



REPUBLIC OF KENYA



KENYA LAW
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Kimani v Chege (Civil Appeal E659 of 2023)
[2024] KEHC 12568 (KLR) (Civ) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12568 (KLR)

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

CIVIL

CIVIL APPEAL E659 OF 2023

RC RUTTO, J

OCTOBER 18, 2024

BETWEEN

DAVIS KINYANJUI KIMANI APPELLANT

AND

JOHN MAINA CHEGE RESPONDENT

*(Being an Appeal from the Ruling and/or order of the Hon. D. O
Mbeja (P.M) dated 4/6/2021 in Milimani CMCC No. 5812 'A' of 2016)*

JUDGMENT

1. The appeal herein is against the ruling that declined to set aside an ex-parte judgment in Milimani CMCC No. 5812 "A" of 2016. In the said suit, the trial court entered an ex-parte judgment on 20/2/2017. Subsequently, on 12/2/2020, the Appellant vide a Notice of Motion dated 12/2/2020 sought, inter alia, to set aside the ex-parte judgment/ decree of Kshs 436, 737.34/= entered against him. He also sought leave to defend the suit.
2. Upon hearing the Application, the trial court, in a ruling delivered on 4/6/2020, found no merit in it dismissed it in its entirety.
3. The Appellant being aggrieved by that ruling filed this appeal vide a memorandum of appeal dated 14/06/2023, seeking that the appeal be allowed with costs and the ex-parte judgment set aside. The appeal is based on the following grounds:
 - i. That the Learned Magistrate erred in both law and fact by dismissing the Appellant's Application in that he held that the Appellant had been properly served with summons in the matter and could therefore not set aside the ex-parte judgment for the matter to be heard a



fresh on merits, when as a fact there was no prima facie evidence of service except an alleged investigation report.

- ii. That the Learned Magistrate erred in both law and fact by dismissing the Appellant's Application in that he completely failed to consider the fact that as at the time of the alleged accident on 21/8/2004, the Appellant had sold the Motor Vehicle Registration No. KAT 443D to the 2nd Defendant in the matter and was therefore not in its actual physical possession, control or even its management and that the respondent may have had a consideration of that hence the reason the respondent too had sued Hosewell Muiruri as a 2nd Defendant in the matter.
 - iii. That the Learned Magistrate erred in both law and fact by dismissing the Appellant's Application in that he failed to appreciate or consider at all the jurisdiction issue the Appellant had raised in his draft defence that had been annexed to the Application, when it is legally clear that issues of court's jurisdiction ought to be raised at the earliest opportunity in the proceedings by even the court on its own motion and the issue can even be raised on appeal.
 - iv. That the Learned Magistrate erred in both law and fact by dismissing the Appellant's Application in that he failed to appreciate that the draft annexed defence had raised plausible, triable and or prima facie issues which he ought to have allowed to be canvassed and be ventilated at a full hearing by setting aside the ex-parte judgment dated 20/2/2017 in line with the provisions of natural justice and the need for a fair hearing provided for by Article 50 (1) of *the Constitution* 2010.
4. The appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 21/5/2024 while the Respondent submissions were dated 23/5/2024.

Appellant's submissions

5. On ground one, the Appellant submitted that he was not properly served with the plaint and summons and, as such, the application ought to have been allowed. He faults the trial court for not being specific on the relevant court documents that were served upon him, and for not referring to the affidavit of service as duly filed.
6. On ground two, the Appellant submitted that as of the date of the accident, that is 21st August 2014, he had already transferred the motor vehicle to one Hosewell on 26th July 2014, though not formally. That on the date of the accident, the vehicle was in Hosewell's possession. The Appellant thus argued that he cannot be held liable for any accident as he was neither in possession nor in control of the vehicle at the time. To buttress this, point the Appellant relied on the case of *Ignatius Makau Mutisya v. Reuben Musyoki Muli, Civil Appeal No. 192 of 2007*.
7. On the third ground, the Appellant submitted that the court failed to address the question of jurisdiction which was raised during hearing. It was his submission that the accident occurred within Kajiado County, and therefore, the Milimani court lacked jurisdiction. To buttress this point, he relied on the case of *Kenya Ports Authority v. Modern Holdings (E.A.) Ltd, Civil Appeal No. 108 of 2016*.
8. On ground four, the Appellant submitted that the draft defence filed together with the application, demonstrated triable issues. Thus, by dismissing the application, the trial court denied the Appellant a fair hearing. The Appellant thus prayed that the appeal be allowed with costs, the ex-parte judgment in the lower court be set aside, and that he be granted leave to defend the matter.



