against the defendant/appellant be set aside; the appellant be allowed to file its defence out of time; and costs of the appeal be awarded to the appellant.

The record is not clear as to when the appeal was admitted to hearing but on 19th February, 2014 Hon Waweru Judge gave directions for the hearing of the appeal.

On 13th November, 2014 when parties advocates appeared before me, they had already agreed to have the appeal herein be disposed of by way of written submissions.

The appellant had filed theirs on 29th October, 2014 whereas the Respondents too filed their written submissions on the same day. Both advocates attached authorities in support of their respective positions.

In support of the grounds of appeal, the appellant's counsel submitted that the trial Magistrate basically failed to exercise his wide discretionary powers to set aside or vary the Interlocutory Judgment when that would have been the just and fair thing to do in the circumstances.

In his view, the Magistrate entered in finding that the issue of contributory negligence ought not to subject to the entire case to proceed for full hearing and that the defendant was at liberty to cross-examine the Plaintiff during the formal proof hearing. Counsel opined that such orders were unprocedural as no finding of contributory negligence can be made on mere cross examination of the witnesses without a defence on record. Counsel maintained that under Order 10 Rule 11 of the Civil Procedure Rule, the Court had discretion to set aside or vary exparte judgment and any consequential orders or decree upon such terms as are just and that under Article 50(1) of the Constitution, and Article 159(2) (a) and (b) by the Constitution the defendant/appellant had been denied the right to a fair hearing through application of procedural technicalities.

Counsel cited the case of **Philip Kiptoo Chemwolo & Mumias Sugar Limited Vs Augustine Kubede (1982-1988) 1 KAR 1036** where the Court of Appeal in dealing with Interlocutory Judgment in default of appearance case, considered whether the trial Judge had rightly exercised his discretion in refusing to set aside the judgment under Order 9A Rule 5 and held that:

> **i.** ***The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms that are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties (Kimani Vs Mconnell) [1966] EA 547.***
>
> ***ii. Where a regular judgment has been entered the Court would not usually set aside the judgment unless it was satisfied that there was a triable issue.***
>
> ***(1) In this case there was a triable issue of contributory negligence which would affect the quantum of damages."***

The appellant's counsel further cited the case of **John Peter Kiria & Another Vs Pauline Kagwiria (2013) eKLR** where the Court stated ***"therefore I think, the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

On the issue of the supporting affidavit, being sworn by a representative of the defendant's insurers, Counsel for the appellant submitted that, that does not affect the competence of the appeal/and application as Dinah Ogulla stated her capacity to so deposed and which arises from the Insurance right of subrogation. The Insurance Company, it was submitted would be liable to satisfy the judgment arising from the suit hence the interest in the suit. In addition that the deponent is not barred from giving affidavit evidence explaining reasons for the delay in filing an appearance and defence in the suit which matters were within her knowledge. Relying on **HCC 32/2014 Tabitha Kerubo Omariba Vs Akamba Public Road Services Limited**, Counsel submitted that Ochieng Judge had held that there was no problem where an officer gives evidence on behalf of a corporation and that such an officer is a mere witness (through affidavit evidence) and the corporation does not have to be a party.

Counsel concluded submissions on behalf of the appellant that the draft defence as filed raised triable issues which the trial Court failed to consider and further, that the said draft defence was open to such amendments as may be necessary which right had been denied by the trial Magistrate. He cited a Court of Appeal decision in **Nyeri Civil Appeal 219/2009 Mount Kenya Bottlers Limited Vs Mary Gathoni Weru** where the Court found that the proposed statement of defence raised triable issues as it denied liability and specifically that the appellant manufactured the Krest Soda with foreign bodies. And that while allowing that appeal, the Court of Appeal held:-

> ***"…….these factors that were not considered by the Learned Judge and if they were, we are certain she would have arrived at the same conclusion as we have, that the mistakes that caused the delay and mix up of pleadings were excusable mistakes. Allowing the defence to be held out of time was a mere inconvenience to the respondent which could have been cured by payment of costs."***

The appellants counsel prayed for this appeal to be allowed in the interest of Justice as the delay if any can be cured by payment of costs.

In opposition to the appellant's submissions and appeal herein, the respondent's counsel was emphatic that this appeal lacks merit and that the same should be dismissed with costs to the respondent. In challenging ground No 1 of the appeal that the trial Magistrate erred in law and fact by holding that the Chamber Summon application dated 26th April, 2010 did not have merit.

