

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
CIVIL APPEAL NO. E041 OF 2024

EDWIN MURATHI NYAGA.....APPELLANT

-VERSUS-

JANE NJERI WABAI.....RESPONDENT

(Appeal arising from the decision of Hon. T.K. Kwambai delivered on 18th January 2023 in

Embu CMCC No. 116 of 2019

JUDGMENT

The Appeal

1. The appellant's memorandum of appeal dated 17th October 2023 seeks orders that:
 - a) The ruling of the trial court be reviewed and/or set aside;
 - b) This Honourable court sets aside or vacates the conditions imposed on setting aside of the *ex parte* judgment in Embu CMCC E116 of 2019; and
 - c) This Honourable court be pleased to direct that the appellant be granted leave to file his statement of defense within 14 days.
2. This appeal is premised on the following grounds:
 - 1) That the Learned Trial Magistrate erred in law in directing the Appellant to deposit the entire decretal sum in court to secure an *ex parte* judgment it set aside in the very same ruling and therefore a judgment that no longer existed;
 - 2) That the Learned Trial Magistrate erred in law and in fact by condemning the Appellant unheard by ordering the Appellant to deposit a decretal sum to secure the potential award from the unheard suit;
 - 3) That the Learned Trial Magistrate erred in law and in fact by condemning the Appellant unheard by ordering the Appellant to deposit a decretal sum to secure the potential award from the unheard suit;
 - 4) That the Learned Magistrate erred in law and in fact in imposing conditions that limited and infringed the Appellant's constitutional right to a fair hearing by ordering him to deposit security before the case is heard and determined on merits;

- 5) That the Learned Magistrate erred in law in her exercise of judicial discretion by Imposing oppressive and unfair conditions;
- 6) That the Learned Magistrate erred in law in her exercise of judicial discretion by imposing conditions that deprived of the Appellant the right to his property in the form of the decretal sum herein which property is not subject to any valid and enforceable judgement/decree; and
- 7) That the Learned Magistrate erred in law and fact in imposing conditions that did not promote, respect, uphold and enforce the Appellant's constitutional rights to the greatest extent.

Background

3. The respondent filed a plaint dated 01st July 2019, seeking judgment against the appellant for general and special damages, future medical expenses and costs of the suit with interest. She stated that she was a lawful passenger onboard motor vehicle registration number KAX 229R when the appellant negligently drove his motor vehicle registration number KBX 345P and caused it to collide with the motor vehicle that the respondent was aboard. As a result of the accident, the respondent suffered severe injuries being a fracture on the right distal tibia fibula (with nail/metal plate implants), injuries on the eye (stitched) and injuries on the right ankle joint.
4. The trial court satisfied itself that the appellant had been duly served with the court processes but he had failed to enter appearance to defend the suit. Judgment was entered in favour of the respondent and the matter was scheduled for formal proof. The respondent testified as the only witness before she closed her case, following which the court gave its judgment on 02/12/2020.
5. On 12th July 2022, the appellant filed an application dated 05th July 2022 seeking orders that execution of the decree be stayed, the interlocutory judgment be set aside and he be granted leave to file a defense out of time so that the case is considered on its merits. The court stated that there was no imminent danger of execution but an interim stay order was granted on condition that the entire decretal amount be deposited in court within 5 days of that order. The court also ordered that the application be served upon the respondent.
6. The appellant did not comply with these orders and he filed another application dated 10th August 2022 seeking review of the court's ruling on conditional stay. In its ruling, the trial court stated that it would review its conditional stay orders on

condition that the entire decretal amount is deposited in court within 45 days of its ruling dated 18th January, 2023. Thereafter, parties were directed to prosecute the previous application dated 05th July 2022. This ruling is the subject of the appeal herein.

