



**AIG Kenya Insurance Company Limited v Okoth (Civil Appeal  
225 of 2018) [2024] KEHC 3626 (KLR) (Civ) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3626 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 225 OF 2018**

**DAS MAJANJA, J**

**APRIL 16, 2024**

**BETWEEN**

**AIG KENYA INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**MICHAEL OKOTH ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. P.N. Gesora, CM dated 13<sup>th</sup> March 2018 at the Magistrates Court at Milimani, Nairobi Civil Case No. No. 7000 of 2017))*

**JUDGMENT**

**Introduction and Background**

1. This is an appeal against the ruling of the Subordinate Court dated 13.03.2018 (“the Ruling”) where it declined to allow the Appellant’s application dated 07.12.2017 that sought to set aside the default judgment entered against it on 15.11.2017 and consequential orders. The appeal is grounded in the amended memorandum of appeal dated 17.09.2021 and has been canvassed by way of written submissions which are on record.
2. It is common ground that on 27.09.2017, the Respondent filed suit in the Subordinate Court claiming that on or about December, 2016, he purchased, for use in his transport business, motor vehicle registration number KCK \* H, Mercedes Axor Prime Mover (“the motor vehicle”) from a vendor by the name Abba’s Investments Limited (“Abba’s”) at the price of Kshs. 5,800,000.00. The Respondent averred that after acquiring the motor vehicle, he made a proposal to the Appellant for its comprehensive insurance cover and the Appellant, after carrying out its own assessment of the motor vehicle’s value, agreed to insure and issued to the Respondent a comprehensive insurance cover in the sum of Kshs. 5,780,000.00 for which the Respondent paid the agreed premium.



3. On 05.02.2017, the motor vehicle was involved in an accident along Mombasa-Nairobi Road and the same became a write-off. The Respondent stated that he reported the said accident and total loss of the motor vehicle to the Appellant on 20.02.2017 but the Appellant, in breach of contract, failed to compensate him for his loss. That when he made a formal demand, the Appellant stated that it had already paid the money due to the Respondent to Abba's allegedly because the motor vehicle had "a financier's interest".
4. The Respondent denied that the motor vehicle was financed by Abba's Investments Limited as alleged by the Appellant and that the refusal by the Appellant to pay to him the insured sum of Kshs. 5,780,000.00 together with the incidental expense of Kshs. 30,000.00 incurred in towing the motor vehicle was in breach of contract. The Respondent further averred that the Comprehensive Insurance Policy which the Appellant issued to him in respect of the motor vehicle did not bear or include any financier's interest and the claim which the Respondent lodged with the Appellant did not, similarly, bear or include any financier's interest. In the premises, the Respondent contended that any payment made by the Appellant to the said Abba's or to any other third party could not be deemed to be a settlement or satisfaction of the Respondent's claim for the total loss of his insured motor vehicle, considering also that the Appellant had failed to issue to him the usual discharge voucher, normally issued by Insurers for execution by an Insured before settlement of claims.
5. The Respondent's claim against the Appellant was therefore for Kshs, 5,780,000.00 being the insured value of the motor vehicle, Kshs. 30,000.00 being towing charges and Kshs. 600,000.00 per month with effect from March, 2017, for a period of at least 12 months, on account of loss of use of the vehicle. The Respondent therefore prayed for judgment against the Appellant for Kshs. 5,810,000.00, loss of use in the sum of Kshs. 600,000.00 per month from 01.03.2017 for a period of at least 12 months on account of loss of use of the insured vehicle, costs and interest.
6. Summons to Enter Appearance and the Complaint were served upon the Appellant on 28.09.2017 whereupon it entered appearance on 13.10.2017. However, it did not file a defence within the time prescribed by law. The Respondent applied for and default judgment was entered on 15.11.2017 against the Appellant for the sum of Kshs. 5,814,000.00 with the remainder of the claim being set down for formal proof. The Respondent proceeded to begin the execution process whereupon the Appellant filed the application to set aside the default judgment. The trial court dismissed the application.
7. In refusing to accede to the application, the Subordinate Court stated that there was evidence that the Appellant had already prepared payments to the Respondent's advocates after the Appellant's property was proclaimed and that the Appellant had prepared and made a payout to Abba's without involving the Respondent and that it was the Appellant to be blamed as they did not conduct their due diligence before making such a move. Thus, the Subordinate Court found that there was no defence worth setting aside the default judgment.

