Johnson v Kyenye (Civil Appeal E398 of 2024)
[2025] KEHC 11419 (KLR) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11419 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E398 OF 2024

G MUTAI, J

JULY 28, 2025

BETWEEN

ZIPPORAH MBENYA JOHNSON ..... APPELLANT

AND

FRIDAH NGINA KYENYE ..... RESPONDENT

JUDGMENT

1. The respondent herein moved the small claims court vide Statement of Claim dated 15th February 2023 and filed on 17th February 2023 seeking judgment in the sum of KES.281,250/-, together with the costs of the claim.

2. The trial court delivered its judgment on 17th April 2023. The decree and certificate of costs was issued on 23rd May 2023. The trial court also issued a warrant of attachment of movable property in execution of a decree for money on 13th July 2023. The respondent filed a Notice to Show Cause why execution by arrest and committal to civil jail should not issue, dated 24th July 2024. The trial court allowed the Notice to Show Cause on 15th August 2023.

3. The appellant filed a Notice of Motion application dated 25th September 2024, seeking the setting aside and stay of execution of orders dated 15th August 2024, on the grounds that there was no proper service. The same was dismissed on 30th October 2024. The appellant applied for a stay of execution of the said orders vide a Notice of Motion application dated 14th November 2024, which was allowed by this Court on 28th January 2025.

4. The appellant sought to have the orders of the trial court issued on 30th October 2024 and the exparte judgement delivered on 17th April 2023 both set aside, that she be allowed to file a statement of defence to enable the court determine the matter on merit, and to have the lower court matter allowed to proceed to full trial. The same is based on the following grounds: -

i. That the learned magistrate misdirected himself by not allowing the appellant to formally come on record and summarily dismissing her application without according her the chance to defend the matter and have the same determined on merit;

ii. That the trial magistrate erred in law by allowing the respondent to proceed and carry out execution by applying for fresh warrants of execution without considering how prejudicial the same will be to the claimant considering the substantial amount of the claim and that she had not been given an opportunity to defend the claim;

iii. That the learned magistrate failed to exercise his discretion judiciously and fairly to the detriment of the appellant;

iv. That the learned magistrate erred in law when he failed to subject the appellant to prove her claim in the suit;

v. That the learned trial magistrate erred in law in giving undue regard to procedural technicalities and at the expense of substantive justice to litigants contrary to Article 159 of the *Constitution* of Kenya, 2010; and

vi. That the learned magistrate erred in law by issuing a premature judgment by failing to hear the appellant, thereby resulting in a miscarriage of justice contrary to section 50 of the *Constitution*.

5. The appeal was canvassed by way of written submissions.

6. The appellant, through her advocates, Mahida & Maina Company Advocates, filed her written submissions dated 30th April 2025. Counsel submitted on two issues, namely, whether the exparte judgment was regular, and whether the court should set aside the exparte judgment.

7. On the first issue, counsel relied on Rule 11(4) of the Small Claims Court Rules and submitted that a regular judgment is rendered where a defendant will have been served properly but for one reason or another, s/he fails to enter an appearance or file a defence. It was submitted that the alleged service to the appellant was fatally defective for want of proof linking the alleged mobile number 0705608784 to the appellant.

8. Counsel submitted that the appellant only became aware of the existence of the suit when she was served with a Notice to Show Cause. Had the appellant been duly served or aware of the suit, she would have defended it from the outset. Counsel urged the court to find that the service was invalid, set aside the ex parte judgment and allow the appeal with appropriate orders as to costs.

9. On the second issue, counsel submitted that setting aside the judgment is an exercise of discretion which should be exercised judiciously. The same is to be exercised freely to avoid injustice or hardship and not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

10. Further, where the defendant proves that they have a good defence, they should be allowed to ventilate their case. Counsel urged the court to allow the appeal and grant the appellant leave to defend the suit on the merits.

11. The respondent, on the other hand, through her advocates, Auma Owino Advocates, filed her written submissions dated 7th May 2025. Counsel submitted that the principles for setting aside default and / or interlocutory judgment are the length of time, the reason for failure to enter an appearance and file a defence, and whether the defence has triable issues.

12. On the length of time lapsed, counsel relied on sections 25 and 27 of the *Small Claims Court Act* and submitted that the respondent filed a claim on 17th February 2023 and served the appellant with

a summons to enter an appearance as well as pleadings via WhatsApp on the appellant's telephone number 0705608784. She urged that the matter was first mentioned on the 6th day of March 2023, then on 23rd March 2023 and on 17th April 2023 when a default judgment was entered, upon the trial court being satisfied that service was properly effected upon the appellant. The application to have the appellant enter an appearance and file a response was filed a year later, specifically on 25th September 2024, and therefore, there was undue delay on the part of the appellant.

13. On the reason for failure to enter appearance, counsel submitted that the respondent explained and elaborated comprehensively in her replying affidavit that the phone number used in the annexures clearly depicted that it belonged to the appellant. That the assertion it is not hers is marred with falsehood and was utterly malicious since the appellant attended court upon being contacted by the court process server for a notice to show cause why execution by way of warrants of arrest and committal to civil jail should not issue, a fact she admitted in paragraph 12 of her supporting affidavit and the said court process server deponed that he contacted her through the same mobile number.

