Ojwang' v Mutinda & another (Civil Appeal E496 of 2022)
[2025] KEHC 10887 (KLR) (Civ) (2 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E496 OF 2022

JM OMIDO, J

JULY 2, 2025

BETWEEN

CHRISTINE OBONDO OJWANG' ..... APPELLANT

AND

NICHOLAS NDAMBUKI MUTINDA ..... 1ST RESPONDENT

PAUL MUNGAI WAHINYA ..... 2ND RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. H.M. Nyaga, Chief Magistrate delivered on 21st June, 2022 in Milimani Commercial CMCC No. 5400 of 2018)

JUDGMENT

1. This appeal emanates from the ruling and order of Hon. H.M. Nyaga, Chief Magistrate (as he then was and now Judge of the High Court) delivered on 21st June, 2022 in Milimani Commercial CMCC No. 5400 of 2018.

2. A brief history of the matter before the lower court is that the matter before the lower court was one in the nature of a tortious liability claim, whereby the Appellant (the Plaintiff before the lower court) sought to recover general and special damages, jointly and severally from the 1st and 2nd Respondents (the 1st and 2nd Defendants respectively before the lower court).

3. The claim arose out of a road traffic accident that occurred on 18th July, 2017 in which the Appellant, who pleaded that she was travelling as a fare paying passenger aboard motor vehicle registration number KBG XXXR sustained bodily injuries.

4. The Appellant pleaded in her plaint that the 1st Respondent was the registered beneficial owner of the said motor vehicle and that the 2nd Respondent also purported to be the owner of the same.

5. It is instructive from the record of the lower court that interlocutory judgement was entered against the 1st Respondent on 30th April, 2020 and the matter thereafter proceeded for hearing (and for formal proof against the 1st Respondent), culminating in a final judgement that was entered on 30th April, 2020. The Appellant commenced execution proceedings against the 1st Respondent.

6. Prompted, perhaps, by the process of execution, the 1st Respondent, vide an application dated 25th March, 2022, sought the following orders from the trial court, on the strength of the claim that the Appellant never served him with summons to enter appearance and the plaint:

    a. .....

    b. .....

    c. That this Honourable Court be pleased to set aside the interlocutory judgement entered against the 1st Defendant on 16th November, 2018 and the entire judgement entered against the Defendants jointly and severally on 30th April, 2020 and the suit be heard de novo pending hearing and determination of the main suit.

    d. That the 1st Defendant/Applicant be granted leave to file his defence out of time in terms of the draft defence annexed hereto.

    e. That costs of this application be provided for.

7. The application before the lower court was canvassed by way of written submissions and the court, through the impugned ruling, allowed the same and proceeded to set aside the judgement entered on 30th April, 2020 on the conditions that (verbatim):

    a. The Applicant to pay thrown away costs of Ksh.30,000/- within 30 days.

    b. The Applicant to pay the auctioneer's fees to be agreed upon or taxed.

    c. The Applicant shall serve the said statement of defence within 15 days of this order.

    d. In default of compliance with order given in (i) then the order vacating the interlocutory judgement shall automatically lapse without further reference to the court.

    e. The matter be set down for pre-trial conference on priority basis.

8. Being dissatisfied with the ruling and orders above, the Appellant, vide the memorandum of appeal dated 27th June, 2022, preferred an appeal on the following grounds:

    a. That the learned Chief Magistrate erred in law and in fact by allowing the 1st Respondent's application dated 25/03/2022 and setting aside invalid judgment dated the 30/04/2020, which decision went against the weight of obvious and undeniable evidence tendered before the court by the parties.

    b. That the Learned Chief Magistrate arbitrarily, unfairly and oppressively exercised his discretion to aid a party who has evidently obstructed and delayed the course of justice thereby, denying the Appellant her Constitutional right to fair hearing and access to justice as guaranteed in the *Constitution* resulting to miscarriage of justice.

    c. That the Learned Chief Magistrate erred in law and in fact by failing to appreciate sufficiently that the invalid judgement dated the 30/04/2020 had already been set aside vide ruling of the same court of the 26/03/2021 and substituted with a judgement dated the same day (26/03/2021).

