Kanake v Wanyoike & 3 others (Civil Suit 452 of 2010)
[2024] KEHC 14357 (KLR) (Civ) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14357 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 452 OF 2010

CW MEOLI, J

NOVEMBER 14, 2024

BETWEEN

ELIJAH PAKETURE KANAKE ..... PLAINTIFF

AND

MARGARET WANGARI WANYOIKE ..... 1ST DEFENDANT

GEORGE MWAI KIMONDO ..... 2ND DEFENDANT

K.B SANGHANI & SONS ..... 3RD DEFENDANT

JOSPHAT KIMANI ..... 4TH DEFENDANT

RULING

1. For determination is the motion dated 04.07.2024 by Margaret Wangari Wanyoike and George Mwai Kimondo, the 1st and 2nd Defendant(s) (hereafter the Applicants) seeking inter alia that the Court be pleased to set aside the judgment delivered on 22.10.2021 together with all consequential orders, that the 1st and 2nd Defendant(s) be granted leave to file a memorandum of appearance and defence out of time and the suit is heard de novo. The motion is expressed to be brought pursuant to Article 48 & 159(2)(d) of *the Constitution*, Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 10 Rule 11 & Order 51 Rule 1 of the Civil Procedure Rules (CPR) and is premised on grounds on the face of the motion, as amplified in the supporting affidavit sworn by 1st Defendant who asserts that he is competent and authorized to depose on behalf of the 2nd Defendant.

2. The gist of the affidavit is that the Applicants have never been served with summonses to enter appearance and yet, an ex-parte judgment was entered against them on 22.10.2021 in default of appearance. That the said default judgment is unlawful for want of due service of summons. She states that the Applicants only recently learned about the suit during a routine internet search on Google.

That the motion has been made in good faith and is not intended to defeat or delay the administration of justice having been presented at the earliest opportunity upon learning of the existence of the judgment in question.

3. She maintains that the Applicants have a good defence that raises triable issues and unless the motion is allowed, Elijah Paketure Kanake, the Plaintiff, (hereafter the Respondent) will levy execution against them as a consequence of which they will suffer irreparable loss and damage through payment of a colossal decretal sum. In conclusion, she reiterates that it is in the interest of justice that the default judgment is set aside.

4. The Respondent opposes the motion by way of a replying affidavit dated 02.09.2024. He views the motion as vexatious, bad in law, an abuse of the court process, and made in bad faith. He goes on to depose that the suit was filed on 07.10.2010 and that the Applicants were duly served with summonses to enter appearance by way of substituted service on 21.05.2013. That despite service they failed to enter appearance and defend the suit and that upon the suit being heard, judgment was entered against the Applicants jointly with K.B Sanghani & Sons and Josphat Kimani, the 3rd and 4th Defendant(s). He states that the purported draft defence contains a general denial of the averments in the Plaint and that it ought to be disregarded as it is an attempt to delay justice, and occasion him extended suffering.

5. Further, the Respondent states that the suit has been in the corridors of justice for more than fourteen (14) years and to set aside the judgment at this late stage would only occasion him prejudice. Because the Applicants despite being properly served chose to ignore the summonses. He points out that as a result of injuries he sustained in the accident which is the subject of the suit, his leg was amputated rendering him incapable of fending for his family and further delay will occasion him injustice. He asserts that this Court ought not entertain indolent litigants such as the Applicants who have not shown sufficient cause for their failure to defend the suit. In summation, he dismisses the alleged triable issues advanced by the Applicants coming at this late stage of the proceedings.

6. In a brief rejoinder by way of a supplementary affidavit, the Applicants reiterated that they were never served with summonses to enter appearance; that the summonses expired on 08.10.2011 and there is no evidence of extension of validity thereof; that the postal address No.26 captured in the summonses does not belong to either of the them; and that there is no demonstration 1st Defendant/Applicant was authorized to receive summonses on behalf of the 2nd Defendant/Applicant.

7. Despite service of the motion upon the 3rd and 4th Defendant(s) they failed to respond or participate in the motion. Upon directions being taken the Applicants opted to file written submissions while the Respondent preferred to rely on his response on record.

