



REPUBLIC OF KENYA



**Sanlam General Insurance Ltd v Maina (Civil Appeal 46 of 2019)
[2024] KEHC 8968 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 46 OF 2019
J WAKIAGA, J
JULY 23, 2024**

BETWEEN

SANLAM GENERAL INSURANCE LTD APPELLANT

AND

JACINTA NJERI MAINA RESPONDENT

*(Being an Appeal from the Ruling and Order of Hon. S.K. Nyaga
R.M delivered on the 30th September 2019 in CMCC No 328 of 2018)*

JUDGMENT

1. By a Notice of motion dated 25th July 2019, the Appellant moved the Court for the following orders:
 - a. There be a stay of execution of the decree herein and any subsequent orders issued thereon pending the hearing and determination of the application.
 - b. The honourable Court be pleased to set aside ex -parte final judgement entered in the instant suit on 8th July 2019.
 - c. The Defendant be allowed to participate in the hearing and defend the suit.
2. The application was supported by the annexed affidavit sworn by Mathew Kithinji Itonga in which it was deposed that the matter was scheduled for hearing of the Appellants application to amend the defence on 25th March 2019 which application was allowed by consent of the parties.
3. That from the Court file, the matter was fixed for pretrial conference on 13th May 2019 and main hearing on the 3rd June 2019 which dates were given in Court after an Advocate by the name Mutuku allegedly held brief for Ms Wambugu for the Defendant who indicated that he was appearing for then firm of K.Itonga for the Defendant , while the said Ms Wambugu was a stranger to the said firm



where the Advocates as at that time were: Mathew Itonga , Michael Mulupi, Gatwiri Njue and Laban Ochieng as confirmed through the firms letter head.

4. That the said Mutuku who allegedly held their brief, did not diaries the matter and as such the cause proceeded ex parte and that they were never served with any notice to file submissions nor notice of judgement, which they only learned after the Advocate for the Respondent through a letter of notification of judgement.
5. It was contended that the failure of the participate in the hearing was by reasons set above and should not be visited upon the innocent Defendant as there was misrepresentation on the part of the said Mutuku was never instructed to appear on their behalf and that the appeal raised triable issues. It was contended that the Appellant should be given an opportunity to defend the suit.
6. In response to the application, the Respondent filed a replying affidavit through Eva W. Mwenda in which she stated that the application was frivolous vexatious as the Respondent instituted a declaration suit for the decretal sum of Kshs. 359,080 as at 16th July 2018 and that the Appellant was aware of the date of pretrial where the Appellant was represented and there is no likelihood that a stranger represented the firm and that the hearing dates were procedurally taken and that the Appellant is not keen to conclude the matter.
7. That the Appellant had not met the grounds for the grant of the orders sought as there is no proof that the lawyer who held the Appellants brief had no authority to act for them and that the application was a mere academic exercise.
8. By a Ruling dated 30th September 2019, the trial Court stated s as follows

“on record the applicants advocate has severally failed to attend Court despite recording a consent dated 28th February 2019 which was adopted as an order of the Court on 25th March 2019. I note that the Applicant’s Counsel was given opportunities to be heard and the Counsel failed to attend Court on the date of hearing. In that regard the hearing proceeded and the judgement delivered on 8th July 2019. Therefore, the grounds stated in the application dated 25th July 2019 are not merited”

Submissions

9. Directions were issued that the appeal be heard by way of written submissions and on behalf of the Appellant it was submitted that Article 50(1) of the *Constitution* provides for the right to hearing and that as per the case of *James Wanyoike & another v CMC & 4others* [2015] eKLR the Court has to consider the defence if any and whether the Plaintiff can be reasonably compensated by way of cost as to deny the subject a hearing should be the last resort of a Court.
10. It was contended that sufficient cause had been shown to the effect that the Appellant has always been interested in participating in the proceedings and that even if the Advocate by the name Mr. Mutuku was properly on record, the mistake of the Advocate should not be visited upon an innocent client.
11. On behalf of the Respondent it was that the Defendant/ Appellant through her Advocate on record on several occasions failed to attend Court and that the Courts discretion is dependent on various circumstances as was stated in the case of *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR. It was contended that in this matter the Court did not exercise discretion since the dates were taken by consent and that if the said Ms Mutuku was unknown to the Appellant, then they have not accounted for the whereabouts of their Advocate.



12. It was contended that the magistrate was right in proceeding with the matter considering that the advocate for the Appellant had failed to attend Court since the discretion of the Court is unfettered with the only objection being to do justice to the parties and to avoid injustice and hardships arising from excusable mistake or error but not to assist a person who deliberately seek to delay the cause of justice as was stated in the case of *Esther Wamaita Njibia v Safaricom Ltd.*

Determination

13. In this matter there is only one issue for determination, being whether the trial Court properly exercise her discretion in refusing to set aside the ex -parte judgment herein.
14. The following facts are undisputed, that the dates were taken by consent in the presence of an Advocate who is alleged to had been holding brief for the firm of Advocates representing the Appellant. What is in dispute is whether the said Advocate was from the said firm, which is purely an issue of facts.
15. If it is true that the said Advocate had no instruction from the firm of K. Itonga & Co, then the said date was fraudulently fixed and as such it is tantamount to defeating the cause of justice. I would have expected Mr Gichuki who held brief for Mr. Wanjohi for the Plaintiff /Respondent to swear affidavit to confirm that on the date when the matter was in Court, in deed there was a Mutuku Advocate.
16. In this day and age where there are fake Advocates and when Advocates are no longer of honour, I will give the Appellant the benefit of doubt, based on the fact that they were not present on the 25th March 2019 when the consent order was adopted and pretrial date fixed for 13th May 2019 and the Respondent is silent as to whether the Appellant advocate was served with the hearing date for 3rd June 2019.
17. The law on the setting aside of exparte judgements is now well settled that where the same was irregular the Court ought to set it aside as a matter of right and if the same was a regular one the Court may exercise its discretion so as to avoid any injustice or hardship resulting for an accident or excusable mistake or error as was stated in the old case of *Shah v Mbogo* [1967] EA 116 as applied by the superior Courts.
18. The ex -parte judgement was therefore irregular which the trial Court ought to have set aside as a matter of right and which I hereby set aside, having looked at the Appellants defence, the same should have been granted leave to defend the suit, however with cost to the Respondent on the application appealed against, which I hereby order.
19. The Appellant having succeeded is entitled to cost of the appeal.
20. Since this matter has been pending in Court for a long time, the same to be heard and concluded within the next 60 days. The file to be placed before the Chief Magistrate together with a copy of this judgement for compliance.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 23rd DAY OF JULY 2024

J. WAKIAGA

JUDGE

In the presence of :

Court Assistant - Quinteen

Mr Waweru for the Appellant

Ms Karimi for the Respondent