According to the Respondent's counsel, the affidavit by Dinah Ogulla, and more particularly paragraphs

2, 3,5,6,7 and 8 compared to the draft defence were contradictory. That there is denial of ownership of the accident motor vehicle registration No. KAU 479S whereas some parts of the draft defence are mere denials, which are disproved by the investigation report. Further, that the draft defence denies the occurrence of the accident in question yet its own documents including the drivers statement confirms the occurrence of the accident. It is therefore submitted that the trial Magistrate correctly applied the correct principle in law to hold that there was no defence on merit worthy of dragging the case for full trial.

On ground No. 2 of the Appeal that the delay in entering an appearance and filing of defence was curable, counsel for the respondent submitted that the trial Magistrate was not given sufficient material to convince him that the failure to file defence and appearance within the stipulated period was explainable and therefore excusable.

On ground 3 that the trial Magistrate erred in law by neglecting evidence tendered by the appellant and by merely stating that contributory negligence would be tackled through cross-examination of the plaintiff during formal proof hearing, Counsel for the respondent submitted that the trial Magistrate exercised his mind and discretion properly and on settled principles of law in that the Court's discretion to set aside default 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 a party who has deliberately sought, whether by evasion or otherwise to abstract or delay the course of justice. It was further submitted that, the appellant did not persuade the Court on the reasons for delay hence it could not blame the Court when it failed to discharge the burden of proof.

On ground No. 4 that the Court erred in making such orders as they are unprocedural and inconsequential in law as the Court cannot make a finding on contributory negligence in the absence of a defence or pleading; the respondents counsel submitted that the trial Magistrate was right as there was no material before him to justify the setting aside of Interlocutory Judgment and that it was within his discretion to make such orders as to avoid injustice and hardship on the defendant.

On ground No. 5 that the trial Magistrate erred in law in failing to find that pleadings could be amended and the draft defence was open to such amendments; counsel for the respondent submitted that no application for amendment was before the Court. Further, that there appears to be a possibility of the appellant to amend the defence to plead that the deceased was on a suicide mission because he was mentally disturbed, which new evidence was not placed before the trial Magistrate and as no medical evidence was available to show that the deceased was mentally disturbed.

On ground No. 6, the respondent relies on answers/submissions in support of grounds No. 1 and 2 whereas on ground No. 7, it is submitted that there was no proper precedent placed before the trial Magistrate which would have bound him to interfere with a regular judgment properly entered into on application and based on evidence.

On case law, the respondent's counsel submitted that the case of **Baiyo Vs Bach (1987) KLR 89** was relevant. That where there are merits in the defence, it would be unjust not to allow defendant to be heard, even if judgment was obtained regularly. On the other hand that if there are no merits, a judgment should stand. Counsel submitted that this Court should not accept to be told that the defendant/appellant has no defence on merit but that they can amend at a later stage once the judgment is set aside which in essence will be applying the wrong principles of law and upsetting the now settled law which has grown in practice that a default judgment can only be upset once a defence or affidavit as presented sufficiently indicate a prima facie defence.

It was urged that this Court should espouse the holding in **Kimani Kigano & Co Advocates Vs Jimba Credit Corporation Limited (1991) KLR 503** in which Bosire Judge held that:

"1. The power to set aside is discretionary it being a judicial discretion must be exercised on the basis of evidence and sound legal principles.

2. Filling of a defence is an essential step which a party is obliged to take to obviate an exparte

judgment being entered against a party.

3. There may have been confusion as to which firm of advocates was acting for the Plaintiff but a defence was not to be filed in offices of the advocates for the Plaintiff. It was to be filed in Court.

Referring to the case of **Pithon Waweru Maina Vs Kiku Mugira [1988-88] SK) KAR 171** in which the Court set out principles for setting aside as follows;

"

1) The power to set aside is discretionary.

2) The discretion is unlimited provided it is properly exercised.

3) It being a judicial discretion must be exercised on the basis of evidence and sound legal principles.

4) The Court has power under order 1XA Rule 10 of the Civil Procedure Rules on terms as are just.

5) The Court is obliged to look at the defence the applicant/defendant may be having to the claim.

6) ***If a party establishes that he has a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the Court ought to be inclined toward setting aside."***

> ***He maintained that the trial Magistrate applied his mind well and relied on the settled principles of setting aside exparte judgment."***

Further, that the **Court of Appeal in Baiyo Vs Bach (supra)** held that an appellate Court should not interfere with the discretion of a Judge acting within his jurisdiction unless he is shown have applied the wrong principles. That it has not been shown that the trial Magistrate applied wrong principles in declining the application hence this Court should not interfere with the exercise of his discretion.

