



Ouma v Ondieki (Civil Appeal 076 of 2023) [2024] KEHC 7093 (KLR) (3 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 076 OF 2023**

TA ODERA, J

JUNE 3, 2024

BETWEEN

JOSIAH OMAMBIA OUMA APPELLANT

AND

EVANS ONDIBA ONDIEKI RESPONDENT

*(Being an appeal from the Ruling delivered by Hon. D. O MAC'
ANDERE (SRM) on 27th June 2023 in KISII CMCC NO. 865 OF 2019)*

JUDGMENT

Introduction

1. The Appellant herein lodged this Appeal vide a Memorandum of appeal dated 2nd August 2023 wherein they raised the following 15 Grounds of Appeal.
 - a. That the learned trial magistrate misdirected herself and erred in law and fact in dismissing the Appellants application dated 18.8.2022 without any justifiable course and without considering the issues raised by the Appellant.
 - b. That the learned trial magistrate misdirected herself and erred in both law and fact in making a ruling that is contrary to the provisions of *Civil Procedure Rules*, law and practice.
 - c. That the learned trial magistrate misdirected herself and erred in law and fact in applying the wrong principles in determining the application dated 18.8.2022.
 - d. That the learned trial magistrate erred in law and in fact in failing to exercise her discretionary duty judiciously.
 - e. That the learned trial magistrate erred in law and fact in finding that there was proper service of summons to the Appellant when there was none.



- f. That the learned trial magistrate erred in law and fact by failing to find that the appellants statement of defense raised triable issues with probability of succeeding that required determination by the court.
 - g. That the learned trial magistrate erred in law and fact in mixing issues in the case before her and in the declaratory suit Kisii CMCC No. E244 of 2022.
 - h. That the learned trial magistrate erred in law and fact in holding that the case KISII CMCC No. 865 of 2019 would not start afresh since there was already an ongoing declaratory suit filed vide Kisii CMCC No.E 244 Of 2022 case in a different suit.
 - i. That the learned trial Magistrate erred in law and fact in holding that the Appellant could not seek stay of the judgment in Kisii CMCC No. 865 of 2019 at the same time proceed in the declaratory suit vide Kisii CMCC No. E 244 of 2022.
 - j. That the learned trial magistrate erred in law and fact by failing to consider the dictate of substrate justice and fair hearing as enshrined in the *Constitution of Kenya*.
 - k. That the learned trial magistrate erred in law by exercising her discretion wrongly and misdirected herself while considering the application dated 18.8.2022 and refusing to allow the Appellant to defend the case.
 - l. That the learned trial magistrate erred in law and fact in holding that the Appellant were aware of the judgment in KISII CMCC No. 865 of 2019 when there was no evidence to that finding.
 - m. That the learned trial magistrate erred in law and fact in holding that it was prudent for the Appellants to canvas their case through the declaratory suit filed vide KISII CMCC No. E 244 OF 2022.
 - n. That the learned trial magistrate erred in law and fact in failing to note that each case filed in court ought to be determined separately on their own merit.
 - o. That the learned trial magistrate's decision /ruling albeit a discretionary one was plainly wrong.
2. The Appellant thus proceeded to pray for the ruling of the lower court delivered on 27.6.2023 to be set aside.

Background

3. Prior to determining this matter, I have to first and foremost set out the background of this matter. From the record before it is clear that the Respondent by way of a plaint dated 13th November 2019 moved the lower court seeking special damages, general damages, cost and interest. In support of his claim the Respondent claimed that on 24th April, 2019 he was a pillion passenger on a motor cycle along Kisii Keroka road. While at Kisii School area, the Appellant's driver negligently drove motor vehicle registration number KCC 971F, Harrier causing it to knock down the plaintiff from behind and as a result the plaintiff suffered bodily injuries which included swollen and tender left wrist joint, fracture on the left radius collie, fracture of the left fibula and swollen and tender left knee joint.
4. The Appellant and his co -defendant did not enter appearance and the trial court proceeded to enter interlocutory judgment against them and disposed off the matter by way of formal proof. On 5.2.2021 trial court upon considering the testimony of the Respondent entered Judgement against the appellant and his co -defendant jointly and severally proceeded to award him Kshs. 1,200,000 as general damages



and Kshs. 45,300 as special damages together with interests at court rates till payment in full. The trial court equally awarded the plaintiff cost of the suit.

