



Mathendu v Bundi & another (Suing as the administrator of the Estate of Mutethia Bundi - Deceased) & 5 others (Civil Appeal E141 of 2022) [2024] KEHC 12576 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E141 OF 2022
EM MURIITHI, J
OCTOBER 17, 2024**

BETWEEN

JANE MATHENDU APPELLANT

AND

RICHARD BUNDI & SABELLA K KAGWIRI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MUTETHIA BUNDI - DECEASED) 1ST RESPONDENT
PS MUGO 2ND RESPONDENT
JAMNADAS 3RD RESPONDENT
DANIEL MBURUGU MBOGORI 4TH RESPONDENT
BRITISH AMERICAN INSURANCE CO LTD 5TH RESPONDENT
JOHN KIRIMI KAARIA 6TH RESPONDENT

(Being an appeal from the Ruling of Honourable M.A Odhiambo (SRM) delivered on 30/9/2022 in Meru CMCC No. 48 of 2017)

JUDGMENT

1. The 1st Respondent herein, the Plaintiff in the trial court, sued the Appellant and the 2nd – 6th Respondents by Plaint dated 5/10/2012 seeking Ksh.55,210, damages under the [Law Reform Act](#) and the [Fatal Accidents Act](#) plus costs and interest. When the Appellant, the 2nd and 3rd Respondents failed to enter appearances and file their defences after duly being served with the summons to enter appearance and the pleadings, the court on 31/10/2014 entered judgment for the 1st Respondent, and the matter proceeded for formal proof, subsequent to which a judgment was delivered on 17/12/2020.



2. In its judgment, the trial court apportioned liability at 10:45:45 against the 1st Respondent, the Appellant, the 2nd and 3rd Respondents on one part and the 6th Respondent on the other part. It then awarded general damages for pain and suffering of Ksh. 20,000, Ksh.1,500,000 for lost years, Ksh. 170,000 for loss of expectation of life and special damages of Ksh. 55,210 together with costs and interest totalling to Ksh. 1,745,210.
3. The Appellant filed an application dated 13/5/2022 seeking a myriad of orders inter alia the setting aside of the ex parte judgment entered on 17/12/2020 and leave to unconditionally defend the suit, which application was dismissed by the ruling of 30/9/2022.
4. Aggrieved by the said dismissal, the Appellant filed a memorandum of appeal in this court on 13/10/2022 raising 6 grounds as follows:
 1. That the learned Senior Resident Magistrate erred in law and fact in failing to appreciate the principles of natural justice and equity and thus her Ruling and orders were not properly founded in law.
 2. That the learned Senior Resident Magistrate erred in law and fact in failing to appreciate that there was no prove of actual service of summons to enter appearance to the appellant who was the 3rd defendant in CMCC 48/17 which led to exparte and irregular judgment.
 3. That the learned Senior Resident Magistrate misdirected herself in arriving to her ruling and orders by considering what was irrelevant and by failing to consider what was the most relevant having regard to the matter before her.
 4. That the learned Senior Resident Magistrate erred in law and fact in failing to find that condemning a person before being heard is against the principles of justice and the law of the land.
 5. That the learned Senior Resident Magistrate erred in law and fact by failing to appreciate the evidence before her with regard to ownership of the alleged M/Vehicle KUX 947 and KBM 652 S which were the cause of the claim before her.
 6. That the learned Senior Resident Magistrate erred in law and fact and her ruling and orders were against the law and the fair administrative action.

Submissions

5. The Appellant urges that she could not cross examine the process server, who had allegedly served her with summons to enter appearance because he had since passed on, and cites Equatorial Commercial Bank Ltd v Mohan Sons (K) Ltd (2012) eKLR and Agigreen Consulting Corp Ltd v National Irrigation Board (2020) eKLR. She relies on Altana Corporation Limited v Clarence Matheny Leadership Training Institute; National Land Commission & another (Interested Party) (2019) eKLR and Supreme Court of India in Sangram Singh v Election Tribunal Koteh 1955 AIR 425 in urging the court to set aside the exparte judgment. She urges that the draft defence raises triable issues and provides a fair and substantial answer to the claim.
6. The 1st Respondent cites Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others (2018) eKLR in urging that the Appellant abandoned her quest to cross examine the process server and opted for written submissions thereby inviting an adverse finding against her under the empty chair doctrine, because had she cross examined the process server, service of summons to enter appearance upon her would have been fortified. He cites James Kanyiiita Nderitu & Another (2016) eKLR, where the distinction between a regular default judgment and an irregular default



judgment was explained and applauds the trial court for finding that the judgment was regularly entered following service of the summons to enter appearance in accordance with Order 5 Rule 8 of the Civil Procedure Rules. He urges that the right to be heard can only be violated if there is proof of a valid defence and thus the Appellant cannot cry foul when she was regularly served. He urges that the Appellant's defence is a mere denial which raises no triable issues, and cites *Highchem Pharmaceuticals Limited v Lemuma Chemist Limited* (2018) eKLR and *Saudi Arabian Airlines Corporation v Premium Petroleum Company Ltd* (2014) eKLR. He urges that court decisions are not administrative actions as contemplated under Section 2 of the Fair Administration Action Act, and cites *Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot* [2020] eKLR. He urges that their evidence that the Appellant was the beneficial owner of motor vehicle registration number KUX 947 was not challenged.

