**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 275 OF 2016**

**TIMOTHY KAMANDE.....APPELLANT**

**-VERSUS-**

**EDWARD KINYAGI NJENGA.....RESPONDENT**

(Being an appeal against the ruling and order of Honourable G. Onsarigo (Mr.) (Resident Magistrate) delivered on 22nd April, 2016 in CMCC NO. 1124 OF 2005)

**JUDGMENT**

1. Edward Kinyagi Njenga, the respondent herein, filed a suit against the appellant and one Timothy Kamande vide the plaint dated 12th August, 2005 in which he sought for both general and special damages plus costs of the suit and interest thereon.

2. The respondent pleaded in his plaint that sometime on or about 10th June, 2003 he was lawfully travelling aboard motor vehicle registration number KAP 882X ("*the subject vehicle*") along Thika-Kandara Road and being at all material times driven by the appellant's driver/agent when the same collided with motor vehicle registration number KAK 850T, causing the respondent to sustain severe injuries.

3. The respondent attributed the accident to negligence on the part of the appellant and/or Timothy Kamande, who later filed a joint statement of defence to deny the respondent's claim.

4. The hearing of the suit proceeded ex parte, with the respondent relying on the testimony of two (2) witnesses.

5. Subsequently, the respondent filed written submissions following which the trial court considered before finally entering judgment in favour of the respondent as follows:

| | |
|---|---|
| a. Liability | 100% |
| b. General damages for pain, suffering | |
| and loss of amenities | Kshs.600,000/ |
| c. Special damages | Kshs.61,135/ |
| **Total** | **Kshs.661,135/** |

The respondent was also granted costs of the suit.

6. The appellant thereafter filed the application dated 27th July, 2015 seeking to have the judgment set aside and further seeking leave to participate in the hearing of the suit. The application was opposed by the respondent.

7. Upon hearing the parties on the aforementioned application, the trial court dismissed the same with costs vide its ruling delivered on 22nd April 2016.

8. The ruling is now the subject of the appeal before this court and the appellant has put forward the following grounds vide his

memorandum of appeal dated 20th May, 2016:

> **i. THAT the learned trial magistrate erred in law in delivering his ruling after 87 days without assigning reasons for the delay thereof.**
>
> **ii. THAT the learned trial magistrate erred in law in declining to appreciate that the appellant's non-attendance at the hearing was not occasioned by himself but by his former advocates.**
>
> **iii. THAT the learned trial magistrate erred in law and misdirected himself by condemning the appellant for the mistake committed by his former advocates who failed to advise him about the hearing date and the progress of the case until the appellant learnt of the judgment at the execution stage.**
>
> **iv. THAT the learned trial magistrate erred in law by declining to set aside the ex parte judgment without finding that the appellant's delay in filing the application was not so inordinate or unpardonable as to not be cured by payment of costs or thrown away costs.**
>
> **v. THAT the learned trial magistrate erred in law in failing to hold whether the setting aside of the ex parte judgment would prejudice the respondent in any way.**
>
> **vi. THAT the learned trial magistrate erred in law in declining to set aside the ex parte judgment by relying on a technicality of non-attendance whereas the appellant had filed a valid statement of defence.**
>
> **vii. THAT the learned trial magistrate erred in law in declining to set aside the ex parte judgment and failed to appreciate that no litigant should be condemned unheard and this is a case which should have been determined on merit.**
>
> **viii. THAT the learned trial magistrate failed to exercise his discretion judiciously in declining to set aside the ex parte judgment dated 15th December, 2014 and all consequential orders.**

9. This court directed the parties to file written submissions on the appeal. On his part, the appellant contended that as soon as he learnt of the ex parte judgment which had been entered against him, he hastened to instruct a new firm of advocates to take over the matter from his erstwhile advocate, who timeously applied to have the ex parte judgment set aside.

