



Ouma v Mokuia (Civil Appeal E008 of 2023) [2024] KEHC 8281 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E008 OF 2023**

TA ODERA, J

JUNE 12, 2024

BETWEEN

JOSIAH OMAMBIA OUMA APPELLANT

AND

ROBISON OSORO MOKUA RESPONDENT

JUDGMENT

Introduction

1. The Appellant herein filed an Appeal vide a memorandum of Appeal dated 7th February, 2023 against the Ruling of Hon. C. Ocharo (SPM) delivered on 10th January, 2023 in Kisii CMCC No. 867 OF 2019 wherein the learned trial Magistrate dismissed his Application dated 18th July 2022 seeking to set aside an interlocutory Judgment entered against him on 27th January, 2021. The Appeal was based on following grounds;
 - i. That the learned Trial Magistrate erred in law and fact in allowing Appellant's application dated 18.7.2022 without any lawful justification.
 - ii. That the learned Trial Magistrate erred in law and fact in relying in technicalities in dismissing the Appellant's application contrary to the clear provisions of Article 159 (2) (d) of *the constitution*.
 - iii. That the learned Trial Magistrate erred in law and fact in over-relying on the Civil Procedure Rules in total disregard of the fundamental rights and freedoms as enshrined under Article 25(c) of *the Constitution* of Kenya, 2010.
 - iv. That the learned Trial Magistrate erred in law and fact by denying the Appellant his right to adduce and challenge evidence in support of their case as enshrined under Article 50(2) (k) of *the Constitution* of Kenya, 2010.



- v. That the learned Trial Magistrate erred in law and in failing to consider the reasons advanced by the Appellant's counsel while making the application dated 18.7.2022.
 - vi. That the learned Trial Magistrate erred in law and fact by not taking into consideration the Appellant's draft statement of defense dated 18. 7. 2022.
 - vii. That the learned Trial Magistrate erred in law and fact in failing to consider whether requisite notices as required under Section 10(2) (a) of *Insurance (Motor Vehicle, Third-Party Risk) Act* Cap 405 Laws of Kenya were properly served upon the Appellant by the Respondent.
 - viii. That the learned Trial Magistrate erred in law and in fact by over-relying on the Respondent's oral submissions while making her ruling.
 - ix. That the learned Trial Magistrate's decision albeit, a discretionary one was plainly wrong.
2. Based on the above grounds the Appellant prayed for: -
- a. The appeal herein be allowed.
 - b. The ruling delivered on 10.1.2023 be set aside and the Appellant be allowed defend this suit.
 - c. The Respondent to pay costs in the lower Court and in this particular appeal.

Factual Background of the Suit

3. The Respondent sued Josiah Omambia, the Appellant herein and Elizabeth Nasimiyu Ongulu praying for judgment against them for:
- a. Special damages
 - b. General damages
 - c. Costs of the suit
 - d. Interest
 - e. Any other relief the court deems fit
4. In support of his claim the Respondent pleaded that at all material times relevant to the suit the defendants were the registered owners of motor vehicle registration number KCC 971 F Toyota Harrier which was in their control, that of their driver. He pleaded too that on or about 24th April 2019, the plaintiff was lawfully walking along Kisii - Keroka road when motor vehicle registration number KCC 97F Toyota Harrier that was being driven so negligently, carelessly and/or recklessly by the Appellants' driver veered off the road and knock down the Respondent occasioning him severe injuries which included.
- a. Tender lateral chest wall injury chest wall
 - b. Fracture of the right 4th, 5th and 6th rib on the right
 - c. dislocation of the right shoulder
 - d. Fracture of the right femure
 - e. Fracture of the right tibia and fibula
5. The Respondent equally pleaded special damages of Kshs. 46,050.



