



Margaret & another v Matonye & another (Suing on their Own Behalf and on Behalf of the Estate of Patrick Matonye Ilondaga - Deceased) (Civil Appeal E025 of 2023) [2023] KEHC 24088 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E025 OF 2023
DKN MAGARE, J
OCTOBER 24, 2023**

BETWEEN

NDEGWA MARGARET 1ST APPELLANT

FESTUS MUTIE MANGI 2ND APPELLANT

AND

JUDY NYALESO MATONYE 1ST RESPONDENT

JOHN STONE MATONYE ANDUKU 2ND RESPONDENT

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE ESTATE OF
PATRICK MATONYE ILONDAGA - DECEASED**

*(Being an appeal from the ruling of the application dated 25th
March, 2022 delivered by Honourable Chief Magistrate J. B. Kalo
in Mombasa CMCC Number 1414 of 2014 delivered on 09/02/2023)*

JUDGMENT

1. This is an appeal from the Ruling delivered on 18/10/2012 in Mombasa CMCC 1414 of 2014 delivered on 9/2/2023.
2. It is a short Judgment in that there is only one issue, whether the Court was entitled to set aside ex parte Judgment vide a plaint filed on 18/7/2014, the Respondents sued 4 parties.
3. For avoidance of doubt, I will use their titles in the lower court. The 1st defendant was said to be a beneficial owner of Motor Vehicle Registration No. KBV 779B. The 2nd defendant was said to be its Registered owner. The 3rd defendant was said to be the registered owner of Motor Vehicle Registration No. KBC 964N Toyota Touring.



4. The two vehicles were alleged to have been involved in an accident on 29/6/2013. The suit was filed on 21/7/2014. Summons were issued to Defendants. The summons stated to have been served. On 1/8/2014, the same person received summons from the 3rd and 4th Respondent. An affidavit of service was sworn by Charles Keriga. That affidavit accompanied the request for judgment.
5. New summons were issued for all the parties dated 11/12/2014.
6. The 2nd defendant Auto blank Abdullah Ltd entered appearance on 13/1/2015. They made an application to strike out their names from the suit in limine. The 1st defendant is said to have been served on 31/1/2015. The summons are not endorsed as having been re-issued. On 15/8/20215, the applicant applied for re-issue of summons. They were re-issued against the 3rd and 4th Defendants on 27/8/2015. This is recalling that they had already been “served” on 1/8/2015
7. There was another attempt to serve on 26/4/2016. The court issued summons on 4/5/16. The application sought leave to effect service. The ground was the attempt to serve were fruitless.
8. There was a request for judgment filed on 18/1/2018. At the time of recording entry of judgment, the last valid summons were 4/1/2016. They expired on 3/1/2017. By the time of entry the court granting the order of service by substituted service, summons had long expired. There was service by Advertisement was placed in some page in this Daily Nation for Thursday 19/10/2012.
9. I have perused the court file. The suit was filed on 10/7/2014. The Respondent are said to be administrators of the estate of the late Patrick Matonye Ilondaga, pursuant to a grant issued on 1/11/2013. The suit was not filed by 1/5/2013.
10. There is a valid question whether the court can grant damages under the said Reform Act, after 6 months of issuance of the grant pursuant to Section 2(3) of the Law Reform Act which provides that: -
 - 3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either—
 - a) proceedings against him in respect of that cause of action were pending at the date of his death; or
 - (b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.
11. The Plaintiff proceeded exparte. He got a decree of Kshs. 3,392,275/= out of which 2,720,204 was General damages under the Land Reform Act and under Fatal Accidents Act.
12. The application dated 18/10/2022 was filed advocates for the 3rd and 4th Defendants. It was seeking to set aside judgment entered on 28/7/2022. They prayed for costs.
13. They stated that they were not aware of service. They stated they became aware through an interlocutory suit. One interesting fact is that the person who was personally served, Margaret Ndegwa, signs quiet different in the affidavit of service and the purported summons to enter appearance.
14. In matter of this nature, it is not only advisable but good that the insurers be served with copies.
15. There is a defence annexed by the 3rd and 4th defendant Defence in they deny that the 3rd defendant was an employee of the 4th defendant. Damages are also denied. They rely on contributory negligence by the deceased. At least they don't blame motor vehicle Registration KAV 779B. However, they blame the deceased as he was the impugned driver of the said motor vehicle.