d. That the Learned Chief Magistrate erred in fact and in law by directing the 1st Respondent to file his statement of Defence yet the judgment dated the 26/03/2021 is still validly on record. In the circumstances there is imminent risk of the trial court embarrassing itself and the entire judicial process by having two sets of judgement if the matter is allowed to proceed as directed by the trial court.

e. That the Learned Chief Magistrate grossly misdirected himself on elementary principles governing setting aside of judgement with regard to the application that was before him occasioning miscarriage of justice against the Appellant.

f. That the learned Chief Magistrate erred in law and in fact by allowing the 1st Respondent's application and ruling in his favour, despite the fact that he failed to substantiate specifically disputed nebulous and misleading averments made in his supporting affidavits on record.

g. The Learned Chief Magistrate erred in fact and in law when he was satisfied that the 1st Respondent had been duly served with the pleadings more than four (4) years earlier and failed to enter appearance or defend the suit, but still went ahead to allow his misleading application.

h. That the Learned Chief Magistrate erred in fact and in law when he was satisfied that the 1st Respondent had been following proceedings "behind the scenes," for four (4) years but still went ahead to allow his misleading application.

i. That the Learned Chief Magistrate erred in fact and in law by making a whimsical and arbitrary decision when he failed to consider the 1st Respondent's inordinate delay of more than four (4) years in bringing the said application and/or entering appearance.

j. That the Learned Chief Magistrate erred in fact and in law when he failed to appreciate that the 1st Respondent's application was marred with fraudulent misrepresentation, rigged with irregularities that defy logic, brought in bad faith and was generally abuse of the process the court in order to defeat justice.

k. That the Learned Chief Magistrate erred in fact and in law by going ahead to allow the 1st Respondent's application dated the 25/03/2022, which sanitised the 1st Respondent's actions, despite clearly finding in his ruling that the 1st Respondent had not approached the court with clean hands.

l. That the Learned Chief Magistrate erred in fact and in law when he failed to consider that the 1st Respondent offered absolutely no excusable reason for his failure to enter appearance and/or defend the suit over a period of more than four (4) years.

m. That the Learned Chief Magistrate erred in fact and in law when he failed to consider that the 1st Respondent's draft statement of Defence raised absolutely no triable issue, having been statutorily barred from any action pursuant to Section 4(1) (a) of the *Limitation of Actions Act* Cap 22 Laws of Kenya.

n. That the Learned Chief Magistrate erred in fact and in law by ignoring or failing to take into account or appreciate the averments in the Appellant's replying affidavit and submissions made by the Appellant in response to the 1st Respondent's application.

o. That the Learned Chief Magistrate erred in fact and in law by failing to appreciate the Appellant's plight by denying her the fruits of her judgement which could have alleviated her suffering from the events leading to the case.

p. That the Learned Chief Magistrate misdirected himself on the principles governing the application that was before him by letting the 1st Respondent get way with blatant abuse of court with a merely slap on the wrist instead of directing the 1st Respondent to deposit the full decretal sum as a condition of staying execution.

9. The Appellant proposes that the appeal be allowed, the ruling of the trial court dated 21st June, 2022 and the consequential orders be set aside, and in the alternative, the 1st Respondent be granted conditional stay by directing him to deposit the full decretal amount in a joint interest earning account held between the parties' Advocates pending hearing and determination of the suit before the trial court. The Appellant also prays for costs of the instant appeal.

10. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

11. In Selle, Sir Clement De Lestang observed that:

> "This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

12. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of Peters v Sunday Post Limited [1958] EA 424 in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> "i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

13. The 1st Respondent's application before the lower court was premised on the grounds that he was not served with the summons to enter appearance and plaint and only became aware of the matter when execution proceedings against him commenced.

14. He further premised his motion on the reasons that the judgement that was entered against him was irregular and that he, in any event, had a good defence to the Appellant's claim, as evidenced by his draft defence, as he had sold the motor vehicle to the 2nd Respondent and was therefore not in possession or control of the same when the accident in question occurred.

