



**Kireru v Kamamo (Civil Appeal E1265 of 2023)
[2024] KEHC 15803 (KLR) (Civ) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1265 OF 2023

JM OMIDO, J

DECEMBER 17, 2024

BETWEEN

JAMES WAIHERA KIRERU APPELLANT

AND

JOSEPHINE WAMBUI KAMAMO RESPONDENT

*(Being an appeal from the ruling and order of Hon. S.G. Gitonga
delivered on 23rd October, 2023 in Milimani SCCC No. E5822 of 2022)*

JUDGMENT

1. The Appellant herein seeks to upset the ruling and order rendered on 23rd October, 2023 in Milimani SCCC No. E5822 of 2022. The grounds raised in the Memorandum of Appeal dated 6th November, 2023 are as follows:
 1. That the learned Adjudicator/Magistrate erred in law by finding that the Appellant had no justifiable cause for his non-attendance of the hearing on 22nd March, 2023.
 2. That the learned Adjudicator/Magistrate erred in law by finding that the Appellant's Draft Amended Response to the Statement of Claim did not raise any triable issues.
 3. That the learned Adjudicator/Magistrate erred in law by failing to consider the contents of the Appellant's further affidavit sworn on 14th July, 2023.
 4. That the learned Adjudicator/Magistrate erred in law by failing to consider or appreciate the submissions and legal authorities filed by the Appellant in support of its Notice of Motion application dated 6th April, 2023 and therefore arrived at an erroneous decision.



5. That the learned Adjudicator/Magistrate erred in law by arriving at a determination not supported by evidence.
 6. That the learned Adjudicator/Magistrate misdirected herself and based her findings on wrong considerations, thus arriving at an unjust determination.
2. Although the above are listed as six distinct grounds, the same in precis, in my view, constitute just one ground which has been couched in an expounded manner to include what ought to be stated in the submissions in support thereof. The single ground that I discern has been disclosed is that the learned trial Magistrate/Adjudicator erred in law in reaching the finding that the Appellant's Notice of Motion application dated 6th April, 2023 seeking to set aside the default judgement entered on 22nd March, 2023 was without merit.
3. The Appellant proposes that the appeal be allowed and that the order for dismissal of the application be set aside and be substituted with an order allowing the said application, with the result that the default judgement be set aside and the matter be remitted back to the lower court for trial.
4. This court directed that the appeal proceeds by way of written submissions and both parties filed their respective submissions.
5. A first appellate court is mandated under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.
6. This court is therefore empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 in which Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

7. Going to the trial court's record, the Respondent herein (the Claimant in the lower court), presented the claim, vide a Statement of Claim dated 29th August, 2022 seeking relief in the nature of a liquidated claim for the amount of Ksh.745,112/- together with costs of the claim.
8. The Appellant resisted the claim by filing a Statement of Defence dated 12th October, 2022 wholly denying the Respondent's claim and sought that the claim be dismissed with costs.
9. The matter was set down for hearing on 22nd March, 2023 and the proceedings of the trial court of that day read as follows:

Onyango for Claimant: Respondent is absent. Certificate of Service is on record. Respondent filed a 3-paragraph response to the claim. We can proceed via documentation. We pray for default judgement against the Respondent.



Court: Certificate of Service is on record. Respondent is absent. I have considered the application made by the Claimant and the Claimant's documents filed. Default judgement is hereby entered against the Respondent in the sum of Ksh.745,112/-. The Claimant is also awarded costs and interest at court rates from date of filing suit until payment in full.

Signed

22nd March, 2023.

