



**Ngutu t/a Real Technology Wisdom v Mutugi (Civil Appeal
E011 of 2022) [2023] KEHC 2191 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E011 OF 2022
EM MURIITHI, J
MARCH 16, 2023**

BETWEEN

ESTHER NJOKI NGUTU T/A REAL TECHNOLOGY WISDOM ... APPELLANT

AND

ERICK MUTUGI RESPONDENT

*(An appeal from the Ruling of Hon. J. Irura (P.M) in
Nkubu PMCC No.18 of 2020 delivered on 29/7/2021)*

JUDGMENT

1. The Respondent herein, the Plaintiff in the trial court, sued the Appellant vide a Plaint dated 18/5/2020 seeking the sum of Ksh. 120,100/=, interest thereon and costs of the suit. When the Appellant failed to enter appearance and file her defence, the Respondent requested for interlocutory judgment, which was duly entered on 18/8/2020. On 28/10/2020, the trial court, after noting that the Respondent's case was for a liquidated claim, entered judgment, under Order 10 Rule 4 of the *Civil Procedure Rules*, in his favour against the Appellant for Ksh.120,100 together with costs and interest.
2. The Appellant filed an application under certificate of urgency dated 2/2/2021 seeking to have the judgment of 28/10/2020 set aside; leave to have the firm of Munene Kirimi & Co. Advocates come on record for her; and the annexed draft Defence to be deemed as having been properly filed. The trial court on 10/2/2021 allowed the firm of Munene Kirimi & Co. Advocates to come on record for the Appellant and granted interim stay of execution of its judgment and decree pending further orders of the court.
3. When the application was finally heard, the trial court, vide its ruling of 29/7/2021 ruled that:

“Being aware that mistakes of an advocate should not be visited upon the client but the conduct of the defendants/ applicants advocate as noted above is somewhat wanting in that



he appeared to have taken this matter casually and so I will not shy away from admonishing the casual way he displayed in the conduct of this matter and even the applicant himself. In conclusion, I find that the application before me is not merited. Therefore, the defendants/ applicants Notice of Motion dated 2nd February 2021 lacks merit and is hereby dismissed with costs to the plaintiff/respondent.”

The Appeal

4. On appeal, the Appellant filed her Memorandum of Appeal on 18/1/2022 listing 6 grounds as follows:
 1. The learned trial magistrate erred in law and fact by holding that there was a regular ex-parte judgment on record despite the fact that no notice of entry of judgment was served upon the Appellant.
 2. The learned trial magistrate erred in law and fact by failing to find that the Appellant had a triable and arguable defence.
 3. The learned magistrate erred in law and fact by failing to accord the Appellant a chance to be heard and to adduce and challenge evidence of the Respondent.
 4. The learned magistrate erred in law and fact by holding that the Respondent would be prejudiced by grant of orders setting aside the interlocutory judgment.
 5. The learned magistrate erred in failing to address and make a finding on the issues raised by the Appellant in her application.
 6. The learned magistrate erred in law and fact by failing to appreciate the Appellant grounds as raised in her pleadings.

Submissions

5. The Appellant urges the court not to visit the mistakes of her former advocate upon her and relies on *Republic v Speaker Nairobi City County Assembly & Another Ex Parte* (2017) eKLR and *Prime Bank Limited v Paul Otieno Nyamodi* (2014) eKLR. She urges that her intended defence raised weighty issues that ought to have been considered, and cites the Court of Appeal case of *Amayi Okumu Kasiaka & 2 Others v Moses Okware Opari & Another* (2013) eKLR. She attributes the delay in filing the application of 2/2/2021 to the fact that she was unaware that there was a judgment against her, and faults the trial court for failing to set aside the interlocutory judgment. She urges the court to allow her appeal explicitly in the interest of justice, and cites *Ann Atieno Adul v Patrick Lang'at & Another* (2020) eKLR.
6. The Respondent implores the court to disregard the contested ground that the ex parte judgment was irregular because no notice of entry of judgment was served upon the Appellant, since the same is a new issue which was not raised in the trial court and the Respondent did not have an opportunity to respond to it, and cites the Court of Appeal case of *Kenya Hotels Limited v Oriental Commercial Bank Limited* (2018) eKLR. He urges that the Appellant was properly served with the Summons and the pleadings, and the trial court did not err by finding that he would be prejudiced if the ex parte judgment was set aside. He urges that the delay in filing the application is inexcusable and inordinate since the Appellant was all along aware of the suit against her and did not bother to find out its position. He submits that the alleged mistake of Jackson Kaberia Advocate could only be taken into account if he had been properly instructed and appointed. He urges that the Appellant has no triable and arguable



defence to set aside a lawful judgment of the trial court. He urges that all the grounds and issues raised by the Appellant in her application were properly analysed and addressed by the trial court. He urges the court to dismiss the appeal with costs or to award throw away costs in the event it allows the appeal, and cites Philip Kiprotich Tuitoek v Edna Jebiwott Kiplagat & 2 Others (2020) eKLR.