Submissions on appeal

7. The court directed that the parties file their written submissions and they complied.
8. In his submissions, the appellant relied on Order 10 Rule 11 and Order 22 Rule 22 of the Civil Procedure Rules and stated that there was no condition that the decretal amount be deposited before setting aside an exparte judgment. He stated that the move by the trial court infers liability yet the matter was not heard on merit. He relied on the cases of **Rayat Trading Co. Limited V Bank of Baroda (K) Limited & another [2012] KEHC 5357 (KLR)**, **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] KEHC 8144 (KLR)**, **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**, **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)** and **Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another [1998] KECA 40 (KLR)**.
9. His argument was that if he is forced to deposit the decretal sum, it amounts to an injustice against him because he was not heard. He urged the court to find a basis to review this discretionary finding by the trial court and he relied on the cases of **Mbogo v Shah [1968] EA 93**, **CFC Stanbic Limited v John Maina Githaiga & another [2013] KECA 461 (KLR)** and **Sebei District Administration v Gasyali [1968] EA 300**. It was his argument that the exparte judgment was irregular and it ought to have been set aside without conditions.
10. The respondent submitted that the exparte judgment by the trial court is regular and it should not be set aside on a whim. She relied on Order 12 Rule 7 of the Civil Procedure Rules and the cases of **Kahunyo & another v Wanjiru & another [2024] KEHC 15600 (KLR)** where the court relied on **Shah v Mbogo & Another (1967) EA 116** and the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another (supra)**. She argued that the provision for deposit of the decretal amount is to hold the parties to a suit accountable so as to avert any delay in justice. Further reliance was placed on the cases of **Gianfranco Manenthi &**

another v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR)
and Nduhiu v Warugongo [1988] 2 KAR.

Issue for Determination

11. From the foregoing, the issue for determination is whether the appeal has any merit.

Analysis and Determination

12. As a first appellate court, it is the duty of this court to reexamine the evidence adduced at trial. This was held in the case of **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, thus:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

13. Following the interlocutory judgment, the appellant filed a notice of motion dated 05th July 2022 seeking the following orders, verbatim:

- 1) *THAT this application be certified urgent and service thereof be dispensed with in the first instance.*
- 2) ***THAT Honourable Court be pleased to issue an order for stay of execution of the ex-parte judgment/Decree dated/delivered on 02/12/2022 pending the interparties hearing and determination of this Application.***
- 3) *THAT this Honourable Court be pleased to set aside the interlocutory judgement and the consequent ex-parte proceedings and Judgment/Decree dated 02/12/2020 herein and any other/further proceedings.*
- 4) *THAT this Honourable Court be pleased to grant the Defendant/Applicant leave to file their Statement of Defence out of time and admit the matter for herein on merits with the parties hereto urging and tendering evidence on their respective positions.*
- 5) *THAT the costs of this Application be provided for.*

14. It is abundantly clear that the appellant sought stay orders together with an order for setting aside the exparte judgment. These prayers were within the same application. The learned trial Magistrate considered the application and directed as follows on 12th July 2022:

“I have perused the application dated 5/7/2022 and filed in court on 12/7/2022.

The supporting affidavit and annexures. There is no imminent danger of execution disclosed. The cause of action is a road traffic accident whose

occurrence is admitted in the supporting affidavit. Service of summons to enter appearance is also admitted. For these reasons, I decline to certify the application as urgent. **Nevertheless, I grant interim orders in terms of prayer No.2 of the application but on condition that the entire decretal sum be deposited in court within the next five (5) days.** Service of the application be effected within the next seven days from today. Upon service, the plaintiff to file and serve a response within the seven days of service. The matter be mentioned before the trial court on 27/7/2022 for directions / orders.”

15. The appellant was dissatisfied with this order and so he filed another application dated 10th August 2022 through which he sought review of the court’s finding. In that application he prayed thus, verbatim:

1. THAT this application be certified urgent and service thereof be dispensed with in the first instance.

2. THAT this Honourable Court be pleased to grant an unconditional stay of execution of the exparte Judgment/Decree dated 02/12/2020 pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to review its orders dated 13th July, 2022 and in particular set aside its order that the Defendant/Applicant should deposit the decretal sum in court pursuant to directions on the application dated 5/07/2022 seeking to set aside the ex parte Judgment herein.

