



Nyangweso v Omariba & another (Suing as Legal Representative of the Estate of Gift Omariba Deceased) (Civil Appeal E062 of 2022) [2023] KEHC 18493 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E062 OF 2022
PM MULWA, J
JUNE 15, 2023**

BETWEEN

LUCAS NYAMBEGERA NYANGWESO APPELLANT

AND

PURITY MUKO MUNENE KITHAKA 1ST RESPONDENT

NICHOLAS ONDIEKI OMARIBA 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF GIFT OMARIBA
DECEASED**

(Being an appeal from the ruling of the Principal Magistrate Hon. G. Omodho delivered on 21st October 2021 in Kiambu CMCC No. 261 of 2019)

JUDGMENT

1. Vide a plaint dated June 7, 2019 the Respondent sued the Appellant seeking damages under the [Law Reform Act](#) and Fatal Accident Act, costs of the suit and interest for injuries sustained on September 30, 2018 along Ruiru-Ruaka Road when the appellant managed and/or controlled motor vehicle xxxx that it lost control and veered off into the pedestrian path knocking down the deceased who sustained serious injuries.
2. The trial court record shows the appellant was served with the plaint and summons to enter an appearance. He only entered appearance but did not file a defence leading to the entry of an interlocutory judgment. The suit proceeded for formal proof. The trial court's only issue for determination was the assessment of damages.
3. The trial court in its judgment of October 27, 2021 found the appellant 100% liable after entering interlocutory judgment and awarded the following damages:
 - a. Loss of dependency Kshs 1,500,000/=



- b. Pain and suffering Kshs 30,000/=
 - c. Special damages Kshs 65,750/=
 - d. Loss of expectation of life Kshs 100,000/=
 - e. Costs and interest of the suit.
4. In the execution of the decree of Kshs 1,695,750/= by the respondent through Nairobi Connection Services the Motor Vehicle xxxx was attached, a move that prompted the appellant to file an application under certificate of urgency dated February 10, 2022 seeking orders seeking to set aside the judgment and the ex parte proceedings. His argument was that counsel instructed to defend the matter by the insurance company failed to execute his duty and urged the court to allow him to defend the suit as he was condemned unheard.
 5. In allowing the application the trial magistrate directed the appellant to file the defence within 14 days and deposit the entire decretal amount in court as security within 30 days, failure to which the respondent to proceed with the execution of the decree.
 6. Aggrieved by the decision of the trial magistrate the appellant brought the instant appeal by the Memorandum of Appeal dated April 5, 2022 and filed on the even date. The grounds of the appeal are that:
 - i. The learned magistrate erred in law and fact by granting the appellant leave to file and serve a defence on condition that the defendant deposits the full decretal amount as security within 30 days.’
 - ii. The learned trial magistrate erred in law and fact by conditioning the Appellant’s defence on depositing the decretal sum that the honourable magistrate had set aside when she granted leave to defend.
 - iii. The trial magistrate erred in law and fact by assuming that the decree of January 24, 2022 was still to be enforced when the appellant had been allowed to defend the suit.
 - iv. The learned trial magistrate erred in law and in fact by allowing the appellant to defend himself and further imposed conditions that effectually curtail that right hence condemning the appellant without being heard.
 - v. The learned magistrate erred in law and in fact by conditioning the appellant’s defence to deposit security based on a decretal sum contrary to the law and common practice that only provide for throw-away costs.
 - vi. The learned magistrate erred in law and in fact as she contradicted herself by granting leave to defend which was tantamount to setting aside the judgment and conditioning the defence to deposit of a decretal sum that had been set aside.
 - vii. The learned trial magistrate erred in law and in fact by exercising her discretion wrongly by failing to grant the appellant unconditional leave to defend the suit having found the defence raises triable issues.

The appellant pleaded with the court to allow the appeal with costs and grant leave to the appellant to defend the suit unconditionally.

