Kamau v Njuguna (Civil Appeal E316 of 2023)
[2025] KEHC 7042 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7042 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E316 OF 2023

H NAMISI, J

MAY 23, 2025

FORMERLY KIAMBU CIVIL APPEAL NO. E323 OF 2023

BETWEEN

TIMOTHY KINYANJUI KAMAU ..... APPELLANT

AND

DOUGLAS KAHARA NJUGUNA ..... RESPONDENT

(Being an Appeal from the Ruling and Order of f Hon. C. K. Kisiangani, Principal Magistrate delivered on 31 August 2023 in Ruiru CMCC No. E012 of 2022)

JUDGMENT

1. This is an appeal against the Ruling of the trial Court following a Notice of Motion dated 11 May 2023 filed by the Appellant seeking stay of execution and to set aside the default judgement entered by the trial Court.

2. In his Application, the Appellant averred that Chador Auctioneers had unlawfully and irregularly attached his motor vehicle registration number KCX 845F in purported execution of a decree issue by the trial Court. It was the Appellant's case that he had not been served with the proclamation nor was he aware of the proceedings in the trial court, having not been served with the Summons to Enter Appearance. It was his averment that the phone number upon which service was effected by the Respondent did not belong to him, but instead belonged to one Margaret Ojwang.

3. In opposing the Application, the Respondent averred that the proclamation was issued following due process and that there was a judgement on record. The Appellant had not entered appearance in the matter despite being served. The Respondent averred that service had been effected upon the Appellant using the phone number that had been indicated on the Police Abstract dated 7 September 2021. Besides, the Appellant had not provided any evidence to the contrary that he was not the owner of the said phone number.

4. In its Ruling, the trial Court observed that before setting aside such a judgement, the court must satisfy itself that the defendant has offered a very plausible explanation as to why he failed to enter appearance and file a defence within the stipulated time. The trial Court further observed that the phone number used by the Respondent to effect service upon the Appellant was indicated on the Police Abstract, which also indicates the details of the owner of the motor vehicle KCX 554E as the Appellant and the driver as Winstone Githungo. This means that the Appellant or his agent are the ones who provided the details to the Police Officers, who then indicated the same on the Police Abstract.

5. It was the trial court's finding that the Appellant was duly served and that the explanation given was not reasonable enough to warrant the court to exercise its discretion in setting aside the judgement on record. The Application dated 11 May 2023 was consequently dismissed.

6. Aggrieved by the Ruling, the Appellant lodged the appeal herein on the following grounds:

    i. That the Learned Magistrate erred in law and in fact in failing to consider whether the Appellant's annexed Draft Defence raised bona fide triable issues that should go to full trial for adjudication;

    ii. That the learned Magistrate erred in law and in fact by failing to find that the Appellant's annexed draft defence raised bona fide triable issues that should go to full trial for adjudication;

    iii. That the learned Magistrate erred in law and in fact in failing to find that the Appellant had availed a cogent reason for failing to enter appearance nor file defence being that he had not been served with the Summons to Enter Appearance at all;

    iv. That the learned Magistrate erred in law and in fact by making a finding that the Appellant had been served with the Summons to Enter Appearance whereas evidence on record showed that the mode of service, being service via whatsapp, was unsatisfactory as it was done to a mobile number obtained from a Police Abstract which clearly captured the contact as that belonging to Winstone Githungo, who was not a party to the suit;

    v. That the learned Magistrate erred in law and in fact by upholding service via whatsapp where the ownership of the mobile number to which the Summons to Enter Appearance were allegedly sent was highly contested and clearly not registered to the Appellant;

    vi. That the learned Magistrate erred in law and in fact by failing to find that the Appellant would suffer tremendous prejudice if the execution of the decree issued in the matter before being given a right to fair hearing;

    vii. That the learned Magistrate erred in law and in fact by failing to find that in the circumstances of the case, it was in the interest of justice to set aside the interlocutory judgement and all consequential orders;

