



Magu v Robert (Civil Appeal E136 of 2022)
[2024] KEHC 9303 (KLR) (Civ) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 9303 (KLR)

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

CIVIL

CIVIL APPEAL E136 OF 2022

AB MWAMUYE, J

JUNE 20, 2024

BETWEEN

CHRISTOPHER MAGU APPELLANT

AND

MUTHII ROBERT RESPONDENT

JUDGMENT

1. The Appellant’s Memorandum of Appeal dated 11th March, 2022 expresses the Appellant’s dissatisfaction with a Ruling and an Order of the Hon. D.M. Kivuti (PM) said to have been given on 25th February, 2022 in Milimani CMCC 2371 of 2016.
 1. However, from the Index dated 29th May, 2023 in the Record of Appeal of even date, Item 19 is a Ruling dated 4th March, 2022 which is contained in pages 111-112 of the Record of Appeal.
 2. The Memorandum of Appeal, however, guides that the Ruling with respect to which the Appellant is aggrieved is the one which the Appellant’s application to have the Trial Court’s judgment of 1st April, 2019 set aside and leave be granted to the Appellant to defend the suit was dismissed. From the proceedings contained in the Record of Appeal, that Ruling was the one dated 4th March, 2022 and it was in respect of an application dated 3rd August, 2021 brought before the Trial Court by the Appellant.
 3. The grounds for the Appellant’s dissatisfaction with the Ruling of the Trial Court are set out in Paragraphs 1 to 10 of the Memorandum of Appeal dated 11th March, 2022. In brief, the Appellant contends that the Trial Court erred in law and in fact by not allowing his application despite the strong points it raised, including that:



- a. The Appellant allegedly only became aware of the suit after the judgment had been delivered and thus, he had no opportunity to participate in the proceedings or to avail critical information to the Court;
 - b. The Appellant was allegedly not the owner of the subject Motor Vehicle at the time of the accident;
 - c. The Advocates who purported to act for the Appellant in the proceedings leading up to the consent and the judgment were allegedly acting without the Appellant's knowledge, information, or instructions; and
 - d. The instructions issued by Xplico Insurance Company were improper as the Appellant was allegedly not the insurance company's client, but rather their client was some other person by the name of James Maina.
2. The Memorandum of Appeal seeks orders from this Court that the impugned Ruling be set aside, and thereafter this Court also sets aside the judgment entered on 1st April, 2019 together with all its consequent orders; and further grants the Appellant unconditional leave to defend the suit before the subordinate court.
 3. The Appellant buttressed these arguments through the Appellant's Written Submissions dated 21st March, 2024; citing various authorities on the principles that govern the setting aside of default judgments and findings on liability.
 4. The Respondent opposed the Appeal through the Respondent's Written Submissions coincidentally also dated 21st March, 2024. The Respondent argued that the Trial Court had acted properly and lawfully exercised its discretion in dismissing the Appellant's Application. The Respondent also argued that the insurance company had the legal right and due capacity to appoint a firm of advocates on behalf of the Appellant; and consequently, the consent order was properly executed.
 5. With the foregoing in mind, this Appeal raises two issues for determination. The first is whether the Appellant's quoting of an incorrect date for the impugned ruling is a fatal defect that must result in the striking out of this Appeal; while the second is on the question of whether the Trial Court's decision vis-à-vis the Appellant's Application dated 3rd August, 2021 was correct.

Whether the Appellant's Quoting of an Incorrect Date for the Impugned Ruling is a Fatal Defect:

6. The first three paragraphs of the Respondent's Written Submissions dated 21st March, 2024 identify the impugned Ruling as being the one delivered on 4th March, 2022 and contained at page 111 of the Record of Appeal. Those paragraphs are clear that the impugned Ruling emanated from the Appellant's Application dated 3rd August, 2021. The Respondent did not detect the Appellant's misquotation of the date of the impugned Ruling, nor did the Party suffer any impediment in its efforts to canvass its position due to that misquotation.
7. Since it is clear to both parties what Ruling of the Trial Court has brought about the present Appeal, and since neither Party raised the issue, and also since this Court is clear as what this Appeal is about and the same is in concert with the position of the Parties; the misquotation of the date of the impugned Ruling cannot be a fatal defect. We are no longer a legal system where minor slips or inadvertent mistakes within pleadings necessarily lead to hugely adverse outcomes unless the same is completely unavailable based on the law and justice.



