



Mwiki PSV Sacco Society Limited & another v Dodhia Motor Limited & 2 others (Civil Appeal E459 of 2022) [2024] KEHC 11732 (KLR) (Civ) (2 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11732 (KLR)

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

CIVIL

CIVIL APPEAL E459 OF 2022

JM NANG'EA, J

OCTOBER 2, 2024

BETWEEN

MWIKI PSV SACCO SOCIETY LIMITED 1ST APPELLANT

PETER NGOIGO MWANGI 2ND APPELLANT

AND

DODHIA MOTOR LIMITED 1ST RESPONDENT

KEL KIONI WANYEKI 2ND RESPONDENT

SIMON KARANGU 3RD RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's court at Nairobi Milimani Commercial Courts (Hon. E. Wanjala-PM) in CMCC No. 7794 of 2019 delivered on 17/6/2022)

RULING

Grounds of Appeal and reliefs sought.

1. By a Memorandum of Appeal dated 25/6/2022, the appellants fault the said trial court's ruling and/or order on the 1st appellant's Notice of Motion dated 12/4/2022 by which it dismissed the application which inter alia sought leave to file defence to the suit in the lower court in terms of a draft defence exhibited in the application. The grounds of appeal are as hereunder:
 - a. That the learned trial magistrate erred in failing to consider that the appellants were not served with Pleadings and Summons to enter appearance.
 - b. That the ex-parte judgement was entered despite the 3rd respondent's express admission of ownership of motor vehicle registration number KCG 511 M that was involved in an accident subject of the suit before the lower court.



And

- c. That the learned trial magistrate erred in denying the 1st appellant a chance to defend the suit.
2. It is proposed that the ex-parte judgement be set aside and the 1st appellant be allowed to file defence to the suit. Alternatively, the court is urged to strike out the 1st appellant from the suit in light of the alleged admission by the 3rd respondent.

Background to the Appeal

3. In the ex-parte judgment, the trial magistrate granted the respondents Ksh. 347,690 plus costs and interest as prayed in the suit on the ground that the appellants failed to enter appearance and/or file defence in respect of the liquidated claim. The 1st respondent instituted the suit claiming compensation for material damage to its motor vehicle registration number KCJ 383 Y that collided with the the said 3rd respondent's motor vehicle registration number KCG 511 M. The 2nd respondent who was the driver of the latter vehicle was blamed for causing the collision owing to negligent driving. The accident is alleged to have led to extensive damage to the 1st respondent's vehicle necessitating repairs and other costs amounting to Ksh. 347, 690 that were defrayed by the 1st respondent's insurer. The suit before the trial court was then brought on behalf of the insurer for indemnity under the insurance doctrine of subrogation. The 1st appellants' application dated 12/4/2022 seeking setting aside of the default judgement was dismissed , thus provoking this appeal.

Guiding Principles

4. It is trite law that the appellate court has the duty of re-assessing the evidence adduced before the lower court and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR among many other decided cases reiterating these principles. The Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:”
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

Analysis and Dtermination

5. In dismissing the appellants' application, the trial magistrate found that the respondents' evidence of service of the suit documents was not challenged. The court was for this reason persuaded that the 1st appellant was duly served but failed to enter appearance. The trial court therefore concluded that the impuged judgement is regular while observing that the appellants did not even pray for setting aside of the judgement itself. The learned trial magistrate thus wondered how the appellants would then file a defence when the ex-parte judgement subsists. The trial court further noted that there was in fact no draft defence annexed to the 1st appellant's application to show any triable issues, were the court to exercise its discretion to set aside the judgement.