The Respondent's Counsel also relied on **Kenya Safaris Lodges & Hotels Limited Vs Tembo Tours & Safaris [1985] KLR 441** to advance the argument that there must be grounds upon which the discretion to set aside should be exercised, the primary consideration being whether the applicant has merits to which the Court should pay heed. He also cited **Wambilyanga Judge in Kaluworks Limited Vs Pepeo Enterprises [1991] KLR 441** as that in the Courts discretion under or 1XA Rule 10 is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not designed to assist a party who has deliberately sought, whether evasion or otherwise to obstruct or delay the course of justice.

In conclusion, counsel for the respondent submitted that the appellant had failed to prove that the appellant had failed to prove that the judgment in default as entered against it was irregular and if regular, to prove that it had a defence on merit which issues in his view were fully addressed by the Resident Magistrate.

Finally, counsel for the respondent submitted that albeit the appellant had relied on Articles 50 (1) and 159 2 (a) and (b) of the Constitution it had not demonstrated how its rights to be heard had been violated and that a fair hearing envisages a speedy and expeditious determination of a dispute.

Further, that the application was heard and determined on merits and not on procedural technicalities as alleged, since the trial Magistrate even allowed the appellant to cross-examine the respondents.

He urged the Court to examine the alternative holding in the **Philip Kiptoo Chemwolo** case at page 1039 that "***The Courts have however laid down for themselves rules to guide them in normal exercise of their discretion. One where 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."

According to Counsel, for the respondent, there was no evidence of contributory negligence as the investigation report was not even attached to the affidavit in support of the application for setting aside exparte judgment. He prayed for dismissal of the appeal herein with costs to the respondents. This being a first appeal, this Court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the Lower Court record and the evidence before it and arrive at its own conclusion. This principles of law is well settled in the case of ***Selle Vs Associated Motor Boat Co. Limited (1968) EA 123*** where Sir Clement De Lestang stated:-

"This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in that respect. However, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif Vs Ali Mohammed Solan) 1955, 22 EACA 270)."

Analysis and determination

I have carefully considered all the pleadings, affidavits, submissions, the law and the cited authorities. The substance of this appeal is the applicability of Order 1XA Rule 6 10 Rules 6, 10 and 11 of the old Civil Procedure Rules. Under Rule 6, where a plaint is drawn for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the Court shall on request in form No. 13 of Appendix A, enter Interlocutory Judgment against such defendant and the plaintiff shall set down the suit for assessment by the Court of the damages or the value of the goods and damages as the case may be. What transpired in the Court below is that the respondents herein who Section 78 of the Civil Procedure Act to evaluate and examine the Lower Court record and the evidence before it and arrive at its own conclusion. This principles of law is well settled in the case of ***Selle Vs Associated Motor Boat Co. Limited (1968) EA 123*** where Sir Clement De Lestang stated:-

"This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in that respect. However, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif Vs Ali Mohammed Solan) 1955, 22 EACA 270)."

In evaluating and assessing the evidence before the trial Court, this Court is also enjoined to apply the principles laid down in **Mbogo Vs Shah & Another (1968) EA 93** on circumstances under which an appellate Court may interfere with a decision of the trial Court as was held that:

"I think it is well settled that this Court will not interfere with the exercise of discretion by the inferior Court unless it is satisfied that the decision 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 account and consideration and in doing so, arrived at a wrong conclusion."

The plaintiffs in the Court below filed their plaint claiming for special and general damages against the appellant, whose vehicle allegedly knocked the deceased thereby fatally injuring him on 19th February, 2007. There is no doubt that the defendant/applicant was served with summons to enter appearance on 17th February, 2010 immediately after filing suit on 16th February, 2010 and on 18th March, 2010 the respondents herein filed a request for judgment against the appellant in default of appearance. No doubt, the judgment that was entered exparte on 31st March, 2010 was regular in accordance with order 10 Rule 6 of the old Civil Procedure Rules and the respondents were also in order in proceeding to move to Court

to set down the case for formal proof hearing as per their letter to Court dated 20th April, 2010.

While that was happening, quite regularly, the appellant on the other hand was going through some protocol issues of first, sending the summons to the Insurance Brokers (Eagle Africa) on 25th February, 2010, who in turn had to submit the claim to the Insurance Company Jubilee Insurance Company to deal. This process, in my view was necessary as it is expected that the accident motor vehicle was insured and in the event of any claim against the owners thereof the Insurance Company would take over the claim and settle on behalf of the their insured whose risk was transferred to the Insurance Company pursuant to the provision of the Insurance (Motor Vehicles Third Party Risks) Act.

The process however, took longer and by the time the Jubilee Insurance Company was instructing an advocate to file an appearance and or file defence on behalf of their insured, judgment in default had already been entered on 31st March, 2010.

The defendants then, by virtue of order 1XA to Rule 11 of the Civil Procedure Rules, invoked the jurisdiction of the Court to exercise its discretion to set aside the Interlocutory Judgment. The relevant provision enacts that:-

"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."