7. The appeal was heard through written submissions pursuant to the court’s direction of June 16, 2022.



Appellant's submissions

8. The Appellant condensed all the grounds of the appeal into one ground and submitted the trial magistrate exercised her discretion wrongly in conditioning the circumstances under which the defendant was to be filed.
9. Regarding Order 10 Rule 11, counsel submits that the court has the discretion to set aside an interlocutory judgment. The rule provides:

' 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.'
10. Further it was submitted that the trial magistrate acted on wrong principles as she could only stay judgment pending appeal but not allow the appellant to defend the suit. The orders of security occasioned confusion.
11. Counsel submitted that the trial magistrate having found the defence raised triable issues she was bound to allow the appellant unconditionally defend the suit. The decretal sum was extinguished with the judgment that was set aside. Imposing conditions of setting aside the judgment is unconstitutional, and irregular as it violates the appellant's rights to a fair hearing.
12. Counsel further submitted that the trial court misapplied the principles of Order 42 Rule 6 of the [Civil Procedure Rules](#) that deal with a stay of execution to determine an application under Order 10 Rule 11, thus arriving at a wrong conclusion.
13. The court was urged to allow the appeal.

Respondent submissions

14. In supporting the trial court decision of 30th February 2022, it was submitted for the respondent that the court has unfettered jurisdiction to set aside ex parte judgment. According to counsel, the conditions set were to caution against the appellant's conduct of obstructing and delaying justice because despite service of summons to enter appearance the appellant filed an appearance but failed to file a defence. The conditions set were fair and proper. The case cited was [Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede \(1982-1988\) KAR](#) page 1036 where the Court of Appeal held as follows - 'the court has unlimited discretion to set aside or vary a judgment entered in default of appearance or defence upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.'
15. The Respondent submits that it is entitled to the fruits of its judgment after obtaining a regular judgment. The conditions of the trial court were to ensure the failure of the appellant to comply with the timelines would not prejudice the respondent. That in any case the decretal sum is to be deposited into court and thus the appellant will suffer no prejudice as he will get a refund if he succeeds in the suit.
16. In conclusion counsel submits the conditions set by the trial court are a measure to strike a balance between the rights of the appellant and the respondent

Analysis and determination

17. I have given due consideration in light of the appeal filed and the submissions. The issue for determination is whether the trial magistrate properly exercised her discretion in making an order that the appellant is at liberty to defend the suit on condition he deposits the decretal sum in court.



18. From the record the trial magistrate found the defence as filed raised triable issues and proceeded to set aside the ex-parte judgment on the condition the appellant deposits the decretal sum in court as a condition to caution the miscarriage of justice. It is trite law that the court has the discretion to set aside ex parte judgements and impose conditions that it deems fit and proper, however, this decision should be exercised judiciously.
19. The trial court in its ruling of March 30, 2022, found the defence raised triable issues, that require the setting aside of the ex-parte judgment it was improper for the trial magistrate to proceed and set a condition of depositing the decretal sum for setting aside the ex-parte judgment. The decretal sum in the trial court is in contention and there the trial magistrate erred in issuing a condition of depositing the decretal amount. The trial court ought to have set aside the ex-parte judgment and ordered that the appellant pay throwaway costs.
20. I hold the same opinion as in the case of *Pilot Technical Services Ltd v Amenan Electrical Services Ltd [2011] eKLR* where the court stated: 'The trial magistrate allowed an application to set aside the ex parte judgment. Once this order is given, the status of a civil suit is to go back to the beginning as if there never was a trial that had been taken or heard. This means the matter begins de novo or from the start. The issue of a decretal sum does not, therefore, arise as the case has to be proved afresh. This sum may change. I wish further to point out that the effect of setting aside an ex parte judgment is to be functus officio on the issue of any decree that may have arisen within the ex parte judgment.'
21. In the circumstances therefore, I find the trial magistrate erred in exercising her discretion by ordering the appellant to pay the decretal sum as a condition for setting aside ex-parte judgment.
22. In *Mbogoh & Another Vs Shah [1968] EA 93* it was stated thus: 'I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion.'
23. In the circumstances, this court finds that the trial magistrate erred in exercising her discretion. I proceed to interfere with the decision of the trial magistrate to set aside orders (b) and (c) the ruling of March 30, 2022.
24. The upshot is that the appeal succeeds. The order that commends itself is the appellant is granted leave to defend the suit.
25. Costs follow the event and therefore the costs of the appeal are awarded to the appellant.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU ON THIS 15TH DAY OF JUNE 2023.

.....

P.M. MULWA

JUDGE

In the presence of:

Kinyua – Court Assistant

Mr. Manyara - for the appellant

Ms. Kinyanjui h/b for Mr. Kinyua - for the respondent