8. The Applicants' counsel opened his submissions by contending that service goes to the jurisdiction. That if non-service is established and or service is held to be insufficient then the final judgment entered ought to be set aside together with consequential orders. While calling to aid the decision Yalwala v Indumuli & Another (1989) KLR 373, counsel highlighted the contention that there was no personal service on the Applicants herein. Moreover, he asserted that the summonses having expired on 08.10.2011 there was no evidence that their validity was subsequently extended for service. Counsel reiterated that the address in the summonses did not belong to either Applicant, and in any event there was no demonstration that 1st Defendant/Applicant had authority to receive summons on behalf of the 2nd Defendant/Applicant. Therefore, the logical conclusion this Court ought to arrive at is that summonses were not duly served. The decision in Gandhi Brothers v H.K Njage t/a H.K Enterprise HCCC No. 1330 of 2001 was cited in this regard.

9. Concerning the question whether the defence raises triable issues and whether the Applicants ought to file it out of time, counsel argued that even if service was proper (which is denied) and the resultant judgment regular, the Court still retained an unfettered discretion to set aside the final judgment. Based on the principles espoused in Philip Chemwolo & Another v Augustine Kubende (1982-88) KAR. He asserted that the intended defence raises triable issues concerning ownership of the suit motor vehicle(s), negligence and awardable damages. In conclusion, it was submitted that this is a proper case for this Court to grant the Applicants unconditional leave to defend.

10. The Court has considered the material canvassed in respect of the motion. In addition, has taken the liberty of perusing the entirety of the Court record. The pertinent events in the suit have in part been captured by the parties in their respective affidavit material outlined above. The motion under consideration seeks twin prayers, namely, the setting aside of the final judgment delivered on 22.10.2021 and leave to file a memorandum of appearance and defence out of time.

11. The motion is inter alia premised upon the provisions of Section 3A of the CPA, the latter which reserves "the inherent power of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court" and Order 10 Rule 11 of the CPR which 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.".

12. The purport of the former provision was discussed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR, wherein it was observed that: -

> " Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd v West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that:
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> > "Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."
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> The Supreme Court went further in Board of Governors, Moi High School Kabarak & Anor v Malolm Bell [2013] eKLR, to add the following: -
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> " Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

13. The principles governing applications brought under Order 10 Rule 11 of the CPR are settled. The grant or refusal of an application invoking the Rule and seeking to set aside or vary a judgment default or any consequential decree or order, is discretionary. The discretion is wide and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. Therefore, in

considering the motion, this Court is guided by the principles voiced in the case of Shah –vs- Mbogo and Another [1967] E.A 116: The Court therein observed that: -

> " The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

14. Further, Platt JA (as he then was) in Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193 as cited with approval in Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR had this to say regarding the exercise of the discretion of the kind invoked here by the Applicants : -

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to be set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the Court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so 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 has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment 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 principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. .... It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction".

15. Here the key question falling for determination is whether the court ought to set aside the interlocutory and final judgment. With the above dicta in mind, it appears apt at this juncture to examine the recorded pertinent events leading up to the judgment on 22.10.2021. The record reveals the following. The plaint was filed on 07.10.2010 after which summonses dated 08.10.2010 were issued and appear to have been collected by the Respondent for purposes of service, upon all the defendants herein. The 3rd and 4th Defendant upon being duly served with the said summonses and as a consequence entered appearance on 29.10.2010 and later filed their joint statement of defence on 12.11.2010.

16. However, it seems that the Respondent encountered difficulty in effecting personal service of summonses upon the 1st and 2nd Defendant(s) who are the present Applicants. Prompting him to file the motion dated 08.03.2011, seeking inter alia that the Court be pleased to extend the validity of summonses against the 1st and 2nd Defendant/Applicants and the leave to serve summonses to enter appearance in the case of the said defendants through substituted service by means of advertisement in a Daily Newspaper. The motion was supported by the affidavit of erstwhile counsel appearing for the Respondent and was saliently premised on the fact that the 1st and 2nd Defendant/ Applicants had not been served with summonses due to difficulty in tracing their whereabouts. When the motion came up for hearing on 15.05.2011, Rawal, J. (as she then was) ordered as follows; -

> " The application dated 08/3/11 is granted as per prayer No. 2. The advertisement be published once in Taifa Leo and Daily Nation. There is no need for the first prayer as the summonses is still valid" (sic)

