



Francis & another v Kanyarati & another (Suing as the Legal Representatives of the Late John Kanuthi Kinyati) (Civil Appeal 01 of 2020) [2023] KEHC 21167 (KLR) (18 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL 01 OF 2020
SN MUTUKU, J
JULY 18, 2023**

BETWEEN

KIMANI FRANCIS 1ST APPELLANT

HENRY NJENGA KINYUA 2ND APPELLANT

AND

JOHN KANYARATI 1ST RESPONDENT

JOYCE WANGUI THIGA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE LATE JOHN KANUTHI
KINYATI**

(Being an appeal from the ruling of the Honorable court delivered on 9/1/2020 at the principal magistrate court at Ngong by Honorable Ruguru N. Principal Magistrate)

JUDGMENT

Introduction

1. Joyce Wangui Thiga & John Kanyarati (Suing as the legal representatives of the late John Kanuthi Kinyati), the Respondents herein, sued the Appellants in the lower court seeking special damages of Kshs 45,700, general damages both under the *Fatal Accidents Act* and the *Law Reform Act*, interest and costs of the suit. The Appellants failed to enter appearance after service, judgment was entered and the matter proceeded for formal proof. The Respondent secured an ex parte judgement in her favour on 31st July, 2019 in the sum of Kshs 2, 342,198.67/-.
2. This turn of events aggrieved Appellants. They filed an application dated 30th September, 2019 seeking various reliefs including stay of the ex parte judgment and dismissal of the declaratory suit filed against them. That application was dismissed via ruling dated 9th January, 2020. It is that ruling that is the subject of this appeal.



Memorandum of Appeal

3. The Appellants have raised the following grounds: -
 - i. The Learned Magistrate erred in law and fact by dismissing the Appellants Application dated 30th September, 2019 without the Application being heard on its merit. The Appellant was condemned without being heard.
 - ii. The Learned Magistrate erred in law and fact in dismissing the Appellants' Application dated 30th September, 2019 and not considering the Appellant's evidence that they were not served with the summons to enter appearance.
 - iii. The Learned Magistrate erred law and fact by dismissing Appellants' Application and not considering Defendants'/Appellants' Defence that they had triable issues that could only be addressed during the hearing of the main suit.
 - iv. The Learned Magistrate erred in law and fact by failing to accord the Appellants the right to be heard and a place in the judgement table. The Appellants/Defendants were condemned without being heard.
4. They urged that the appeal be allowed and the orders of 9/1/2020 be varied and/or set aside; that the exparte judgement of 31/1/2019 and subsequent orders be set aside; that they be allowed to file their memorandum of appearance and defence and that the costs of the appeal be awarded to them.
5. The appeal was canvassed by way of written submissions.

Submissions.

6. The Appellants filed their submissions dated 17th September, 2021 in which they submitted that the lower court allowed the application for substituted service without the Respondent showing the efforts she went through to serve the Appellants as required by Order 5 Rule 7 of the Civil Procedure Rules.
7. It is the Appellants' case that their insurers only learnt about the suit when they were served with the letter demanding satisfaction of the judgement dated 22/8/2019; that a declaratory suit being Ngong CMCC 163 of 2019 was filed as an execution of the lower court judgement and that they then filed an application to set aside the exparte judgment which was within their right but that application was dismissed. The Appellants relied on the court of appeal case of James Kanyitta Nderitu & another v Marios Philotas Gbikas & another [2016] eKLR where the court extensively addressed the issue of setting aside of default judgements.
8. It is their argument that they were condemned unheard when their application to set aside the exparte judgement was dismissed contrary to Article 50 of the Constitution. They cited the Supreme Court of India case of Sangram Singh v Election Tribunal Koteh AIR 1955 SC 664 at 711 as quoted in James Kanyitta Nderitu & another v Marios Philotas Gbikas & another [2016] eKLR where the court stated that:

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”



9. They stated that their defence raised triable issues and was not a mere denial as described by the lower court. They further stated that it was an oversight on their part for failing to attach the draft defense to their application and instead attached it to their supplementary affidavit. They argued that the mistake of counsel should not be meted out on the Appellants.
10. On the issue of the defence of merit they relied on the Court of Appeal case of *Muthaiga Road Trust Company Ltd v Five Continents Stationers Ltd & 2 others* [2003]eKLR where the court stated that:

“..The principles to be followed in an application to set aside judgment were set out in *Patel VEA Cargo Handling Services Ltd* [1974] EA 75 at 76 where Duffus, J said:-

“I also agree with this broad statement of the principles to be followed. The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the Court will usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J, put it, “ a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”
11. On the issue of costs, they submitted that costs follow the event as provided under section 27(1) of the *Civil Procedure Act*.
12. The Respondents filed their submissions dated 15th January, 2021. On the issue as to whether there Appeal is competent, they submitted that the appeal should be dismissed as the consent of 19/10/2019 to the effect that the Appellants were to provide security in the form of bank guarantee to the tune of Kshs 2,152,755 has not been complied with; that the Appellants failed to file a record of appeal which failure renders the appeal incompetent. They cited *Bwana Mohammed Bwana v Silvano Buko Bonanya & 2 others* [2015] eKLR where the Supreme Court quoted *Law Society of Kenya v Centre for Human Rights and Democracy & 12 others*, SUP No. 4 of 2014, where that Court stated that:

“ The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower court, without which the appellate court would not be able to determine the appeal before it”
13. On whether the trial magistrate erred in dismissing the Appellants’ application dated 30/9/2019, the Respondents argued that they served the Appellants with the pleadings and summons to enter appearance through substituted service; that the Appellants failed to enter appearance and file defence; that they sought judgment in default which judgment was delivered on 31/7/2019 and that they issued a notification of judgement to the Appellants’ insurers vide a letter dated 22/8/2019.
14. They submitted that when the Appellants filed their application the lower court directed that submissions be filed on 30/10/2019, but the Appellants did not comply and that on 9/1/2020 the application was dismissed; that the Appellants have a history of ignoring rules of procedure and orders issued by both the trial court and this Honourable court. In support of this argument, they relied on the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] eKLR and *Gulabchand Popatlal Shah & another* Civil Application No 39 of 1990 (UR) to emphasize the importance of obeying court orders and directions.
15. They also cited Order 10 Rule 4(1) and 9 of the *Civil Procedure Rules* on the action to be taken when a party fails to enter appearance and or file defence after being served with summons. They argued



that the trial court exercised its discretion judiciously and the appellate court need not interfere with the trial court's discretion. They relied on *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR where that court stated that:

“In *Edward Sargent v Chotabha Jhaverbhat Patel* [1949] 16 EACA 63, it was held that an appeal does lie to an Appellate Court against an order made in the exercise of judicial discretion, but the Appeal Court will interfere only if it be shown that the discretion was exercised injudiciously. The principles that guide the appellate court in the exercise of this mandate were set by the predecessor of the Court in *Mbogo & Another v Shah* [1968] EA 93, where it was held at page 96 that: -

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice”

Analysis and Determination

16. I have taken time to read the record of the lower court. I have noted the reasons the trial court advanced in dismissing the application by the Appellants to stay the execution of the judgment and proceedings in the declaratory suit. The court noted that the Appellants did not contest service of summons but only contested failure to be served with notice of judgment. Order 5 Rule 17 (1) of *Civil Procedure Rules* states that:

(1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the courthouse, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

17. The above Rule gives the court wide discretion to determine whether or not to allow an applicant to serve by way of substituted service. The law is clear that an appellate court can only interfere with the discretion of the lower court in the following scenarios:

- a. where the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion.
- b. Where the appellate court it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice

18. The Appellants ought to have addressed their minds to this requirement and demonstrated to this court that the trial magistrate fell into error by exercising her discretion wrongly as shown above.



19. The trial court applied the law correctly in her ruling. I have noted that guided by the Court of Appeal decision in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, the trial court made her determination and invoked her discretion to find that the application by the Appellant lacked merit. In the above Court of Appeal decision, the court made a distinction between a regularly entered default judgment and an irregularly entered one.
20. In its reasoning in the above cited authority, the Court of Appeal in that case stated 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.
21. In contrast to a regular default judgment, the Court of Appeal stated that in an irregular default judgment:
- “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.”
22. The trial court found the application without merit and dismissed it. I find no fault in that exercise of discretion. The Appellants have not demonstrated where the trial court went wrong in exercise of her discretion.
23. In *Patel v E.A Cargo Handling Services Ltd* (1974) EA 75, the court held that:
- “There are no limits or restrictions on the Judge’s discretion to set aside or vary an *ex-parte* judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the Rules.”
24. In our instant case it is not in dispute that the summons to enter appearance were served through substituted service. The default judgement entered therefore was a regular one which in turn gave the trial court the discretion to set it aside or not. The trial court found that the Defence did not raise any



triable issues and that it was a mere denial. The Appellants have not attached the draft Defence in their record of appeal to determine whether it raises any triable issues. The lower court having considered all the factors found in its discretion to dismiss the Appellant's application.

25. In *Shah v Mbogo & another* [1967] EA It was held that:

“The court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should therefore be refused.”

26. I have noted from the record of the trial court that on 30/10/2019 parties agreed to canvass the application by way of written submissions and took a mention date on 20/11/2019 to confirm filing of submissions. I have also noted that the lower court in its ruling stated that, “I have carefully considered the Applications, response thereto as well as rival parties' submissions.” To my mind this is a clear indication that the trial court considered the issues raised by both parties and therefore, it is not true that the Appellants were condemned unheard as regards the subject application. The lower court in its discretion considered the case for both parties and dismissed the application.

27. Should this court interfere with that discretion? In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA it was held that:

“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.”

28. I find, as stated in the above case that it has not been demonstrated that the trial magistrate misdirected herself in law; that she misapprehended the facts; that she took account of considerations of which she should not have taken account; that she failed to take account of considerations of which she should have taken account, and that her decision, albeit a discretionary one, is plainly wrong.

29. Consequently, I find no merit in this appeal. The same is hereby dismissed with costs to the Respondents.

30. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED ON THIS 18TH JULY, 2023.

S. N. MUTUKU

JUDGE