The trial Magistrate upon hearing both parties on the application to set aside Interlocutory Judgment dismissed the application, emphasizing that the Judgment as entered was regular and that the defendant had not demonstrated that they had a defence that raised triable issues to warrant setting aside judgment. Further that the defendants' claim of contributory negligence could be tackled during cross-examination of the Plaintiffs during formal proof. The ruling was delivered on 13th July, 2010 and a date for formal proof was set for 5th October, 2010. The appellant however appealed and obtained an order staying the proceedings in the Lower Court pending hearing and determination of this appeal.

As noted in the submissions by both Counsels for the respective parties, each party has maintained a very strong stance on whether or not exparte Interlocutory Judgment should be set aside. Whereas the appellant urges this Court to interfere with the ruling of the trial Magistrate the respondents maintain that it has not been shown that the trial Magistrate erred in principle in the manner in which he exercised his discretion not to set aside the exparte Judgment and that Judgment as entered having been regular in the absence of evidence of a defence with triable issues, this Court should not allow this appeal as it would be unjust and obstructive of the course of justice.

The appellant urged that the right to defend a suit is a fundamental right to a fair hearing under Article 50 (1) of the Constitution and that the delay and failure to file an appearance and defence within the stipulated period was explained and excusable. Further, that the appellants' draft defence raises triable issues which should be ventilated in a full trial by allowing the defendant to file it. Further, that the respondents can be adequately be compensated by way of costs for the inconvenience occasioned by the setting aside of the exparte Interlocutory Judgment.

The parties advocates provided this Court with very detailed written submissions for which I commend them. I have considered the submissions and the applicable statutory and case law cited by the parties and from my own independent research.

Issues for Determination

The main issues for determination in this appeal from the 7 grounds of appeal are whether the Learned trial Magistrate erred in law and fact in declining to exercise his judicial discretionary powers to set aside or vary the Interlocutory exparte Judgment in favour of the appellant and if there was such failure what orders should this Court make.

The principles applicable in application for setting aside of exparte Judgment are now well settled as shown in the cases that have been ably cited by both advocates for the parties to this appeal. In **Kimani Kigano & Co. Advocates Vs Jimba Credit Corporation Limited (Supra)**. The Court was clear that;

> ***"The power to set aside exparte judgment in default is discretionary. The discretion is unfettered provided it is properly exercised. That discretion is a judicial one and therefore it must be exercised on the basis of evidence and sound legal principles.***
>
> ***The Court has power under the provisions of Order 1XA Rule 10 of the (old) Civil Procedure Rules on terms as are just. The Court is obliged to look at the defence that the applicant defendant may have to the claim; and if a party establishes that he has a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the Court ought to be inclined toward setting aside."***

The Court of Appeal in the case of **Harrison Wanjohi Wambugu Vs Felista Wairimu Chege and Peter Chege Njau CA 295/2009 (Per Visram, Koome & Odek JJA** observed that:-

"We take note that the Learned Judge in declining to reinstate the appeal exercised his discretionary jurisdiction. Therefore, before we can interfere with the Learned Judge's discretion, we must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. In Mbogo & Another Vs Shah (1968) EA 93 at page 95, Sir Charles Newbold P. held;

"….a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…."

In **Richard Nchapi Leiyagu Vs 1EBC & 2 Others Court of Appeal 18/2013** the Court of Appeal expressed itself thus;-

"We agree with the noble principles which go further to establish that the Court's discretion to set aside an exparte Judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error but not to assist a person who deliberately seeks to obstruct the course of justice."

In this case, therefore, I have to ask myself whether the failure by the appellant to enter appearance and or file defence within the stipulated statutory period which resulted in exparte Interlocutory Judgment being entered on 31st March, 2010 constituted an excusable mistake or was it meant to deliberately delay the course of justice.

The appellant contended that the delay was occasioned by the procedures which had to be followed to forward the plaint and summons to enter appearance to the Insurance Brokers who in turn had to submit them to the Insurance Company to take action of instructing an advocate. That when the advocates were instructed on 1st April, 2010 they immediately prepared a memorandum of appearance and proceeded to file it in Court but that they did not trace the file which they later learnt was with the Magistrate following the request for entry of Judgment by the plaintiff and that the Magistrate was unavailable. That they only managed to file the Memorandum of Appearance on 9th April, 2010 after the file was released back to the registry by which time Interlocutory Judgment had been entered hence they embarked on putting in place mechanisms to set aside the exparte judgment under Order IXA Rule 10 of the Civil Procedure Rules.

The appellant concedes that indeed the judgment as was entered was regular but that the delay is not inordinate and is excusable, which can be compensated by costs, as it was a mistake that is excusable and not intended to delay the course of justice.