17. Subsequently, there was no activity in the matter until the Respondent once more moved the Court via another motion dated 15.10.2012 seeking inter alia that the Court be pleased to extend the validity of summonses against the 1st and 2nd Defendant/ Applicants. The said motion was supported by the affidavit of erstwhile counsel, the gist thereof being that 1st and 2nd Defendant/Applicants had not been served with the summonses due to difficulty in tracing them. Earlier, on 25.03.2011 the Court had granted leave to serve summonses upon the 1st and 2nd Defendant/ Applicants via substituted service. When the latter motion came up for hearing on 16.11.2012, Odunga, J. (as he then was) ordered as follows; -

> " The application dated 15th October 2012 is allowed with the result that the validity of summons against the 1st and 2nd Defendant extended for a period of 6 months" (sic)

18. The record shows that summonses in respect of the 1st and 2nd Defendant/Respondents were issued on 25.01.2013. The Plaintiff later lodged a request for interlocutory judgment vide a letter dated 19.06.2013 and received by this Court on 28.06.2013. The request for interlocutory judgment was supported by an affidavit dated 27.06.2013 sworn by the Plaintiff/ Respondent's erstwhile counsel, one Jacqueline Njagi. I find it useful to reproduce here some facets of the letter requesting for interlocutory judgment and pertinent paragraphs of the affidavit in support of the request. The letter drawn up by the firm of Jacqueline Njagi & Co. Advocates read in part as follows "Kindly enter interlocutory judgment on liability and special damages of Kshs. 5,700/= each against the 1st and 2{{^}} other defendants who have been served on 19th October 2010 but have not entered appearance or filed a defence" In addition, paragraphs *4*, *5*, *6* & 7 of the affidavit in support of the request for interlocutory judgment, deposed by counsel stated that: -

> " 1.....
>
> 2.....
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> 3.....
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> 4. That 1st and 2nd Defendant herein have not been served with the summons as it has been difficult to trace their whereabouts.
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> 5. That on or about 7th February 2013 the Court granted leave to serve summons upon the 1st and 2nd Defendants by way of substituted service.

6. That upon extension of the validity of summons the Defendant herein be served by way of substituted service through an advertisement on Daily Nation on 21st May (annexed hereunto and marked as EKP "1" is a copy of the advertisement)

7. That the statutory period for the 1st and 2nd Defendants to enter appearance has lapsed and they have not entered appearance.

8....." (sic)

19. Based on the above request for judgment and affidavit, the Deputy Registrar (DR) on 03.07.2013 proceeded to enter interlocutory judgment against the 1st and 2nd Defendant/ respondents with a further direction that the matter be set down for formal proof. Later, the suit proceeded to full hearing and the trial Court on 22.10.2021 eventually gave judgment in favour of the Plaintiff/Respondent jointly and severally against the all the Defendants.

20. The key plank canvassed in support of the motion before the court is the regularity of the interlocutory and final judgment and whether the same is liable for setting aside "ex debito justitiae" or otherwise. The Applicants through their affidavit material contend inter alia that they only learnt about the suit through a routine search on 'Google' and that the judgment against them is unlawful for want of due service of valid summonses as required by law. The Plaintiff's riposte was that the Applicants were duly and properly served with summonses to enter appearance via substituted service on 21.05.2013 but failed to defend the suit.

21. Upon consideration of the rival arguments, the Court proposes to first address the question whether there were valid summonses as of the date of asserted service upon the Applicants. As earlier noted, upon filing suit, the Respondent duly effected service of summonses upon the 3rd and 4th Defendant(s) however it appears that he had difficulty effecting personal service upon the 1st and 2nd Defendant/ Applicants. Hence the first motion dated 08.03.2011 by which leave was obtained to effect service vide substituted service in two (2) local dailies and the second motion dated 15.10.2012 resulting in the validity of summonses in respect of the 1st and 2nd Defendant/ Applicants being extended for a period of six (6) months.