5. On 18th August, 2022, the Appellant filed a notice of Motion Application at the lower court seeking to set aside the default Judgment delivered on 5th April, 2021 and all consequential orders and proceedings arising out of the Judgment and to be granted leave to defend the suit on merit. The Appellant equally sought for leave to file his defense out of time. To support the Application, the Appellant claimed that he had never been served with summons to enter appearance and the plaint. He denied the contents of the affidavit of service sworn by a process server, one Elijah Gekonge Nyangau and vowed to cross-examine him with a view of confirming that his averments in the said affidavit of service were false. He claimed too that they were never served with the notice for entry of the Judgement as required by law. It was equally his claim that they had an arguable defense hence it was just for the application to be granted.
6. In response to the Application, the Respondent filed a replying Affidavit on 29th August, 2022 wherein he vehemently opposed the Application. He averred that the defendant were properly served with the summons to enter appearance and the plaint and proceeded to attach an Affidavit of service as prove. The Respondent brought to the attention of the lower court that he had since filed a declaratory suit (KISII CMCC NO. 244 OF 2022) against the insurer and thus he felt that the Appellant was being used by the insurer to frustrate the said matter. The Appellant equally averred that he had since paid further court fees of Kshs. 45,760 upon extracting the decree which amount he stood to lose if the Application was to be allowed. He deponed too that the notice for entry of Judgement was properly served.
7. On 5th September, 2022, the trial court directed that the Application be canvassed by way of written submission. Upon considering the Application, the reply and submissions of the trial court dismissed the Application vide its ruling delivered on 27th June, 2023. For clarity the trial court held as follows;

“The principles for setting aside ex-parte judgments are provided for in legislation and have been restated severally in judicial authorities.

Order 12 rule 7 of the *Civil Procedure Rules* 2010 as read with rule 2 provide that where judgment has been entered the court may set aside or vary the judgment or order upon such terms as may be just.

In the case of *Kimani Kigano and Company Advocates v Jimba Credit Corporation Limited* Justice Bosire (as he then was) summarized the powers of the court to set aside ex-parte orders as follows:

1. The power to set aside is discretionary;
2. The discretion is unlimited provided it is properly exercised;
3. It being a judicial discretion must be exercised on the basis of evidence and sound legal principles;
4. “The court has power under order 14A rule 10 of the *Civil Procedure Rules* to set aside on terms as are just;
5. The court is obliged to look at the defense the Applicant Defendant may be having to the claim;



6. If a party establishes that he has a reasonable defense and which appears on the face of the pleadings to contain considerable merit, the court ought to be inclined towards setting aside.

Another factor that the court ought to consider is that the Applicant is not guilty of obstructing the course of justice.

In the applicants/defendants' submissions, it is contended that there was no service. The respondent/plaintiff on the other hand states that there was proper service and has referred to the affidavits of service filed in court.

According to precedents, where there is no service the court has no discretion but to set aside the judgment. This was the decision of the court in Nairobi HCCC No. 171 of 2001; *Remco Ltd v. Mistry Javda Parbat & Co. Ltd & 2 others* where he stated as follows:

“First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito Justitiae* (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of judicial process itself. Secondly, if the default judgment is a regular one, the court has unfettered discretion to set aside such Judgment and any consequential decree order upon such terms as are just as ordained by Order IXA rule 10 of the *Civil Procedure Rules*. Case law on the exercise of the discretion is plenty. The cases show that the main concern of the court is to do justice between the parties”.

However, where there is proper service the court has to inquire about the reasons for failure to attend court and also look at the defense to ascertain whether or not there are triable issues raised in the defense.

Setting aside of *Ex parte* judgment is discretionary and 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 v Mbogo & Another* [1967] EA 116).

In this case the grounds upon which the application to set aside the judgment was made were on the basis of lack of service of the hearing and judgment date.

I have perused the file and I have established that interlocutory judgment was entered on 27/2/2020 after court had satisfied itself that proper service had been effected. The matter was then set for formal proof hearing on 5/10/2020 whereupon after the close of the plaintiff's case a date for filing of submissions was set and eventually a judgment date was issued. Judgment was then entered for the plaintiff against the defendant. At this stage the judgment delivered was regular since all procedures had been followed.

The respondent contended that there is a declaratory suit being KISII CMCC No. 244 of 2022 between the respondent and Kenya Orient Insurance Company Ltd that is ongoing and the applicants' advocates are also defense advocates in that suit.

That the applicants' have mounted this application to frustrate the said suit.

I have perused that file and I establish the 1st defendant is represented in that declaratory suit. At this stage it will not be proper to start the case afresh since there is already an ongoing case



in a different suit. If the defendants' wanted to stay the judgement in the present suit why are they proceeding in the other suit? They could have sought for stay in that other but by them proceeding with that suit it goes to show were aware of the judgement in the current suit

It Will therefore not be prudent for the defendants to converse there case through their declaratory suit that is currently ongoing in another court.

I disallow the application and order that the costs of the application be borne by the defendants/applicants."

8. It is against this ruling dated 27th July, 2023 that the Appellant has approached this court in the manner hereinabove highlighted.
9. This court directed that the Appeal be disposed of by way of written submissions. The appellants filed their submissions on 4th December, 2023 while the Respondent filed their submissions.

Issues of Determination

10. Having analyzed the grounds of Appeal, reviewed the written submissions of the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the sole issue of determination are;
 - a. Whether the trial court erred by failing to set aside its default Judgment entered on 5th February, 2021 against the Appellant.