Before I answer that question, it is important to look at the Court of Appeal decision in the case of **Belinda Murai & Others Vs Amoi Wainaina (1978) KLR 2782 where Madan JA** described what constitutes a mistake in the following terms:-

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of junior Counsel the Court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The Court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule."

The respondents argued that the delay in filing an appearance and defence was not explained and therefore inexcusable and supported the trial magistrate's order dismissing the application for setting aside the exparte judgment as he correctly exercised his discretion by properly applying his mind to the settled principles for setting aside of exparte judgment.

This Court, having examined the Lower Court record, the submissions by parties in the Lower Court and before this Court, finds that the appellant's failure to enter appearance and file defence in time was excusable.

This is because from the record, it is clear that the delay was occasioned by the processes through which the appellant had to go to get the summons to enter appearance to the Insurance. Under the doctrine of subrogation, the Insurance Company has an interest in the case like the one herein, noting that it undertook the risk of compensating third parties for any loss or damage occasioned by the motor vehicle of its insured, the appellant. The appellant was therefore not expected to have filed an appearance or defence without first contacting the Insurance Company. It has not been shown that the appellant delayed in submitting the summons and copy of plaint to the Insurance Company. The appellant was served on 17th February, 2010 and by 25th February, 2010 the Insurance Broker Eagle Africa had already received the summons which they timeously submitted to the Jubilee Insurance Company Limited. The delay was therefore occasioned by the Insurance Company which only contacted the advocate on 1st April, 2010. The advocate on the other hand immediately prepared the Memorandum of Appearance but could not file it in time before exparte Judgment was endorsed on 31st March, 2010, and it was not until 9th April, 2010 that they accessed the Court file which was before the Magistrate for entry of Interlocutory Judgment. This Court is inclined to believe the appellant and give them the benefit of doubt that it acted with alacrity upon receipt of summons to enter appearance but the delay was occasioned by the Insurance Company, who only contacted the advocate on 1st April, 2010.

More so, upon learning of the entry of exparte Judgment, the appellant's advocates filed the application seeking to set aside the said judgment on 6th May, 2010 within a period of one month, which, in my most considered view, was not inordinate delay.

In addition, this Court finds that had the respondent's advocate served the Insurance Company with a statutory notice of Institution of suit as required under the provisions of Section 10 (2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act, the process of engaging an advocate to represent the appellant would have been shortened. The appellant was webbed into the bureaucracies that go with notifying the Insurance Company which, under the contract of Insurance would be liable to compensate the respondents for any loss or damage following the fatal accident involving the appellant's motor vehicle.

In **Phillip Chemwolo & Another Vs Augustine Kubede (1982-1988) KAR 103 at 1040 Apalloo JA** (as he then was) held;-

"Blunders will continue to be made from time to time and it does not follow that because a mistake has

been made, a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of parties and not for purpose of imposing discipline."

In the instant case, it was not shown that there was fraud or intention to overreach. The inconveniences caused to the respondents by a delay of about one month after the entry of the Interlocutory Judgment, could have been compensated by costs. Further, although the primary suit was filed in 2010 before the enactment of the 2010 Civil Procedure Rules, it is clear that the suit would have been caught up in the new rules requiring full discovery by both parties.

The respondents support the trial Magistrate's ruling to the extent that he correctly found that the defence on the issue of contributory negligence alone should not take the matter to full trial as the defendant could still counter it through cross-examination of the respondents at the hearing. It is true that in exercising the Courts discretion to set aside exparte Judgment, the Court should look at the defence that may be offered and whether it raises triable issues. The case of **Chemwolo & Mumias Sugar Co (Supra)** is instructive: The Court of Appeal was clear that in that case, there was a triable issue on contributory negligence which would affect the quantum of damages.

I agree that indeed, the issue of contributory negligence is a triable issue which cannot be resolved merely through cross examination. It is worth noting that parties do not adduce evidence in cross-examination. Neither can cross examination be deemed to be a defence to a claim.

In the Court of Appeal decision **of John Wainaina Kagwe Vs Hussein Dairy Limited Mombasa Court of Appeal 215/2010** per Githinji, Makhandia and Murgor JJA, the Court of Appeal was categorical that ***"answers in cross-examination cannot form a basis of a party's case or built a defence. They must tender evidence in support of the allegation."***

In **Nandwa Vs Kenya Kazi Limited (1988) KLR 488 the Court of Appeal** observed that;

"In an action for negligence, the burden is always on the Plaintiff to prove the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the Plaintiff's favour unless the defendants' evidence provides some answer adequate to displace that inference." I also associate myself with the holding in **Muthuku Vs Kenya Cargo Services Limited (1991) KLR 464-** that:-

"In my view, it was for the appellant to prove, off course, upon a balance of probability, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault."