15. In his affidavit in support of the application, the 1st Respondent expounded on the above grounds and was emphatic that the Appellant did not serve the summons and pleadings upon him and that he had good grounds of defence to the Appellant's suit.

16. The Appellant resisted the 1st Respondent's motion by filing a replying affidavit in which she stated that service of the initial court process, which included the summons and plaint was effected upon the 1st Appellant and that the same was demonstrated by the process server's affidavit.

17. The Appellant further stated that the 1st Respondent's draft defence did not offer any tenable grounds of defence to the Appellant's suit as the 1st Respondent remained on record at the motor vehicle registration registry as the registered owner of the motor vehicle that was involved in the accident pursuant to which the tortious claim arose.

18. The application was considered by the learned trial Magistrate on the basis of affidavit evidence and written submissions. In the impugned ruling, the learned trial Magistrate rendered himself as follows:

> " The explanation that was advanced by the Defendants deponent falls short of what would have been expected in a case for the setting aside of an interlocutory judgement. The 1st Defendant explained the cause for the delay for not filing a defence within the prescribed time was that he was never served with summons to enter appearance and the plaint and was therefore not given a chance to set out his case regarding the suit. Notably, the affidavit of service filed before (the court) states that on several instances the 1st Defendant was served with pleadings and chose to ignore them.
>
> I agree with the Plaintiff/Respondent that it is clear that the 1st Defendant was following the case behind the curtains and therefore is not coming with clean hands through his application.
>
> However, in the case of Kenya Commercial Bank v Nyantange & another [1990] KLR 443, Bosire J (as he then was) held that:
>
> > " Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex parte judgement entered in default of appearance or defence and any consequential decree or order upon such terms as are just."
> >
> > .....
> >
> > Similarly, in the case of Thorn PLC v MacDonald [1999] CPLR 660, the Court of Appeal stipulated the following guiding principles:
> >
> > > " i). While the length of any delay by the Defendant must be taken taken into account, any pre-action delay is irrelevant;
> > >
> > > ii). Any failure by the Defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside
> > >
> > > iii). The primary consideration is whether there is a defence with a real prospect of success, and that justice should be done; and

iv). prejudice (or the absence of it) to the claimant also has to be taken into account."

I have gone through the defence advanced by the 1st Defendant and from the foregoing, although the delay was not out of good faith the defence raises triable issued especially on the ownership of the motor vehicle which I believe might change the course of the judgement if determined....."

19. The learned trial Magistrate proceeded to determine the application as follows:

> "In this scenario it would be in the interest of justice, if the parties were heard fully in the merits of their respective claims. I however suggest that the matter should be heard expeditiously in order that justice is seen to be done. In order to achieve this expediency and in the interest of justice and the parties, its my considered that the court's judgement delivered on 30th April be set aside on the following conditions:....."

20. The learned trial Magistrate then went on to outline and impose the conditions that I have reproduced in paragraph *6* (above) of this judgement.

21. In precis therefore, the learned trial Magistrate found that summons and plaint were properly served upon the 1st Respondent and that the judgement was a regular one. He however reached the opinion that that the 1st Respondent had a good defence to the Appellant's claim and on that basis proceeded to exercise his discretion and set aside the judgement conditionally.

22. This court directed that the appeal be canvassed by way of written submissions. The Appellant and the 1st Respondent filed their respective submissions. The 2nd Respondent did not file sibmissions and did not, therefore, participate in the appeal.

23. In her written submissions, the Appellant took the position that the learned trial Magistrate, after reaching the finding that the 1st Respondent was "following the case behind the curtain and was not coming with clean hands through the said application", proceeded to wrongly and oppressively exercise his discretion in setting aside the judgement in favour of a party who was abusing the court process, which in her view resulted in a miscarriage of justice.

24. The Appellant further urged that the learned trial Magistrate failed to consider that the 1st Respondent's draft defence was anchored on a contract that was time barred by statute, as the allegations that the 1st Respondent had sold the vehicle to the 2nd Respondent, coming more than 6 years after the alleged sale transaction, rendered his claim statute barred for the reason that the period within which to bring such a claim was 6 years.

