



**Kenya Orient Insurance Limited v Khalfan (Civil Appeal
E035 of 2021) [2023] KEHC 20375 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E035 OF 2021**

**OA SEWE, J
JULY 10, 2023**

BETWEEN

KENYA ORIENT INSURANCE LIMITED APPELLANT

AND

MOHAMED SALIM KHALFAN RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Lesootia Saitabau, Principal Magistrate, delivered on 12th March 2021 in Mombasa CMCC No. 9 of 2020)

JUDGMENT

1. This is an interlocutory appeal arising from the ruling and orders made by Hon. Lesootia Saitabau, Principal Magistrate, in Mombasa Chief Magistrates Civil Case No 9 of 2020: Mohamed Salim Khalfan v Kenya Orient Insurance Limited. The brief background of the matter is that the respondent obtained judgment in the sum of Kshs 5,000,000/= in Mombasa Chief Magistrates Civil Case No2610 of 2012 in respect of injuries suffered by him in a road traffic accident. The respondent thereafter filed a declaratory suit against the appellant on the ground that the subject motor vehicle was, at the material time, insured by the appellant. The declaratory suit, namely, Mombasa CMCC No 9 of 2020, was therefore filed pursuant to the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya.
2. The record of the lower court shows that a default judgment was entered in the declaratory suit on January 28, 2020 after the appellant failed to file a Memorandum of Appearance or Defence; and that notice thereof was duly given to the appellant. The record further shows that the respondent proceeded to apply for execution and lifted Warrants of Attachment and Sale in execution of the Decree against the appellant. The Application for Execution was made on 12th February 2020. It appears that this is the step that prompted the appellant to file the Notice of Motion dated 9th March 2020, by which it prayed for, inter alia, the setting aside of the *ex parte* judgment entered by the lower court on January 28, 2020.



3. The application was heard and determined by Hon. Lesootia, PM, on March 12, 2021. He took the view that:

“...the defendant was aware of the suit herein but for reasons known to them they ignored the proceedings only to be woken up upon execution by the plaintiff. Finally, I give consideration to the fact that the defendant was given an opportunity to be heard and having slept on his right, I hold the view that allowing the application will highly prejudice the plaintiff who is equally entitled to expeditious determination of his matter.”

4. Accordingly, the learned magistrate dismissed the application dated March 9, 2020 with costs; thereby setting the stage for this appeal. In its Memorandum of Appeal, filed on March 17, 2021 through the firm of M/s Jengo Associates, the appellant contended that:

- (a) The learned magistrate erred in law and in fact in failing to hold that the proposed Defence as drawn disclosed various triable issues.
- (b) The learned magistrate erred in law and in fact and disregarded precedent in failing to grant the appellant leave to defend.
- (c) The learned trial magistrate erred in law and in fact in holding that the respondent had properly served summons and Plaint and in disregarding the provisions of Order 5 Rule 3 of the Civil Procedure Rules.
- (d) The magistrate erred in law and in fact in holding that the Notice of Judgment and the 10 days’ notice before execution was an indication that the Defence did not raise any triable issues and in failing to consider the service of a Statutory Notice under Section 5 and 10 of the Insurance (Motor Vehicles Third Party Risks) Act.
- (e) The learned magistrate erred in law and in fact in holding that the defence that the sum sought to be executed is beyond the statutory limit does not hold water.

5. Consequently, the appellant prayed that the ruling and order of the learned magistrate dismissing the Notice of Motion dated 9th March 2020 be set aside and be replaced with an order allowing the application; and that the costs of the application in the subordinate court and this appeal be awarded to the appellant.

6. The appeal was urged by way of written submissions pursuant to the directions given herein on March 1, 2022. Ms. Julu for the appellant filed her written submissions on May 6, 2022, acknowledging that the ruling and orders appealed from were given in the exercise of the discretionary powers of the lower court. She accordingly referred to the applicable principles in such instances, as discussed in Baraka Apparels EPZ (K) Ltd v Rose Mbula Ojwang T/A Faida 2002 Caterers, CA No 280 of 2005. Counsel then discussed the provisions of Sections 5 and 10 of the Insurance (Motor Vehicles Third Party Risks) Act to demonstrate that the appellant’s proposed Defence raised the following triable issues:

- (a) Who was the insurer of the subject motor vehicle?
- (b) Which kind of cover if any had been issued?
- (c) Was a statutory notice served before filing the primary suit or 30 days after filing as per the Act?
- (d) Fraud
- (e) Capping of amounts payable by insurance companies at Kshs 3,000,000/=.



