



**Gatheru v Orege (Civil Appeal 326 of 2023)
[2024] KEHC 9821 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 326 OF 2023
BM MUSYOKI, J
JULY 24, 2024
(FORMERLY KIAMBU HCCA NUMBER E359 OF 2023)**

BETWEEN

SIMON KARANJA GATHERU APPELLANT

AND

DENNIS OREGE RESPONDENT

(An appeal from the ruling of Honourable C.K. Kisiangani SRM dated 24-08-2023 and delivered on 24th day of August 2023 in Ruiru Senior Principal Magistrate's Court civil case number E412 of 2021)

JUDGMENT

1. This judgement relates to the main appeal. There is an application dated 6-11-2023 on record which has remained unprosecuted. The appellant seems to have lost interest in the application and in the circumstances, I will deliver judgement on the main appeal upon which the application would be overtaken by events.
2. This appeal arises from ruling and orders of Ruiru Senior Principal Magistrate's Court civil case number E412 of 2021 in which the appellant's application dated 10th March 2023 was dismissed. The application sought to have judgment against the appellant in the case set aside and appellant granted leave to file defence out of time.
3. Interlocutory judgement was entered against the appellant on 9-02-2022. The said judgement was on the basis of an affidavit of service by one Loise Njoroge dated 1-12-2021. The case proceeded for formal proof and judgment rendered on 30-06-2022.
4. The appellant's application was supported by an affidavit of one Edinah Masanya sworn on the 10th March 2023. The deponent described herself as the legal officer in Britam General Insurance Company



Limited which was purportedly the insurer of the motor vehicle registration number KCC 973E which was involved in the accident cause of action in the suit. The grounds as far as I can understand from the application and the supporting affidavit were that the defendant was not aware of existence of the suit and that he had a good defence to the claim.

5. An ex-parte judgement can be set aside as a matter of right if the defendant had not been served with summons to enter appearance and pleadings or the service is found to have been improper. Even where service is found to have been proper, the court would set aside the judgment if the defendant demonstrates that he has a good defence to the plaintiff's claim.
6. The appellant has raised five grounds of appeal. In the first ground, the appellant states that the magistrate erred in finding no merits in the application. This is a general ground which is dependent on the others. The success of this ground depends on court's finding on the others which I handle in the following paragraphs.
7. The 2nd ground faults the magistrate for finding that the legal officer of the insurance company that had insured the appellant's motor vehicle was not competent to swear the supporting affidavit dated 10-03-2023. I do agree with the counsel for the appellant and the three authorities he has cited in support of the position that an officer of the insurance company which issued the cover for the motor vehicle is competent to swear affidavits in the suit. However, the competence must be limited to matters which the officer is able to personally attest to including matters of information in which case the source of information must be disclosed.
8. I have gone through the ruling of the learned magistrate. In respect of the supporting affidavit and the competence of the deponent, the learned honourable magistrate said;

“I have noted the contents of the affidavit in support of the same and note that the process server having deponed in the affidavit of service that the defendant was served, the deponent of the supporting affidavit who is a legal officer of the insurance company that had insured the defendant's motor vehicle has no capacity to swear to the averments because she was not there with the defendant and neither has, she stated that she shares phone number 0723xxxx with the defendant herein. I therefore find that she is not competent to swear as to whether the defendant was served or not.”
9. In my considered view, the above cannot be interpreted to mean that the magistrate held that the deponent was not competent to swear the affidavit. What the magistrate said was that the deponent was not competent to swear on the aspect of service. I entirely agree with the holding of the magistrate. The appellant was the only person competent to deny service. In any event in the whole affidavit, there is nothing to show that the appellant's motor vehicle was insured by the said insurance company. I see no reason to disturb the magistrate's finding on that issue. I therefore dismiss that ground of appeal.
10. In the third ground of appeal, the appellant avers that the magistrate erred in law and fact for finding that his failure to attach a draft defence was fatal to the application. I hold the view that whereas it is important to attach a draft defence in order to enable the court establish whether the defendant has a good defence, that is not the only way to demonstrate existence of a good defence. If from the averments in a supporting affidavit or otherwise, it can be demonstrated that the defendant has a good defence to the claim, the court should exercise its discretion in favour of the defendant. In the instant case, did the appellant demonstrate through its documents filed in court in support of the application that he had a good defence? I don't think so. None of the 11 paragraphs of the supporting affidavit demonstrate the defence the appellant was intending to mount against the suit. In the circumstances, my finding on the application would be the same as the one reached by the magistrate.



11. The fourth ground faults the magistrate for failing to consider that the respondent had instituted another suit in the same court for the same cause action. According to the appellant, he had defended the said suit (civil suit number 468 of 2021) until it was dismissed on 22-02-2023. The respondent denied knowledge of this suit or instructing any other firm of advocates to file the said suit. Once this fact was denied, it behooved the appellant to prove it on a balance of probabilities. All that the appellant exhibited in support of this averment was a plaint, summons to enter appearance and a verifying affidavit dated 1-09-2021. None of these documents bears the case number. The appellant did not attach the defence he allegedly filed in that suit which in my view would even have given the court the kind of defence he had against the respondent's claim.
12. I have taken time to look at the signature on the verifying affidavit exhibited in the supporting affidavit on one hand and those in respondent's replying affidavit dated 20-03-2023, verifying affidavit in the suit and witness statement on the other hand. The two sets of signatures are clearly quite different to the naked eye. The appellant had a duty to bring all the important evidence or facts before the court. He should not have left the court to make assumptions or fill gaps in his application.
13. Even if there were evidence of there having been another suit, this would not form a ground for setting aside the judgment. In his own words, that suit was dismissed for non-attendance. Since the suit was not heard on merit, the issue of duplicity of suit could not arise. The said suit did not have a judgment and pursuant to Sections 6 and 7 of the *Civil Procedure Act*, it is the latter suit which ought to be either stayed or struck for being sub judice or *res judicata* this suit.
14. In view of the above, the 5th ground must also fail. It is my finding that there is no enough evidence that the respondent abused the court process. The defendant was indolent and can only blame himself. He came to court with unclean hands for failure to disclose all material facts. In my mind, he is not sincere and does not deserve discretionary orders of this court.
15. The upshot of the above is that this appeal lacks merits and is hereby dismissed with costs to the respondent

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