10. Following the entry of judgement in the manner above, the Appellant filed the application dated 6th April, 2023 seeking inter alia the setting aside of the said judgement. The application was opposed by the Respondent and was after consideration by the trial court dismissed with costs on 23rd October, 2023. It is the order for the dismissal of the application that gives rise to this appeal.
11. It is instructive from the position taken by the Appellant that he sought to upset and set aside the judgement entered on 22nd March, 2023 primarily because failure to appear in court on his part was excusable and that the defence or Response to Claim filed raised triable issues.
12. From the authorities of *Jane Kanyita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR; *Bouchard International (Services) Limited v M'Mwereia* [1987] KLR 193; *Remco Limited v Mistry Jadva Parbat & Company Limited & 2 others* [2002] 1 EA 233; *Gulf Fabricators v County Government of Siaya* [2020] eKLR; and *Baiywo v Bach* [1987] KLR 890, I am guided that an irregular judgement is set aside, upon application by a party as a matter of right, or ex debito justitiae and unconditionally while a regular judgement may on application by a party be set aside by the court in exercise of its discretion, whereby the court may attach terms and/or conditions to the order setting it aside.
13. It is clear from the record of the lower court that the Appellant filed a Response to the Respondent's claim. The Response was on record when the matter was listed for hearing before the learned Adjudicator on 22nd March, 2023.
14. Rule 11(1) of the Small Claims Court Rules provides that where a Respondent fails to file a Response to the Claim within the time specified in the rules or within such additional time as the Court may have allowed, the court shall, on the written request of the claimant, enter default judgment and issue a decree in favour of the claimant. The default judgement under the rule is entered where a Respondent fails to file a response to the Claim.
15. Rule 21 states what follows when a Respondent in a claim before the Small Claims Court does not attend to the hearing of the claim. It states as follows:
 21. Effect of non-attendance at hearing
 - (1) Where neither the claimant nor the respondent attends on the date fixed for hearing, the Court may dismiss the claim.
 - (2) Where only the claimant attends, and the Court is satisfied that—
 - (a) the respondent was duly served with the Hearing Notice, it may proceed to hear and determine the claim.
16. From the foregoing rules, it is clear to me that a default judgement can only be entered against a Respondent (or a Claimant in respect to a Counterclaim) where the Respondent (or Claimant, as the case may be) fails to file a Response to the Claim (or to the Counterclaim) within the specified time.



17. Where such a party has filed a Response, default judgement is not available. As can be seen from Rule 21 above, the course the court may take is to proceed to hear the matter in the absence of the party who does not appear.
18. Back to the matter before the lower court, it is apparent that the learned Adjudicator proceeded to enter default judgement against the Appellant on the ground that he was not present at the hearing. The learned Adjudicator no doubt fell into error as that was not a ground available in law for entry of a default judgement. What the trial court should have done was perhaps to consider proceeding to hear the Respondent, the absence of the Appellant notwithstanding. Entering a default judgement where there was a Response to the Claim filed was irregular and the judgement that resulted was in the premises also irregular.
19. As we have seen from the authorities above, an irregular judgement is set aside ex debito justitiae, as a matter of judicial duty and unconditionally, as opposed to a regular judgement which is set aside in judicious exercise of the court's discretion whereby the court may attach conditions to the order setting the judgement aside.
20. Being of the findings that the default judgement was irregular, I find merit in the appeal and proceed to allow it in the following terms:
 - i. The order of the trial court issued on 23rd October, 2023 dismissing the Appellant's Notice of Motion application dated 6th April, 2023 is hereby set aside and substituted with an order allowing the said application with the result that the default judgement entered on 22nd March, 2023 is hereby set aside together with all consequential orders.
 - ii. The trial court file to be remitted back to the Small Claims Court, Milimani for trial before an Adjudicator other than Hon. S.G. Gitonga.
 - iii. The file to be mentioned before the Head of Station Small Claims Court, Milimani on 28th January, 2025 for reallocation.
21. The Respondent shall bear the costs of the appeal.

DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 17TH DAY OF DECEMBER, 2024.

JOE M. OMIDO

JUDGE

For Appellant: No appearance.

For Respondent: Ms. Njoroge.

Court Assistant: Ms. Njoroge.

Court: A mention notice to be served upon the Appellant.

JOE M. OMIDO

JUDGE