Respondent's submissions

9. The Respondent submitted that the trial court, in exercising its discretionary powers, was guided by the case of *Savings and Loans Limited v. Susan Wanjiru Muritu*, Nairobi Milimani HCC No. 397 of 2002, which emphasizes the duty of a litigant to attend court on the date fixed for hearing. The Respondent further relied on the cases of *Patel v. E.A. Cargo Handling Services Limited* (1974) EA 75 and *Shah v. Mbogo* (1967) EA 166, to argue that the trial court did not err in dismissing the Appellant's application. He contended that the trial court's findings were justified, as the Appellant's application was based on mere denials, asserting that service had not been effected on him personally.
10. The Respondent further submitted that setting aside an interlocutory judgment is not a constitutional right but rather a discretionary power bestowed upon the court, which must be exercised judiciously and expeditiously.
11. The Respondent also submitted that contrary to the Appellant's claim that the subject motor vehicle had been sold at the time of the accident, the transfer had not been effected, and thus the Appellant must be held accountable. The Respondent relies on Sections 8 and 9(10) of the *Traffic Act*. He further argued that the Sale Agreement cannot be relied upon due to the glaring inconsistencies, pointing out that the Appellant was still the policyholder at the time of the accident. The investigation report dated 22nd July 2015 also confirmed that the Appellant still owned the subject motor vehicle at the time of the accident.
12. On the issue of jurisdiction, the Respondent submitted that the accident occurred along Magadi Road, within Nairobi County, just before the Multi Media University Gate. That, even though it was reported at the Ongata Rongai Police Station, the Respondent argued that the lower court had jurisdiction to hear the matter because, geographically, the accident scene is within Nairobi County.
13. The Respondent concluded by stating that if the appeal is allowed, he should be awarded costs of Kshs. 100,000/= to compensate for the delay caused by setting aside the judgment and allowing the Appellant to defend the case.

Analysis and Determination

14. This being a first appeal, this Court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the Record of Appeal and make its own conclusions. See the case of *Selle vs Associated Motor Boat Company Limited* (1986) E.A 123.
15. I have considered the pleadings and the evidence adduced before the trial Court as well as the contending submissions in this appeal. The crux of this appeal is a determination on whether the trial Court properly exercised its discretion in dismissing the Appellant's application seeking to set aside the ex-parte judgment. The Appellant also seeks that leave be granted for them to file their defence.
16. Order 10 rule 11 of the Civil Procedure Rules 2010 gives the Court unfettered discretion to set aside an ex-parte judgment that was entered in default of appearance and defence. In *Thorn PLC-V Macdonald* (1999) CPLR as cited in *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* [2021] eKLR the Court of Appeal highlighted the following guiding principles in the exercise of this discretion:
 - a. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
 - b. Any failure by the defendant to provide a good explanation for the delay is a factor to be considered but is not always a reason to refuse to set aside;



