



**Family Bank Limited v Muriungi & another (Civil Appeal  
E017 of 2020) [2023] KEHC 1867 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1867 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E017 OF 2020  
EM MURIITHI, J  
MARCH 16, 2023**

**BETWEEN**

**FAMILY BANK LIMITED ..... APPELLANT**

**AND**

**TITUS MUGAMBI MURIUNGI ..... 1<sup>ST</sup> RESPONDENT**

**SANLAM KENYA INSURANCE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Honourable S. N Abuya  
(SPM) delivered on 14/10/2020 in Meru CMCC No. 155 of 2019)*

**JUDGMENT**

1. The 1<sup>st</sup> Respondent herein, the Plaintiff in the trial court, sued the Appellant and the 2<sup>nd</sup> Respondent vide a plaint dated 10/5/2019 seeking an order of injunction restraining the Appellant whether by its agents, employees and/or any other person working under its instructions from repossessing, attaching and selling by public auction the Respondent's motor vehicle registration number KCF 872 W TOYOTA HIACE, a declaration that the 2<sup>nd</sup> Respondent was in breach of the contract of insurance under policy NO. 010/080/9/027886/18/08 and that the 2<sup>nd</sup> Respondent is liable to compensate the Respondent for the value of motor vehicle registration KCF 872 W TOYOTA HIACE matatu at the sum insured, and costs plus interest of the suit.
2. The Appellant and the 2<sup>nd</sup> Respondent duly entered appearance and filed their respective defences. When the Appellant and the 2<sup>nd</sup> Respondent failed to attend court on the hearing date, the matter proceeded ex parte and a judgment was entered on 30/7/2020 for the 1<sup>st</sup> Respondent against them as prayed in the plaint.



3. The Appellant filed an application under certificate of urgency dated 6/8/2020 seeking to have the judgment of 30/7/2020 stayed, set aside and an opportunity to be heard. The court, by its ruling of 14/10/2020 held:

“I have carefully considered the rival submissions filed and I will deal with both applications for setting aside *ex parte* judgment. I find the reason given by the applicants counsels in both applications for not attending court on the hearing date (that the applicants Advocates were never served with the hearing notice) is not a sufficient reason as upon perusal of the court email I find all counsels were served with the hearing notice on 15/6/20 via email by the court. However mistakes of counsels should not be visited on his innocent clients. Having stated the above I allow the application dated 30/7/2020 in terms of prayer no. 3 and 4 and I also allow the application dated 6<sup>th</sup> August 2020 in terms of prayer 3 & 4 but order the Applicants in both applications to pay the Respondents costs in both the applications and the Respondent’s thrown away costs of Ksh.7,000 each within 21 days from today.”

4. Even after its application had been allowed by the trial court, the Appellant was still unhappy and he lodged a Memorandum of Appeal dated 30/10/2020 raising 7 grounds as follows:
  1. The Learned Magistrate erred in law and fact by arriving at the finding that the failure by the Appellant to attend Court on an undisclosed date for the hearing of the suit was the fault of the Appellant’s Advocates.
  2. The Learned Magistrate erred in law and fact by failing to adhere to the principle of *audi alteram partem* and proceeding to deliver the judgment without Hearing all the parties in the suit, particularly the Appellant.
  3. The Learned Magistrate erred in law and fact by proceeding with the Hearing *ex parte*, if at all there was a Hearing, without confirming whether the other parties had been served with or received the Notice of the Hearing.
  4. The Learned Magistrate erred in law and fact by finding that the Appellant did not attend Court due to mistakes of its Advocates and not of the Court itself and proceeded to award costs of the Application and throw away costs to the 1<sup>st</sup> Respondent on that ground.
  5. The Learned Magistrate erred in law and fact by failing to consider and totally ignoring some of the issues raised by the Appellant in its Notice of Motion Application dated 6/8/2020 and Supporting Affidavit thereto particularly that there was nothing on record to show that indeed the Hearing Notice was served upon the Appellant’s Advocates.
  6. The Learned Magistrate erred in law and fact by failing to give due consideration to the fact that if at all the Hearing happened, it was during the period of Secession of movement into and out of Nairobi and therefore the Appellant’s Witness could not attend Court.
  7. The Learned Magistrate erred in law and fact by directing that the Appellant and the 2<sup>nd</sup> Respondent pay to the 1<sup>st</sup> Respondent costs of the Application and throw away costs of Kenya Shillings Seven Thousand (Kshs.7,000) within 21 days after finding that the Appellant’s Application dated 6<sup>th</sup> August, 2020 and that of the 2<sup>nd</sup> Respondent dated 30<sup>th</sup> July, 2020 were merited.