10. The appellant also argued that the trial court ought to have considered prevailing circumstances such as the fact that a statement of defence had been filed and that the appellant was not informed of the hearing date by his former advocate, citing the case of **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** where Court of Appeal in addressing its mind on whether to set aside an ex parte judgment entered by the High Court took into account factors such as the existence of a defence on record and the inadvertence of counsel for the appellant in that instance.

11. The appellant further urged this court to consider his right to a fair trial as provided for under Article 50(1) of the Constitution, 2010 and reinforced by the court in **Kiai Mbaki & 2 others v Gichuhi Macharia & another [2005] eKLR** as follows:

> **"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."**

12. It was the appellant's argument that the trial court ought to have acknowledged the prejudice occasioned to him as a result of the ex parte judgment.

13. The respondent in urging this court to dismiss the appeal began by submitting that the appeal ought to be struck out for the reason that it was filed out of time and without leave of the court being sought and obtained.

14. On a different note, the respondent contended that the appellant cannot be heard to blame his erstwhile advocate in the absence of any evidence to show that he had taken the initiative to follow up his case with the said advocates. To support his arguments, the respondent referred this court to **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCC NO. 397 of 2002** where the court opined that while it may be excusable for a litigant to state that he or she was let down by his or her advocate, such litigant has a corresponding duty to constantly follow up the progress of the case with the relevant advocate.

15. The respondent maintained that to grant an order setting aside the ex parte judgment would inevitably be prejudicial to his case since it will be an up-hill task for him to trace all his evidence and/or witnesses.

16. I have considered the contending written submissions alongside the authorities cited and I have also re-evaluated the evidence placed before the trial court. Whereas the appellant put in eight (8) grounds of appeal, I note that the twin issues for determination have to do with the question of the delay in delivery of the ruling and the question on whether the ex parte judgment ought to have been set aside.

17. Before I address the above issues, however, I wish to give my view on an issue raised in the respondent's submissions in respect to the competency of the appeal.

18. It is noted that the impugned ruling was delivered on 22nd April, 2016 whereas the memorandum of appeal was filed on 23rd May, 2016.

19. It is correct that this court vide its ruling delivered on 20th December, 2016 issued among other orders, an order granting the appellant leave of 10 days within which to appeal.

20. It is apparent from the foregoing that the filing of the memorandum of appeal, being the substantive appeal, preceded the above order. Be that as it may, owing to the granting of leave to appeal out of time, it is fair to state that the appeal was deemed to have been duly filed even though the record of appeal was filed at a much later date on 3rd May, 2019. In any event, the respondent did not challenge the competency of the appeal at an earlier stage and cannot be heard to now raise this issue at the conclusion of the appeal. In that case, I decline to strike out the appeal.

21. I will now discuss the first issue of the appeal relating to the timelines for delivery of the ruling. Going by the lower court record, it is apparent that the trial court, upon directing the parties to file written submissions from which the impugned ruling derives, confirmed compliance by the parties on 27th November, 2015 and issued them with a ruling date for 25th January, 2016.

22. It is clear that there was a delay of about three (3) months in delivery of the ruling and this court is not privy to the explanation behind the delay. Suffice it to say that it would not be proper for this court to set aside the ruling on that ground alone.

23. Having determined the above, I now turn to address the issue which forms the crux of the appeal. In his affidavit supporting the application dated 27th July, 2015 filed before the trial court, the appellant explained that he was not made aware of the hearing date by his former advocate, neither was he aware of the ex parte judgment until such time as the respondent commenced with the execution process, hence it would be in the interest of justice to grant him an opportunity to defend his case.

24. In opposing the application, the respondent asserted that the trial court correctly exercised its discretion and considered all relevant circumstances in declining to grant an adjournment in the suit.

25. It was also the respondent's contention that the erstwhile advocate for the appellant did not produce any evidence to show that he was indisposed and in any case, the appellant was himself not present in court during the hearing.

26. Upon hearing the parties, the trial court reasoned that a litigant is ultimately responsible for his or her case and where a litigant's advocate has let him or her down, the litigant is at liberty to seek the services of another advocate.