16. The 1st Respondent swore an affidavit dated 27/10/2022. Parties filed voluminous submissions. There was basically a dispute whether the appellant met the grounds for issuance of orders sought.

17. In that lower court the Respondent relied on the case of Patel versus E. A Cargo Handling Services limited (1974) E.A 75 or 76 letter C and E where Duffus P.

“There are no limits or restriction on the Judge’s discretion except that if he does not vary the judgment he does as 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 order discretion give to it by the rules.

18. Secondly, as was stated by Harris J in Shah versus Mbogo (1967) EA 116 at page 123 letter B:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the course of justice”

19. A Party cannot set aside a regular judgment unless it is satisfied that there is a defence on merits. They on the case of James Kanyiyta Nderitu & Another (2010) eKLR., where the court stated as doth: -

“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 other. “

20. They also relied on the cases Kimani vs Mc Conneel (1968) EA 545 Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah [2014] eKLR, where the court stated as doth: -

“The object of clothing the court with discretion to set aside judgment obtained ex parte has been pronounced in many decisions. Sample the following:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...” See: Shah v Mbogo and Another [1967] EA. 116.

14. In Patel v E.A. Cargo Handling Services [1974] EA 75, Sir William Duffus, P at page 76 stated:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions in 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 not usually set aside the judgment



unless it is satisfied that there is a defence on the merits. In this respect defence on 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.”

21. It is their view that the case of in the case of DT Dobie & Company Ltd vs Muchina [1982] eKLR it was stated thus;

“The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”)

22. In International Finance Corporation v Uteaxfrica sprl [2001] CLC 1361, it was stated that the test of a defence having a real prospect of success means that the prospects must be better than merely arguable.

23. Theo respondent relied on Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR, where Justice G.L. NZIOKA, stated as doth; -

“69. It’s an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality”

24. They lamented the cost of the declaratory suit wherein a sum of Kshs. 70,000/= has been paid.

25. The court delivered its Ruling on 9/2/2023 in absence of parties. Ruling triggered the Appeal herein.

26. In the Ruling the Chief Magistrate, J B Kalo stated that there was no dispute that the Appellants were properly served. The court lamented that the respondent took 5 years before the parties got their justice. The court lamented that the application was 2 months after delivery of judgment. There was said to be personal service and substantial service.

27. The parties filed lengthy submissions, which I have had a chance to peruse. The appellant relied on the case of Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR here the Court of Appeal stated: -

“(13) The petition was opposed by the respondent through grounds of opposition in which the respondent maintained that the petition and its supporting affidavits were defective and a waste of time; that the petition was filed in bad faith and failed to meet the conditions of Article 22 of *the Constitution*; that the appellants were guilty of laches as the events occurred in 1982; that the appellants failed to explain the inordinate delay of 30 years hence were not deserving of equitable remedies; that the Department of Defence was justified



under the Armed Forces Act Cap 199 Laws of Kenya to take reasonable disciplinary measures against indiscipline members of the force; and that the allegations by the appellants are unsubstantiated, false and mere hearsay and a ploy to hoodwink the court into sympathizing with them.”

Parties submissions

28. Parties filed detailed submissions, which I have had the pleasure of reading. They use similar authorities but give them a different tinge. I note however, that notwithstanding the final outcome, counsel’s submissions were thorough and well reasoned. My only lamentation is that the submissions are scanned instead of Conversion to pdf, they are a strain to the eye. Authorities are not a necessary attachment to submissions. The court are under duty to read the decisions directly from Kenya law, if the decisions are reported. This assures integrity of the decisions relied on.