Analysis and Determination

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).
8. The Appellant has raised a ground that the ex parte judgment was irregular because no notice of entry of judgment was served upon her. The Respondent has beseeched the court to ignore that ground because it has only been raised on appeal.
9. With respect, a judgment does not become irregular because the notice of entry of judgment is not given to the judgment debtor! The requirement of notice of entry of judgment is a post-judgment requirement, an antecedent for enforcement of judgment through “execution by payment, attachment or eviction”, without a bearing on the validity of judgment, which depends on the valid service of summons to enter appearance.
10. Order 22 rule 6 of the *Civil Procedure Rules* provides for application for execution as follows:

“

“6. Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”
11. This court in *Elizabeth Kavere & another v Lilian Atho & another* [2020] eKLR was of the view that:

“The requirement of notice applies to application for execution by way of ‘payment, attachment or eviction’ and may only have affected the initial attempt at attachment of the 1st defendant’s movable property by application for execution dated 4th December 2018, which was unsuccessful prompting the application for execution dated 17th April 2019 seeking Notice to Show Cause why the judgment-debtor/applicant should not be committed to civil jail for failure to comply with the decree herein. The procedure for execution by arrest and detention already has statutory protections for notice to show cause, and the hearing thereof, making the notice of entry of judgment under Order 22 rule 6 of the Civil Procedure Rules unnecessary.”
12. The mode of execution chosen by the Respondent was arrest and committal to civil jail, thus the requirement for service of notice of entry of judgment was inapplicable.



Issue for determination

13. Having analysed the pleadings and the rival submissions as well as the cited authorities, the issues for determination are (a) whether the judgment of the trial court was regular and (b) whether it should be set aside.

Regular judgment

14. Order 10 Rule 2 of the *Civil Procedure Rules* provides that-

“2. Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant he shall file an affidavit of service of the summons unless the summons has been served by a process -server appointed by the court.”

15. This Court has had occasion previously to discuss the consequences of regular and irregular judgments in MERU HCCA NO. E010 OF 2020, *Stanley Miriti v Julius Murungi Murianki (Suing on behalf of Agusta Karigu Murungi – Deceased)*, [2022] eKLR as follows:

“Regular or Irregular Judgment

15. Was that a regular judgment or an irregular judgment, which ought to be set aside ex debito justitiae? The distinction between the two and its implications 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....”

15. This court, without any doubt 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.
16. The test for setting aside a regular ex parte judgment is threefold, that (1) whether there is reasonable explanation for the delay; (2) whether there is a defence on merits; and (3) whether the Respondent would in any way be prejudiced.”
16. In this case, one Gichunge Miriti, an advocate of the High Court of Kenya swore an affidavit of service on 21/5/2020 averring that, on 20/5/2020, at around 2.00 p.m he served upon the Appellant summons dated 19/5/2020 and a Plaint dated 18/5/2020 at her shop known as Real Technology Wisdom at Kiigene – Nkubu. The Appellant was pointed out to him by the Respondent, and after accepting service, the Appellant declined to sign on his return copies. No application for the cross-examination of the advocate on his service of summons was made by the applicant.
17. In view of the Affidavit of Service sworn and filed by an advocate of this Court, this court is thus satisfied on a balance of probabilities that the Appellant was duly served with the summons and pleadings herein, but failed to either enter appearance and/or file her defence within the stipulated time. Since the said service was proper, it thus follows that the judgment of the trial court was regular.

Setting aside of the judgment

18. The trial court, in its impugned ruling observed that:

“I therefore find that there is no sufficient cause demonstrated to warrant this court to set aside both the interlocutory and regular judgment as to do so would be sitting on my own appeal.”
19. On a point of correction, the trial court is vested with discretion to set aside its judgment, and that would not be tantamount to sitting on appeal on its own decision. Order 10 Rule 11 of the *Civil Procedure Rules* provides for setting aside judgment as follows:

“ 11. 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.”
20. In the Court of Appeal decision of *James Kanyita Nderitu v Maries Philotas Ghika & Another* (2016) eKLR it was clarified that:

“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.”

As pointed above, the three-fold test for setting aside a regular ex parte judgment is whether, there is a defence on merits; whether the Respondent would in any way be prejudiced; and whether there is reasonable explanation for the delay.

21. The trial court duly considered the Appellant’s defence that she and the Respondent were lovers and found that”

“The defendant has brought in a fresh issue that both she and the plaintiff were boyfriend and girlfriend until the plaintiff became very abusive, an issue that she had already reported to the police. However, she failed to state in which police station she so reported the matter at and the occurrence book number issued to her and if at all any action was taken against the plaintiff.”

22. The Appellant blamed Jackson Kaberia Advocate, a counsel she had allegedly instructed to represent her for her misfortunes. In the absence of any evidence of such appointment by way of a notice of appointment, this court finds that the Appellant was the sole author of her adversities. The consent on record, pursuant to Order 9 Rule 9 (b) of the *Civil Procedure Rules* was executed by Munene Kirimi & Co. Advocates, the outgoing advocates and Mwirigi Kaburu & Co. Advocates, the incoming advocates.
23. The court further finds that the Appellant did not offer a satisfactory explanation for her inordinate delay in filing the application to set aside the regular judgement.
24. The ground that the trial court failed to address all the issues raised by the Appellant in her pleadings is manifestly unfounded, because the trial court considered all the Appellant’s issues, as clearly seen in its detailed ruling.
25. On the whole, this Court does not find any justification on the test of *Mbogo v. Shah* (1968) EA 93, for the appellate interference with the exercise of discretion of a trial court, to depart from the findings of the trial court.

Orders

26. Accordingly, for the reasons set out above, the Court finds that the Appellant’s appeal is without merit and it is dismissed.
27. The appellant shall pay the costs of the Appeal to the Respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mwirigi Kaburu & CO. Advocates for the Appellant.



Muchomba Law & Co. Advocates for the Respondent.