Analysis and Determination

11. It is clear that the Appellant mainly aggrieved by the trial court failing to set aside the default Judgment against him and affording him an opportunity to be heard on merit and based on his draft statement of defense which he contends was arguable. According to the Appellants the trial court ought to have made a determination that the Appellants were not properly served and that the affidavit of service filed as proof of service was full of falsehood. According to them the default Judgment was an irregular one and the trial court ought to have as of right set it aside and allowed him to defend the suit. The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In *Frigonken Ltd v Value Pak Food Ltd*, HCCC NO. 424 of 2010, the High Court expressed itself thus.

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

12. In *Kabutha v Mucheru*, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he then was) had expressed the principle thus:

“With respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defense so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.”



13. In this instant application the main question is whether the trial court erred by finding that in deed the Appellant was properly served and proceeded to exercise her discretion not to set aside the default Judgment.
14. As a first Appellate court, this court has taken its time to consider from the record and proceedings of the lower court to establish whether in deed the Appellant was properly served as was determined by the trial court.
15. The process server in his Affidavit dated 28th January 2020 stated as follows;
 - “ 3. That the Said 1st defendant aforesaid, is an advocate practicing in the firm Ouma & Co. Advocates; 3rd floor room 8 the same situated along Kenyatta Avenue in Nakuru town within Nakuru county. I knew the said 1st defendant having contacted him over the said service in the matter herein.
 4. That on 24th January, 2020, I called the said 1st defendant (Josiah Omambia Ouma) whom after introduction and more particularly over service of court documents, upon him said the 1st defendant and the 2nd defendant aforesaid, in respect of Motor vehicle KCC 97IF make Toyota Harrier which is the subject matter, the said 1st defendant aforesaid, requested me to check on them (said 1st and 2nd defendants) at Nakuru town on 27th January 2020 at around 10.00 run, for purposes of receiving the same for the necessary action for the matter.
 5. That on 27th January 2020, I proceeded to Nakuru town, upon arrival at around 9.30 am, I contacted the 1st defendant and in the circumstance I met them (1st and 2nd defendant) at the said firm of Ouma & Co. Advocates aforesaid, after which I served the said 1st and 2nd defendants with aforesaid documents, at around 10.00am, the said defendants acknowledged their respective copies, whereby the said 1st defendant did sign upon the principal summons, while the said 2nd defendant declined to sign, same attached herein as duly served in the matter.
 6. That further to the foregoing, the said defendants aforesaid whom I served at Nakuru Town within Nakuru County, were personally known to me at the time of service by the aid of the said 1st defendant mobile phone number, which I knew from the police records in the matter herein.
 7. That I now a return where the summons duly served together with the affidavit of service in support of the said service in the matter herein.”
16. In his affidavit in support of his Application to set aside the interlocutory Judgment at paragraph 5, the Appellant stated as follows;

“ That the affidavit of service dated 28th January, 2020 upon which the Exparte Judgment was based is false and misleading and I will seek leave of the court to have the deponent one Elijah Gekonge Nyang’au cross-examined at the hearing of this Application on the contents of the affidavit”
17. A perusal of the lower court proceedings that are before me reveals that the Appellant consented to have the Application be disposed of by way of written submissions and hence he seeks leave of the



court to cross-examine the process server as he had intended so as to test the veracity of his averments. That being the case the evidence of the process server that the appellant was duly served remained unchallenged and thus the finding of the trial court that the interlocutory Judgment was a regular.

18. Order 10 rule 11 of the *Civil Procedure Rules* provides,

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree on such terms as may be just ‘The said rule thus gives the court wide discretion to set aside or vary a judgment in such terms that it deems fit. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, the Court held that: “There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

19. On whether the draft defence raises triable issues, the same indicates that the applicant denies, occurrence of the accident, ownership of the vehicle, damages and in the alternative is claims that the accident was caused by the negligence of the unknown motor cycle on which the respondent was ridding (whose Particulars have been specified). It was also pleaded that the suit is ambiguous. It is trite law that the court must look at the draft defence to see whether it raises triable issues in deciding setting aside of a regular judgment. I have seen the draft defence which was annexed to the application for setting aside and I find that the same raises triable issues of liability and quantum. The appellant has a right to be heard and it is fair and just that he be given a chance to be heard in this matter.

20. From the forgoing therefore I find good reasons to interfere with the discretion of the learned trial Magistrate of refusing to set aside a regular default Judgment and allow the application dated 18.8.22 for setting aside of the interlocutory judgment. Appeal is allowed. The appellant to pay respondent thrown away costs of Kshs. 30,000/= and costs of the appeal. Mention on 17.6.24 before the Chief Magistrate Kisii (Court no .1) for compliance /further orders.

21. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT KISII THIS 3RD DAY OF JUNE 2024.

T.A ODERA

JUDGE

3.6.24

Delivered virtually in the presence of:-

Wanjohi for Appellant

Miss Chilwasa hold brief for Nyandoro for Respondent

Court Assistant Oigo