14. Ms Auma submitted that the defence and counterclaim deed indeed raise serious allegations denying the existence of any debt and further claiming that the respondent owed her money for some overpayment.

15. She urged that if the court is persuaded to allow the appeal, the appellant be compelled to pay throw-away costs as well as deposit part of the decretal amount in court as a condition for setting aside the default judgment.

16. In conclusion, counsel urged the court to dismiss the appeal with costs.

17. I have considered the appeal and the rival submissions by both counsels. The issue for determination herein is whether the ex parte judgment should be set aside.

18. The court in the case of Mureithi Charles & another v Jacob Atina Nyagesuka [2022] KEHC 1805 (KLR), the court stated that: -

> " That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence 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. See Shah vs. Mbogo & Another [1967] EA 116.
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> In Pindoria Construction Ltd vs. Ironmongers Sanitaryware; Civil Appeal No. 16 of 1976 it was held that: -
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> > " It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he

should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

19. Order 5 rule 22C of the Civil Procedure Rules provides;

    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.

20. The appellant alleges that she only learnt of the matter when she was served with a Notice to Show Cause and has also denied being the owner of mobile number 070560878. The respondent in her affidavit of service, sworn on 15th March 2023 by her advocate, Barbra Yvette Auma, at paragraph *2*, stated that she served the appellant via WhatsApp with her registered telephone contacts 0705608784 with the claimant's pleadings as well as notice for first mention scheduled on 6th March 2023. She also served a Mention Notice for the mention scheduled for 22nd March 2023 via WhatsApp on the same number. The same number was also used for service of the 10-day' Notice of entry of judgement, copy of decree, as well as certificate of costs.

21. In an affidavit of service sworn on 2nd August 2024 by Ian Keari, a court process server, at paragraph *3*, it was deposed that the process server called the appellant on the same number for service of notice to show cause, which she accepted by signing thereon.

22. In its judgment of 17th April 2023 the trial court stated that:-

    " From the affidavit of service and the mention notices issued, the court is satisfied that service has been duly effected including that of today on account of the averment by the claimant's counsel even in the absence of a certificate of service."

23. In dismissing the application dated 25th September 2024, the trial court, in its ruling of 30th October 2024 the court stated that: -

    " Flowing from the above it is clear that the respondent's prayer for setting aside of the judgement of the court is one that must fall by the stilts of straw upon which it was predicated. This is because it falls short of all the conditions for setting aside of a court's judgement as laid down in Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR or even as a matter of ex debito justiciae."

24. I have perused the record of appeal. I am of the view that no substantive evidence was tendered to confirm that the subject mobile phone number belongs to the appellant and that he was thereby served, but declined to enter an appearance wilfully and without a just cause. The right to a fair trial requires that a person accused of an offence or a civil wrong be heard before an adverse action is taken against them. In my view, the ownership of the said number could easily have been established through mobile money services.

25. The court in the case of Mureithi Charles & another v Jacob Atina Nyagesuka (supra) stated,

> " In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647."

26. I have perused the response to the statement of claim dated 25th September 2024. It is evident that the appellant denies the claim that she owes the respondent herein and has raised a counterclaim that the respondent owes her Kes.12,500/- on account of overpayment of the alleged funds borrowed from the Claimant. The appellant urged the court to dismiss the claim with costs. The respondent has also conceded that the defence raises triable issues and urged the court to grant throw-away costs if it allows the appeal.

27. On thrown away costs, the court in the case of Gakuha v Embakasi Ranching Company & 4 others [2024] KEELC 7208 (KLR) stated that: -

> " The purpose of throw away costs was stated as follows in the case of County Government of Tana River & Another vs Hussein Fumo Hiribae [2021] eKLR:-
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> > " In my view the award of costs either in the classification defined in section 27 as those that follow the event or throw away costs as it's in the case herein, the uniting factor is closely linked to adjudicative procedures before courts by a litigating party. These procedures can consume time, energy and money. This award of costs may be one route to improve due diligence and efficiency in our legal system as a whole....In my strong view the respondent being awarded throw away costs are to cater for substantial indemnity costs to reflect time that was wasted and would be duplicated when the trial is rescheduled."

> The import of the foregoing is that throw away costs are issued to compensate a litigant who put time and energy into litigating a case whose judgment was then set side."

28. Since the defence raises triable issues and as there is doubt as to whether the appellant/applicant was served, it would be in the interest of justice that the appeal is allowed and the appellant/applicant granted a chance to defend the claim in the trial court on the merits.

29. I award the respondent throw-away costs of Kes.30,000/-, which should be paid by the appellant within 30 days of the date of this judgment.

30. It is so ordered.

DATED AND SIGNED IN MOMBASA, THIS 28TH DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Owiti, for the Appellant /Applicant;

Ms Auma, for the Respondent; and

Arthur – Court Assistant.