Wakaba v Mwambu (Civil Appeal E040 of 2024)
[2025] KEHC 5838 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5838 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E040 OF 2024

M THANDE, J

MAY 9, 2025

BETWEEN

SAMUEL WAKABA ..... APPELLANT

AND

ISAACK MWAMBU ..... RESPONDENT

JUDGMENT

1. The Appellant herein is aggrieved by the ruling delivered on 21.3.25 in Mariakani CMCC No. 2 of 2014 in which the trial Magistrate dismissed his application dated 18.12.23.

2. Following the impugned ruling, the Appellant filed his appeal dated 5.4.24. The grounds of appeal are that:

    1. The learned trial magistrate erred in both facts and in law of making an erroneous finding to wit, that the Appellant was served personally but declined to sign the summons.

    2. The learned magistrate erred in both law and fact when she proceeded to write a Ruling whose trajectory was clearly predetermined and thereby relying on tenuous evidence in reaching the impugned decision.

    3. The learned magistrate erred in both law and facts when she completely disregarded the Appellant's application and fell into further error in not making a finding on the fate of the said application in her ruling.

    4. The learned magistrate erred in both law and facts when she fallaciously made a finding that the Appellant upon judgment in default being entered and assessment done, the Defendant/ Appellant through their advocates agreed to pay the decretal sum by way of installments and forwarded a cheque of in respect of Kshs. 35,000/= to the Respondent's Advocates.

5. The learned magistrate erred in both law and facts in finding that the Appellant/Defendant has been aware of the entry of judgement against him since August, 2018.

6. The learned magistrate erred in both law and facts in finding that no reason is advanced why the Appellant/Defendant never took any steps to set aside the judgment from August, 2018 five years down the line.

7. The learned magistrate erred in both law and facts in finding that the delay in entering appearance is inordinate as well as the delay in filling the present application by the Appellant/ Defendant.

8. The learned magistrate erred in both law and fact in making final orders, ruling and directions that were clearly incongruous and discordant with the body of the application as pleaded in supporting and further affidavits of Appellant/Defendant.

9. The learned magistrate erred in both law and fact in finding the reasons by the applicant are to my mind are not excusable.

10. The learned magistrate erred in both law and fact in finding the reasons by the applicant are to my mind are not excusable.

11. The learned magistrate erred in both law and fact in finding the Defendant has further inordinately delayed in filling the present application, which to this court is an indicator that the applicant was not interested in his case.

12. The learned magistrate erred in both law and fact in finding that although the defence may raise triable issues the applicant took five years to file the present application to set aside judgment even after being aware of the judgment and making some commitments to pay the decretal sum.

13. The learned magistrate erred in both law and fact by disregarding and not putting into consideration the weighty, credible and consistent evidence of Appellant in his application.

14. The learned magistrate erred in both law and fact by deliberately misstating the appellant's application.

15. The learned magistrate erred in both law and fact in failing to consider the submissions of the Defendant and authorities cited in support of the submissions.

16. The learned magistrate erred in both law and fact in failing to analyse the evidence tendered by the Appellant and proceeded to consider extraneous in her judgment.

17. The learned magistrate erred in both law and fact by failing to appreciate the facts laid before her by Appellant and instead proceeded to re-state her own version of facts in complete departure from the pleading before her apparently with aim of justifying her decision.

3. The Appellant prayed that the Appeal be allowed and that the impugned ruling be set aside. He also sought costs of the Appeal.

4. Being a first appeal, this Court is called upon to re-assess and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See Selle v Associated Motor Boat Co. [1968] EA 123).

5. The record shows that the Respondent had instituted a suit by way of a plaint dated 29.10.13 against the Appellant seeking damages for injuries sustained in a road traffic accident which occurred on

14.12.12 at Maji ya Chumvi, along the Mombasa Nairobi Road. On 4.4.17, judgment in default of appearance and default of defence was entered against the Appellant. The matter proceeded to formal proof and by a judgment dated 3.7.18, the Respondent was awarded the sum of Kshs. 550,000/= costs and interest at court rates. Thereafter the execution process commenced.

6. In the dismissed application, the Appellant sought stay of execution and setting aside of judgment entered in default of filing a defence and the judgment of 3.7.18. He also sought leave to file a defence out of time. The Appellant's case is that he was never served with the summons to enter appearance nor the pleadings in the matter and that the Respondent did not attach any evidence of service.