In other words the above cited authorities displace the learned trial Magistrate's notion that the issue of contributory negligence as pleaded could still be proved during cross examination. Whatever parties gather in cross-examination of a witness cannot be said to build up one's defence. It would not be sufficient on the part of the appellant to plead contributory negligence on the part of the deceased. They are enjoined to adduce evidence to prove how the deceased contributed to the occurrence of the accident.

It therefore follows that the trial magistrate misapprehended what a triable issue is in finding that contributory negligence alone could not drag the parties to a full trial.

It has been held in the case of **Shailesh Patel T/A Energy Company of Africa Vs Kessels Engineering Works Pvt Limited & 2 Others [2014] eKLR,** citing **Patel Vs East Africa Cargo Handling Services Limited [1974] EA 75** in considering whether the Court should set aside judgment, the Court should attach some conditions to it. The Court has a wide discretion in setting aside exparte Interlocutory Judgments.

In the **Patel Vs EA Cargo Handling Services Limited (Supra)** it was held that;

"***a regular judgment will normally not be set aside unless the Court is satisfied that there is a defence on its merits. The main concern of the Court is to do justice to the parties. I have looked at the proposed defence. It does not appear to me to address the issue in the same way the defendant has addressed the issues in this application. It does not strike out to be a good defence. However, a good defence does not mean a defence which must succeed. It merely needs to satisfy the concept of prima facie defence. I will therefore give it the benefit of doubt. This brings me then, to the condition upon which this Court can set aside the said judgment. The discretion of the Court is unfettered, but if the judgment is to be set aside, it must be done on terms that are just."***

The applicability of the above decision to the instant case is that albeit the respondents have strongly submitted against the draft defence and maintained that it raises no triable issue as it is inconsistent with the investigation report and the appellant's submissions, for example, that whereas the appellant in the draft defence denies ownership of the accident motor vehicles, and or even occurrence of the fatal accident subject matter of the dispute, their own investigation report which was not attached to the supporting affidavit but filed as a document together with a draft defence shows that they are indeed owners of the accident motor vehicle and that an accident did occur on the material date and time pleaded involving the said motor vehicle and the deceased. It is further strongly resisted that the appellant appears to be admitting in their submissions that the draft defence raises no triable issues but that they want the judgment set aside so as to allow them an opportunity to amend the draft defence to introduce a plea that the deceased was on a suicide mission when he was knocked down as he suffered mentally.

My finding on the above submission is that examining the draft statement of defence filed in Court on 6th May, 2010 paragraph (5) and 6 thereof states;-

"The Defendant denies the contents of paragraph 4 of the plaint and in particular that an accident occurred on the date and in the manner alleged or at all and puts the plaintiff to strict proof thereof"

"Further and without prejudice to the foregoing, the defendant states that if the alleged accident occurred, which is denied, the same was caused by its driver, servant and or agent. Each and every allegation of negligence set out under paragraph 5 (a-g) of the plaint is denied and the plaintiffs shall be put to strict proof, thereof."

Under paragraph 7, the respondent particularized 5 acts of negligence attributed to the deceased namely:-

> ***"(a) Failing to keep any or any proper sufficient regard for his own safety when crossing the road;***
>
> ***(b) Failing to pay any or any sufficient heed to the presence of the said motor vehicle registration number KAU 479S which was being driven on the said road;***
>
> ***(c) Crossing the road in total disregard of the presence of motor vehicle registration number KAU 479S.***
>
> ***(d) Being careless and/or ignorant of his own safety and thus endangering his life and that of others;***
>
> ***(e) Failing to see the said motor vehicle registration number KAU 479S in sufficient time to avoid the accident or at all."***

In a claim of negligence, no doubt the plaintiff must prove any of the allegations of negligence attributed to the defendant. On the other hand, where the defendant pleads contributory negligence, then the burden shifts under section 109 of the Evidence Act, Cap 80 Laws of Kenya. Under the said section 109 of the Act, the burden of proof as to any particular fact lies to the person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person of

proving the same is cast on the defendant who alleges (See also Section 107, 108). Under section 108, the burden of proof lies on that person who would fail if no evidence at all were given on either side. It cannot therefore, be expected that the defendant/appellant would sufficiently prove those acts of contributory negligence pleaded against the deceased through cross-examination. Further, I find that on the basis of the plea by the appellant that **the accident did not occur in the manner pleaded by the Plaintiff,** and **or that the deceased substantially contributed to the occurrence of the material accident are triable issues** which as was held in the **Patel Vs EA Cargo Handling Services Limited, (supra)** a triable issue need not be an issue that must succeed, but in my view, satisfies the concept of prima facie defence or issue.

