



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 128 OF 2013

ELIZABETH WANJIKU ISAAC.....1ST APPELLANT

HARRISON KAMAU KINYANJUI2ND APPELLANT

VERSUS

HARRISON KAMAU KINYANJUIRESPONDENT

(Being an appeal from the Ruling delivered on 8th February, 2013

by Hon. T.S. Nchae (Ag. Senior Resident Magistrate) Milimani

Commercial Courts in CMCC No. 7095 of 2010)

JUDGMENT

1. The Respondent's motor vehicle Registration No. KBJ 461K was involved in a Road Traffic Accident on 15th May, 2010. The Respondent sued the Appellants for special damages in the sum of Ksh.1,961,500/=. Subsequently, *ex parte* judgment was entered for the Respondent.
2. Vide application dated 17th October, 2012, the Appellants applied for orders of stay of execution and the setting aside of the *ex parte* judgment.
3. The trial Magistrate ruled that the judgment had been regularly entered and dismissed the application. That is what triggered the filing of the appeal herein.
4. The grounds of appeal can be summarized into one broad ground. That is whether the trial magistrate failed to exercise the court's discretion judiciously and therefore erred in dismissing the application to set aside the *ex parte* judgment.
5. The appeal was canvassed by way of written submissions which I have considered.
6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

7. The affidavit of service sworn by the process server on 30th November, 2010 reflects that service of summons was effected on 30th November, 2010. The summons gave the Appellants 15 days to enter appearance. The request for Judgment was received in court on 17th

December, 2010. The *ex parte* judgment was entered on 23rd December, 2010. In the meantime, the Appellants' Memorandum of Appearance and Statement of Defence was received in court and bears the stamp for 20th December, 2010. A reply to the defence was filed in court on 14th January, 2011. The matter proceeded for pre-trial directions and fixing of a hearing date before it became apparent to the trial court that there was an *ex parte* judgment on record.

8. From the above scenario, it is abundantly clear that the Memorandum of Appearance and the Defence were filed out of time. It cannot therefore be set aside as a matter of right as argued by the Appellants. The delay in filing the Memorandum of Appearance and the Defence was not inordinate. The delay appears not deliberate as both parties were ready to proceed with the hearing of the case.

9. The principles applicable in determining whether to set aside an *ex parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983]eKLR** as follows:

“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b*). Secondly, this 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c*). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah [1968]EA 93*.

10. Issues have arisen whether that Respondent’s claim was a liquidated one. In my view it was a liquidated claim. The claim is for a specific amount of money. The Blacks Law Dictionary 8th edition defines a Liquidated claim as follows:

“1. A claim for an amount previously agreed on by parties or that can be precisely determined by operation of law or by the terms of the parties agreement 2. A claim determined in a judicial proceeding.”

11. With the foregoing, I allow the appeal with costs in cause. Throw away costs to the Respondent.

Dated, signed and delivered at Nairobi this 8th day of Feb., 2018

B. THURANIRA JADEN

JUDGE