



**Maina & another v Otieno & another (Civil Appeal E032 of 2022)  
[2023] KEHC 24179 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24179 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E032 OF 2022  
DAS MAJANJA, J  
OCTOBER 24, 2023**

**BETWEEN**

**DAVID NJUGUNA MAINA ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH WANYOIKE MACHARIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GODFRED OMONDI OTIENO ..... 1<sup>ST</sup> RESPONDENT**

**LETSHEGO KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. Y. M. Barasa, SRM dated  
31st March 2022 at the Magistrates Court, Naivasha in Civil Suit No. 717 of 2019)*

**JUDGMENT**

1. The appeal herein emanates from a ruling by the Subordinate Court declining to set aside an ex-parte judgment.
2. By way of short background, the events leading to the present appeal are as follows. The 1<sup>st</sup> Respondent herein, as Plaintiff, filed his claim before the Subordinate Court on 07.10.2019 claiming compensation as a result of injuries sustained in a road traffic accident that allegedly occurred along the Nakuru-Nairobi Highway on 18.08.2019. The Plaint and Summons to Enter Appearance (“the Summons”) were served on the Appellants herein together with the 2<sup>nd</sup> Respondent, as Defendants, on 19.10.2019. The Appellants failed to enter appearance and interlocutory judgment was entered against them on 05.11.2019. The 2<sup>nd</sup> Respondent entered appearance and filed its Defence.
3. The suit proceeded for hearing without the participation of the Appellants. They were ultimately found fully liable for causing the accident by the judgment rendered 05.08.2021 whereupon the 1<sup>st</sup> Respondent moved to execute the judgment and decree. The Appellants invoked Order 10 rule 12 of



the Civil Procedure Rules and moved the court by an application dated 21.09.2021 seeking to set aside the judgment.

4. The trial magistrate considered the application and dismissed it thus precipitating this appeal. In their Memorandum of Appeal dated 06.04.2022, the Appellants raise the following grounds of appeal:
  1. That the learned trial magistrate erred in law and in fact by dismissing the Appellant's application dated 21<sup>st</sup> September, 2021 without considering in totality the grounds in the application, supporting affidavit thereof and the Appellant's submissions.
  2. The learned trial magistrate erred in law and fact in unreasonably and unjustifiably dismissing the appellant's subject application by failing to exercise his discretion judiciously.
  3. The learned trial magistrate erred in law and in fact by failing to consider that the Appellant's right to be heard and right to a fair hearing as enshrined in the Constitution of Kenya are so fundamental that they cannot be fettered by an exercise of discretion and cannot be limited as in accordance to article 25 of the constitution of Kenya 2010.
  4. That the learned trial magistrate erred in law and in fact by misapplying the principles in setting aside ex-parte judgment.
  5. That the learned trial magistrate erred in law and fact in finding that the draft defence filed by the Appellants raised no triable issue, a finding which occasioned them a miscarriage of justice.
5. The parties have filed written submissions which I have considered. The appeal majorly revolves around the exercise of the court's discretion to set aside ex-parte judgment under Order 10 Rule 11 of the Civil Procedure Rules. In the circumstances the court is guided by the principle that the appellate court will not interfere with the decision of the trial court unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR).
6. From the evidence on record, the trial court was satisfied that the Plaint and Summons to Enter Appearance ("the Summons") were properly served upon the Appellants. The Appellants indeed acknowledged that they were served and as such, the ex-parte judgment entered by the trial court is regular. However, even where the judgment is regular, the court may yet proceed to set aside the judgment if justice of the case demands, particularly where the defendant demonstrates that it has a good defence and any prejudice caused by setting aside may be assuaged by an award of costs (see *Tree Shade Motors Limited v D T Dobie and Company (K) Ltd and Another* [1998] eKLR). Ultimately, as the court stated in *Patel v E.A. Cargo Handling Services Ltd* [1974] EA 75,

"There are no limits or restrictions on the judge's discretion 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 to it by the rules."



7. In this case, the trial court upon being satisfied that ex-parte judgment was regular proceed to consider whether the Appellants had a good defence. The court stated,
- “As to whether there is a good defence, I have perused the draft annexed defence and I have note(d) that it contains mere denials. There is nothing special that the court should take note of.”
8. I have read the draft defence and the trial magistrate was correct to note that the Appellants had not denied the claim. But it must be borne in mind that this is not a case of a liquidated claim or debt but a claim for negligence which a party must prove hence the defence could not have been dismissed outright. In other words, I would not say that the defence would not have any prospect of success. Moreover, the trial magistrate did not consider whether costs would be sufficient to cure any prejudice sustained by the Respondents or even it would impose conditions to secure the Respondents’ interests.
9. Having reached the aforesaid conclusion, I allow the appeal. The Appellants shall pay costs of the application before the trial court and costs of the appeal. Further, the security ordered by the court by the ruling dated 30.02.2023 shall remain in place pending the hearing and determination of the suit.
10. I therefore make the following dispositive orders:
- a. The appeal is allowed, the ruling dated 31.03.2022 is set aside and substituted with an order allowing the application dated 21.09.2021.
  - b. The Appellants shall pay the Respondents’ thrown away costs of the proceedings before the Subordinate Court.
  - c. The Appellants shall pay costs of this appeal assessed at Kshs. 20,000.00 for the 1<sup>st</sup> Respondent and Kshs. 20,000.00 for the 2<sup>nd</sup> Respondent.
  - d. The security ordered by the court by the ruling dated 30.02.2023 shall remain in force pending the hearing and determination of the suit before the Subordinate Court.
  - e. The above orders shall apply in Naivasha High Court Civil Appeal Nos. E030/2022, E031/2022 and E033/2022.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIVASHA THIS 24<sup>TH</sup> DAY OF OCTOBER 2023.**

**G. K. NZIOKA**

**JUDGE**