22. The procedure relating to issuance and service of summons is generally provided for in Order 5 of the CPR. Concerning the objective underlying the requirement of service of summonses to enter appearance, the Court of Appeal in Patrick Omondi Opiyo t/a Dallas Pub v Shaban Keah & another [2018] eKLR stated that; -

> " .....As stated earlier, the purpose of summons along with the plaint or other pleading is to notify the sued party that a suit has been filed against them and that they are required to file their defence within a particular time frame failing which the other party would be at liberty to request for judgment in default of filing a defence.
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> 19. Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud....."
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> See also; - Equatorial Commercial Bank Limited v Mohansons (K) Limited [2012] eKLR and Diamond Trust Bank Kenya Limited v Maingi & another [2023] KECA 712 (KLR)

23. The same Court in the case Misnak International (UK) Limited -V- 4MB Mining Limited c/o Ministry of Mining Juba, Republic of South Sudan & 3 Others (2019) eKLR in concurring with the decision

of Aburili J in Law Society of Kenya vs Martin Day & 3 Others [2018] eKLR adopted the sentiments of the leaned Judge as follows: -

> " It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked."

24. As concerns the duration and renewal of summons, Order 5 Rule 2 of the CPR provides that: -

"(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

(2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.

(3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

(5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons."

25. On the purport of the above provision, this Court has previously in Kale Foundation v Alpharma Limited & Polycarp Njenga Kamoche [2021] KEHC 1090 (KLR) and Patrick Mukiri Kabundu v Nation Media Group Limited [2022] KEHC 2317 (KLR) recognized the existence of two schools of thought on the question whether expired summons to enter appearance can be "revived". As stated in the two cited decisions, the court's considered view is that the provisions of Order 5 Rule 2 CPR as read with other relevant provisions of the CPR and Section 95 of the CPA give wide discretion to the Court to extend the life of expired summons in proper cases. Which obviously was the view taken by the court regarding the second motion. Consequently, on account of the order of Odunga, J of 16.11.2012 the expired summonses were revived and ttheir validity duly extended. The decision has not been challenged on appeal, and it is improper and disingenuous for the Applicants to attempt to challenge the order of Odunga J before a court of concurrent jurisdiction.

26. Based on the extension of validity granted on 16.11.2012, the summonses were valid for a period of six (6) months. Pursuant to the provisions of Order 50 Rule 4 of the CPR in respect of which the Court of Appeal in Maersk Kenya Limited v Murabu Chaka Tsuma [2017] KECA 204 (KLR) stated that "...Order 50 rule 4 makes it clear that the rule applies specifically to computing time under the Civil Procedure Rules, or in accordance with an order of the court", the summons were to remain valid for a period of six months, excluding the period between 21st December and 13th January, when time does not run.

27. The next question is whether service was properly effected during their validity. Rawal, J. (as she then was) on 15.05.2011 granted the Respondent leave to effect substituted service by way of advertisement once in "Taifa Leo" and "Daily Nation". However, the Plaintiff/ Respondent's request for interlocutory judgment contains what are apparent errors. The letter states that 1st and 2nd Defendant/Applicants were served on 19.10.2010, which is a mere 12 days since filing suit, when summons are unlikely to have issued. The affidavit of service in support of the request for judgment however states that service was affected by way of substituted service on 21.05.2013. (see annexure marked '"EKP 1").

28. Despite the obvious error in the request for judgment, the deposition in the affidavit of service is supported by the annexed copy of the newspaper advertisement. Thus, it appears that proper service was effected upon the Applicants during the validity of the summons and proof tendered by way of the affidavit of service and related annexure. All in compliance with Order 5 Rule 15(1) of the CPR. Consequently, the impugned judgment was a regular judgment against the 1st and 2nd Defendant/ Applicants.

29. As held in Miarage Co Ltd (supra) where there is a regular judgment the Court would not usually set aside the same unless it is satisfied that there is a defence on merit, namely a prima facie defence which should go to trial or adjudication. Recently, the Court of Appeal in James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR set out the parameters to be considered when setting aside a regular judgment as follows:

> " 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.
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> See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173)."

30. First, concerning the explanation proffered by the 1st and 2nd Defendant/ Applicants, no direct reference was made to the substituted service by advertisement as asserted and demonstrated by the

Respondent. The Applicants efforts appearing to be taken up with the alleged absence of personal service and the details of the mail address on the summons to enter appearance. However, it warrants mentioning that the 1st Defendant/ Applicant's assertion that she only learned of this matter through a Google search does not appear plausible or probable; the results of the alleged Google search have not been exhibited in her affidavit, in support of the explanation. Secondly, in respect of delay, interlocutory judgment was entered on 03.07.2013 with final judgment on the matter being delivered on 22.10.2021. The Applicants' affidavit does not categorically state when the purported Google search was conducted, while the instant motion was filed on 08.07.2024, some eleven years since interlocutory judgment and almost four years since the final judgment. It would be difficult in the circumstances not to find that delay herein is palpably inordinate and unexplained.