    viii. That the learned Magistrate erred in law and in fact by failing to order unconditional release of the subject motor vehicle even where the Respondent had admitted through his pleadings on the record that the attachment of the motor vehicle was not preceded by a proclamation;

    ix. That the learned Magistrate erred in law and in fact by making a finding that the Appellant had filed a Memorandum of Appearance and defence on 29 September 2019 which was clearly untrue as no such pleadings were on the record and even the matter was filed in 2022;

    x. That the learned magistrate erred in law and in fact in failing to address the effect of failure to service the Notice of Entry of Judgement;

xi. That the learned Magistrate erred in fact and in law in filling gaps left out by the Respondent;

xii. That the learned Magistrate erred in fact and in law by failing to uphold the Appellant's right to be heard;

xiii. That the learned Magistrate erred in fact and in law in failing to consider the overwhelming evidence tendered by the Appellant in favor of his application

7. The Appeal was canvassed by way of written submissions.

Analysis and Determination

8. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123.

9. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles.

10. I have keenly read the contents of the Record of Appeal and the submissions by the respective parties.

11. The well-established principles of setting aside interlocutory judgements were laid out in the case of Patel v East Africa Cargo Handling Services Ltd (1974) EA 75 where it was 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."

12. It is now well settled from numerous precedents that a distinction exists between a default judgment that is regularly entered and one which is irregularly entered. The difference between the two was elaborated in detail by the Court of Appeal in *CA No. 6 of 2015* James Kanyita Nderitu vs. Marios Philotas Ghika & Another [2016] eKLR, where it was held that:-

> " ....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 in the whole it is in the interest of justice to set aside the default judgement, among others.

.....

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiciae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v Attorney General [1986 – 1989] EA 456)."

13. The question before this Court is whether the judgement entered in the trial court was regular or irregular.

14. The Respondent instituted proceedings in the trial court for special damages, costs and interest following a road traffic accident involving the Respondent's and Appellant's motor vehicles. According to the Affidavit of Service, Daniel Gachau Mwangi, Advocate, effected service upon the Appellant through the Appellant's number 07598*0 on 18 January 2022. In the Affidavit filed in response to the Application to set aside the default judgement, the Respondent averred that the number was indicated in the Police Abstract.

15. The Appellant averred that this number did not belong to him, but instead belonged to a third party. Further, the Appellant argued that there was no evidence of said service, no screenshots attached to the Affidavit of Service dated 2 March 2022 to prove that the Appellant was, indeed, served.

16. The issue of service in litigation is a crucial one and a court must satisfy itself that each party was properly served and afforded the opportunity to participate in the proceedings.

17. Setting aside a default judgment is an exercise of judicial discretion. Judicial discretion is unfettered. However, it must be exercised in accordance with the law. In CMC Holdings Ltd vs. Nzioki [2004] KLR 173, the Court of Appeal held as follows:

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well

amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgment."

18. With respect to mobile-enabled messaging applications, Order 5 Rule 22C provides as follows:

    1. Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.

    2. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.

    3. Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.

    4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.

19. Looking through Record of Appeal, there is no evidence attached to the Affidavit of Service dated 2 March 2022 confirming delivery of service. I have also perused the trial court file placed before me and find that the said evidence is missing. In the absence of such evidence, the judgement entered by the trial court cannot be deemed to be regular.

20. Further, from the indication on the Police Abstract, the phone number used by the Respondent to effect service upon the Appellant appears to be that of the driver, Winstone Githungo, and not that of the Appellant.

21. For the foregoing reasons, I find that the appeal is meritorious. I hereby set aside the Ruling delivered on 31 August 2023 in Ruiru Civil Case No. E012 of 2022 and all consequential orders. The Notice of Motion dated 11 May 2023 is allowed as prayed. I make no orders as to costs.

DATED AND DELIVERED AT THIKA THIS 23 DAY OF MAY 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Dennis Maina.. for the Appellant

Ms. Kabau h/b Gachau..... for the Respondent

Libertine Achieng .....Court Assistant