



REPUBLIC OF KENYA



**Njau & another v Achola (Civil Appeal E046 of 2023)
[2025] KEHC 3251 (KLR) (10 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E046 OF 2023
GL NZIOKA, J
FEBRUARY 10, 2025**

BETWEEN

WILLIAM NGARI NJAU 1ST APPELLANT

LILIAN MUTHONI NGARI 2ND APPELLANT

AND

STEFEE BONJELA ACHOLA RESPONDENT

(Being an Appeal from the decision of Honourable J. Ndengeri Senior Resident Magistrate delivered on 20th day of April, 2023 vide Naivasha CMCC NO. 841 of 2018)

JUDGMENT

1. By a plaint dated 29th June 2018 and amended on 9th July, 2019, the plaintiff (herein “the respondent”) sued the defendants (herein the appellants seeking for judgment against the appellants for: -
 - a. General damages
 - b. Special damages as stated at paragraph 6 of the plaint
 - c. Costs of the suit
 - d. Interest from the date of filing the suit
2. The cause of action arose from a road traffic accident that occurred on or about 1st December 2015 in which the respondent sustained bodily injuries. The respondent pleaded that, he was travelling as a lawful paying passenger on a motor vehicle registration No. KBN 087P along Nakuru-Gilgil road’. That the appellants’ agent drove that motor vehicle negligently and as a result it collided with motor vehicle registration No. KBT 593C and the respondent was injured.



3. The particulars of negligence attributed to the appellants' agent are tabulated at paragraph 5 of the plaint. The plaintiff further pleaded that, he sustained injuries as tabulated at paragraph 6 of the plaint.
4. From the trial court proceedings, the appellants did not enter appearance nor filed a defence and an ex parte and/or interlocutory judgment was entered against them.
5. On 12th November 2020, the firm of Frank Mwangi & Co. Advocates filed a notice of appointment on behalf of the 2nd appellant and by a notice of motion application dated 2nd August 2021, sought for stay of proceedings, setting aside of the ex parte judgment and leave to file a defence, as may be directed by the court.
6. On 25th April 2022 the respondent filed a replying affidavit dated 3rd September 2021 and subsequently, the parties were engaged in negotiation to settle the application out of court but that, did not materialize. On the oral application of the respondent, the application was dismissed for want of prosecution, by an order of the trial court dated 19th July 2022.
7. The trial court then directed that, the matter proceeds to formal proof which was done and the judgment dated 17th November 2022 delivered wherein the trial court held the defendants 100% liable and awarded the plaintiff quantum as follows: -
 - a. General damages -----Kshs 600,000
 - b. Special damages -----Kshs 149,810
 - c. Future medical expenses-----Kshs 310,000
 - Total sum-----Kshs 1,059,810

The plaintiff was also awarded the costs of the suit.
8. By a notice of motion application dated 17th January 2023, the appellants sought for setting aside of the judgment dated, 17th November 2022 and unconditional leave to file a defence upon payment of thrown away costs agreed on by both parties. Further that their case be re-opened and they be allowed to call their witnesses and adduced evidence in the matter. That the costs of the application be provided for.
9. The application was opposed vide a replying affidavit dated 8th February 2023, and consequently, it was heard and a ruling delivered on 20th April 2023, whereby the application was dismissed with costs to the respondent.
10. It is against the afore decision that the appellants have filed the appeal herein relying on the following grounds: -
 - a. That the trial court erred in law and in fact by dismissing the appellant's application dated 17th January 2023.
 - b. That learned trial court failed to appreciate the appellant's right to fair hearing and in particular denied them an opportunity to be heard and to defend themselves.
 - c. That the trial court failed to properly evaluate the facts set out in the affidavit by the appellant's thus arriving at erroneous decision.
 - d. That the trial court magistrate erred in law and facts by finding that the appellants did not raise any triable issues in their defence.



