



**British American Insurance Co. (Kenya) Limited v Njambi (Civil Appeal
109 of 2015) [2023] KEHC 23848 (KLR) (Civ) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23848 (KLR)

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

CIVIL

CIVIL APPEAL 109 OF 2015

JN NJAGI, J

OCTOBER 19, 2023

BETWEEN

BRITISH AMERICAN INSURANCE CO. (KENYA) LIMITED APPELLANT

AND

DAVID NJOROGE NJAMBI RESPONDENT

*(Being an Appeal against the ruling of Hon.M. Chesang, Senior Resident Magistrate,
in Milimani CM's Court Case No.3371 of 2014 delivered on the 16/3/ 2015)*

JUDGMENT

1. The Appellant herein who was the Defendant at the lower court had filed an application dated 19th December 2014 before the said court wherein it was seeking for setting aside of an ex parte judgment entered against it on 5/12/2014 and for enlargement of time to file a defence out of time. The application was dismissed by the trial magistrate on grounds that the explanation for the delay was not satisfactory and that the draft defence did not raise triable issues.
2. The Appellant was aggrieved by the ruling and filed the present appeal. The grounds of appeal are that:
 1. The learned magistrate erred in law and in fact when she failed to appreciate that the respondent's claim was in the nature of general damages and therefore outside of the scope of Order 10 rule 4 of the Civil Procedure Rules
 2. The learned magistrate erred in law and in fact when she held that the claim filed by the respondent was a liquidated demand capable of entry of interlocutory judgement under Order 10 rule 4 of the Civil Procedure Rules



3. The learned magistrate erred in law and in fact when she held that the appellant's defence was a mere denial when on record was an arguable case.
4. The learned magistrate failed to consider the claim of Kshs. 850,000/= for loss of Motor Vehicle against an insured value of Kshs.400,000/= was an issue entitling the appellant to leave to defend.
5. The learned magistrate erred in law and in fact when she held that the decretal sum including sum of Kshs.136,000/= at paragraph 10 of the Plaint on account of travelling and subsistence was a liquidated demand for which interlocutory judgement could be entered
6. The learned magistrate erred in law and in fact when she held that the sum of Kshs. 136,000/= allegedly incurred on tracing and apprehending those who stole the motor vehicle was a sum payable by the appellant to the respondent under the policy of insurance.
7. The learned magistrate erred in law and in fact when she held that the claim for damages for loss of user is capable of entry of interlocutory judgement.
8. The learned magistrate erred in law in her findings on the law applicable to an application for setting aside
9. The learned magistrate failed to exercise her discretion judiciously and fairly to the detriment of the appellant.
10. The learned magistrate erred in law when she failed to subject the respondent to prove his claim in the plaint.
11. The learned magistrate did not address herself to the submissions made by the appellant.

3. The Appellant is now seeking for orders that the ruling and order of the trial magistrate delivered on 16/3/2015 be reversed and the Appellant's application dated 19/12/2014 be allowed. Further that for an order that the case do proceed to full trial on merit.

The Application before the trial court

4. The grounds in support of the application to set aside the exparte judgment were that the Defendant entered appearance on 04/11/2014 and thereafter filed its defence on 4/12/2014 and served the same on the Plaintiff's advocate on 5/12/2014. That the Defendant was unable to file the defence before 4/12/2014 as the court file could not be traced prior to that date. That the Plaintiff did not notify the Defendant of the judgement entered, went ahead and extracted a decree without approval of the Defendant and thereafter proceeded with execution of the decree by attachment of the Defendant's property. That the motor vehicle subject matter of the suit had a declared insurance value of Ksh. 400,000/= and had depreciated at the time of loss yet the Plaintiff had sought and obtained judgement of Ksh.1,048,743.80/=. That the motor vehicle was outside the insured's jurisdiction and that the insurance premium for the motor vehicle had not been fully paid in breach of the contract.

Response by the Respondent

5. The application was opposed by the Respondent, then Defendant, on the ground that the Applicant was aware that the time within which to file its defence had since lapsed and did not take care to seek



leave to file the same out of time. That the Defendant's allegation that the court file was missing is not backed by any evidence or a letter to the Executive Officer complaining of its unavailability. Further that the Defendant does not state the period from which the court file was allegedly unavailable and the said allegation is clearly a lie.

Submissions in this appeal

6. The parties canvassed the appeal by way of written submissions. The appellant submitted that the claim was a liquidated one but that the trial court failed to subject it to formal proof. The appellant relied on the definition of liquidated and unliquidated claims in the case of *Mawji v Kaderdina Majee Essak Ltd* (1992) eKLR.
7. The appellant submitted that they were not issued with a notice of entry of judgment before execution as required by order 22 rule 6 of the *Civil Procedure Rules, 2010* and no such notice was produced.
8. The appellant further submitted that the trial court misapprehended the applicable principles for setting aside or upholding default judgment. It was submitted that this court has wide discretion to set aside interlocutory judgment and that there are no limits or restrictions on that discretion as long as it is exercised on such terms as may be just. In this regard the appellant cited the decision in *Times U Savings and Credit Co-operative Society Limited v Njuki* 2022 eKLR. They also cited the decision in the case of *Mbogo & Another vs Shah* (1968) 1 EA 93, where the Court stated;

“Applying the principle that the Courts discretion to set aside an ex-parte judgement 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....”
9. It was submitted that the Appellant's defence raised triable issues contrary to the finding by the trial court. The appellant cited the case of *Mureithi Charles v Jacob Atina* 2022 eKLR where Odunga J (as he then was) held that:

“... and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication.....The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement.”
10. The respondent on the other hand submitted that the claim was partly liquidated and partly unliquidated. That the judgment entered was a regular one as the appellant had been served and failed to enter a defence as required by the law. That reasons for the delay had to be given and timelines complied with irrespective of the nature of the proceedings before the court.