7. In the impugned ruling, the trial Magistrate noted that the Respondent confirmed that the Appellant was served personally but declined to sign the summons. Further that upon judgment being entered in default and assessment done, the Appellant through his advocates agreed to pay the decretal sum in instalments and forwarded a cheque of Kshs. 35,000/= to the Respondent's advocates. The trial Magistrate found no reason was advanced as to why the Appellant took no steps to set aside the judgment in spite of having been aware of it since August 2018. The trial Magistrate noted that a delay of 5 years in seeking to set aside the judgment is inordinate and proceeded to dismiss the application.

8. The circumstances herein are that the Appellant maintains that he was not served with the summons to enter appearance and pleadings in the court below. The Respondent on the other hand insists that service was indeed effected and that the Appellant had paid Kshs.35,000/= towards the settlernent of the decretal amount. Further that the Appellant had been aware of the existence of the instant case since the August 2018 but failed to make any steps to set aside the judgment.

9. I have carefully looked at the record. There is an affidavit of service sworn by Michael Otieno on 11.2.16, indicating that he effected service on the Appellant on 20.1.14, who he found sitting in motor vehicle registration number KST 318 in Mariakani area. He had been informed by the Respondent's advocate that the Appellant operates the said vehicle. He then says that the Appellant confirmed who he was, accepted service but declined to sign for the same.

10. It is noted that the Appellant did not deny that he operates the said motor vehicle in Mariakani area. The process server stated that he found the Appellant sitting in the said vehicle and confirmed that he is the defendant in the matter. The Court further notes that in spite of the Appellant indicating in the application that he would apply to cross examine the process server, no such application was made. In light of the foregoing, the Court finds that service of court process was duly effected upon the Appellant.

11. The Court must now make a determination as to whether the trial Magistrate erred in dismissing the application before her to set aside the default judgment.

12. The law relating to setting aside judgment or dismissal is found in Order 12 Rule 7 of the Civil Procedure Rules, which provides:

> Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

13. The orders sought by the Appellant in his application before the trial court are discretionary. The rule does not provide the conditions that must be met for the setting aside of judgment and reinstatement of dismissed suits. A court considering such an application thus has wide discretion to grant orders on terms. The terms must however be just.

14. The default judgment was entered on 4.4.17 while judgment after formal proof was delivered on 3.7.18. In spite of this, it was not until 20.9.23, over 5 years later, that the Appellant filed the application

seeking the setting aside of the judgments. It is clear that it is the issuance of the proclamation dated 16.9.23, that triggered the application in question.

15. In the impugned ruling, the trial Magistrate considered the Appellant's defence and noted that while the defence raised triable issues, that ought to be determined on merit, she considered the position of the Respondent and the need to ensure that rules of procedure are adhered to. The trial Magistrate also considered that the Respondent has a legitimate expectation of enjoying the fruits of judgment which would be taken away were the judgment to be set aside.

16. In the case of Shah v. Mbogo & Anor. (1966) EA 116, Harris J. set out the guiding principle governing the exercise of discretion in an application to set aside an exparte judgment as follows:

> "I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice..."

17. The Appellant has not in the present case, demonstrated that there was an inadvertent or excusable mistake or error, to warrant the setting aside of the default judgment.

18. In James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR, the Court of Appeal listed some of the factors to be considered in determining whether or not to set aside the default judgment as follows:

> 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).

19. I have already rejected the Appellant's reason for default. In addition, the delay of over 5 years is clearly inordinate. While the Appellant may have a triable defence, reversing the decision of the trial Magistrate will occasion great prejudice to the Respondent. Taking the factors set out in the cited case, I find that on the whole, the interests of justice will be better served if the decision of the trial Magistrate is upheld.

20. As regards the contested claim that the Appellant had paid Kshs.35,000/= towards the settlement of the decretal amount to demonstrate that the Appellant was aware of the matter, my view is that this issue is now moot. Having found as I have that service was duly effected, there would be no need to interrogate this issue.

21. In the end and in view of the foregoing, I find that the Appeal lacks merit and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 9TH DAY OF MAY 2025

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M. THANDE

JUDGE