Whether the Trial Court was correct to dismiss the Appellant's Application:

8. Turning now to the second issue, I begin my analysis by quoting that brief ruling in its entirety and verbatim.

“Ruling

The application dated 3/8/2021 seek *inter alia*:

- i. Re-opening of the suit
- ii. Setting aside judgment and more so the consent judgment on liability.

The application is opposed. Both parties filed written submissions for and against the application. The grounds presented I note that the consent in question was entered to by counsel competently appointed by the client. There are no substantial grounds to depart from that consent which is akin to a contract. I do not find the opening of the suit and considering the steps taken by he (*sic*) parties to be reasonable.

Consequently, the application is without merit and the same is dismissed with costs to the respondent.”

9. Very brief rulings that do not contain elaborate reasoning are problematic. It becomes difficult for the appellate court to satisfy itself that there was a well-reasoned decision satisfying the five-pronged test that:

- (1) the Trial Court did not misdirect itself on the law;
- (2) it did not misapprehend the facts;
- (3) it did not take into account matters and considerations it ought not to;
- (4) it took into account all the matters and considerations it should have; and
- (5) that it did not exercise its discretion in a manner that created injustice.

As in this case, very brief rulings result in the appellate court having to divine the reasons from the proceedings and thereafter gauge if those reasons are proper in law and in fact; rather than a situation where they are expressly stated and the appellate court can analyse them from the text of just the ruling.

10. It is clear to me that there are a number of issues that should have weighed heavily on the mind of the Learned Magistrate. These are:

- a. That the Police Abstract gives the name of the owner and driver of the subject Motor Vehicle as being someone other than the Appellant;
- b. The suit was brought against the Appellant herein and not the person listed as the owner of the subject Motor Vehicle as per the Police Abstract;
- c. The Statement of Defence dated 9th February, 2017 did not disclose that the Defendant making the defence was actually the Insurance Company; and
- d. The nature of the consent entered into on 24th November, 2019.

11. Had the Trial Court properly applied its mind to these and other issues, it would have sustained the Appellant's Application. The steps taken by the Parties was not a material consideration, particularly when the Trial Court did not explain why it felt that any ensuing delay could not be adequately



compensated for by costs when weighed against the prospect of denying the Appellant the right to be heard. The Trial Court should have been guided by the considerations set out in the case of *Sebel District Administration v Gasvali*, [1968] EA 300 where at 301-302 the court opined on what would be properly exercised discretion with respect to an application to set aside a judgment:

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think it should always be remembered that to deny a subject a hearing should be the last resort of a court.”

12. The nature of the Application before the Trial Court was that a Party was alleging the very real prospect of being condemned to pay a large sum of money for a civil wrong that he did not commit. From the Application, it was also clear that the Appellant herein was ready to deposit security and that the Respondent, who was then the Plaintiff, could be compensated by way of costs for the elongated trial process if he won at the end. Lastly, the Trial Court failed to demonstrate in its decision that it had properly and lawfully exercised its discretion and it had not improperly denied the Appellant a chance to be heard on what were very weighty allegations.
13. The Appellant may not ultimately succeed at the trial but he raised sufficiently weighty and compelling grounds for a trial court properly applying its mind to the facts and the law to inescapably exercise its discretion in favour of the Appellant. The Appellant deserves his day in the trial court.
14. Consequently, the Appeal succeeds on the following terms:
 - a. The Court File of Milimani CMCC No. 2371 of 2016 is hereby re-opened;
 - b. The Ruling of the Honourable D.M. Kivuti (PM) in Milimani CMCC No. 2371 of 2016 delivered on 4th March, 2022 is hereby set aside;
 - c. The Judgment dated 1st April, 2019 at Milimani CMCC No. 2371 of 2016 is set aside, together with its Decree and any orders consequent to the judgment;
 - d. The consent judgment on liability recorded on 24th November, 2017 together with its consequent Decree and Notice to Show Cause are set aside;
 - e. The Defence dated 8th February, 2017 filed on behalf of the Defendant is struck out;
 - f. The Appellant herein is granted unconditional leave to defend the suit, which shall commence de novo;
 - g. Milimani CMCC No. 2371 of 2016 shall be mentioned before, heard, and determined by any other Magistrate other than the Learned Magistrates who presided over the initial trial;
 - h. The Appellant herein is awarded the costs of this Appeal as well as the costs of the Application dated 3rd August, 2021 before the Trial Court; and
 - i. Milimani CMCC No. 2371 of 2016 shall be mentioned on 4th July, 2024 for directions.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF JUNE, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:-



Ms. Owino h/b for Ms. Mutuku Counsel for the Appellant

Ms. Amondi Counsel for the Respondent

Mr. Guyo, Court Assistant