### **Analysis and Determination**

8. Even though the Appellant raises 29 grounds of appeal, the appeal is in essence about determining the propriety of the Subordinate Court's Ruling dismissing the Appellant's application to set aside the default judgment. The jurisdiction of courts to set aside a default judgment is wide and unfettered and the appellate court will not interfere with the decision of the trial court unless it is satisfied that the said court in exercising its discretion has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of its discretion and that as a result there has been an injustice (see *Mbogo v Shah*



[1968] EA 93 and United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd [1985] eKLR).

9. There was no dispute that the Appellant was served with summons of the suit, entered appearance but failed to file a defence. Under Order 10 of the Civil Procedure Rules, the court may enter final judgment where a liquidated amount is claimed or interlocutory judgment in any other claim. Where summons have been served and the party has entered appearance but has defaulted in filing a defence, such a judgment is deemed to be regular. However, even where the judgment is regular, the court may yet proceed to set aside the judgment if justice of the case demands, particularly where the defendant demonstrates that it has a good defence and any prejudice caused by setting aside may be assuaged by an award of costs (see *Tree Shade Motors Limited v D T Dobie and Company (K) Ltd and Another* [1998] eKLR).
10. The Appellant's defence was that the entire transaction was mired in fraud and material concealment of facts by the Respondent and his accomplices. The Subordinate Court held that the Appellant's defence was negated by the fact that it had already paid the claimed sum to Abba's and that it had prepared payments to the Respondent's advocates after its property was proclaimed.
11. The trial magistrate took the view that the Appellant did not have a defence to the suit. However, the issue at this stage is whether the proposed defence raises a triable issue. It has been held that a triable issue does not need to be one that would succeed but merely one that warrants further interrogation or investigation by the court (see *Job Kilach v Nation Media Group Ltd and Others* [2015] eKLR). The substance of the Appellant's draft or anticipated defence is that Abba's had a financier's interest endorsed on the policy cover and that it was paid on that basis. Further, that the Respondent could not therefore make the claim it purported to do in view of the financier's interest. If the Appellant's position is correct then the Respondent's claim would fail. Apart from this, the Appellant raises the issue of fraud and misrepresentation which were live issues that could not be dealt with summarily as the trial magistrate purported to do. I would therefore set aside judgment on this account.
12. In any event, I am not satisfied that the failure to file the defence on time was sufficiently explained. The Appellant had the opportunity to seek extension of time in the event it was facing difficulties in getting information it required to file its defence or otherwise file a defence which could be amended at a later date. Since the Appellant is the author of its misfortune, it shall pay costs of the application before Subordinate Court and of this appeal.

### **Disposition**

13. For the reasons I have outlined above, I allow the appeal on the following terms:
  - a. The ruling and order of the Subordinate Court dated 13.03.2018 is set aside and substituted with an order allowing the Appellant's application dated 07.12.2017 on terms that judgment and all consequential orders entered for the Respondent against the Appellant are set aside on condition that the Appellant shall file its defence within 14 days from the date hereof.
  - b. The Appellant shall pay costs thrown away including costs of this appeal assessed at Kshs. 40,000.00 within 14 days from the date hereof.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL 2024.**

**D. S. MAJANJA**

**JUDGE**

Mr Mbaka instructed by Mwenda Mbaka and Company Advocates for the Appellant.



Mr Mwakisha instructed by Moses Mwakisha & Company Advocates for the Respondent