6. The Appellant and the 2nd Defendant did not enter appearance despite having been served as was evidenced by an affidavit of service that was filed. A request for judgment was made which request was endorsed and granted by the lower court. The case proceeded by way of formal proof wherein the Respondent testified and produced the discharge summary, P3 form, Police Abstract, Medical Report, copy of records and receipt, Demand Letter and bundle of receipts in support of the special damages as exhibits 1 (a), (b), 2, 3, 4, 5(a), (b), 6 and 7(a), (b) respectively. The Respondent closed his case and was invited to file written submissions which he did file.
7. The lower court on 27th January, 2021 found that the Appellant and the 2nd Defendant were 100% liable for the occurrence of accident and the Respondent was thus awarded the Kshs. 1,500,000 as general damages and Kshs. 46,050 as proved special damages. The Respondent was equally awarded cost of the suit as well as interests from the date of judgment till payment in full.
8. The Appellant on 18th July, 2022 filed a notice of motion Application seeking the lower court to set aside the ex parte Judgment delivered on 27th January 2021 and all consequential orders and/or proceedings arising therefrom. The Appellant equally sought be granted leave to defend this suit on merit and the same to start *de novo* as well as leave to file defense out of time. The said application is supported by the grounds on the face of it and the Supporting Affidavit that was by the Appellant himself. The major contention in his Application was that he was not served with the summons to appearance and notice of entry of judgment.
9. The Appellant equally contended that the affidavit of service sworn by one Elijah Gekonge Nyangau on 28th October, 2020 was based on falsehood and that he was going to seek leave to have the deponent cross-examined at the hearing of this application. The Appellant further contended that he had a good and arguable defense and hence locking him out of the proceedings was an act of bad faith that was calculated to oppress him. He contended too that the application had been brought in a timely manner since the respondent was not going to be prejudiced and thus urged the court to allow his application.
10. In response to the application the respondent filed a replying affidavit 2nd August, 2022 stating that the Appellant was served with the summons to enter appearance and plead as was evidenced in the affidavit of service that he annexed to his Affidavit. It was the respondent's position that the Appellant was being used by the insurer to frustrate the case in which the insurance company had been sued being Kisii CMCC No. E160 of 2022 and that the affidavit was full of falsehoods. The respondent further stated that a notice of entry of judgment was served hence the application was brought in bad faith and was only meant to frustrate his efforts in realizing the fruits of his Judgment and thus urged the court to dismiss the same for lack merit.
11. In a rejoinder, the applicant filed a supplementary affidavit in which he reiterated the contents of the supporting affidavit and stated further that he was not aware of the existence of Kisii CMCC No. 160 of 2022 as he was not a party to the same. The appellant also denied being served with a notice of entry of judgment and prayed to be given an opportunity to defend the suit on merit as the rules of natural justice dictates.
12. In a further affidavit the respondent stated that the appellant could not claim not to be aware of Kisii CMCC No. E160 of 2022 as his advocates were the same who had entered appearance for the defendant in the said suit. The Respondent equally averred that the Appellant his Application late in the day and did not explain the delay or even how he came to learn of the existence of this suit if indeed he was not served.



13. The court that the application be disposed of by way of written submissions. The court thus directed the parties to file their submissions which directions they complied with and filed their written the submission.
14. Upon considering the Application, the response thereto, the written submissions the learned trial Magistrate dismissed with cost vide its ruling dated 10th January, 2023. The learned trial Magistrate in ruling made the following observations.

“I have carefully considered the submissions, rival affidavits and authorities cited by the applicant. The orders being sought are of a discretionary nature which discretion must be exercised judiciously. The issues for determination are whether the application was served with the summons to enter appearance; whether the draft statement of defense raises triable issues and whether the application has merit defense ought to be allowed.

On the 1st issue the 1st defendant contends that he was never served with the summons to enter appearance. The respondent on the other hand states that service was done and proof is contained in the affidavit of Elijah Gekonge Nyangau on 28.10.2022. Though the states that the said affidavit contains falsehoods and expressed the intention to cross-examine the process server, the applicant neither sought this order for cross-examination nor followed through on the same.

Whenever the contents of an affidavit are challenged especially in circumstances such as in this case, it is imperative that the deponent is called for cross-examination, otherwise this court finds that service was indeed done and was proper. Despite of the applicant stating he does not particularize what these falsehoods are. The court dismisses the allegations that the 1st defendant was never served with the summons to enter appearance. In any event, the applicant has not disclosed how then he came to know that this suit existed. I therefore find the interlocutory judgment entered herein on 27.2.2020 regular and decline to set aside same and the subsequent proceedings and orders based on the allegation of non-service.

on the 2nd issue, in the case of *Patel versus East Africa Cargo Handling Services Limited* (1974) EA 75, the court appreciated the wide discretion given by the rules in order to meet the main objective of the court which is to do justice to the parties. The court will usually not set aside a regular judgment unless it is satisfied that there is a defense on the merits. In this respect defense does not mean a defense that must succeed it means a defense "that is" an issue which raises a prima facie defense and which should go to trial for adjudication.

I have looked at the draft statement of defense annexed to the supporting affidavit. It is full of mere denial and raises no triable issues in light of the judgment delivered herein. It will not serve any purpose to grant the 1st defendant leave to defend this suit. Finally, the applicant filed the instant application on 19th July 2022 yet the interlocutory judgment was entered on 27.2.2020. He does not explain the inordinate delay even after service of notice of entry of Judgment upon the insurance in June, 2021.

Again the applicant does not attempt to explain the circumstances that led to his being aware of this suit.

The upshot is that the application is lacking in merit and is hereby dismissed with costs to the respondent”

15. It is against this background that the Appellant filed this Appeal. When this Appeal came up for hearing this court directed that the same be disposed of by way of written submissions. The



court equally directed the Parties to file their written submission. Both parties have since filed their submissions for my consideration in disposing of this Appeal.

Issues of Determination

16. Having analyzed Appeal and the written submissions filed by the Parties herein, I find that the sole issue for determination is whether the Appellant met the requirement for setting aside the interlocutory Judgment entered against him on 27th October, 2021.