In **Olympic Escort International Company Limited and 2 Others Vs Parminder Singh Sandhu & Another [2009] eKLR.** The Court of Appeal held inter alia;-

"With that finding it becomes unnecessary to examine the merits of the application under sub-rule 2 (1) of order 35 to determine whether the appellants had shown by affidavit or otherwise that they should have leave to defend the suit, either conditionally or unconditionally. Even if we were to consider that issue, we would have found that there were prima facie triable issues raised in the defence and the replying affidavit on record. It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide……"

The same principle was espoused **in Sultan Hardwares Limited Vs Steel Africa Limited [2011] eKLR** where the Court of Appeal held;

"We are aware that the suit in the superior Court was not heard on its merits and what is at stake before us is whether the appellant should have been given an opportunity to be heard on its defence which had been filed. In the case of Laiji T/a Vakkep Building Contractors Vs Casuosel Limited [1989] KLR 386 the predecessors of this Court (Nyarangi Platt, JJA and Kwach Ag J.A) held that:

"Summary Judgment is a draconian measure and should be given in only the clearest cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist." See also **Kassam Vs Sachamia (1982) KLR 191 and Zola Vs Ralli Vs Bros Limited [1969] EA 591.**

I reiterate that having failed to enter appearance and file defence within the stipulated period, the plaintiffs were entitled to request for judgment against the defendant/appellants and the Lower Court correctly entered that judgment as requested, in a regular manner. However, the entry of Interlocutory Judgment is not cast in stone as the Court has the unfettered Judicial discretionary powers under Order 1XA Rule 10 of the old rules (now order 10 Rule 11 of the Civil Procedure Rules to set aside or vary such Judgment and consequential decree or order upon such terms as are just. And as was held in **Prime Bank Limited Vs Paul Otieno Nyamodi (2014) eKLR**, ordinarily, the Court will not set aside or vary Interlocutory Judgment because it would essentially be setting back the plaintiff's progress in prosecuting its case causing it to suffer prejudice. The Court must therefore be satisfied that the defendant has offered a very plausible explanation as to why he failed to file his Memorandum of Appeal and defence in time before such Judgment can be set aside.

I am satisfied on the evidence in the affidavit of Dinah Ogullah and the submission by both parties advocates that the defendants explanation for the delay is plausible.

The issue therefore is whether the Judgment can be interfered with, which in effect disturbs the Judicial discretion of the trial Magistrate. In my view, the trial Magistrate in dismissing the appellant's application for setting aside exparte Judgment which application had been made timeously, did not state what hardship or injustice would be suffered by the plaintiff particularly in the absence of fraud or negligent intention on the part of the defendant/appellant to obstruct the course of justice. (See also **Waweru Vs Ndugu (1983) KLR 236**. In my view, the trial Magistrate ought to have set aside or varied the exparte Interlocutory Judgment to give the parties on opportunity to be heard on the same on merits.

As was held in the case of **Richard Ncharpi Leiyagu Vs IEBC & Others (Supra)** the right to a hearing

is a protected right in our constitution and also the cornerstone of the rule of law. This is not to say that the respondents have been responsible for the violation of the appellants right to a fair hearing, but that Courts should endeavor and employ, where appropriate the principle that justice is served to all parties to a dispute who avail themselves to the jurisdiction of the Court giving them an opportunity to ventilate their grievances and be heard on merits.

In my view, delay has been occasioned by the filing of this appeal which in my view, is the only delay occasioned by the 4 year period that it has taken to have this appeal heard and determined. From the decisions relied on by the appellant and Respondent's counsels, this Court finds that there is general consensus that and I have stated in this judgment, the discretion to set aside exparte judgment is not cast on stone. But in majority of the cases, the Courts and more particularly the Court of Appeal in the cited cases leans towards according both parties to a suit an opportunity to be heard.

The idea this Court gets is that the right to access to justice must be balanced against the right to expeditious justice. On the one hand, there is the appellant who will be driven from the seat of justice without trial if exparte judgment is not set aside, considering the circumstances of the case, and on the other hand, we have the respondent who is entitled to expeditious disposal of her case without delay especially where the appellant has no defence worth of trial. This places the Court to engage in a novel and delicate balancing act of ensuring that;-

a. as that defendant(appellant gets a fair trial by considering whether a bona fide triable issue exists; and

b. (b) the plaintiff/respondent equally gets a fair trial by eliminating such delay in the administration of justice which would keep her away from her lawfully obtained judgment.