25. The Appellant therefore proffered the position that the learned trial Magistrate fell into error when he reached the finding that the 1st Respondent's draft defence raised triable issues to the Appellant's claim, and that the judgement of the trial court ought not to have been set aside on the basis of that ground.

26. In conclusion, the Appellant asserted that the order setting aside the trial court's judgement was in error as the exercise of discretion in determining the application was not judicious and that the same resulted in immense hardship and prejudice being visited upon the Appellant as the matter had taken a substantial amount of time before being determined.

A. The 1st Respondent's Submissions on Appeal.

27. In his submission, the 1st Appellant stated that the learned trial Magistrate properly exercised his discretion in setting aside the judgement on the conditions that he laid down. The 1st Respondent was of the view that what the Appellant seeks through the instant appeal is for this court to substitute its opinion with that of the trial court.

28. The 1st Respondent extended the argument that the Appellant did not demonstrate that the learned trial Magistrate, in reaching his decision to set aside the lower court's judgement on conditions, misdirected himself in some matters and as a result arrived at a decision that was erroneous or that he was clearly manifestly wrong in the exercise of his judicial discretion.

29. The 1st Respondent further urged that the learned trial Magistrate reached the correct finding that the draft defence that was annexed to the 1st Respondent's affidavit raised triable issues, which paved way for the exercise of discretion to set aside the judgement.

30. On the point taken by the Appellant on limitation of the 1st Respondent's averment in the draft defence that no liability could attach against him as he had sold the vehicle to the 2nd Respondent, the 1st Respondent submitted that he was not seeking to enforce the motor vehicle sale agreement or any other claim against the 2nd Respondent and that in the premises, the issue of limitation did not arise.

31. I have considered the grounds of appeal presented herein, the submissions by the parties, the record of the lower court and I deduce the issues that I am now tasked to determine as follows:

    a. Whether sufficient grounds were presented by the 1st Appellant before the trial court to warrant an order of setting aside the judgement on the conditions that the learned trial Magistrate set out?

    b. Whether the 1st Respondent's draft statement of defence disclosed triable issues?

    c. Who should bear the costs of the present appeal?

32. I will first proceed to determine issues (a) and (b) together.

33. The authorities of Jane Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR; Bouchard International (Services) Limited v M'Mwereia [1987] KLR 193; Remco Limited v Mistry Jadva Parbat & Company Limited & 2 others [2002] 1 EA 233; Gulf Fabricators v County Government of Siaya [2020] eKLR; and Baiywo v Bach [1987] KLR 890 provide the jurisprudence that where there is no or no proper service of summons upon a Defendant, or where the summons served upon a Defendant are invalid, the ensuing judgement that may be entered in default of appearance and/or defence is an irregular one.

34. It then conversely follows that where the service of valid summons is properly effected upon a Defendant who fails to enter appearance and/or file a defence, the judgement that is entered in default, is a regular one.

35. The law presents the position that an irregular judgement is set aside, upon application by a party, as a matter of right, or ex debito justitiae and unconditionally. To borrow the words of Ringera J (as he then was) in Mwalia v Kenya Bureau of Standards [2001] 1 EA 151,such a judgement is set aside bila maneno. On the other hand, a regular judgement may on application by a party be set aside by the court in exercise of its discretion, whereby the court may attach terms and/or conditions to the order setting it aside. Such discretion must however be exercised judiciously.

36. The position that the learned trial Magistrate reached in his ruling is that the summons and plaint were properly served upon the 1st Respondent. The validity of the summons was not disputed and the finding that there was proper service upon the 1st Respondent was not challenged. That then yields the position that the judgement that was entered against the 1st Respondent was a regular one. As we have seen above, such a judgement could only be set aside in judicious exercise of the court's discretion and not as a matter of right.

37. Having reached the position that the judgement was entered after proper service was effected upon the 1st Respondent, the learned trial Magistrate was obligated to look at the defence to determine if the same raised triable issues before proceeding to consider whether to exercise his discretion to set it aside. That is precisely what the learned trial Magistrate did.

