REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 98 OF 2012

(ARISING FROM THE RULING AND ORDER OF HONOURABLE C. OBULUTSA (MR) SENIOR RESIDENT MAGISTRATE AT MILIMANI COMMERCIAL COURT MADE ON 9TH FEBRUARY 2012 IN NAIROBI CHIEF MAGISTRATE'S COURT CIVIL SUIT NO. 14231 OF 2004)

JUSTA WAWIRA ………………………...APPELLANT

VERSUS

GINZA MOTORS LIMITED …………RESPONDENT

JUDGMENT

1. This appeal arises from the ruling and order of Honourable C. Obulutsa (Mr) Senior Resident Magistrate at Milimani Commercial Court made on 9th February 2012 in Nairobi Chief Magistrate's court civil suit No. 14231 of 2004.
2. The appellant herein Justa Wawira was the plaintiff in the court below. She filed suit against defendant/respondent herein Ginza Motors Ltd & 2 others seeking for special damages and general damages following a traffic road accident which occurred on 24th May 2002 along Thika Nairobi road in Nairobi involving motor vehicle registration No. KAM 073 U wherein the appellant was traveling as a lawful passenger.
3. The original plaint dated 22nd December 2004 was filed on the same day against Michael Kamau Githuka who was the alleged driver, agent or servant of the 2nd defendant Simon Chege alleged to be the owner of the accident motor vehicle registration No. KAM 073U.
4. The said plaint was amended on 23rd March 2005 introducing (enjoining) the respondent herein Ginza Motors Ltd as defendant and striking out Michael Kamau Githuka from the proceedings. The amended plaint also changed the date of accident from 16th July 2003 to 24th May 2002.
5. The defendants filed defence to the plaintiff's claim, denying the claim. The plaintiff's suit was heard and judgment delivered on 9th February 2008 in her favour. The trial magistrate Honourable A.N. Ongeri (Mrs) found the respondent herein and one Simon Chege, jointly liable in negligence at 100%. The trial magistrate found that the respondent herein was liable as it was the registered owner of the accident motor vehicle at the material time while Simon Chege who was the 1st defendant was also held liable for being the beneficial owner of the accident motor vehicle and the two were to compensate the appellant/plaintiff shs 300,000/- general damages for pain and suffering and shs 3100 special damages together with costs of the suit and interest at court rates.
6. By an application dated 1st August 2011, the law firm of Ameli Inyangu & Partners filed an application seeking leave to come on record for the respondent in the place of Oruko, Imende

& Kiriko advocates. They also prayed for stay of execution of decree issued in respect of the judgment and lastly but more importantly, they sought, on behalf of the respondent herein an order setting aside the judgment made on 9th February 2008 and all consequential orders made there under, and for leave to be granted to the respondent to defend the suit by giving evidence in the matter.

7. By a ruling delivered on 9th February 2012 by Honourable Obulutsa, then Senior Principal Magistrate, the court below set aside the judgment entered and directed that considering the age of the case, did not set aside the proceedings as getting the witnesses may be difficult. The court therefore only allowed the 2nd defendant/respondent herein to present its case from where the plaintiff had closed her case and ordered costs to be in the cause.
8. It is that ruling of Honourable C.Obulutsa (Mr) Senior Resident Magistrate delivered on 9th February 2012 that provoked this appeal by the appellant.
9. The appellant's Memorandum of Appeal dated 9th March 2012 and filed on 12th March 2012 sets out 7 grounds of appeal namely:-

a. The learned magistrate erred in law and fact when he failed, as he did, to find that there was a proper ground in law or otherwise to set aside the judgment entered on 19th February 2008.
b. The learned magistrate erred in law and in fact when he failed, as he did, to find that there was inordinate delay in making the application dated 1st August 2011 by the respondent.
c. The learned magistrate erred in law and in fact when he found, as he did, that there was merit in the said application dated 1st August 2011 as consequently set aside a judgment entered after the respondent was granted a very reasonable opportunity to be heard and after about 4 years from the date of the said judgment.
d. The learned magistrate erred in law and in fact by failing to consider the merited submissions by the appellant in making his ruling on the application dated 1st August 2011.
e. The learned magistrate erred in law and in fact by relying on irrelevant and extraneous issues in arriving at the erroneous decision to set aside the judgment and hence failing to appreciate that justice delayed is justice denied.
f. The learned magistrate erred in law and in fact by failing, as he did to exercise his discretion in favour of the appellant and thereby resulting in great injustice to the appellant in the circumstances.
g. The learned magistrate erred in law and in fact, as he did, when he arrived at his decision to allow the respondent's application dated 1st August 2011 when replying on relevant and/or nonexistent evidence and disregard the relevant facts and evidence on record and thereby misdirecting himself and arriving at an erroneous decision.

