



**Nyang'wara & another v Ogutu (Civil Appeal 217 of 2021)
[2023] KEHC 17305 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 217 OF 2021**

**OA SEWE, J
MAY 10, 2023**

BETWEEN

PETER ORERO NYANG'WARA 1ST APPELLANT

JULIUS MWITI RUKUNGU 2ND APPELLANT

AND

KENNETH OWINO OGUTU RESPONDENT

*(Being an Appeal from the Ruling and Orders of Hon. C.N. Ndegwa SPM,
delivered on the 18th October, 2021 in Mombasa CMCC No. 2387 of 2018)*

JUDGMENT

- (1) The appellants were the defendants in Mombasa CMCC No. 2387 of 2018 in which the respondent, Kenneth Owino Ogutu, had claimed general and special damages, interest and costs, in respect of injuries sustained while lawfully travelling aboard the 1st appellant's Motor Vehicle Registration No. KCA 749Y from Bamburi to Mwandoni. The respondent had alleged negligence on the part of the 2nd appellant, who was then in the employ of the 1st appellant as a driver.
2. The record of the lower court further shows that interlocutory judgment was entered on July 29, 2020 in default of appearance and defence; and that the matter proceeded to formal proof, whereupon final judgment was entered in favour of the respondent on September 16, 2020. The respondent was accordingly awarded general damages in the sum of Kshs. 300,000/= together with special damages of Kshs. 27,000/= plus costs and interest. Thereafter, the respondent applied for execution of his decree by way of attachment and sale. The process culminated in the attachment and sale of the subject motor vehicle, Registration No. KCA 949Y on April 6, 2021.
3. Upon attachment being levied, the appellants filed a notice of motion dated March 24, 2021 seeking, *inter alia*, the release of the attached motor vehicle as well as the setting aside of the default judgment



dated July 29, 2019 together with all the consequential orders emanating therefrom. That application was the subject of the impugned ruling, dated October 18, 2021. The learned magistrate was not convinced as to the merits of the defendant's arguments and therefore took the view that:

“...the draft defence consists of bare denials which do not raise any triable issues. In some instances, the 1st defendant for example denies that he is the owner of the vehicle while at the same time deponing in the supporting affidavit that he is the owner. Such is not the kind of defence that raises triable issues.

Prayer 3 has already been overtaken by events because the bus has already been sold in execution of the decree. For prayer 4, no useful purpose would be served by setting aside the judgment when there are no triable issues to go for trial. The same applies to prayer 5.

In conclusion therefore, it is my finding that the Defendants application dated 25/3/2021 has no merit. I accordingly dismiss it with costs to the plaintiff...”

4. Being aggrieved by that decision, the appellant filed the instant appeal on November 16, 2021, on the grounds that:
 - (a) The learned magistrate erred in law and in fact in holding that no attempt was made to cross-examine the Process Server who effected service of Summons whereas Summons were served by way of registered post to a wrong postal address.
 - (b) The learned magistrate erred in law and in fact in holding that service of Summons on record is conclusive and that the judgment on record was regular.
 - (c) The learned magistrate erred in law and in fact in holding that the draft Defence did not raise any triable issues.
 - (d) The learned magistrate erred in law and fact in holding Prayers 3, 4 and 5 had been overtaken by events and hence could not issue.
 - (e) The learned magistrate erred in law and in fact in dismissing the appellants' application with costs.
5. Thus, the appellants prayed that the appeal be allowed with costs and that the ruling of Senior Principal Magistrate in CMCC No. 2387 of 2018 delivered on October 18, 2021 be set aside.
6. The appeal was canvassed by way of written submissions, pursuant to the Court's directions dated June 23, 2022. Accordingly, learned counsel for the appellants, Mr. Omwenga, filed his written submissions on July 20, 2022, urging the Court to allow the appeal. He reiterated the appellants' assertion that summons to enter appearance was not served as required by law. He pointed out that the 1st appellant denied that the address, P.O. Box 2384-80100, upon which the summons was served, belongs to him. Counsel made reference to the 1st appellant's averments at pages 70-74 of the Record of Appeal and urged the Court to find that service was not properly effected.
7. On that account counsel submitted that the default judgment was plainly irregular and ought to be set aside as of right. He relied on *Southern Credit Banking Corporation v Jonah Stephen Ng'ang'a* [2006] eKLR; *Fidelity Bank Limited v Owen Amos Ndungu & another*, HCCC No. 241 of 1998 and *John Sakaja v Caleb Kositany* [2008] eKLR to support his submissions and added that, service having been effected via registered post, it would have been inappropriate to have the process server summoned for purposes of cross-examination.