## Submissions

5. The Appellant submits that the rules of natural justice are the bedrock of justice, particularly, *audi alteram partem* which requires that no party should be condemned unheard, and cites *Gathigia v Kenyatta University* (2008) KLR 587, *Egal Mohamed Osman v Inspector General of Police & 3 Others* (2015) eKLR, *Kanda v Government of the Federation of Malaya* (1962) AC 322, *Ridge v Baldwin* (1963) 2 ALL ER 66, *Charkaoui v Minister of Citizenship and Immigration* 2007 SCC 9 and *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others* (2013) eKLR. It urges that it had a right to be heard and to challenge the evidence of the 1<sup>st</sup> Respondent's witness during the hearing of the case. It cites the prevalence of Corona Virus, NCAJ directive on scale down of court activities and the unavailability of a link to enable it attend the court virtually as the reasons for its non-attendance during the hearing of the case. It faults the trial court for awarding costs of the application and throw away costs, which it wants to be set aside, and cites *Pangaea Holdings Limited v Hacienda Development Holdings Limited* (2012) eKLR. It terms the trial court's decision to order costs to be paid by the Appellant as a travesty of justice, and relies on *Farah Awad Gullet v CMC Motors Group Ltd* (2017) eKLR and *Republic v The Public Private Partnerships Petition Committee (The Petition Committee) & 2 Others Ex Parte International Container Terminal Services Inc (ICTSI) and Cosco Pacific Limited* (2016) eKLR.
6. The 1<sup>st</sup> Respondent urges that the hearing date of the matter was communicated by the trial court on 15/6/2020, and invites the court to go through the proceedings. He accuses the Appellant of failing to severally pay court adjournment fees, and urges the court to bring the litigation herein to an end by dismissing the appeal with costs. He applauds the trial court for properly ordering the Appellant to pay costs and throw away costs to him.

## 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. After due consideration of the grounds of appeal and the submissions together with the authorities relied on, the sole issue for determination is whether the trial court erred in awarding costs of the application and throw away costs to the Respondent.

## The Proceedings

9. This matter was fixed for hearing by consent on 15/4/2020, but on that date, both parties were absent. The trial court fixed the matter for hearing on 6/7/2020 and directed that all the parties be notified via email or WhatsApp. Come that day, the Respondent's counsel was present but the Appellant and its counsel were absent. Mr. Ngugi for the Respondent informed the court that, "We were served with today's hearing date by the court. We are ready." After the Respondent had testified and closed his case, the trial court directed that, "The defendant's case is also closed as they were aware of the hearing date but they failed to attend court."
10. When the trial court delivered the judgment on 30/7/2020 via email, the Appellant moved with speed to have the same set aside and leave to defend the suit. The trial court duly set aside the *ex parte* judgment and granted the Appellant an opportunity to be heard, on condition that it bears the costs of the application and pays throw away costs of Ksh.7,000 to the Respondent.



11. It is trite that costs follow the event as provided under Section 27 of the *Civil Procedure Act* that:

- “(1) (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

12. The court is satisfied that the Appellant was duly notified by the Court of the hearing date, but it failed to attend court to defend the case. The trial court, even after finding that the Appellant was fully aware of the hearing date, still exercised its discretion in favour of the Appellant, who was clearly undeserving of the same, by giving it another opportunity to be heard. This court finds that the Respondent was entitled to an award of throw away costs to indemnify him for the costs expended and time spent in the prosecution of the case, which will certainly be increased when the trial starts afresh.

13. I should respectfully agree with Mativo, J. (as he then was) in *R v Rosemary Wairimu Munene, Ex parte Applicant v Ihururu Dairy Farmers Co-operative Society JR No. 6 of 2014*) that the legal basis for awarding costs is primarily not to penalize the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending the case. In this case, although, the court exercised discretion to allow the setting aside of the judgment, the court found that the appellant had failed to attend court for the hearing and it had, therefore, caused the respondent to incur the now throw away costs in prosecuting the case, which has to be done afresh.

14. An appellate Court is entitled to interfere with the discretion of a trial court in the circumstances set out by the Court of Appeal for East Africa in *Mbogo v. Shah (1968) EA 93* as follows:

“[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

15. This Court does not find anything on the principles of *Mbogo v Shah (1968) EA 93* to warrant the interference by this court with the discretion of the court in the proceedings for the setting aside of the ex parte judgment and or on the order for costs made thereon.

## Orders

16. Accordingly, for the reasons set out hereinabove, the Appellant’s appeal is dismissed with costs to the Respondents.

Order accordingly.

**DATED AND DELIVERED ON THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**



**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Ngeri, Omiti & Bush Advocates for the Appellant.

M/S Kiogora Mugambi & CO. Advocates for the Respondent.