Analysis and Determination

7. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).
8. The issues for determination are whether the ownership of Motor Vehicle Registration Nos. KUX 947 and KBM 652 S was proved and whether the ex parte judgment is irregular for want of proper service upon the Appellant.
9. The 1st Respondent pleaded that, "At all times material to this suit the 1st and 2nd Defendants were joint-registered owners of Motor Vehicle Registration No. KUX 947 Isuzu Pick-up while the 3rd Defendant was the beneficial owner and/or driver of the said motor vehicle. At all times material to this suit the 4th Defendant was a joint registered owner and/or driver of motor vehicle registration number KBM 652 S Toyota Corona while the 5th Defendant was the other joint registered owner of the said vehicle."
10. The copy of records produced in court shows that motor vehicle registration number KUX 947 was jointly registered in the names of the 2nd and 3rd Respondents while motor vehicle registration number KBM 652 S was jointly registered in the names of the 4th and 5th Respondents. It is stated in the police abstract as follows: "KUX 947 P/UP W/O Insurance Owner of M/V Never Produced The Insurance. She is from Thabene Area." That is proof on a balance of probabilities that the Appellant was the beneficial owner and/or driver of Motor Vehicle Registration No. KUX 947 at the material time, which was duly registered in the names of the 2nd and 3rd Respondents, while Motor Vehicle Registration No. KBM 652 S belonged to the 4th and 5th Respondents.
11. This court finds that the 1st Respondent proved by uncontroverted evidence that the Appellant was the beneficial owner and/or driver of Motor Vehicle Registration No. KUX 947 Pick-up.
12. Order 10 Rule 11 of the Civil Procedure Rules gives the court wide discretionary powers to set aside a default judgment as follows;

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."
13. Joseph Kithinji M'Kiambati, a licenced court process server swore an affidavit of service on 4/3/2013 averring that, after receiving summons to enter appearance, copies of plaint, verifying affidavit and other related court documents from the 1st Respondent on 28/1/2013, "On 18th February, 2013 at around 8.45 a.m I served the said Court documents in this case on 3rd and 4th Defendants at Ntharene



market by tendering the copies thereof to them and requiring their signatures which they accepted Service, each took his/her copies but they declined to sign. At the time of service the said 3rd & 4th defendants were pointed out to me by the Principal, Ntharene High School Mr. Paul Gitonga.”

14. The Appellant did not seek to cross-examine the process server or Mr. Paul Gitonga, in her application of 13/5/2022. On the empty chair doctrine, it must be assumed that if the Appellant had so cross-examined the two, they would have testified adversely against her and fortified the trial court’s finding that service was proper.
15. After the Appellant neglected to enter appearance and/or file her defence within the stipulated time, the 1st Respondent requested for interlocutory judgment which was duly entered on 31/10/2014. The matter was then set down for formal proof hearing and judgment was subsequently entered in favour of the 1st Respondent on 17/12/2020.
16. Was that a regular or an irregular judgment, which ought to be set aside *ex debito justitiae*? The distinction between the two was considered by the Court of Appeal in *James Kanyita Nderitu v Maries Philotas Ghika & Another* (2016) eKLR as follows:

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173). In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711: “[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives



and property should not continue in their absence and that they should not be precluded from participating in them.”

17. This court finds that the judgment herein was regular as service was proper. Having found that the service herein was proper and therefore the judgment was regular, the next question is whether the same ought to be set aside.
18. The test for setting aside a regular ex parte judgment is threefold whether, there is a defence on merits; whether the Respondent would in any way be prejudiced, and whether there is an explanation for the delay. (See the Court of Appeal in Abdalla Mohammed & Another v Mbaraka Shoka (1990) eKLR).
19. On whether the Appellant had a good defence on merits, (Sheridan J.) in Sebei District Administration v Gasyali & others (1968) EA 300 was of the view that:

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of the court. Though I realise that the views expressed may not be shared by everyone I think that there was not a full judicial exercise of discretion in this case, and that it was wrong under all the circumstances to shut out the defendant. He should I consider have been visited with a severe order as to costs, and permitted to defend.”
20. The court has looked at the draft defence annexed to the Appellant’s application dated 13/5/2022 and it agrees with the trial court that the same is a mere denial, which raises no triable issues at all.
21. The Appellant has not proffered any explanation for the inordinate and unreasonable delay in filing the application on 13/5/2022 for the setting aside of the ex parte judgment which was entered on 17/12/2020.
22. This court finds that the 1st Respondent will be greatly prejudiced if the ex parte regular judgment is set aside.

Orders

23. Accordingly, for the reasons set out hereinabove, the Appellant’s appeal is dismissed.
 24. The Appellant will pay the costs of the appeal to the Respondent.
- Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. G. Anampiu for the Appellant.

Ms. Anguche for M/s C.B Mwangela the Respondent.