- e. That the trial court failed to exercise its discretion judiciously and failed to consider the overriding objective of the Civil Procedure Act and the Constitution.
11. The appellants pray that as a result judgment of the trial court be set aside, reviewed and/or revised and substituted with an order allowing their application dated 17th January 2023. That, the Honourable court issue further orders as it may deem fit and the appeal be allowed with costs to them.
 12. The appeal was canvassed vide filing of submissions. The appellants in submissions dated 9th April 2024, submitted that the learned trial Magistrate failed to appreciate their right to a fair hearing under Article 50 of the Constitution of Kenya, 2010. That, despite them being present in court when the matter came up for formal proof, the trial court did not accord them an opportunity to present their case and to cross-examine the respondent.
 13. Further, the trial court failed to consider their application dated 17th January 2023 seeking to pay throw away costs and have the matter reopened to allow them to tender their evidence.
 14. That, the court as the custodian of justice had a duty to ensure each and every person is afforded an opportunity to exercise the right to a fair trial. The appellants relied on the case of, Brian Yongo Otumba vs Hiten Shantilal Shah [2016] eKLR where the High Court in allowing the defendant unconditional leave to defend the case against it stated that, taking into consideration the principle under Article 159(2) of the Constitution of Kenya, a court should exercise its mandate and jurisdiction to ensure the ends of justice are met.
 15. The appellants further submitted that, the trial court erred in finding that their defence sated 17th January 2023 did not raise any triable issues. That, their statement of defence lay blame on the owner and/or driver of motor vehicle registration KBT 593C for causing the accident as per the judgment in Chief Magistrate Civil Case No. 363 of 2016 availed to the court, where the trial court found the owner and/or driver of the said vehicle 100% liable for the accident.
 16. The appellants argued that, the legal and disputable facts raised in their defence could only be resolved through a comprehensive hearing as held in the case of, Brian Yongo Otumba vs Hiten Shantilal Shah (supra) where the High Court cited the case(s) of, Osondo vs Barclays Bank International Limited (1981) KLR 30 and Churanjilal & Co vs Adam (1950) 17 EACA 92 and stated that, where the defendant shows and/or raises a triable issue of fact or law the court has no recourse but to grant the defendant an opportunity and/or unconditional leave to defend and argue it before the court.
 17. That, the learned trial magistrate failed to properly evaluate the facts in their statement of defence and arrived at an erroneous decision and dismissed of their application leaving them fully liable for the accident despite judgment in CMCC 363 of 2016 absolving them from liability.
 18. However, the respondent in submissions dated, 20th March 2024 argued that the trial court dismissed the appellants' application after taking note of the manner they had conducted themselves in the primary suit which reasons are well captured in the subject ruling.
 19. Further, the appeal is unmerited, an abuse of the court process and employed as a delay tactic which tactic the appellants deployed in the trial court and in the circumstances, the court must exercise its discretion and protect the interest of the parties, more so of the respondent who has suffered for a long period. Furthermore, that litigation must come to an end.
 20. At the conclusion of arguments by the parties, I have considered the application in the light of the materials before the court and in particular the ruling of the trial court and the reasons therein. The trial court in dismissing the application stated that the applicants had offered two different reasons of



