Obiero v Severin & another (Civil Appeal E201 of 2023)
[2025] KEHC 2724 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2724 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E201 OF 2023

AB MWAMUYE, J

MARCH 13, 2025

BETWEEN

CLIFFORD OTIENO OBIERO ..... APPELLANT

AND

WERNA SEVERIN ..... 1ST RESPONDENT

JULIAN ODHIAMBO ABISALOM ..... 2ND RESPONDENT

(Being an appeal against the Judgment and Decree of the Hon. G.C. Serem delivered on 5th October 2023 in Kisumu SCCC No. E253 of 2023)

JUDGMENT

1. The Appellant herein is aggrieved by the Judgment of the Trial Court rendered on 5th October 2023 in Kisumu SCCC No. E253 of 2023. The Memorandum of Appeal dated 28th November 2023 raises four grounds of appeal, all rooted in issues of law. The central dispute concerns whether the Hon. Adjudicator erred in law by setting aside an interlocutory judgment that had been regularly entered. This Court, therefore, embarks on a solemn duty: to scrutinize the Trial Court's discretion, determine whether it was judiciously exercised, and ascertain whether the appeal is meritorious.

2. The Appellant filed his Written Submissions dated 24th January 2024, while the Respondents filed their Written Submissions dated 11th February 2024. The Court has considered these submissions in their entirety, alongside the record of appeal and relevant authorities.

3. The facts, though shrouded in legal complexities, are simple. The Appellant, the owner of motor vehicle KDJ 195E, sued the Respondents for damages after the 2nd Respondent, while recklessly driving the 1st Respondent's truck, KCT 543T, caused an accident. The claim was for Kshs.491,000/= as repair costs and Kshs.684,000/= for loss of revenue. The Respondents, despite service, failed to enter an appearance or file a defence, leading to an interlocutory judgment being delivered on 5th October 2023. When the decree stirred them to action, they sought to set aside the judgment, arguing they had

not been served. The Trial Court granted their request. The Appellant contends that this decision was a grave misdirection in law.

4. This Court's jurisdiction at the appellate level is confined to issues of law under Section 38 of the *Small Claims Court Act*. It is well established that judicial discretion, if improperly exercised, is a matter of law. The primary questions before this Court are: (i) whether the Respondents were duly served, (ii) whether the interlocutory judgment was regular, and (iii) whether the Trial Court erred in setting aside the judgment.

5. On the issue of service, the Appellant tendered a Certificate of Service, detailing the mode and date of service. The Respondents, in seeking to set aside the judgment, did not provide cogent evidence disproving service. The trial court was duty-bound to make a critical judicial inquiry into whether service was proper. The failure to do so constitutes a legal error. As was held in K-Rep Bank Ltd v Segment Distributors Ltd [2017] eKLR, an ex parte judgment entered after proper service must be accorded a different treatment from one entered without service. In arriving at the decision, the court stated as follows;

> 'Having found that the Summons to Enter Appearance and Plaint were duly served on the Defendant, it follows that the default judgment was regularly entered. And where that is the case, it is trite that the court ought to be slow in setting it aside. In James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR, the Court of Appeal restated the distinction aforementioned and held that:'
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> 'From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant 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 a defendant 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 defendant 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 v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).'

5. Judicial discretion is akin to a delicate balancing act, a solemn trust reposed in the courts to ensure justice is not only done but manifestly seen to be done. This discretion is not absolute, nor is it an open cheque to be wielded arbitrarily. The Court of Appeal in Mbogo v Shah [1968] EA 93 cautioned against judicial overreach, stating that appellate intervention is warranted where a trial court has misdirected itself or considered extraneous factors. In this case, the Trial Court disregarded established legal precedent and misapplied its discretion, an error this Court cannot overlook.

6. Further, in Hajar Services Limited v Peter Nyangi Mwita [2020] eKLR, the Court reiterated that discretion must be exercised judicially, not whimsically.

> 'This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but

deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.'

5. The Respondents, despite adequate notice, chose inertia over action, awakening only when the decree became imminent. The law does not aid the indolent. Discretion, when exercised in their favor, must serve the ends of justice, not serve as a refuge for negligence.

6. The sanctity of finality in litigation is a hallowed principle, ensuring the wheels of justice do not grind endlessly. The Court in Gideon Sitelu Konchella v Daima Bank Limited 2013 eKLR where the court while authoritatively citing the case of Mobil Kitale Service Limited v Mobil Oil Kenya Limited HCC No. 205 of 1990 (unreported) underscored that judicial processes must not be an avenue for strategic delays. In discussing that, the court stated thus;

> " It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously" ....."The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

5. The Respondents, having been afforded every opportunity, cannot be permitted to circumvent justice through procedural evasions. Their application, founded on flimsy grounds, stands at odds with this doctrine.

6. The distinction between a regular and an irregular judgment is pivotal. In Patel v EA Cargo Handling Services Ltd [1974] EA 75, the Court held that a regular judgment—entered after due process—should not be set aside unless a plausible defence raising triable issues is presented. In this case, Duffus P. stated as follows:

> " 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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

5. In this instance, the Respondents failed to proffer any such defence, rendering the Trial Court's ruling untenable. The law does not indulge litigants who sleep on their rights.

6. *The Constitution* of Kenya, under Article 50, enshrines the right to a fair hearing. However, as held in James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR, this right does

not extend to resuscitating cases that have suffered the misfortune of litigant negligence. Courts must guard against procedural abuse under the guise of constitutional claims.

7. The scale of justice must tip towards diligence and expedition. In Shah v Mbogo [1967] EA 116, the Court opined that discretion is meant to prevent injustice—not to perpetuate delay. The Respondents, by their lack of diligence, have lost any equitable basis for relief. The scales of justice cannot be tilted to accommodate procedural lethargy.

8. Moreover, the ruling of the Trial Court contravenes the principle enshrined in Article 159(2)(b) of *the Constitution*: that justice shall not be delayed. The Supreme Court in Law Society of Kenya v Centre for Human Rights & Democracy & 13 Others [2014] eKLR reaffirmed that procedural rules exist to foster substantive justice, not hinder it. The ruling of the Trial Court, in setting aside a properly entered judgment, inadvertently encouraged procedural gamesmanship rather than advancing justice.

13. In the result, this Court finds that the appeal is meritorious. The Trial Court's ruling of 21st November 2023 setting aside the interlocutory judgment was erroneous and is hereby set aside. Consequently, this Court reinstates the interlocutory judgment entered on 5th October 2023 in Kisumu SCCC No. E253 of 2023.

14. The Appellant shall have costs of this appeal and costs in the Trial Court.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2025.

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BAHATI MWAMUYE

JUDGE