Analysis and Determination

11. This being a first appeal, this court is obliged to re-assess, re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving an allowance to that-see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
12. I have considered the pleadings and the evidence adduced before the trial court and the submissions in this appeal. The main issue for determination is whether the Applicant has made out a case for setting



aside of the ex-parte interlocutory judgement and conversely whether the trial magistrate erred in law and fact in dismissing the Appellant's application dated 19/12/2014.

13. This court has unfettered power under order 10 rule 11 of the Civil Procedure Rules, 2010 to set aside a default judgment. The Order provides that:

“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.”

14. In addition, Article 159(2) of the Constitution requires courts of law to dispense justice without having undue regard to procedural technicalities. In Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 others [2011] eKLR, the Court of Appeal while discussing the input of article 159 of the Constitution in dispute resolution held as follows:-

“.....Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents. The court in that regard exercise judicial discretion”.

15. Similarly, in Nicholas Salat v IEBC & 6 others, CA (Application) No 228 of 2013, the Court of Appeal further held that;-

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

16. It is clear from the aforesaid that the court has power to set aside the interlocutory judgment and allow a party to file a defence. However, such leave is not to be granted as a matter of course. The court must satisfy itself that there is a good explanation that has been offered to set aside such judgment and upon such terms that it would deem fit in the circumstances for the reason that such action would definitely be taking a Plaintiff back in time causing delay in the conclusion of her case especially where a judgment has been given.

17. In the case of Mohamed & Another -v- Shoka (1990) KLR 463 the court set out the principles that a court should consider in setting aside interlocutory judgment to include:

- i) Whether there is a regular judgment;
- ii) Whether there is a defence on merit;
- iii) Whether there is a reasonable explanation for any delay;
- iv) Whether there would be any prejudice.



18. The court is required to interrogate whether the impugned judgment is a regular one or an irregular one. A distinction has to be made between the two as observed in the case of *Fidelity Commercial Bank Ltd v Owen Amos Ndungu & Another*, HCC No.241 of 1998 (UR)as cited in.....where the court stated as follows:
- “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 the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right”
19. In this matter the *ex parte* judgment was a regular one as service was not contested. The question is whether the Appellant had given reasonable explanation for the delay in filing a defence.
20. The Appellant in the supporting affidavit sworn by its legal officer, Penina Kinyua, deposed that the failure to file a defence was due to the fact that their advocate repeatedly attempted to file the defence prior to 4/12/2014 but the court file could not be traced at the registry. That the failure was not intentional and thus the Defendant should not be punished for the same. That unless the court allowed the application, the judgement entered and decree issued would cause great injustice, prejudice and hardship to the Defendant as it would be denied an opportunity to access the court, a right that is enshrined in *the Constitution*.
21. In my view, the reasons advanced by the Appellant for failure to file the defence were not convincing. The Appellant did not produce any document written to the court to show that the court file was actually missing and that they were following up the matter. Neither did they obtain any letter from the lower court to confirm that the court file was missing. It was thus not enough for the Appellant to just allege that the court file was missing without any evidence to support it.
22. That notwithstanding, the trial court was required to consider whether the draft defence of the Appellant raised a triable issue. The trial magistrate in this case considered the draft defence and concluded that it did not raise triable issues.
23. The Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR defined a triable issue as follows:
- “A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
24. The Appellant in its defence stated that the respondent was not entitled to full compensation of the motor vehicle as he had not made full payment of the premium. The Appellant further denied that there was loss of user. In my view these were matters that required further interrogation by the court and they were therefore triable issues. The trial magistrate erred in holding that the draft defence did not raise triable issues.
25. The trial court was further required to consider whether the respondent would suffer any prejudice if the matter was to be heard on merit. The court did not consider this aspect of the case. I find that the respondent did not show that the delay in filing the defence will have any adverse effect on the just



determination of the case. I am therefore of the considered view that justice could still be done in the case despite the delay by the Appellant in filing the defence.

26. It is trite law that no party should be penalized just because there was a blunder committed by his or her advocate. In the case of *Republic v Speaker Nairobi City County Assembly & another Ex Parte* [2017] eKLR, it was held that blunders will continue being made and that just because a mistake had been made, it does not mean that a party should not have his case heard on merit.
27. Though the reason for the delay in this matter was not convincing, it is my considered view that this court should exercise its discretion so as to allow the Appellant's suit to be heard on merit. The Appellant has shown its intentions to be heard and it is my view that it would not be in the interests of justice to deny them an opportunity to be heard. The prejudice that the Respondent would suffer for the delay in the conclusion of his case by having it heard on merit can be compensated by way of costs. The question on whether the claim of Kshs.986,000/= amounted to liquidated or unliquidated damages can be dealt with during trial
28. In the premises, I find that the appeal is merited. The ruling of the trial court dated dated 16/3/2015 is hereby set aside and the application by the Appellant/ Defendant dated 19th December 2014 is allowed as prayed therein. The case is thereby reinstated for hearing. I order that it be heard by a different magistrate.
29. Each party to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH OCTOBER, 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr.Omondi Owino HB for Mr. Ojiambo for Appellant

Miss Adhiambo HB for Mr.Mbuthia Kinyanjui for Respondent

Court Assistant – Amina

30 days Right of Appeal