7. Ms. Julu then took the Court through several authorities to demonstrate that the five issues flagged by her are indeed triable issues. For instance, on the issue of the statutory limit of Kshs 3,000,000/=, counsel relied on Section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act* and the cases of *Justus Mutiga & 2 Others v Law Society of Kenya & another* [2018] eKLR and *Gateway Insurance Co. Ltd v Jamila Sulciman & another* [2018] eKLR to support her argument that it was a triable issue whether or not the judgment of the lower court, which is in excess of Kshs 3,000,000/=, is a valid judgment.
8. Counsel further impugned the ruling and orders of the lower court on the ground that the learned magistrate completely disregarded precedent in failing to grant unconditional leave to the appellant to defend the suit. She listed some of the binding decisions at page 7 of her written submissions and pointed out that, had the learned magistrate given consideration to the decisions, he would have been well guided in arriving at a fair decision in the matter. Thus, Ms. Julu prayed that the appeal be allowed and the orders prayed for by the appellant granted.
9. Mr Wachenje for the respondent filed his written submissions on May 4, 2022. He proposed the following issues for determination:
 - (a) Whether the appellant's draft Defence raised any triable issues;
 - (b) Whether Summons to Enter Appearance was properly served upon the appellant;
 - (c) Whether a 10-day Notice of Entry of Judgment was served on the appellant;
 - (d) Whether a Statutory Notice was served upon the insurer;
 - (e) Whether the firm of advocates had authority to file the appeal on behalf of the appellant.
10. Mr Wachenje took the posturing that the learned magistrate was correct in holding as he did, that the draft defence raised no triable issue because the appellant attempted to thereby raise factual issues through the backdoor, including the issue of service of the Statutory Notice and alleged forgery. In his view, the issues ought to have been raised in the primary suit. On the assertion that the decree was in excess of the statutory minimum, counsel was of the view that the appellant is at liberty to pay what, in their view, was statutorily allowed and let the rest be the subject of contention. Counsel relied on *Blue Sky EPZ v Natalia Polyakova & Another*, Nairobi High Court Civil Case 136 of 2006, and *Charles Mwavita Mwangome v Grace Anyango* [2014] eKLR to support his argument.
11. Mr Wachenje further submitted that service of Summons was duly effected; and therefore that it matters not that process was signed for by a person other than the principal officer of the appellant. In the same vein, he asserted that the Notice of Entry of Judgment was duly served on the appellant on 3rd February 2020; and therefore the learned magistrate was right in dismissing the application for setting aside judgment. The case of *Ben Otieno Owaga & 2 others v Eliakim Owalla & another*, Nakuru High Court Civil Case No 340 of 2012 was relied on to underscore the submission that justice is two-way; and therefore the interest of the respondent had to be taken into account as well. In respect of Ground 4 of the Memorandum of Appeal, Mr Wachenje submitted that the Statutory Notice was duly served via registered post and proof thereof presented in the primary suit, at page 28 of the Record of Appeal; and therefore that the appellant was at all times aware of the existence of the primary suit.
12. Lastly, Mr Wachenje submitted that no company resolution has been presented by the firm of advocates representing the appellant to show that they have been duly authorized under seal, and empowered by the Board to present this appeal. He relied on *Assia Pharmaceuticals v Nairobi Veterinary Centre*



Ltd, Nairobi (Milimani)HCCC No 391 of 2000 in urging the Court to strike out the appeal on that account.

13. 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). I likewise bear in mind the caution expressed in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA 898, 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 considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

14. Thus, the main issue before the lower court was whether the appellant had put forward a good case to warrant the setting aside of the default judgment. Allegations were made as to non-service of the Statutory Notice, the Summons to Enter Appearance and the 10-day Notice of Entry of Judgment. In addition, the appellant raised the issue as to whether the declaratory judgment against the appellant, which was in excess of Kshs 3,000,000/=, was valid. Accordingly, the only issue for determination in this appeal is whether the learned magistrate judiciously exercised its discretion in the circumstances. But before going into the merits of the appeal on these parameters, there is need to dispose of the technical issue raised by counsel for the respondent; namely, whether the appellant’s Board of Directors gave authority for the firm of Jengo & Associates to act for them in this appeal.
15. Mr Wachenje drew the attention of the Court to the email sent by one Catherine Kendi Kaburu (at page 211 of the Record of Appeal) by which instructions were given to the firm of Jengo & Associates to file an appeal from the ruling in Mombasa CMCC No 9 of 2020 as well as stay pending appeal. He argued that the email communication was insufficient; as the law requires that instructions from a limited liability company be given by way of a company resolution, firstly appointing the firm of advocates and secondly setting out the purpose and scope of that appointment. The case Asia Pharmaceuticals v Nairobi Veterinary Centre Ltd. Nairobi (*supra*) was relied on by Mr Wachenje, in which it was held:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect...As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

16. There is no gainsaying that the appellant is a limited liability company; and therefore is a separate legal entity capable of suing and being sued in its own right. It similarly has the right to appeal where it deems such action appropriate; and where such action is anticipated, the company ordinarily gives its



authority through its board of directors or the shareholders. The rationale for this was explicated in *Affordable Homes Africa Ltd v Henderson & 2 Others* [2004] eKLR, thus:

“... As an artificial person ... a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court...”