10. The appellant prayed that this appeal be allowed , setting aside the ruling of Honourable C. Obulutsa (Mr) Senior Resident Magistrate delivered on 9th February 2012 in CM CC 14231/2004 and be substituted with an order allowing the appellant to proceed with execution of the judgment and decree given on 19th February 2008 and an order for costs of the application dated 1st August 2011 and costs of this appeal in favour of the appellant against the respondent.
11. This appeal was admitted to hearing on 19th May 2014 by Honourable Justice Waweru J and on 21st July 2014 directions were given. The parties' advocates agreed to have the appeal disposed of by way of written submissions. The appellant filed hers on 8th August 2014 whereas the respondent filed on 16th October 2014.
12. The appellant consolidated grounds 1, 2, 3 and 4 and argued them together as one. It is submitted that the respondent and its advocate having failed to attend court for defence case hearing on 27th September 2007, its case was closed. That they were duly served for that date. That before judgment date, the matter was mentioned in court severally. The appellant accused the respondent of indolence which fact, it was submitted, the trial magistrate ignored in setting aside the judgment. it was submitted that the respondent's indolence is inexcusable as they stayed for nearly 4 years without enquiring from their advocates on record on how the suit in court was progressing hence they cannot hide behind their advocate's failure to inform them of the court

proceedings.

13. The appellant's counsel relied on the case of **Josephat Nderitu Kariuki vs Pine Breeze Hospital Ltd [2006] e KLR** where the court held that

> ***"……..the discretion is intended to avoid hardship resulting from inadvertence or a mistake but not to assist a party who has sought to delay or obstruct the course of justice. The defendant chose their advocate who failed to attend court. This is a proper case where an advocate should bear the consequences of their own professional negligence of failure to attend court on behalf of their clients. Similarly the client should bear the consequences of their choice of his legal fees….."***

14. The appellant urged that the lower court should have followed the above principle since the respondent chose counsel who did not inform them of the proceedings. Further, that the respondent had recourse against his counsel elsewhere relying on **Hezron Tirimba Mucheka vs Alfayo Omesa Omangi HCC 14/2003.** It was argued that the trial court erred in punishing the appellant for the indolence of the respondent and their advocate.
15. In support of grounds 5,6 and 7 of the memorandum of Appeal, the appellant's advocates argued that under Order 12 Rule 7 of the Civil Procedure Rules, the court can only exercise discretion when it is given reasons for default which the respondent failed to avail in support of their application for setting aside judgment. Further, that the judgment entered was not exparte as the respondent was well aware of the trial. The appellant's counsels further submit that the application by the respondent also contained a prayer for amendment of the defence which was denied as it was being sought after judgment hence, it follows that without such an amendment, the respondent's defence as it in record does not raise any triable issue; relying on the case of **Stephen Isoe Nyaribo vs Samuel Orindo Manani & Another [2006] e KLR,** and arguing that: ***………where a judgment has been regularly entered it can only set aside on grounds that would assist in the promotion of justice between the parties to the suit and the conduct of the defendants precludes the court from interfering with the judgment entered in favour of the plaintiff.***
16. In the appellant's view, the trial court exceeded its jurisdiction by setting aside the judgment to allow the respondent to defend their case even when they had continuously exhibited blatant disregard of the law, relying on the case of **Adero & Another vs Ulinzi Sacco Society Ltd.** The appellant counsel urged this court to exercise its discretion to allow the appeal by setting aside the order that set aside judgment and the judgment be reinstated to enable the appellant to proceed with execution of the decree.
17. In opposing this appeal, the respondent's counsel submitted that the respondent sought for orders of setting aside the judgment and grant of leave to defend the suit by giving evidence on the matter, not to amend the defence as alleged by the appellant. Further, that the judgment entered was exparte since the respondent never gave up its right to call witnesses to testify as its defence could not be substituted with written submissions. Counsel supported the trial magistrate's order which he stated that it took into account the justice to the parties that would be served, considering the circumstances of the case since there was a valid defence on record denying ownership of motor vehicle KAL 739 J and or being in any way responsible for the accident involving motor vehicle KAM 073U. That its failure to participate in the proceedings was occasioned by the mistake of its advocate on record who never notified the client/respondent of the progress in the matter. That the accident motor vehicle had been sold to the 1st defendant and therefore the respondent could not be liable where the motor vehicle did not belong to it at the time of accident as the evidence was abundant that the 1st defendant owner had insured it with United Insurance Company Co. Ltd. In addition, it was submitted on behalf of the respondent that being the registered owner is only prima facie evidence of ownership of the vehicle but there was evidence to rebut that presumption and that it is for that reason that the trial court had found that the 1st defendant was the beneficial owner thereof.
18. The respondent contended that therefore failure to set aside the judgment would cause a grave injustice to the respondent as it has a defence that raises serious triable issues which should go to trial for adjudication. Further, that the discretion to set aside judgment is unfettered judicial discretion to ensure justice is done to both parties which discretion is intended to avoid hardship

resulting accident, inadvertence or excusable mistake or error, not exercised to assist those who have deliberately sought for obstruct the course of justice. Citing the case of **Patel vs EA Cargo Handling Services Ltd (1974) EA 75 and Shah vs Mbogo (1967) EA 116 at 123** and **Shabir Din Vs Ram Parkash Anand (1955) 22 EACA 48**, the respondent maintained that it had a good defence and that where it was clear that the default was due to its legal advisers even though negligent, the discretion of the court may be exercised depending on facts of the case in issue.

19. The respondents urged the court not to interfere with the discretion of the trial court as the appellant had not demonstrated that the lower court misdirected itself resulting in a wrong decision /and or that the trial magistrate was clearly wrong in the exercises of his discretion that occasioned an injustice upon the appellant. That the appellant was seeking to fetter the discretion of the courts when considering applications under Order 12 of the Civil Procedure Rules.
20. The respondent maintained that the fact that not all the proceedings were set aside was an indication that the trial court considered justice for both parties to avoid an injustice/hardship of the appellant going through a fresh trial while according the respondent an opportunity to be heard in defence.
21. That the cases relied on by the appellant on where there was mistake by counsel are not binding on this court as courts decide each case based on its own peculiar facts relying on **Shabir Din** where it was held that:

> ***"………….A mistake or misunderstanding of the appellant's legal advisors even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts o the particular case."***

22. The respondent urged the court not to substitute its own discretion for that of the trial court unless the lower court misdirected itself and as a result arrived at a wrong decision which aspect is said to be lacking in this case and therefore prayed for dismissal of the appeal with costs to the respondent.
23. I have anxiously considered this appeal, submissions by both counsels, in favour and in opposition to the appeal and the judicial precedents and procedural laws relied on in urging their respective positions. The Milimani CMCC 14231/2004 was instituted in 2004 and was heard on 13th April 2006 under certificate or urgency as the appellant was said to be relocating to the UK.
24. The record in the court below shows that on the date of 13th April 2006 when the hearing commenced, both defendants were ably represented in court. Mr Imende represented the 2nd defendant whereas Mr Okello represented the 1st defendant, and Mr Gitonga appeared for the plaintiff. The plaintiff /appellant testified in the presence of the advocates for both the defendants who did not ask her any question after which her case remained open and the 1st defendant Simon Chege testified in defence stating that he was the owner of the accident motor vehicle as stated by the police but did not understand on what basis police formed that opinion as they had not informed him whether they got the information from its insurance Company or police abstract. The first defendant testified that the vehicle was insured with United Insurance Company.
25. The record shows that subsequent to that hearing, there was no appearance by the defendants or their advocates until 23rd July 2007 when PW2 a police officer testified for the plaintiff to the effect that the accident motor vehicle belonged to the 1st defendant Simon Chege who was insured with United Insurance Company and that the accident was reported to Thika Traffic police station vide OB No. 12/24/5/2002. The case was then adjourned to 27th September 2007 to call the doctor but the plaintiff's counsel abandoned the quest as the documents had been produced by consent and the trial court directed parties to file submissions for judgment to be delivered.
26. Until 19th February 2008 when judgment was delivered in favour of the appellant, the respondent herein and his co-defendant never made appearances in court, until 1st August 2011 when the respondent herein filed the application seeking to set aside the judgment delivered on

19th February 2008, hence the orders of 9th February 2012 by Obulutsa (SPM) which are impugned herein. The record shows that on all those occasions when the case proceeded for hearing before the trial magistrate, the respondents advocates on record were served with hearing notices. They had even been invited on many occasions to send their representatives to attend at the registry to fix hearing dates by consent but they never responded. When the appellant set in motion the process of executing decree is when the respondent was awakened and obtained stay, culminating in the application to set aside judgment entered, urging that their advocates on record never notified them on the progress of the matter.

27. The issue for determination is whether the trial magistrate was justified in exercising his discretion to allow the respondent's application setting aside the judgment entered on 19th February 2008 and allowing the respondent to adduce its evidence in defence to the claim by the appellant.

28. In setting aside the judgment entered in favour of the appellant on 19th February 2008, it is obvious that the trial magistrate was exercising judicial discretion. It is established in our courts as was set out in the case of **Mbogo & Another vs Shah EALR (1968) page 13** that an appellate court will not interfere with the exercise of the trial judge's discretion unless it is satisfied that the judge in exercising his discretion misdirected himself in some matters and as a result 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 mis-justice.

29. I agree with those very noble principles which have stood the test of times and which go further to establish that the courts' discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

30. I have deeply considered the respondent's reasons that were offered in the lower court regarding their failure to attend court for the hearing of the case against it on several occasions with an anxious mind. I have asked myself whether their failure to attend court and offer their defence constituted an excusable mistake, an error of judgment regarding their advocate's failure to notify the respondents of the hearing dates and or progress of the case before the court. I note that on the day the plaintiff and 1st defendant testified, the respondent's advocate was in court and did not cross examine the plaintiff on her evidence. Thereafter, the said advocate never made any appearances for the respondent. On the other hand the advocates for the 1st defendant Simon Chege had sought and obtained leave of court vide chamber summons dated 3rd April 2006 to cease acting. That was before the plaintiff's advocates by their application dated 10th April 2006 sought to have the suit listed and evidence of the plaintiff taken expeditiously to enable her leave the jurisdiction of the court as she was to relocate to the United Kingdom, having divested her interest in Kenya.

31. The record, as I have stated above does not reflect any reasons why the respondent or its advocates, Oruko Imende & Kiura advocates did not attend court after the plaintiff and the 1st defendant had testified on 13th June 2006 and on all the subsequent occasions including the 27th September 2007 despite the fact that the record shows that they were duly served for the hearing. Neither did they file submissions after the plaintiff's case was closed and a date for judgment was therefore set and judgment delivered on 19th February 2008.

32. According to the respondent, it was not aware of all the above happenings until 15th July 2011 when Expeditions General Merchants Auctioneers proclaimed its goods and on perusal of the court file, it discovered that the matter proceeded exparte after 13th June 2006 as their advocates could not be traced at some point as their whereabouts were unknown.

33. When the plaintiff's case was closed on 27th September 2007, on 2nd November 2007 the trial magistrate directed that the defendants to be served with notice to file their submissions and by the affidavit of service sworn by Sakana Kimarong filed on 1st November 2007, the respondent's advocates were served on 1st November 2007, with the said mention notice for 2nd November 2007 dated 26th October 2007. The hearing notice for 27th September 2007 too dated 27th July 2007 was served upon the said advocate on 1st August 2007.

34. The record further shows that the appellant's counsels diligently served the respondent's counsel with a mention notice for 16th November 2007 when the matter was fixed for submissions /taking of judgment date. Their counsel were served on 14th November 2007 and an affidavit of service filed in court to that effect.
35. After the delivery of judgment, the appellant's counsels took out a notice to show cause dated 13th January 2011 and there is evidence that the respondents were served on 19th May 2011 for hearing of the said notice to show cause on 10th June 2011. The process server who effected service of Notice to Show Cause upon George O. Gawiri of the respondent's company deposes in her affidavit of service of 19th May 2011 that she visited the respondent's premises located at Cannon Tower, along Moi Avenue, Mombasa who even gave her his business card. The respondents made no appearance on 10th June 2011 to show cause and it was then that M.K. Kiema (Resident Magistrate) issued an order directing the warrants of attachment and sale of the respondent's movable properties, which warrants were issued to Francis Muchiri t/a Expeditions General Merchants Auctioneers.
36. The affidavit of Mohamed Amir sworn on 29th July 2011 at paragraph 9 states that the respondents only learnt of the outcome of the case when the auctioneers proclaimed their goods on 15th July 2011 and further at paragraph 8 that their advocates former offices in Kizingu, Mombasa could not be traced. There is no mention of the Notice to show Cause served on them prior to the proclamation.
37. Counsels for both parties extensively submitted on their respective client's positions and cited opposing authorities, those that favour the setting aside of judgment on account of counsel's mistakes, and those that are against, offering the applicant an alternative remedy of suing the offending advocate for professional negligence.
38. I have considered all those authorities, the primary authority on setting aside judgment as I have stated is the cases of **Shah vs Mbogo & Another (1967) EA 116** where it was held inter alia:

> ***" the discretion to set aside an exparte 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."***

39. In the present case, the respondent had filed its defence denying the appellant's claim and contending that it had sold the accident motor vehicle to the 1st defendant Simon Chege and surrendered all the documentation to him as well as the motor vehicle albeit the transfer had not been effected. However, the motor vehicle quoted in the defence which is KAL 739 J is different from the accident motor vehicle registration number KAM 073U.
40. Counsel for the respondent has urged this court to ignore that as being a topographical error whereas the appellant's counsel contends that to set aside judgment would also be allowing the respondent to amend their defective defence which quotes a different motor vehicle from the accident motor vehicle, to cure the defect which in fact, renders that defence without any triable issue and which amendment would then be taking effect after judgment, contrary to the established provisions of the law.
41. The respondent urges the court to consider all circumstances of the case and find that the defence on record raises triable issues and decline to interfere with the discretion of the trial court by substituting it with this court's own discretion especially where it is not demonstrated that the trial magistrate in exercising that discretion, committed an error of principle.
42. In the case of **Patel vs EA Cargo Handling Services Ltd**, the court held that:

> ***" In considering an application to set aside an exparte judgment , the nature of the action should be considered, the defence if any been brought to the notice of the court, however, irregularly, should be considered. The question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally it should be remembered that to deny a litigant a hearing should be the last resort of a court."***

43. In this case, the trial magistrate in setting aside the judgment and allowing the respondent to tender its evidence in defence considered that indeed there was a defence filed showing the motor vehicle was KAL 739J instead of KAM 073U as per its affidavit and documents showing they had sold the accident motor vehicle to the 1st defendant who had failed to cause transfer effected in his favour. He also considered that in the circumstances, based on the facts and decision in **Shah vs Mbogo** (supra), the application should be allowed and that '**the court should not shut out the 2nd defendant from justice for the fault of the other."**
44. In other words, the trial magistrate found that the respondent's defence raised serious triable issues and secondly, that the respondent was let down by its advocates who even pleaded the wrong particulars of the accident motor vehicle although all other facts related to the motor vehicle KAM 073U.
45. On the issue relating to mistake of counsel, the respondent referred to several decisions that favour the position that such mistake is excusable and should not be visited on the client/party.
46. In the Court of Appeal Case of **Belinda Murai & Others vs Amoi Wainaina (1978) KLR 2782**, Madan J.A (as he then was) described what he considered what he considered constitutes a mistake in the following words:

> ***"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary o rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which court of appeal sometimes overrule."***

47. What I gather from the respondent's plea is that it did not deliberately decline to attend court to give evidence since its advocate on record did not communicate any progress to it. Further, that infact, the said advocate pleaded a wrong particulars of the accident motor vehicle yet it had given full instructions with correct particulars. Thirdly, that when execution process was set in motion, it tried to locate the said advocate's offices but could not trace them.
48. I find that there was indeed, mistake of counsel, on the face of it for failure to communicate to the client. However, what the respondent did not inform the court below and this court is whether they had paid the said advocate their legal fees to enable full representation. On the other hand, an advocate who has no instructions is provided with a legal avenue to cease acting for a party and claim his/her legal fees.
49. In this case, the court has not been told why the advocate chose not to attend court on behalf of his client and or why he did not notify his clients on the hearings that followed, despite being served with hearing as well as mention notices.
50. It is finally submitted that the advocate could now not be found! The respondent did not allude to the deposition by the appellant that they were served with notices to show cause why execution cannot issue before proclamation of their goods but that they ignored and only sought to intervene when attachment was done by auctioneers.
51. In my view, the conduct of the respondents counsel M/S Oruko Imende & Kiriko advocates as officers of the court was deplorable and unbecoming and must be condemned as it was obstructive to the cause of justice. It is therefore expected that the respondent would lodge a complaint to the Law Society of Kenya against them for appropriate disciplinary action to be taken against them. It is their conduct of failing to attend court on behalf of their client and or informing their client the respondent that led to the case proceeding exparte. If they had any issues with their client, they should have relinquished the brief. I find that it is that conduct/mistake of the firm Oruko Imende and Kiriko advocates that denied the respondents an opportunity to be heard in defence. In **Phillip Chemwolo & another vs Augustine Kubende (1982-1988) KAR 103 at 1040** Apaloo J. A. (as he then was) posited as follows:-

> ***" Blunders will continue to be made from time to time and it does not follow that***

because a mistake has been made that because a mistake has been made that a party should suffer the penalty of not having his case heard as merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

52. This court however, does not appreciate the inconvenience caused to the appellant by the delay, and default caused by the respondent's counsel's failure to attend court and or inform their clients of the progress of the matter on several occasions during the hearing and or even notifying them of the judgment. The said advocates have not availed themselves to explain what caused that default and the respondent alleges that neither have they managed to trace their whereabouts.
53. In my view, that default and delay can be compensated with costs payable by the respondent for reasons that the respondents too have their own share of blame. They did not seek to inquire of the case they were defending through their advocates. They were also served with notice to show cause in May 2011 before the attachment was done in July 2011 and they only rushed to court after the attachment.
54. In my view, the trial magistrate did not err in exercising his discretion to set aside the judgment and in allowing the respondent to adduce evidence in defence of the claim. He must have been advancing the overriding objectives in the administration of justice.
55. This court too employs and embraces the principle that the right to a hearing is a well protected right in our Constitution. See Article 50(1) and is also the cornerstone of the rule of law. That is why even if the courts have inherent jurisdiction to dismiss suits, this can only be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.(see **Richard Nchampi Leiyagu vs IEBC & 2 Others (2013) eKLR** where the Court of Appeal elaborately set out the above principle, when setting aside the ruling of the Superior Court (Wakiaga J).
56. The other ancillary question is whether the respondent's defence raises triable issues. The respondent contends that it instructed the advocates to file defence in respect of the suit material vehicle being KAM 073 U and not KAL 739J cited in the defence. The said defence contends that the respondent has sold the accident motor vehicle to the 1st defendant prior to the accident and surrendered all documentation hence it had diverted itself of any interest in the motor vehicle subject matter of the suit. The appellant had pleaded that the 1st defendant was the beneficial owner of the accident motor vehicle whereas the respondent herein was the registered owner thereof. The trial magistrate in her judgment found them liable for the accident in negligence. In **Shailesh Patel T/a Energy Company of EA vs Kessels Engineering Works PVT Ltd & 2 Others (2014) e KLR** , the Court of appeal stated that inter alia:

"……….this court has a wide discretion in setting aside exparte interlocutory judgments. In the case of Patel vs EA Cargo Handling Services Ltd (1974) EA 75, it was held hat a regular judgment will normally not be set aside unless the court is satisfied there is a defence in its merits. The main concern of the court is to do justice to the parties. I have looked at the proposes defence. It does not appear to me to address the issue in the same way the defendant has addressed the issues in this application. It does not strike met be a good defence. However, a good defence does not mean a defence which must succeed. It merely needs to satisfy the concept of a prima facie defence. I will therefore give it a benefit of the doubt. This brings me then, to the conditions upon which this court can set aside the said judgment. The discretion of the court is unfettered, but if the judgment is to be set aside it must be done on terms that are just."

57. Again in **Olympic Escort International Company Ltd & 2 Others vs Parminder Singh Sandhu & Another (2009) e KLR** the Court of Appeal expressed itself inter alia:-

" with that finding it becomes unnecessary to examine the merits of the application

under sub Rule 2 (1) of Order 35 to determine whether the appellants had shown b y affidavit or otherwise that they should have leave t defend the suit, either conditionally or unconditionally. Even if we were to consider that issue, we would have found that there were prima facie triable issues raised in defence and the replying affidavit on record. It is trite that, a triable issue is not necessary one that the defendant would ultimately succeed on. I need only be bona fide."

58. In **Sultan Hardwares Ltd vs Steel Africa Ltd (2011) e KLR** the Court of Appeal also expressed itself thus concerning the right to be heard on merits:-

> ***" we are aware that the suit in the Superior Court was not heard on merits and what is at stake before us is whether the appellant should have been given an opportunity to be heard on its defence which had been filed. In the case of Lalli t/a Vakkep Building Contractors vs Casousel Ltd (1989) KRL 386 the predecessors of this court (Nyarangi, Platt, JJA and Kwach, Ag JA) held that:***
>
> ***"Summary judgment is a draconian measure and should be given is only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist."***

59. In the early cases of **Soliza Figuerido & Company Ltd vs Mooring Hotel Ltd (1959) EA 425** the Court of Appeal held that if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions……." And in **Kenya Trade Combine Ltd vs Shah CA 193/99,** the Court of Appeal 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."**

60. In **Bangue Indosuez vs D.J. Lowe & company Ltd CA 79/2002** and **Momanyi vs Hatimy & Another (2003) 2 EA 600** the Court of Appeal was categorical that where a bona fide triable issue has been disclosed, the court has no discretion to exercise in regard to the defendant's right to defend the suit.
61. I have no reason to depart from those noble principles espoused in those cases of a Court Superior to this court, as the circumstances of the case are similar to those in the many cases that I have cited hereto.
62. In this case, albeit it has been submitted by counsel for the appellant that the respondent should seek a remedy from their advocates for the failure to attend court and or whereas I concur that a problem of such nature should lead to settlement between party and advocate, rather than between one party (defaulter) and another (the innocent) in **Susan Njuguna vs B.K. Teren & 2 Others (2005) e KRL** per Ojwang J (as he then was) faced with a similar situation held that:

> ***"……Misunderstandings between advocate and client, therefore is not a proper factor to take into account in setting aside an interlocutory judgment. I have however, read the plaintiff's proposed defence counterclaim, and formed the impression that is squarely joins issue with the 3rd defendant's claims in the counterclaim; and the question emerging ought to be resolved in the context of trial."***

63. The learned judge in the above case set side judgment entered on 27th November 2002 dismissing the plaintiff's suit on conditions including, directing that the suit be set down for hearing within specified timelines and default, the judgment would revert.
64. In this case, I have considered the defence by the respondent and without delving into its merits, I find that it raises triable issues which can and should be resolved in the context of the full trial. Among them, is whether or not the accident motor vehicle KAM 073U belonged to the

respondent herein the 1st defendant in the suit below, noting that albeit the respondent was the registered owner thereof, their affidavit evidence and defence was categorical that they had sold it and surrendered its possession and documentation to the 1st defendant as at the time of the material accident. Section 8 of the Traffic Act Cap 403 is clear that the registration of the ownership of a motor vehicle is prima facie evidence of ownership unless the contrary is proved. Since ownership is denied, the issue in my view should be determined in a full trial by according the respondent an opportunity to be heard.

65. However, as I have stated, the default was not occasioned or contributed to by the appellant. From the decisions that I have referred to, and pursuant to the provisions of Order 12 Rule 7 of the Civil Procedure Rules which provides that " where under the order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just." The trial magistrate ordered that costs be in the cause. In my view, albeit costs are in the discretion of the trial court, the fact that the issue was between the respondent and their advocate which had created an inconvenience to the appellant who had a lawful judgment on record, costs should have been awarded to the appellant, to compensate her for the inconvenience.

66. Invoking the provisions of Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya, which empower this court to as the first appellate court to among others, exercise the same powers and perform as nearly as may be the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of the suit instituted therein, I set aside the order on costs and substitute thereof with an order that the respondent pays the costs of the appellant in the application for setting aside the judgment.

67. For all the above reasons, I dismiss the appeal herein. I however order that the respondents pay costs of this appeal to the appellant for reasons that they were indolent in failing to consult/inquire from their advocates the position/progress of the case and that they never turned up for the Notice to show cause before the attachment in execution of decree, thereby seriously inconveniencing the appellant.

Dated, signed and delivered in open court at Nairobi this 9th day of July 2015.

R.E. ABURILI

JUDGE

9/7/2015

Coram R.E. Aburili J

C.A. Samuel

Mr Inyangu for respondent

No appearance for appellant.(date was given in court)

Court – Judgment read and pronounced in open court.

R.E. ABURILI

JUDGE

9/7/2015