31. Thirdly, concerning whether the draft defence raises any triable issues, the Court of Appeal in Daniel Lago Okomo v Safari Park Hotel Ltd & Another [2017] eKLR in defining a "triable issue" cited its decision in *Kenya Trade Combine Ltd v Shah, Civil Appeal No. 193 of 1999*, where it stated:-

> " In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."

32. In assessing the draft defence, the court must juxtapose its contents against the averments in the plaint. The Applicants here argued that the draft defence (annexure marked 'M-2") raises triable issues concerning ownership of the suit motor vehicle(s), negligence and awardable damages and they should be granted leave to file it out of time. The Plaintiff's retort is that the purported draft defence contains general denials of the averments in the plaint and that it ought to be disregarded as an attempt to delay justice. By his plaint, the Plaintiff avers that he was a fare paying passenger aboard the 1st Defendant's motor vehicle which at the time was being driven by the 2nd Defendant/Applicant when the same collided with 3rd Defendant's motor vehicle which at the time was being driven by the 4th Defendant. Particulars of negligence were pleaded against the respective drivers of the suit motor vehicles.

33. By their draft defence, the 1st and 2nd Defendant(s) generally deny ownership of the motor vehicle and negligence, without more, which to the Court's mind amounts to no more than mere denials instead of triable issues. A semblance of what may qualify as a triable issue is the Plaintiff/ Respondent's alleged contributory negligence pleaded in paragraph 5 of the 1st and 2nd Defendant(s) draft defence. To shore up the said defence, the Applicants have pleaded particulars of negligence against the Plaintiff/ Respondent. They aver therein that the accident was caused and substantially caused by the negligence, recklessness of the Plaintiff by "a) failing to have any sufficient regard for the safety of the users of the said road b) having total disregard to the traffic rules and regulations c) causing the said accident". The Plaintiff was evidently a fare paying passenger aboard the Applicants' vehicle, and the Court is at a loss as to how the Respondent could have contributed to a collision between two vehicles involved in the subject accident.

34. The Court of Appeal decision in Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo observed that; - ".....When a collision occurs between two vehicles, as between them, the issue of contributory negligence and apportionment may arise. However, as between a passenger and the owners/drivers of the two vehicles involved in the accident, liability on the part of the owners is 100% joint and several and no question of apportionment arises unless it is proved the passenger was negligent." Examining the pleaded particulars of contributory negligence, in light of this dicta, the court is not persuaded that there is an iota of a triable issue therein. In short, the draft defence raises no serious triable issue.

35. Finally, regarding the 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, the court notes that the Applicants had ample opportunity to defend the suit by filing the defence. Having been properly served with summons, which service has not been impeached. Equally, the Applicants were casual and failed to sufficiently explain their delay, this being a suit relating to a cause of action arose more that fifteen (15) years ago with final judgment being almost four years ago. In the court's view, the Applicants, by their own apparent indolence, are really the authors of their misfortune and must accept their karma.

36. It is relevant too that according to his pleadings and affidavit, the Plaintiff suffered severe injuries that resulted in the amputation of his leg whose attendant sequela must have informed the trial Court's award of damages in its final judgment. There appears to be every likelihood that reopening the matter will mean more delay and prejudice to the Respondent, especially due to the difficulty of procuring witnesses on both sides, given the time that has lapsed since the occurrence of the subject accident.

37. Weighing one thing against another, the court is persuaded that allowing the setting aside of the judgment at this late stage likely to unduly prejudice the Plaintiff/Respondent, more than the Applicants. And would in the circumstances of the case, amount to a travesty of justice. Consequently, it is the court's firm finding that the motion dated 4.07.2024 is without merit. It is hereby dismissed with costs to the Plaintiff/Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF NOVEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Chamwanda for the Defendant/Applicant

Ms Ondicho holding brief for Mr. Okolo for the Plaintiff/Respondent:

C/A: Erick