



REPUBLIC OF KENYA



**Githaiga v Muituma (Civil Appeal 627 of 2016)  
[2023] KEHC 3785 (KLR) (Civ) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3785 (KLR)

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

**CIVIL**

**CIVIL APPEAL 627 OF 2016**

**JN MULWA, J**

**MAY 2, 2023**

**BETWEEN**

**DANIEL WAGURA GITHAIGA ..... APPELLANT**

**AND**

**THOMAS KABUI MUITUMA ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order of the Chief Magistrate's Court at Nairobi in CMCC No. 4376 of 2015 delivered by Hon. E. Wanjala (SRM) on 22<sup>nd</sup> September 2016)*

**JUDGMENT**

1. Vide a Complaint dated March 16, 2015, the Respondent instituted Milimani CMCC No. 4376 of 2015 against the Appellant claiming special damages in the sum of Kshs. 524,820/- plus interest thereon and costs of the suit. The claim arose from a road accident which occurred on August 18, 2012 along Koinange Street near Kenyatta Avenue Junction. It was filed under the principle of subrogation on behalf of the Respondent's insurer, UAP Insurance Company Limited, who covered the expenses for repairing his motor vehicle following the accident.
2. The Appellant failed to enter appearance and/or file a Defence which led to the entry of judgment in default of appearance by the lower court on 8<sup>th</sup> December 2015. The Respondent extracted the Decree and instructed Fantasy Auctioneers to commence execution against the Appellant for a sum of Kshs. 648, 251.64. Upon being served with the Warrants of Attachment, the Appellant filed in the lower court an application dated 23<sup>rd</sup> June 2016 seeking for inter alia the setting aside of the default judgment entered in favour of the Respondent on December 8, 2015.
3. Upon hearing the application, the lower court, in a Ruling delivered on September 22, 2016, found that the Appellant was duly served with the summons to enter appearance and thus dismissed the



application. Aggrieved by the said decision, the Appellant filed the instant appeal on the following five (5) broad grounds

1. That the Honourable Magistrate erred in law and in fact in failing to consider the Appellant's motor vehicle was insured by Pacis Insurance Company who was forwarded the pleadings served on the Appellant but failed to appoint an advocate to enter appearance or file a defence on behalf of the Appellant as required by the terms of the Insurance Policy issued to the Appellant by Pacis Insurance Company.
  2. That the Honourable Magistrate erred in law and in fact by failing to address her mind to the fact that the appellant has a right to a fair hearing as enshrined in article 50 of *the Constitution*.
  3. That the Honourable Magistrate erred in law and in fact by failing to address her mind to section 1A (1) of the *Civil Procedure Act* which provides that the overriding objective of the act and the rules made there under is to facilitate just, expeditious, proportionate and affordable resolution of the civil disputes governed by the act.
  4. That the Honourable court erred in law and in fact in failing to consider the Court of Appeal case of *Adiel Mureithi Philip v Thomas Maingi* (2016) in which the court examined the court record and found nothing to suggest that the applicant was trying or previously tried to undermine or delay the expeditious and just determination of the appeal.
  5. That the Honourable Magistrate erred in law and in fact in failing to consider the fact the Appellant is a taxi operator based in Lang'ata Shopping Centre with little income hence executing the proceedings will paralyze his operations.
4. The appeal was canvassed through written submissions. The only issue for determination is whether the trial court erred by declining to set aside the default judgment that was entered against the Appellant.
  5. There is no dispute that the Appellant was duly served with Summons to enter appearance and the Plaintiff by the Respondent. In his own admission, the Appellant states that he was duly served with the same in October 2015 and upon receipt of the documents, he proceeded to Equity Insurance Brokers at Nairobi West who assured him that the matter would be handled on his behalf by Pacific Insurance Company Limited who had insured his motor vehicle. To that end, the court finds that the default judgment was regularly entered. However, this alone is not enough reason to decline to set aside such a judgment. The Court of Appeal in *James Kanyिता Nderitu & Another v Marios Philotas Ghikes & Another* [2016] eKLR, laid down the factors to be considered by stating:

“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). [Emphasis mine]

6. The Appellant blamed the Insurance Company for failing to appoint an advocate to enter appearance and/or file a defence on his behalf and urges that the inadvertent omission by the Insurance Company should not be visited upon him. He argued that had he been notified in good time that the said Insurance Company would not be defending his interest in the suit, he would have appointed his own advocate. The court notes that the Appellant did not exhibit any proof that he handed over the summons to enter appearance to his insurer as alleged. Further, the court agrees with the Respondent that the arrangements between the Appellant and unknown third parties who are not part of the suit cannot be deemed as sufficient cause for failing to file defence within the prescribed timelines. Even if it were true, the Appellant has not shown whether he made any follow-ups thereafter.
7. The Appellant also argued that he has a good defence to the claim that raises triable issues and ought to be given a chance to ventilate his case on merits. However, just like the trial court, this court finds that no draft defence was exhibited to enable the trial court assess whether it raises triable issues or is a sham. That being the case, the court finds that there was absolutely no basis for the trial court to set aside the default judgment entered against the Appellant.
8. Consequently, the court finds that the appeal lacks merit and dismisses it with costs to the Respondent.
9. Orders accordingly.

**DATED, DELIVERED AND SIGNED IN NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2023.**

**JANET MULWA**

**JUDGE**