6. Learned Counsel for the 1st appellant and the 1st respondent filed their written submissions. It would appear that the 2nd appellant, the 2nd respondent and the 3rd respondent have not put in their submissions. The 1st appellant's advocates contend that the ex-parte judgement is irregular as their clients were not served with summons to enter appearance. The court was referred to the 1st appellants' official's affidavit in support of the application dated 12/4/2022 praying to set aside the judgement which affidavit is said to indicate names of persons allegedly served with the suit documents that are "fictitious and unknown" to the 1st appellant. The 1st appellant is said to have sought to cross-examine the Process Server but the court directed the application to be disposed of by written submissions, thus depriving the appellants of an opportunity to prove that they didn't receive the suit documents. The 1st appellant, however, admits that it didn't exhibit a draft defence, attributing the omission to their advocates. Relying on the case of *CFC Stanbic Limited v. John Gitthaiga & Another* (2013) eKLR, Counsel for the 1st appellant submit that a litigant should not suffer because of a mistake of his advocate. In *David Kiptanui Yego & 134 Others V. Benjamin Rono & 3 Others* (2021) eKLR also relied upon by Counsel, it was held that among factors to consider in an application to set aside an ex-parte judgement order is the defence, however irregularly brought to the court's attention, since denial of the right of hearing is a matter of last resort.
7. The appellants further submit that, in any event, their position is fortified by the 3rd respondent's admission vide affidavit dated 15/6/2021 sworn in support of his application of even date, objecting to execution of the impugned judgement, of its ownership and control of the accident vehicle registration number KCG 511 M. According to the 1st appellant, it was merely the financier of the 3rd respondent in the purchase of the vehicle and so it cannot be held liable for injury to third parties arising from the use of the vehicle.
8. Regarding the prayer to strike out the 1st appellant from the suit, Counsel cite Order 1 Rule 10 of the *Civil Procedure Rules* 2010 which enables the court at any stage of the proceedings to strike out any party who has been improperly joined, from a suit or add the name of a person who ought to have been joined for the court to "effectually and completely adjudicate upon and settle all questions involved in the suit." The court is also referred to the judicial determination in *Pravin Bowry v. John Ward and Another* (2015)eKLR in which this legal position was underscored.
9. Learned Counsel for the 1st respondent maintain that Summons to enter Appearance in the suit was properly served upon the 1st appellant. Counsel point out that the 1st appellant did not seek to cross-examine the Process Server pursuant to Order 5 Rule 16 of the Civil Procedure Rules 2010, if service of the suit documents was contested. The 1st respondent submits that this course of action is also reiterated by case law as enunciated in Kisumu CACA NO. 15 of 2010 (*Amayi Okumu Kasiaka & 2 Others v. Moses Okware Opari*) where service of suit documents is disputed. The 1st appellant is further faulted for failing to specifically pray for setting aside of the ex-parte judgment in its application before the lower court as well as the absence of a draft defence for the court's perusal and determination if it raises triable issues. The court is referred to the judicial determination in *Patel v. East Africa Cargo Limited* (1974) EA 75 in which it was stated that the defendant must give a plausible reason for failure to enter appearance and /or file defence within the required time. Counsel for the 1st respondent therefore submit that the trial court rightly found that the ex-parte judgement in issue was regular and there was no good cause for it to be set aside.
10. It is not disputed that the 1st appellant did not expressly seek an order vacating the impugned judgement in its application dated 12/4/2022 before the trial court. Neither did it annex its proposed defence to the application. From the record of the lower court, the appellant is not also shown to have sought to be allowed to cross-examine the process server on the contested matter of service of the suit documents



upon the 1st appellant. The main point for determination in this appeal, therefore, is whether the trial court properly and lawfully exercised its discretion in dismissing the 1st appellant's application in the circumstances of this matter.

11. The court has unlimited discretion to set aside or vary an ex-parte judgement. The discretion is judicious and not capricious, the intention of the court being to do justice regard being had to the facts and circumstances of a particular case before the court (see the judicial decision in *International Air Transport Association & Another v. Roskar Travel Limited & 3 Others* (Civil Case E457 of 2020) {2022} KEHC 200(KLR) (Commercial & Tax (17th March 2022 (Ruling) cited in the 1st appellant's submissions. The manner of exercise of the court's discretionary power is also stressed in the famous case of *Shah v. Mbogo*.

Determination

12. Clearly, the trial court rightly found that the ex-parte judgement is a regular one, the 1st appellant having failed to challenge evidence of service of the suit documents. It is noted from the record that the suit documents were purportedly served on the 1st appellant's manager and the 2nd respondent. Whereas the 1st appellant could be allowed to defend the suit notwithstanding the regular default judgement, it has to demonstrate that it has a defence on the merits. No such proposed defence is, however, presented. Affidavit evidence tending to indicate such a defence will not suffice in law. It is evident that the 1st appellant did not exercise due diligence in seeking to defend the suit.
13. All the grounds of appeal as set out accordingly fail. The appeal is dismissed in its entirety with costs to the respondents.

JUDGEMENT DELIVERED VIRTUALLY THIS 2ND DAY OF OCTOBER 2024 IN THE PRESENCE OF :

The 1st Appellants' Advocate,
The 1st Respondents' Advocate,
The 2nd Respondent's Advocate,
The Court Assistant, Amina

.....
J. M. NANG'EA
JUDGE.