- failure to pursue the matter expeditious. That they had internet challenges and failed to appear in court on 19th July 2022, and at the same time they were negotiating payment of thrown away. The trial court states that it was at a loss as to which account to go by.
21. The trial court also states that, it could not understand why the appellants sat back to resurface on the hearing date to negotiate payment of thrown away costs.
 22. The trial court further held that, the appellants did not annex a draft defence to the application in issue but the registry had availed a statement of defence dated; 17th January 2023 filed in court on 17th April 2023. The trial court then held that there was no draft defence but still found that the defence did not raise any triable issue.
 23. Finally, the trial court held that the appellants had employed delaying tactics in conclusion of the matter and noted that; “equity aids the vigilant and not indolent”, and then concluded that, on balance of probabilities, the scale of justice was balanced in favour of the respondent and dismissed the application with costs to the respondent.
 24. Pursuant to the aforesaid, and after analysing the evidence in total, I note the following salient issues; that the accident herein occurred on 1st December 2015, as stated in the amended plaint, being a period of nine (9) years to date. Further, the suit was instituted by the initial plaint dated, 29th June 2018 and amended on; 9th July 2019 being a period of six (6) years to-date.
 25. Further, the ex parte judgment was entered against the appellants on 10th December 2019. It suffices to note that while granting the interlocutory judgment the trial court observed that, the appellants had been served with summons to enter appearance and/or file a defence and had failed to do so.
 26. It is also noteworthy that, the application seeking to set aside the interlocutory judgment dated 2nd August 2021, was filed eight (8) months after entry of interlocutory judgment. In fact, a perusal of the said application reveal that, while seeking to set aside that judgment as sought for in prayer (3) of the application, the appellants did not even cite the date of the subject judgment.
 27. Be that as it may, the reasons advanced in support of that application is that, the appellants’ law firm inadvertently made a mistake of mixing this matter and/or the file with other files that had been complied with. Evidently, then the appellants were not denying service of summons to enter appearance and/or file a defence.
 28. Indeed, the appellants were given an opportunity to canvass that, application and from the lower court record, the application was fixed for hearing on 17th May 2022 and then stood over to 19th July 2021, for mention as stated by Hon. E. Cherop (RM) and the order for mention notice to issue.
 29. On the 19th day of July 2022, the trial court was informed that, the appellants were aware of the date of the hearing of the application and had been properly served with the mention notice and affidavit of service filed. The application was then dismissed.
 30. However, it suffices to note that, although the subject application for setting aside the interlocutory judgment is not the subject of this ruling but it is evident that, when it was dismissed on 19th July 2023, the matter had been fixed for mention for directions and not hearing. Therefore the trial court could only give directions at most or a hearing date for the application.
 31. It is the finding of this court that to have dismissed it on the date it was scheduled for mention, was unfair and prejudicial to the appellant. Consequently, up to that point, their right to a fair hearing was compromised.



32. Be that as it may, the suit proceeded to formal proof on 18th October 2022, and the defendants' plea to be heard on payment of thrown away costs was disallowed. Evidently, the appellants did not have an opportunity to challenge the trial court's decision to disallow their offer of thrown away costs, as the matter proceeded to formal proof hearing on the same day their plea was rejected. The resultant outcome was the judgment delivered in the main suit.
33. Thus the appellants were then left with no alternative but seek for the setting aside of the subsequent final judgment delivered. Again their application was dismissed, hence this matter.
34. In my considered opinion the interest of the parties herein must be considered for the scale of justice to balance and accord each party a just and fair decision. Consequently, two issues call for the intervention of this court. One, the fact that the interlocutory judgment was dismissed on a date scheduled for mention thus denying the appellants an opportunity to be heard
35. Secondly in the ruling dismissing the application to set aside the final judgment, the trial court indicated that there was no draft defence annexed to the application but again acknowledged that one was traced in the registry and then proceeded to make a finding that it did not raise any triable issues.
36. In the considered opinion and with due respect, whether the defence raised triable issues or not could only be canvassed on an application under Order 2 Rule 15 (a) of the Civil Procedure Rules, 2010 or after a full hearing of the matter. The trial court could not make that decision without hearing any of the parties and when the issue was not under consideration.
37. Be that as it were, the appellants conduct in prosecuting their defence is least impressive. It smacks of a party who is least interested in expeditious disposal of the matter. The observation by the trial court that, the appellants were re-active then proactive is well founded.
38. In the same vein the respondent observation that the appellants are guilty of laches is in order. The maximum of equity referred to by the trial court that "Equity aids the vigilant and not the indolent" was well applied. Consequently, the appellants must pay the price for their part in delay in this matter.
39. It is noteworthy that the plaintiff suffered bodily injuries and is entitled to expeditious disposal of the matter under Article 159 of the Constitution of Kenya just as the appellants are entitled to a right to be heard under Article 48, thereof.
40. The upshot of the afore said is that, I direct that the final judgment delivered herein be and is hereby set aside on condition that, the appellants do pay the respondent half of the decretal sum within twenty-one (21) days of the date of this order and secure the balance by deposit in deposit or a bank account in a reputable commercial bank agreed upon by the parties lawyers and in joint names of the lawyers of both parties within the same period of time.
41. The costs of this application will abide the outcome of the matter if heard afresh. In case of default of comply with the conditions of stay of execution, the order setting aside the judgment shall stand vacated on the 22nd day from the date of this order. In case of compliance, the matter reverts to the Chief Magistrate for re-hearing of the same on priority basis.
42. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 10TH DAY OF FEBRUARY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:



Ms. Wanjiru for appellant

Macharia for respondent

Mr. Komen: Court assistant