Appellant’s submissions

29. The appellant filed detailed submissions together with authorities running to 58 pages. They urged me to allow the appeal. They rely on the decision of Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR where the court of appeal, Platt, Gachuhi & Apallo JJA, posited as doth: -

“At the same time this Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice. (See Mbogo v Shah [1968] E A 93(supra)”

30. In Mbogo v Shah [1968] EA 93 adopted the opinion of Harris J in Kimani v McConnell [1966] EA 547 where he said:

“In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

31. It is their case that on 18/9/2016 the respondent swore an affidavit that he has been unable to serve since the defendant could not be traced. The same party cannot turn around and state that there was service.

32. The also rely on order 5 rule 15 and state that the original summons were not returned. Thence they were 27 years old by the time of service. The second set of summons were equally irregular, invalid, null and void. They rely on order 25 rule 2(1) of the Civil Procedure Rules.

33. They question the validity of the summons that whose validity was not extended. They also relied on the case of Udaykumar Chandulal Rajani & 3 Others Vs Charles Thaithi [1991] eKLR, where the court of Appeal, Gicheru, Tunoi & Shah, JJ.A, held as doth: -

“Order V rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the *Civil Procedure Act* cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstances re-issue fresh summons after the expiry of the



aforsaid 24 month period. Neither did the entry of appearance by the defendants revive the summons which had expired.

The original summons in an action is only valid for the purposes of service for 12 months from the date of its reissue. The court, before 1996, could only by order extend its validity from time to time for such period not exceeding 24 months from the date of its issue if satisfied that it was just to do so. However, in this case, neither the plaintiff nor his advocate did exhaust the provisions of Order V rule 1(5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of summons beyond 24 months, when in fact there was no valid summons in existence. It follows, therefore, that the alleged service upon the defendants was ineffective and invalid and so were the summons issued on 28th August, 1992.”

34. They further place reliance on the decision of Julius Njoroge Muira V Harrison Kiambuthi Mburu [2011] eKLR, where stated as doth: -

“I shall thus without any hesitation find that the Original Summons is not in existence and all the efforts to revive the same by reissuance were null and void. The Original Summons which has lost its life cannot be resurrected as it seems to have been done in this case.

There is no provision for reissuance of summons under the Civil Procedure Rules. I shall also find that the Appearance and Defence cannot put life into the expired summons and thus cannot validate the expired summons.

I shall quote the passage by Lord Denning in the case of Macfoy –vs- United African Ltd. (1961) 3ALL ER 1169 at 1172.

“If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers.”

35. They buttress their arguments by the case of Brenda Karanja v Mweki Dominic [2021] eKLR, where justice Kemei stated as doth: -

“

“ 10. In interpreting the above provisions of the law, I note that in the first instance, the summons shall be valid for twelve months. Where a concurrent summons has been issued, it shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of the issue of the concurrent summons. Where the validity of the summons is extended, it shall be until the period specified in the order. As many attempts may be made to serve the summons during the period of the validity of the summons care must be exercised lest the same is relied upon when they are already expired.

11. In the celebrated case of Civil Appeal No 82 of 1996 Udaykumar Chandulal Rajani & 4 Others vs Charles Thaithi [1997] eKLR which is binding on this court, the Court of Appeal held as follows:-

“Order V Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore non-compliance with the procedural aspect cause by failure to renew the



summons under this rule is such a fundamental defect in the proceedings that inherent powers of the court under Section 3A of the *Civil Procedure Act* cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service could not have in the circumstances re-issue fresh summons...the court had no power to extend the validity of summons beyond 24 months, when in fact there were no valid summons in existence....”

36. Finally, the Appellant placed reliance on the decision of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR, where the court of Appeal, G.B.M. Kariuki, Kiage & M’noti JJA stated as doth: -

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

37. They argue that the court found as a fact that the matter required formal proof otherwise it was going to be a travesty. Despite that finding, the court proceeded to decline the Appellant’s appeal.

Respondent’s submissions

38. The decision of Keipto Chemwolo & another v Augustine Kubende [1986] eKLR was common to both parties and the quoted the same in extensio
39. The Respondents submitted that the appellants were properly served. The first service was personal service followed by service via substituted service.
40. It is their case that service was properly done hence the appellant cannot seek to set aside the said judgment based on untruthful allegation of non-service. They rely on the case of, where The Court has discretion to set aside or not to set aside an ex parte judgment. Such discretion must be exercised judiciously. In deciding whether to set aside or not, the Court is guided by the decision of the Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, where the court of Appeal stated thus:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling Services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.