Having carried out that delicate balancing act, I find that the learned trial Magistrate erred in law and misdirected himself in exercising his discretion by declining to set aside the exparte judgment in favour of the appellant, when, in fact, the material suit had not even been set down for formal proof hearing at the time the application to set aside the said Interlocutory Judgment was filed.

In my view, that exercise of discretion denied both parties to the suit expeditious justice. Accordingly, I allow this appeal, set aside the ruling and order dated 13th July, 2010 and substitute thereto with an order allowing the appellant/defendant's application for setting aside the exparte Interlocutory Judgment entered on 31st March, 2010.

I further order that the appellant/defendants' Memorandum of Appearance dated 1st April, 2010 and filed on 9th April, 2010 be deemed to be validly on record.

I further direct the defendant/appellant herein to file and serve upon the Plaintiff/Respondent a statement of defence within 15 days from the date of this Judgment, whether or not the Lower Court file will have been returned to the Lower Court pending the typing and certification of this Judgment. I award costs of the application for setting aside of exparte Interlocutory Judgment to the respondent.

Costs of this appeal shall abide by the outcome of the suit in **Limuru Civil Case No. 39 of 2010. Dorleen Wasonga & Another Vs Farmers Choice Company Limited.**

But before I depart, I must make an observation, on an issue that was not raised by either party to this appeal and not even in the Lower Court. This observation is guided by the fact that the Court is presumed to know the law. The issue arises from the pleadings that the accident subject matter of the suit before the Lower Court occurred on 19th February, 2007.

The suit was filed on 16th February, 2010 within three years. In the said pleadings, the victim of the accident, the late Harrison Wasonga died on the same date of accident on 19th February, 2007. Under Section 4 (2) of the Limitation of Actions Act, Cap 22 Laws of Kenya, an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. **However, in**

the case where the injured person has died the relevant provisions are Section 29 of the Limitation of Actions Act Cap 22 Laws of Kenya. The said section provides:-

"29 provision where injured person has died

(1). ***In relation to an action to which Section 27 of this Act applies, being an action in respect of one or more causes of action surviving for the benefit of the estate of a deceased person by virtue of Section 2 of the Law Reform Act (Cap 26), Section 27 of this Act and Section 28 of this Act shall have effect subject to subsections (4) and (5) of this Section.***

(2). Sub Sections (1), (2) and (3) of Section 27 of this Act and Section 28 of this Act shall have effect, subject to subsection (4) and (6) of this Section, in relation to an action brought under the fatal accidents Act (Cap 32) for damages in respect of a person's death, as they have effect in relation to an action to which Section 27 of this Act applies.

(3). In the following provisions of this Section, and in Sections 27 and 28 as modified by those provisions, "the deceased" means the person referred to in subsection (1) or subsection (2) as the case may be.

(4). Section 27 (1) of this Act shall not have effect in relation to an action falling within subsection (1) or subsection (2) of the Act, unless the action is brought before the end of twelve months from the date on which the deceased died.

(5). For the purposes of the application of subsection (2) of Section 27 of this Act to an action falling within subsection (1) or subsection (2) of this section-

(a) any reference in the said subsection (2) to the plaintiff

shall be construed as a reference to the deceased.

(b) ……

(6). In the application of Sections 27, 28 and 29 of this Act, to an action

brought under the Fatal Accidents Act-

(a) Any reference to a cause of action to which an action relates shall be construed as reference to a cause of action in respect of which it is claimed that the deceased could (but for his death) have maintained an action and recovered damages , and

(b) Any reference to a cause of action shall be construed as a reference to establishing that the deceased could (but for his death) have maintained an action and recovered damages in respect thereof."

Section 27 of the Act provides for extension of limitation period in case of ignorance of material facts in actions for negligence etc.

On the other hand, Section 28 sets out the procedure for application of leave of Court to extend the limitation period under Section 27 of the Act.

From the above provisions of Section 29 of the Limitation of Actions Act, it is clear that where the person injured as a result of the tortious act of another dies, then his or her personal representatives can only bring an action on behalf of the estate of the deceased person within twelve months from the date when the deceased died.

Where such period has lapsed, then no cause of action lies, unless, by application of Sections 22, 27 and 28 of the Act, leave of Court is sought to extend such period for bringing an action.

In other words, the Plaintiffs suit was filed outside the limitation period of twelve months from the date when the deceased died. However, because the Limitation of Actions Act does not exist to extinguish claims, the plaintiff can still apply for extension of such period, which application, subject to Section 27 (2) can be brought in the suit pursuant to the provisions of Section 28 (3) of the Act, exparte.

Orders accordingly.

Dated, Signed and delivered in Open Court this **23rd** day of **March, 2015.**

R.E. ABURILI

JUDGE

23.3.2015