



REPUBLIC OF KENYA



KENYA LAW
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**Onchonga v Mwangi & another (Civil Appeal E227 of 2023)
[2024] KEHC 11789 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E227 OF 2023**

**JM NANG'EA, J
OCTOBER 4, 2024**

BETWEEN

GEOFFREY KARASINGA ONCHONGA APPELLANT

AND

JANE WANJIRU MWANGI 1ST RESPONDENT

JOSEPH KARIUKI 2ND RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's court at Nairobi Milimani Commercial Courts (Hon. Opande-PM) in CMCC No. 7692 of 2019 delivered on 13/3/2023)

RULING

Grounds of Appeal and reliefs sought.

1. By a Memorandum of Appeal dated 27/3/2023, the appellant faults the said trial court's ruling on the respondents' Notice of Motion dated 27/9/2022 setting aside ex-parte judgement delivered on 26/7/2022, on grounds that may be summarized as hereunder:
 - a. That the learned trial magistrate erred in law and fact by failing to appreciate customs and practices applicable to the insurance industry.And
 - b. That the learned trial magistrate otherwise erred in law and fact in determining the application in favour of the respondents against the weight of evidence.
2. The appellant therefore prays for re-instatement of the ex-parte judgement and the costs of this appeal.



Background to the appeal.

3. In the ex-parte judgment, the trial magistrate granted the appellant a total of Ksh. 677,334 in general and special damages following injuries he sustained after the 1st respondent's motor vehicle registration number KCH 809 B driven by the 2nd respondent knocked the appellant as a result of careless or negligent driving thereby causing him bodily injuries. It would appear that the respondents entered appearance through advocates appointed by their insurer who, however, failed to appear in court for hearing of the suit. The default led to hearing of the suit in their absence and subsequent delivery of the ex-parte judgement. The respondents then brought the said application dated 27/9/2022 seeking setting aside of the judgement and hearing of the suit de novo which application was allowed, thus provoking this appeal.
4. It is trite law that the appellate court has the duty of re-assessing the evidence adduced before the lower court and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR among many other decided cases reiterating these principles. The Court of Appeal for East Africa in *Peters – vs- Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
5. In allowing the respondents' application, the trial magistrate noted the undisputed fact that the respondents had advocates on record who had sought to cease acting vide their application dated 6/5/2022 which application was never prosecuted. It was, however, the trial magistrate's opinion that “it was incumbent upon the plaintiff to inform the defendant that in fact they were on their own as the advocate had filed the application but failed to prosecute it.” (sic). Alternatively, the lower court reasoned that the appellant could have served notice of hearing of the suit upon the respondents personally and thereafter seek “directions on the application to cease acting from the court.”
6. Learned Counsel for the parties filed their written submissions. The appellant's advocates contend that the respondents were indolent in failing to appear at the hearing of the suit despite their advocates having notice. By dint of Order 9 rule (5) of the Civil Procedure Rules 2010 the court is told that that an advocate is deemed to be on record in a case unless and until a notice of change of advocates is filed and served on the opposite party. According to Counsel the only remedy available to an affected client is to file an action against the advocate for professional negligence {(see *Water Painters International V. Benjamin Ko'goo T/A Group of Women in Agriculture Kochieng (Gwako) Ministries* (2014) eKLR cited in reliance)}.
7. The appellant's advocates further submit that the respondents' omission cannot be excused on the basis of Article 159 (2) (d) of *the constitution* for the reason that a mistake of Counsel is not a procedural technicality excusable thereunder following inter alia the decision in *Rayat Trading Co. Ltd V. Bank of Baroda & Tetezi House Ltd* (2018) eKLR relied upon by the appellant.



8. The respondents do not seem to have filed their submissions. Having considered the record and the appellant's submissions, indeed it is a matter of fact that the respondents had advocates on record as appearing for them at the time of hearing of the suit in the lower court. The advocates had filed the application dated 6/5/2022 to cease acting for the respondents but the same was not heard and granted. As pointed out by the appellant, they were therefore deemed to be still representing the respondents. I agree with appellant in the circumstances that he was not obligated to serve the respondents with notice of hearing directly as that would be contrary to Order 9 rule (5) of the Civil Procedure Rules, 2010. If aggrieved by their advocates' conduct the respondents' remedy lies in an action for professional negligence as opined in the case of Water Painters International supra.

Determination.

9. Both grounds of appeal as set out accordingly succeed. The trial court's order setting aside the ex-parte judgement dated 27/9/2022 is vacated and substituted with an order re-instating the ex-parte judgment. The matter is remitted to the trial court for hearing of the application dated 27/9/2022 on merits by consideration of the respondents' defence to determine whether or not it raises triable issues in accordance with established guiding principles. The order striking out the appellant's defence is set aside and the trial court will proceed to hear and determine the suit on merits. The appellant gets the costs of the appeal.

JUDGEMENT DELIVERED VIRTUALLY THIS 4TH DAY OF OCTOBER 2024

In the presence of :

The Appellant's Advocate,

The Respondents' Advocate,

The Court Assistant, Amina

J.M NANG'EA , JUDGE.