17. I however have no hesitation in rejecting the proposition by Mr Wachenje that whenever a limited liability company files an appeal, it must of necessity obtain the resolution of its board giving such instructions to its advocates. I say so because Order 4 Rule 1(4) of the *Civil Procedure Rules* which is the provision alluded to by Mr Wachenje, is specific to plaintiffs in first level suits as opposed to appeals. It provides:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

18. Secondly, the application in respect of which the impugned ruling was given was filed on behalf of the appellants by the firm of Jengo & Associates. Hence, the said firm was deemed to be the advocates of the appellant even on appeal and did not require a resolution from the Board of Directors to file the appeal. This is because Order 9 Rule 5 of the *Civil Procedure Rules* is explicit that:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

19. There is another reason why Mr Wachenje's technical point is untenable. In *Wanyiri Kiboro v Konabauthi Ltd* [2017] eKLR, the Court of Appeal expressed itself thus on the point:

“The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor* (1970) 1 EA 147. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

However, the principle enunciated in the *Bugerere* case has since been overruled by the Uganda Supreme court in the case of *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No 8 of 2000 where the Court endorsed the decision of the Court of Appeal that the decision in the *Bugerere* case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*: SCCA No1 of 1998. The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on



behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

20. I therefore find no merit in the technical objection by Mr Wachenje as to the competence of the appeal. On the merits of the appeal, since all the grounds of appeal revolve around the principles for setting aside a default judgment, the position taken in *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 is pertinent, namely, that:

“In law, the discretion that a Court of law has, in deciding whether or not to set aside an *ex parte* order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.”

21. Consequently, when faced with an application for setting aside a default judgment, the first consideration would be whether the default judgment is a regular judgment or an irregular one; a distinction well drawn in *Fidelity Commercial Bank Ltd v Owen Amos Ndung'u & another*, HCCC No 241 of 1998 (UR), by Njagi, J. (as he then was) 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.”

22. The aforesaid principle was restated thus by the Court of Appeal in *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR:

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.”

23. 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).

24. Indeed, it is noteworthy that the learned magistrate made reference to several authorities, including Court of Appeal decisions on the point, including *Tree Shade Motors Ltd v DT Dobie & Another* [1995-1998] 1 EA 324. Thus, in his ruling dated 12th March 2021, the learned magistrate found as a fact (at page 209 of the Record of Appeal) that the appellant was duly served with Summons to Enter Appearance as well as the Notice of Judgment. Accordingly, the learned magistrate was under obligation to go a step further and consider 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 had elapsed since the default judgment was entered; whether the intended defence raised triable issues; the respective prejudice each party was likely to suffer; whether on the whole it was in the interest of justice to set aside the default judgment, among other considerations.

25. Other than his conclusion that to set aside judgment would prejudice the respondent; and that

“...the claim that sum sought to be executed is beyond the statutory limit does not hold water...”,

the learned magistrate did not give sufficient attention to the draft Defence proposed by the appellant, which raised several triable issues, including allegations of fraud. In her written submissions, Ms. Julu flagged up the following issues in addition to fraud:

- (a) Who was the insurer of the subject motor vehicle?
- (b) Which kind of cover if any had been issued?
- (c) Whether a statutory notice was served before or after filing the primary suit?
- (d) Capping of amounts payable by insurance companies at Kshs 3,000,000/=.

26. Hence, even if the lower court was convinced that the default judgment was regular and that Summons to Enter Appearance was duly served, it was still obliged to pay attention to the issues raised in the Defence in exercising his discretion. Indeed, in *Philip Keipto Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende* (*supra*), that:

“...unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

27. In the premises, I am convinced that the learned magistrate failed to take into account critical factors that he ought to have taken into account in his ruling and thereby arrived at a decision that was plainly



wrong in the circumstances. I am guided by the position taken in *Banco Arabe v Bank of Uganda* [1999] 1 EA 22, that:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.”

28. In the result, I find merit in the appeal. The same is hereby allowed and orders granted as hereunder:
- (a) The ruling and order of the learned magistrate dismissing the Notice of Motion dated March 9, 2020 be and are hereby set aside and substituted with an order allowing the application;
 - (b) The *ex parte* judgment entered in the lower court matter on January 28, 2020 and all its consequential orders are hereby set aside and the appellant granted leave to defend the suit.
 - (c) A Defence be filed and served within 14 days from the date hereof.
 - (d) Each party to bear own costs of the subject application in the subordinate court and of this appeal.
29. Orders accordingly.

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

OLGA SEWE

JUDGE