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 justiae*, 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.”

41. The respondent relied on the same authorities they relied in the low court as above enunciated.

Analysis

42. The question before me is whether, the Appellant was served by personal service or by substantial service. The second question is whether they have an arguable defence. I note that the court blamed the entire 8 years on the Appellant for the delay. The appellant had not made any application before October 2022. There can be no way the delay in prosecuting the case can be attributed to them. It is the duty of the plaintiffs to prosecute their cases. The unconditional evidence was that the defence became aware of the said with a declaratory suit being Mombasa CMCC 1194 of 2022. That suit was filed on 3/8/2022. Regarding the two types of service, I note that the plaintiff purported to have served personally on 1/8/2018. They even made a request for judgment. The request for judgment was declined on 21/10/2014. There was no other request for judgment by basis of personal service. *Ipsa fact* there was no personal service. There was no interlocutory judgment entered.

43. Secondly the summons to enter appearance had not been extended. Therefore, there was nothing to serve by substituted service. The fact that service is by substituted service, the thing to be served must exist without service, of valid summons. I do not want to go into the consequences of serving expired summons.

The Court was confronted with two issues: -

- i. A regular judgment
- ii. Irregular judgment.

44. The two aspects have different implications when there is a regular judgment, the court is to look at the defence. The court did not deal with this issue. The defence raises issues as liability and damages. One of the issues that have come up where the court cannot bid itself is the issue of damages under Law Reform. I will say no more.

45. The issue of liability in a collision is an issue that should be dealt with at *inter partes* hearing of the suit. There is therefore a meritorious defence. Though dealing with injunction, the decision of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, becomes handy in finding what constitutes a *prima facie* case. The court stated as follows: -

- “4. A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a



right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

46. The next question was whether this was a regular or irregular judgment. I note that the judgment was entered more than once request the 1st defendant. This has not been challenged. There is no valid judgment against the 3rd and 4th defendants.
47. First the request for judgment was not acted upon. Secondly the purported service upon the 4th defendant is untenable. The process server does not indicate how he know that the respondent owned the Ratim Shop. It is not a normal cause of nature for plaintiff's in ruling down matters to know the forfeasers.
48. However, the advertised was rightly ordered. Unfortunately, there were no validly summons to enter appearance. It is unfortunate that the suit has been in court for some time. However, procedure is the handmaids of the Temple of Justice.
49. In the case of Mc Fory Lord Denning stated as doth: - In Macfoy vs. United Africa Co. Ltd [1963 All E.R. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
50. The service of expired summons was a nullity from the word go. I understand that the defendants could not have seen the advertisement. It was squeezed into some back page of a Thursday. However, I will not go into that issue as there were no valid summons. What then is the way forward? The court notes that the summons must be extended before parties enter appearance. I therefore find and hold that: -
 - a. The court erred in fettering its discretion.
 - b. The judgment entered against the Appellants is highly irregular and must be set aside ex debito justitiae.
 - c. The Court therefore proceeds to set aside judgment entered in this matter that is, full judgment herein, and nay interlocutory judgment against the appellants.
 - d. The respondent (plaintiffs) in the lower court should make an application to extend summons for service on the Appellants. The appellants to enter appearance within 14 days of service and file defence.
 - e. Given that notice of Appointment has been filed by the firm of Jengo & Company Advocates, service of summons shall be served on that firm should summons not be extended within 14 days from todays the suit against the Appellants shall stand dismissed with costs of the 3rd and 4th Defendants, the Appellants herein.
 - f. As regards to costs, the Court takes cognizance that the Respondents put in their best endeavour and the matter succeeded on a technical point. Consequently, each party to bear its own costs.
 - g. The case shall be heard by any other Court, other than J.B. Kalo.
 - h. Mention the matter in the subordinate Court on 28/11/2023 for directions.



i. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Miss Mwanzia for the Respondent

Hamisi for the Appellant

Court Assistant - Brian