- c. Primary considerations are whether there is a defence with real prospect of success and that justice should be done; and
 - d. Prejudice, or the absence of it, to the claimant also has to be taken into account.
17. Also, see the case of *Toshike Construction Company Limited v Harambee Co-operative Savings & another* [2019] eKLR which buttresses the above principles.
 18. It is clear from the aforesaid cases that the court has the power to set aside an ex-parte judgment and allow the appellant to file a suitable defence. However, such leave is not granted as a matter of course. The court must be satisfied that a good explanation has been offered for setting aside the judgment and may impose such terms as it deems appropriate under the circumstances. This is because such action would definitely be taking a Plaintiff back in time causing delays in the conclusion of the case.
 19. This court has carefully considered the grounds and facts as presented by the Appellant in seeking to set aside the ex-parte judgment. The Applicant advanced two main reasons first, that he was not properly served with the plaint and summons; and secondly, that the draft defence attached to the application to set aside raises triable issues which include the fact that the subject motor vehicle had been sold to one Hoswell Muiruri as at the time of the accident and there were jurisdictional issues. In its ruling, the trial court duly considered the two grounds above, and found no merit in these claims.
 20. As noted earlier, the provisions of Order 10 Rule 11 of the Civil Procedure Rules grant the court of first instance broad discretion to set aside or vary a judgment entered in default of appearance. The law also allows the trial court to impose any terms it deems appropriate.
 21. As an appellate court, this Court typically exercises restraint in interfering with the lower court's discretion, except when it is demonstrated that such discretion was exercised injudiciously or based on incorrect principles. See the decision in *Shah vs Mbogo* (1968) EA 93. Summarily, this court ought not to interfere with the exercise of the discretion by a subordinate court unless it is satisfied that its decision is clearly wrong because the trial court misdirected itself or because it has acted on matters which it should not have acted on or it has failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong conclusion.
 22. I have re-evaluated the record of the trial court and note that despite the trial court stating in its ruling that it has no doubt that the Appellant was duly served with the relevant court documents, no such evidence of service was provided in the record. What is on record is an affidavit of service sworn on 4/11/2016 by one Peter Anyangu Omukweyi which indicates that service was done only to one Hoswell Muiruri the 2nd Defendant in the trial court.
 23. However, I have also noted another Affidavit of Service sworn on 20/6/2017 by Peter Kipsang Ngeno which shows that both the 1st and 2nd Defendant in the trial court were served with the Notice of Entry of Judgment of which at that time, the Appellant (the 1st defendant in the trial court) if diligent enough would have arrested the endorsement of the Notice of Entry of Judgment and not wait for three years later to file an application to set aside judgment after receiving proclamation notices. On his part, the Respondent in opposing the application, did not also file anything to support the fact that the Appellant was indeed served with the pleadings.
 24. Flowing, from the foregoing, it is this court's finding that the Appellant was never served with the summons, plaint and accompanying documents and for this reason alone, it is sufficient to set aside the judgment for it is irregular.



25. The second reason advanced for setting aside the judgment was that the draft defence raises triable issues which the trial court considered and found no merit in it. I have considered the draft defence exhibited by the Appellant and I have found that though very precise, it raised the following triable issues: ownership of the motor vehicle and jurisdiction of the court to determine the dispute. These cannot be determined summarily or by way of an application.
26. I am alive to the fact that a defence raising triable issues, need not convince court that the defence shall succeed, but that it is one which should go to trial for adjudication. See the Court of Appeal case of Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR which defined a triable issue in the following terms: “a bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
27. Noting that the judgment as elaborated above was irregular and that the defence raises a triable issue and having had due regard to the cases inter alia, of John Peter Kiria & another v Pauline Kagwiria [2013] eKLR and Kenya Pipeline Company Limited vs Mafuta Products Limited [2014] eKLR, amongst several other cases where it was held that no party should be shut out from ventilating its defence, that a court may set aside interlocutory judgment if a party had a reasonable defence which raises triable issues, and that at all possible times, cases should be heard on merit; therefore, it is my considered view that while no plausible reason was offered for the inordinate delay the fact that the judgment was irregular and the Appellant has a triable defence, it is only fair and just to allow them to exercise their fundamental right to be heard as enshrined in Article 50 (1) of *the Constitution* of Kenya.
28. When exercising this discretion, it is important to consider the extent to which the Respondent would suffer prejudice if the interlocutory judgement was set aside. I note the Respondent submission that he should be awarded costs of Kshs. 100,000/= to compensate for the delay caused by setting aside the judgment. Further the Respondent did not place any evidence before the Court to show that the prejudice he will suffer would be so irreparable as to constitute a grave injustice that could not be adequately compensated by way of costs.
29. On the other hand, the trial Court merely stated that the Respondent would be highly prejudiced without addressing its mind to the extent of prejudice and if the same was incapable of being compensated by costs.
30. Taking into account the foregoing factors it is my considered view that this Court should exercise its discretion so as to allow the suit to be heard on merit. The prejudice that the Respondent would suffer for the delay in the conclusion of his case by having it heard on merit can be compensated by way of throw away costs.
31. Consequently, I issue the following orders:
 - a. The Ruling delivered on 4/6/2020 is hereby set aside and is substituted with an order allowing the Notice of Motion Application dated 12/2/2020.
 - b. The ex-parte judgment entered on 20/2/2017 and all consequential orders are hereby set aside.
 - c. The Appellant is given 14 days from the date hereof to file its defence.
 - d. The Appellant shall pay to the Respondent throw away costs in the sum of Kshs 30,000/= within fourteen (14) days from the date of this ruling.



- e. In the event the Appellant fail to comply with order (c) and (d) hereinabove, the Respondent will be at liberty to move the Court for appropriate orders.
- f. Each party to bear its own costs.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 18TH DAY OF OCTOBER 2024

For Appellants:

For Respondent:

Court Assistant: Peter Wabwire