27. The trial court eventually opined that the appellant had failed to establish a basis for having the ex parte judgment set aside.

28. The law is well settled that the courts have a wide and unfettered discretion in deciding whether or not to set aside an ex parte judgment, keeping in mind that such discretion ought to be exercised in meeting the ends of justice.

29. Going by the record, it is clear that when the suit came up for hearing on 14th May, 2013 the appellant's counsel was not in attendance but had sent a colleague to hold his brief and seek an adjournment, explaining that he was indisposed.

30. I concur with the trial court's finding that no evidence was produced to confirm the above position and further, that the suit was quite an old matter.

31. The record equally shows that the appellant's former advocate did not participate in the hearing or attend court thereafter. In my view, it is evident that the appellant was let down by his then advocate. In this regard, the courts have on previous occasions held that the inadvertence of an advocate should not be visited upon the client.

32. However, it is noteworthy that the same courts have gone ahead to opine that the defence of mistake of an advocate does not apply in an open-ended manner; rather, a client is responsible for showing that he or she faithfully followed up the case. This was the position taken by the trial court and which position I fully support. A similar conclusion was arrived at as seen in the case of **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCC NO. 397 of 2002** which I have already cited.

33. In the present instance, the appellant did not demonstrate any tangible steps taken at consulting his erstwhile advocate or obtaining updates on the progress of the matter. I take the view that it was not enough for the appellant to cast blame on his advocate without showing any diligent action on his part in defending the suit.

34. Whereas the learned trial magistrate did not address his mind to the following issue, I deem it necessary to discuss it. I have looked at the lower court proceedings and I have established that on more than one occasion prior to the ex parte hearing, the respondent's counsel had sought for and been granted adjournments, thereby contributing to the delay in the prosecution of the suit. This is a factor that the learned trial magistrate ought to have considered in arriving at his determination.

35. In addition, a court faced with a question on whether to set aside an ex parte judgment is similarly called upon to consider whether there is a triable defence on record.

36. It is clear from the learned trial magistrate's pronouncement that he did not make any reference to the appellant's defence.

37. In that case, I have looked at the statement of defence filed by the appellant and note that the negligence is solely or substantially attributed to the driver of motor vehicle registration number KAK 850T who was not enjoined in the suit by either party.

38. From the accounts given by the parties, it is apparent that the accident in question involved two (2) motor vehicles. In the premises, I am

satisfied that the defence raises triable issues which necessitated further examination at the trial.

39. Last but not least, the learned trial magistrate was required to weigh the prejudice that would befall the parties but he did not. I acknowledge the age of the suit and the fact that the respondent has a long-awaited judgment in his favour of which he is entitled to enjoy the fruits. I likewise acknowledge that the appellant has the right a fair hearing on his defence as guaranteed by **Article 50(1)** of the **Constitution**.

40. In view of the foregoing, the rules of natural justice call upon me to exercise fairness in finding that the appellant; being the party who stands to be gravely prejudiced if kept out of the seat of justice; should be granted an opportunity to defend his case. Either way, it is noted that the decretal amount was previously deposited by the appellant into a joint interest earning account in the names of the parties' advocates. Moreover, the respondent did not bring forth any evidence to support his averment that he may not be able to trace the evidence to be relied upon and in any event, it is only the respondent and a police officer who testified for the plaintiff's case.

41. In the end, the appeal is allowed and the following orders are made:

**a. The ruling delivered by the trial court on 22nd April, 2016 and resulting order are hereby set aside and substituted with an order allowing the application dated 27th July, 2015.**

**b. Consequently, the ex parte judgment delivered on 15th December, 2014 and all consequential orders are hereby set aside and the suit is reinstated to be heard by another magistrate of competent jurisdiction other than Hon. Onsarigo.**

**c. Costs of the appeal to abide the outcome of the suit.**

**Dated, Signed and Delivered at Nairobi this 13th day of December, 2019.**

**.....**

**J.K. SERGON**

**JUDGE**

In the presence of:

……. for the Appellant

……. for the Respondent