Analysis and Determination

17. Order 10, of the *Civil Procedure Rules, 2010*, addresses the issue of consequences of non-appearance, default of defense and failure to serve by a party. Order 10, rule 4 empowers Courts to enter interlocutory judgment in cases where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. On the other hand, rule 9 gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10, rule 10 provides that in cases where a defendant has failed to file a defense, rules 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set a side or vary a judgment that has been entered under Order 10.
18. Courts have the discretionary power to set aside *ex parte* judgment with the main aim being that justice should prevail. In the case *Mohamed & Another -v- Shoka* (1990) KLR 463 the Court set out the tenets a court should consider in entering interlocutory judgment to include:
- a. Whether there is a regular judgment;
 - b. Whether there is a defense on merit;
 - c. Whether there is a reasonable explanation for any delay;
 - d. Whether there would be any prejudice.

Whether There is a Regular Judgment;

19. The issue of regular judgment was addressed in the case *Mwala -v- Kenya Bureau of Standards* EALR (2001) 1 EA 148, where the court stated;

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular *ex-parte* judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but *ex debit justitiae* for a court should never countenance an irregular judgment on its record.”

20. In this Instant Appeal the Appellant claims that the Judgement entered by the lower court was an irregular one since he was not properly served. The Applicant reiterates in his Appeal that the affidavit of service was full of false of hood and thus the trial court erred by not making such a finding. As correctly observed the learned trial magistrate the Applicant had in his supporting Affidavit at paragraph 5 averred that affidavit of service dated 28th January, 2020 sworn by the process server one Elijah Gekonge Nyangau was full of falsehood and that he was going to seek leave of the court to have



him cross-examined at the hearing of the Application on the contents of the said Affidavit. However, the Appellant did not specifically particularize the alleged falsehoods he had noted in the said Affidavit. Equally from the proceedings of the trial court before the Appellant did not during the hearing of the Application seek leave of the lower court to summon the process server in order to cross-examine indicated in his supporting Affidavit. It goes without saying therefore that the learned trial Magistrate was spot on when she found that Appellant were not proved to the required standard.

21. Having established that the Appellant failed to disapprove the veracity of the Affidavit of service that elaborated how he was served personally as legally required, I find no reason to interfere with the finding of the trial court in its ruling that the Appellant was properly and thus the interlocutory Judgment was regularly entered.

Whether There is a Defense on Merit;

22. In determining whether or not to set aside an *ex parte*/default judgment, a court is equally required to consider whether a party has a defence that raises triable issues, even where service of summons is found to be proper. In so saying, I find support in the case of *Tree Shade Motors Ltd v D.T. Dobie & Another* (1995-1998) IEA 324 relied upon in *M/S Jondu Enterprises Limited v Spectre International* [2019] eKLR thus:

“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the *ex-parte* judgment aside.”

23. The learned trial magistrate found that the draft defense was full of mere denial and raised no triable issues in light of the judgment delivered and thus it was not serve any purpose to grant the Appellant leave to defend the suit. I have with keen interest looked at the defense and truly the defense is just but a mere denial or rather a general traverse that does not raise any trial issues. Am persuaded by the holding of the court in the case of *Blue Sky Epz limited –vs- Natalia Polyakova & Another* [2007] eKLR where it held that:

“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defense must raise a triable issue.”

Whether There is a Reasonable Explanation for Any Delay;

24. It is clear that the Application was filed more than year since the lower court entered Judgment in favor of the Respondent. In as much as the Appellant claims that he was never served with summons to enter Appearance and thus did not know of the existence of the suit against him, it is outright that he did not at all cost explain how and when he got to learn of the Judgment against him. As have also already found hereinabove, the summons to enter appearance were served upon the Appellant he failed and/or refused to enter appearance and defend the suit. The Appellant equally raised unchallenged claim that the Appellant had only filed the Application to aid his insurer whom the Respondent had filed a declaratory suit against in the lower court. Without any rebuttal, the respondent dismissed the Appellant’s claim that he was not aware of the declaratory suit and disclosed that in deed the Appellant’s advocate was the one who was representing the Appellant’s insurer in the declaratory suit.



From the forgoing therefore it goes without saying the one-year delay in filing the Application was not explained and thus the learned trial magistrate was correct when she found so.

Whether There Would Be Any Prejudice.

25. It is clear that the Respondent had taken steps in realizing the fruits of Judgment by filing a declaratory suit against the Appellant's insurance and thus set aside such judgment and allowing the Appellant into a suit one year later without a proper defense one year after the said judgment was entered and without any proper explanation for the delay in filing the explanation would amount to immense prejudice to the Respondent.

Disposition

26. In the end, I find that the Appeal lacks merit and the same is dismissed with cost to the Respondent

27. It is so ordered.

DATED AND DELIVERED AT KISII THIS 12TH DAY OF JUNE, 2024.

T.A ODERA

JUDGE

Delivered virtually via teams platform in the presence of

N/A for Appellant

N/A for Respondent

Court Assistant: Oigo

