



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. E015 OF 2021**

**EUDICAS FUNDI NYAGA.....APPELLANT**

**VERSUS**

**PURITY NKIROTE NYAGAH (Suing as the Legal Representative**

**of the Estate of HARRISON NYAGAH ELISHA-Deceased).....RESPONDENT**

***(Being an Appeal arising from the ruling of the Honourable S. Ouko, Resident Magistrate delivered***

***in Runyenjes SPMCC No. 39 of 2018 on 11<sup>th</sup> March 2021)***

**JUDGMENT**

1. Vide a memorandum of appeal dated 25.03.202, the appellant herein filed the instant appeal having been dissatisfied with the ruling at Runyenjes SPMCC No. 39 of 2018 and thus set out the following grounds of appeal:

*i. The learned trial Magistrate erred in law and in fact by making a finding that the Appellant was served with the summons to enter appearance together with the Plaintiff when the affidavit of service did not disclose the identity of the person who allegedly accompanied the process server and pointed out the Defendant for service contrary to the provision of Order 5 Rule 15 as read together with appendix A No. 4 of the Civil Procedure Rules 2010.*

*ii. The learned trial Magistrate erred in law and in fact by holding that the Appellant admitted a traffic charge of causing death by dangerous driving and as such he didn't have a defence raising triable issues contrary to provisions of Section 47 A of the Evidence Act.*

*iii. That the learned trial Magistrate erred in law and in fact by failing to apply the correct principles of law regarding the setting aside of ex-parte judgement and her decision has denied the Appellant the opportunity to exercise his constitutional right to be heard.*

*iv. That the Learned Magistrate erred in law and in fact by failing to make a finding that no prejudice would be occasioned to the Respondent incapable of being compensated by an award of costs.*

*v. In arriving at her decision, the trial Magistrate did so in a speculative and cursory manner not guided by the Civil Procedure Rules, 2010, the provisions of the Evidence Act and the principles of setting aside ex-parte judgment that have crystallized into law and her failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed and set aside.*

2. The Appellant sought for orders that the ruling and decision by the trial court made on the 11<sup>th</sup> of March 2021 be set aside and be substituted with an order allowing the Appellant's application dated 20<sup>th</sup> August 2020.

3. It is the applicant's case that the trial court erred in making a finding that the appellant was served with summons to enter appearance together with the plaintiff when the affidavit of service did not disclose the identity of the person who allegedly accompanied the process server and pointed him out.

4. Directions were taken and the parties filed and exchanged their submissions wherein the appellant failed to file his submissions while the respondent submitted that the appellant was served with summons to enter appearance and an affidavit of service to that effect, filed. That, the court was right in finding that the appellant did not have a defence raising triable issues; that this was depicted from the record of appeal where the appellant had pleaded guilty and further convicted for an offence of causing death by dangerous driving in CD1 of 2017 at Runyenjes and that the same judgment has never been appealed against. As such, he urged this court to dismiss the appeal herein with costs to the respondent.

5. I have considered the grounds of appeal herein and the submissions of the parties. I find that the matter for this court's determination is whether the interlocutory judgment entered for the respondent against the appellant should be set aside or not.

6. By a ruling dated 11.03.2021, the trial court declined to set aside its interlocutory judgment entered on 2.11.2018 citing reasons *inter alia* that the defence by the appellant raised no triable issues as it only consisted of blanket denials and further that, the appellant had admitted liability in the accident that caused the death of the deceased.

7. The appellant herein filed before the trial court SPMCC No.39 of 2018 at Runyenjes, suing as the legal representative of the estate of Harrison Nyagah Elisha (deceased) and wherein he sought general damages under Fatal Accidents Act and Law Reforms Act, special damages and costs of the suit. The suit was founded on the tort of negligence. The respondent proceeded to request for interlocutory judgment on the basis that the appellant herein had failed to enter appearance or file his defence and after which interlocutory judgment was entered on 2.11.2020. The appellant then filed the application dated 20.08.2020 seeking stay of execution, setting aside of the interlocutory judgment. The said application was determined and the trial court via a ruling delivered on 11.03.2021 dismissed the same. It is the said ruling which necessitated the appeal herein.

8. What is clear from the appeal herein, is that, it is in regard to invoking the trial court's exercise of its discretionary powers. The circumstances in which an appellate court can upset the exercise of discretion of a trial court were laid down by the Court of Appeal in **Mbogo and Another v Shah [1968] EA** and further in the case of **Wachira Karani v Bildad Wachira (2016) eKLR**, wherein the court had the following to say:

*Mulla, the Code of Civil Procedure (2) has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgment/decreet. Essentially, setting aside an ex parte judgment is a matter of the discretion of the court. In the case of Esther Wamaitha Njihia & two others v Safaricom Ltd (3) the court citing relevant cases on the issue held inter alia: -*

*"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel v E.A. Cargo Handling Service Ltd (4) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah v Mbogo.) The nature of the action should be considered, the defence if any should also be considered; It also goes without saying that the reason for failure to attend should be considered."*

9. In **Francis Wambugu v Babu Owino & Others, SC Petition No. 15 of 2018**, on the issue of an appellate court entertaining an appeal founded on exercise of discretion of the trial court, it was stated:

*"[76] In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court's decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court's judicial independence and exercise of discretion."*

10. It appears from the record that the main ground in support of the application before the trial court was the fact that the appellant was never served with the summons to enter appearance. The trial court in its ruling, found that there was proper service and that the appellant herein failed to enter appearance. As I have noted, the setting aside of interlocutory judgment is a discretionary power and which this court cannot interfere with, unless on grounds well set by law. The issue being service of summons to enter appearance, I have perused the affidavit of service of the said summons and I note that the deponent/ process server, one Wilfred Njeru Kigoro explained how he served the summons upon the appellant himself at his place of work at Thika Medicare Pharmacy opposite Mount Kenya University.

11. In **Gulf Fabricators v County Government of Siaya [2020] eKLR**, Aburili J. while appreciating the importance of service of summons to enter appearance and which decision I find persuasive held that; -

*"...It must be appreciated that service of summons to enter appearance and plaint upon the Defendant in a suit is crucial. In addition, before the court can be asked to proceed and grant leave to the plaintiff to apply for interlocutory judgment and before such interlocutory judgment leading to formal proof hearing in unliquidated claims is entered and or issued, the court must be satisfied that summons to enter appearance and plaint were properly served upon the defendant, as stipulated in the law..."*

12. In the instant appeal, a perusal of the affidavit of service clearly shows that indeed the appellant was served with summons to enter appearance.

13. As observed by the learned magistrate in her ruling, the appellant did not deny his phone number as indicated in the affidavit of service. That he did not also deny his place of work or that he was at work on the material day service is said to have been effected.

14. On whether the defence raises triable issues the court has perused the draft statement of defence that was annexed to the application. The same consists of mere denials save for paragraph 6 that has attributed negligence to the deceased, the particulars whereof are set out therein. It is my considered view that the issue of who between the driver of motor vehicle KCK 099A and motor cycle KMCX 323A Skygo was to blame has been settled in that the appellant pleaded guilty to the offence of causing death by dangerous driving in CD I of 2017 in which he was convicted and found guilty on his own plea of guilty. He did not prefer any appeal against the sentence and the conviction still remains.

15. In the premises aforesaid, it is my considered view that the appeal herein has no merits and the same is hereby dismissed with costs to the respondent.

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF FEBRUARY, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent