



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL DIVISION
CIVIL APPEAL NO. 171 OF 2024

PETER MAITHYA KILONZO.....

APPELLANT

(suing as the Administrator and Personal Representative
of the Estate of **Caroline Mwendu Maithya(deceased)**)

VERSUS

SIMON IRUNGU WAMBUA.....

.....RESPONDENT

**(Being an Appeal against the Ruling of the
Honourable Derrick K Kuto in Mavoko Chief
Magistrate's Court in CMCC no. E017 of 2020**

JUDGMENT

- 1.The Appellant filed this appeal seeking to set aside the ruling delivered on 30th February 2024 in Mavoko CMCC E017/2020.

- 2.Briefly, the background of this matter was that the Appellant filed a suit in the court below on 17th September 2020 for general and special damages as a result of fatal injuries sustained by his son in an accident involving the respondent's motor vehicle and served the summons to

enter appearance through substituted service. There was no entry of appearance and the suit went for formal proof and judgement was subsequently entered in favour of the Appellant. The Appellant then filed a declaratory suit against the insurer Pioneer General Insurance. The Respondent in turn filed an application seeking to set aside the ex parte judgement. The application was allowed and the ex parte judgment was set aside and defendant was ordered to file a defence within seven days and pay thrown away costs.

3. The Respondent did not comply with the court orders and on the day the matter came for mention to confirm compliance his Advocate did not appear. The court made orders that the Appellant was free to commence execution. Thereafter the Respondent's advocate filed an application seeking to stay execution of the decree and for the court to review, vary or set aside the orders that allowed the plaintiff to proceed with execution. He also prayed that his defence be deemed as properly filed.
4. After considering the application, the trial court allowed the application and deemed the respondent's defence as duly filed.

5. Aggrieved by the ruling, the Appellant lodged this appeal on grounds that: -

“a. The learned trial magistrate erred in law and in fact by failing to consider that the application dated 22nd April 2024 was res judicata because the issues raised were in effect similar to the issues raised in the application dated 4th September 2023 that had been filed and determined by its own ruling delivered on 14th February 2024

b. The learned trial magistrate erred in law and in fact by failing to appreciate that the respondent did not apply for setting aside of the ex parte judgement vide his application dated 22nd April 2024 and thus leave to file defence could not be granted before the ex parte judgement was set aside.

c. The learned trial magistrate despite finding the respondent's advocates explanation as to why he was not in court suspicious and there being no proper explanation for the respondent's indolence allowed the application and which constitutes a misdirection and improper exercise of discretion.

d. The learned Trial Magistrate erred failed to properly consider the application, the responses thereto and the parties' submissions and the defence filed by the

respondent and the applicable principals of law and therefore misdirected himself in the matter and arrived at an unfair determination.

6.This appeal was canvassed by way of written submissions.

Submissions

7.Learned Counsel for the Appellant submitted that the application dated 22nd April 2024 was an application primarily seeking the setting aside of the ex-parte judgement that had been reinstated as a consequence of the respondent's in ordinance and that this application for setting aside the ex parte judgement had been brought for a second time against the rules of res judicata.

8.Reliance was made to the case of **Lorkino v Lorkino [2023] KEELC 17741 (KLR), Patriotic guards Ltd v James Kipchirchir Sambu [2018] e KLR, Mbogo vs Shah (1968) EA.**

9.Counsel reiterated that the trial court seriously failed to appreciate the application before it thus failed to thoroughly examine the defence filed by the respondent which raised no triable issues and were mere denials.

10. Counsel urged the court to set aside the ruling in its entirety and grant the appellant justice.

11. The respondent on the other hand submitted that the appellant was seeking to deny the respondent an opportunity to put forth his case, to be heard, to have his day in court.

12. It was also submitted that the principle of res judicata applies only where a matter has been heard substantively and judgment or decision has been rendered on it. It does not apply in applications (to reinstate).

13. The respondent finally submitted that the appellant seemed to be apprehensive that if the case is heard by the trial court on merit and judgment is rendered, the outcome will be different from the one that he got ex-parte.

Analysis and determination

14. I have considered the submissions of the learned counsel for the parties, the cases cited and the law. This is a case where the appellant filed the suit before the trial court and properly served the summons to enter appearance through substituted service following which the suit proceeded by way of formal proof after which

judgment was entered in favour of the Appellant. The Appellant subsequently commenced execution and after obtaining warrants, the Auctioneers attempted to execute against the Respondent to no avail.

15. The Appellant thereafter filed a declaratory suit against the insurer of the plaintiff's vehicle, Pioneer General Insurance Company Limited at the Chief Magistrates Court and it is then that the respondent then filed an application seeking to aside the ex parte judgment.

16. The learned magistrate set aside the ex parte judgment on terms but which the respondent either neglected or refused to comply with. The Respondent did not comply with the order to file a defence within seven days and did not pay the thrown away costs ordered by the Court. In spite of that the learned magistrate went ahead and once again made favourable orders in favour of the respondent. I agree with the appellant's contention that the learned magistrate did not act fairly. It is my finding that he exercised his discretion in aid of an indolent party which he ought not to have done. Whereas the discretion of the court is not fettered it must never be exercised in favour of an indolent party. It is for situations such as the instant one that parliament enacted Sections 1A and 1B of

the Civil Procedure Act. A party who intentionally refuses or neglects to comply with a condition imposed by the court is not entitled to the exercise of that court's discretion in their favour. Doing so, can only give rise to an unfair and unbalanced litigation and is no good for the administration of justice. It can also lead to erosion of the confidence in the judiciary. Looking at the plaint the driver of the respondent's vehicle pleaded guilty to the causing the death of the deceased by dangerous driving. It is evident from the respondent's conduct that his intention was intended to not only occasion delay, but to keep the appellant from enjoying the fruits of his judgment. This is not justifiable.

17. In the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others** [2018] KEHC 6100 (KLR) it was observed that;

"A lawyer's duty to the court also helps define the limits of the zealous representation of a client. The need to create ethical boundaries within an adversarial system was addressed by Gavin MacKenzie in his article The ethics of advocacy thus:-

"Adversarial tactics tend to escalate despite the best of intentions in a competitive system. Lawyers adopt adversarial tactics...because to refrain from doing so would put their clients at a

competitive disadvantage relative to the clients of lawyers who show no such restraint...We should be sceptical of justifications of questionable conduct that appeal to the ethics of the adversary system."[27]

38. We can distil a lawyer's duty to the court to three:- (a) to use tactics that are legal, honest and respectful to courts and tribunals; (b) to act with integrity and professionalism while maintaining his or her overarching responsibility to ensure civil conduct; and (c) to educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice....."

18. Since the enactment of **Sections 1A and 1B of the Civil Procedure Act**, it is no longer fashionable for a litigant to come to court and allege that the sins of his advocate are being visited upon him. What did the Respondent do to ensure that the condition imposed by the court was complied with? It seems that he was content only with the many similar applications that his advocate would file in court. That in my view is unacceptable. His conduct is clearly intended to frustrate the Appellant and to stop him from enjoying the fruits of his judgment. Justice delayed is justice denied. Delay is frowned upon by **Article 159(2)(b) of the Constitution**. It is for the afore-going reasons that this court finds merit in this appeal.

19. The upshot is that the appeal is allowed and the impugned ruling of the learned magistrate is set aside. The Respondent shall bear the costs of the appeal.

Orders accordingly.

Judgment signed, dated and delivered virtually on this 25th day of September, 2025.

E. N. MAINA

JUDGE

IN PRESENCE OF:

Miss Okoth, Advocate for Mr. Mwangi for the Appellant.

Mr Ng'ang'a, Advocate for Mr. Olubai for the Respondent.

Geoffrey, Court Assistant.