38. The issues that this appeal now presents for adjudication are as follows:

    a. Whether the draft defence raises triable issues.

    b. Whether the trial court judiciously exercised its discretion in setting aside the judgement that was entered on 30th April, 2020.

    c. Who should bear the costs for the instant appeal?

39. I have perused the draft statement of defence annexed to the 1st Respondent's affidavit in support of the application. No doubt, in a tortious liability claim based on negligence as the one that was before the trial court, the 1st Respondent cannot be held liable if he can demonstrate through evidence that he had sold the motor vehicle and was not in its possession and/or control at the time the accident occurred.

40. Thus then, whether the 1st Respondent had sold the vehicle to the 2nd Respondent before the occurrence of the accident and was therefore not in possession or control of the same is a triable issue. It follows then that whether liability can attach against the 1st Respondent is also an issue that is triable.

41. But then, the Appellant argues that the 1st Respondent's position that he sold the vehicle to the 2nd Respondent is time barred by statute as the same is being made more than 6 years after the execution of the motor vehicle sale agreement, with the effect that the draft defence raises no triable issues, on that basis.

42. With respect, I disagree with the Appellant's argument. My persuasion, in agreement with the 1st Respondent, is that from the pleadings before the trial court, the claim before the court is one purely based on tort and the 1st Respondent does not, in the draft defence, seek to enforce the motor vehicle sale agreement or any other claim against the 2nd Respondent. The issue of limitation does not therefore arise

43. The next issue for me to determine is whether the trial court judiciously exercised its discretion in setting aside the judgement that was entered on 30th April, 2020.

44. The authority of Mbogo & Another v Shah [1969] EA 93, speaks of instances where an appellate court can interfere with a trial court's exercise of discretion. In that case, it was held, inter alia, that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in

exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

45. What I get from the above decision is that a party who moves the court on appeal seeking that the appellate court interferes with the lower court's exercise of discretion must demonstrate that the court below, in exercising its discretion, misdirected itself, or acted on matters that it ought not to have acted upon, or failed to consider matters that it ought to have considered and as a result arrived at a wrong finding. An appellate court cannot interfere with the exercise of discretion by a lower court simply on the basis that the appellate judge would have himself perhaps exercised such discretion differently.

46. We have seen above that a default regular judgement can be set aside by a court, while exercising its discretion, where the party seeking the order of setting aside demonstrates that it has a good defence to the claim of the Plaintiff. My view, as I have stated before, is that the 1st Respondent indeed demonstrated that his defence raises triable issues. That alone paved way for the trial court to properly and judiciously proceed to exercise discretion to set the said judgement aside. I cannot therefore fault the learned trial Magistrate for the finding that he reached.

47. The Appellant has not demonstrated that the learned trial Magistrate in exercising his discretion, misdirected himself, or acted on matters that he ought not to have acted upon, or failed to consider matters that he ought to have considered and that as a result arrived at a wrong conclusion or that such exercise of his discretion was injudicious.

48. Who then should bear the costs for the instant appeal? Section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya dictates that costs ought to follow the event. Accordingly, the Appellant shall bear the 1st Respondent's costs of the appeal, which I take the liberty of assessing at Ksh.30,000/-. I make no orders on costs in respect of the 2nd Respondent as he did not participate in the appeal.

49. I order that the trial court's file be transmitted to the Head of Station, Milimani Commercial Chief Magistrate's Court so that the trial may proceed apace. The file to be mentioned for directions before the Head of Station on 23rd July, 2025.

50. The Court Administrator, Milimani Commercial Chief Magistrate's Court, to serve the parties with a mention notice.

51. This file is hereby closed.

DELIVERED (VIRTUALLY) DATED & SIGNED THIS 2ND DAY OF JULY, 2025.

JOE M. OMIDO

JUDGE

For the Appellant: No Appearance.

For the 1st Respondent: No Appearance.

For the 2nd Respondent: No Appearance.

Court Assistant: Mr. Ngoge & Mr. Juma.