8. In support of the 3rd Ground of Appeal, Mr. Omwenga made reference to *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR for the proposition that a triable issue is not necessarily one that must succeed. He therefore submitted that the draft defence, having raised a question as to whether the suit motor vehicle belonged to the 1st appellant, raised a plausible defence worth proceeding to full trial for. In the same vein, counsel submitted that, since there was stay of execution pending the hearing and determination of the application, the purported sale of the suit motor vehicle was not genuine and ought not to be believed in the absence of a Certificate of Sale. He thus urged that the appeal be allowed with costs.
9. On behalf of the respondent, written submissions were filed herein by Ms. Mango on August 31, 2022. She relied on section 73 of the *Traffic Act*, chapter 403 of the Laws of Kenya as the legal basis for the address that was used to serve process on the 1st appellant. She pointed out that the 1st appellant did not refute the contents of the information as given in the Police Abstract. Counsel also relied on *Shadrack Arap Boiywo v Bodi Bach* [1987] eKLR as to the presumption of service pursuant to the process server's affidavit. According to her the learned magistrate committed no error in relying on the same authority.
10. Ms. Mango further defended the decision of the learned magistrate and reiterated the respondent's stance that the draft defence relied on by the appellants did not raise any triable issue; and added that a Certificate of Sale was in fact exhibited at pages 83-87 of the further replying affidavit to demonstrate that the subject motor vehicle was sold to one Abdulkarim Adan Hirbo on March 27, 2021. She therefore urged the Court to find that the learned magistrate did not err at all in dismissing the application dated March 24, 2021 with costs.
11. This being a first appeal, it is the duty of this Court to re-evaluate the evidence placed before the lower court and make its own conclusions thereon. (see *Selle & Another v Associated Motor Boat Co. Ltd & others* [1968] EA 123). Accordingly, I have carefully considered the impugned ruling from the backdrop of the application dated 24th March 2021 and its Supporting Affidavit, as well as the submissions filed in that regard by learned counsel. I have likewise given due consideration to the Grounds of Appeal set out in the appellants' Memorandum of Appeal dated November 15, 2021. The single issue arising therefrom for determination is whether the learned magistrate erred in dismissing the application dated March 24, 2021.
12. The appellants attacked the ruling on two fronts; firstly, on service of Summons to Enter Appearance; and secondly, on whether the draft defence raised a triable issue. I note that the 1st appellant endeavoured to demonstrate that the address used for service was not his; and therefore that service was not properly effected as by law required. It is trite that where service is questionable, the default judgment is to be treated as irregular and therefore amenable to setting aside ex debito justitiae. The distinction was aptly explained in *Fidelity Commercial Bank Ltd vs. Owen Amos Ndung'u & another*, HCCC No. 241 of 1998 (UR), thus:

“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right.”



13. The Court of Appeal further expounded on the matter in *James Kanyitta Nderitu & another v Marios Philotas Gbikas & another* [2016] eKLR, as follows:

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 others."

14. The Court further stated that:

"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).

15. With the foregoing in mind, I have looked at the rival positions taken by the parties. On the one hand the respondent contends that process was served by registered post to the address given as per the Police Abstract; while on the other hand the 1st appellant availed evidence to show that the address was not his. In this regard, reliance was placed by the respondent on section 73(1) of the *Traffic Act*, which stipulates that:

"If in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby injury or damage is cause to any person, vehicle, dog or cattle, the driver of the motor vehicle shall stop, and give his name and address and also the name and address of the owner and identification marks of the vehicle and the owner shall report the accident at a police station within 24 hours."

16. It is plain that in the Police Abstract presented before the lower court, the names of the two appellants are shown and the address given as P.O. Box 2384-80100 Mombasa. Presumably, the information was given by the 2nd appellant pursuant to section 73(1) of the *Traffic Act* aforementioned and was therefore properly used by the Police in the Abstract. Moreover, not much turns on the assertion by



the appellants that the subject motor vehicle was captured in the Police Abstract as Reg. No. KCE 749Y, granted that in the abstract filed with the Plaintiff the registration number of the motor vehicle is correctly reflected as KCA 749Y. Indeed, the respondent relied on the Motor Vehicle Copy of Records issued by NTSA in which the registration number was given as KCA 749Y.

17. In the circumstances, the learned magistrate cannot be faulted for concluding that service was duly effected and that the default judgment was regularly entered. In the same vein, it is now trite that it was within the discretion of the lower court to determine whether or not the defence raised triable issues; and therefore that an appellate court such as this ought not to interfere with that exercise of discretion unless it is plain that it was done injudiciously.
18. The guiding principles were well explicated in by the Court of Appeal in *Mbogo v Shab* [1968] EA 93 the Court of Appeal held thus:

“...it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at the wrong conclusion.”

19. Likewise, in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA the Court of Appeal held:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

20. In the result, I find no merit in this appeal. The same is hereby dismissed with costs.

21. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF MAY 2023

OLGA SEWE

JUDGE