4. THAT the costs of this Application be provided for.

16. This second application was heard and determined through a ruling of the court delivered on 18th January 2023, wherein the trial court stated as follows:

‘Based on the admission by the applicants that they were duly served I will allow the application on condition that the entire decretal sum be deposited in court within 45 days from today. Subsequently thereafter the parties to list down notice of motion dated 5/7/22 for hearing. Right of appeal 30 days.’

17. From the foregoing, it is evident that the trial court only allowed stay of execution conditionally pending hearing and determination of the substantive application. At the hearing, the issue of stay and setting aside of the exparte judgment would be canvassed, but the matter had not yet reached that stage. The condition was set by

the trial court after allowing prayer 2 of the application dated 05th July 2022 which was a prayer of stay of execution. That condition had absolutely nothing to do with the prayer for setting aside of the exparte judgment.

18. Under Order 42 Rule 6(2) of the Civil Procedure Rules the Court can order that security should be provided for a stay order to be made. In essence, depositing of the decretal amount as a condition for stay, is a discretionary matter that the court decides based on the circumstances of the case. This provision states:

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

19. The appellant, through his own prayer 2 of the application dated 05th July 2022, sought stay of execution. In the supporting affidavit to that application, he explained to the court why he deserves the stay orders. But he did not offer any security. It should be noted at that point, he was already a judgment-debtor upon whom execution was due and pending. From the wording of the court’s ruling after considering that application, it applied its discretion even though there was no obligation in law to grant the order, even conditionally.

20. Through his second application dated 10th August 2022, the appellant urged the court to review its finding of 12th July 2022 where it imposed a condition in issuing its stay order. It is to be continuously noted that on 12th July 2022, the condition set was only to apply to prayer 2 of the application dated 05th July 2022, which was for stay of execution pending hearing and determination of that application.

21. In prayer 2 of the review application dated 10th August 2022, the appellant sought for stay of execution again, a matter that had been settled through the application dated 05th July 2022. The interim order that had been issued on 12th July 2022 had settled the point and stay was extant, meaning the fresh prayer for stay was in fact otiose. Through prayer 2 of the review application dated 10th August 2022, the appellant asks the court to ‘*review its orders dated 13th July, 2022 and in particular set aside*

its order that the Defendant/Applicant should deposit the decretal sum in court pursuant to directions on the application dated 5/07/2022 seeking to set aside the ex parte Judgment herein'.

22. Clearly, this is where the problem arises. The appellant linked the condition set on 12th July 2022 to the prayer for setting aside the exparte judgment and not to the prayer for stay of execution. He has faulted the trial court for this, but clearly he was grossly misled. In fact, he misapprehended the court's order issued on 12th July 2022 where the court's discretion had already been applied in his favour. This discretion is, in fact, exercised judiciously and in the terms intended under Order 42 Rule 6(2) of the Civil Procedure Rules. Discretion cannot be overturned on appeal simply because a party is disgruntled. In **Mbogo v Shah [1968] EA page 93**, De Lestang VP (as he then was) observed at page 94:

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Conclusions

23. It is absolutely clear to this Court that the application dated 05th July 2022 is yet to be heard and determined substantially. This is a point that the trial court was aware of and had directed upon. On this basis, prayer (b) of this appeal is based on a falsehood or a misapprehension of the trial court's ruling and a careless mistake that could have been avoided, had the appellant paid close attention to the orders of the court.

24. The appellant has also blamed the trial court for condemning him unheard and allegedly finding him liable before he was allowed to defend the suit. As earlier stated, the trial court did not impose any condition neither did it allow or dispense with the setting aside application, which is still pending hearing and determination. In essence, the trial court has not yet considered the issue whether or not to set aside the exparte judgment.

25. Through the impugned ruling, the appellant was allowed 45 days from the date of that ruling to deposit the full decretal amount in court. It is not clear whether or not he has complied with this order. As things stand, the respondent who is the decree-holder remains at liberty to execute for the decretal amount unless the appellant can show that the decretal amount was paid, as that was the condition set for stay of execution.
26. Given that this second condition for stay of execution has since been overtaken by events, it is necessary that the court makes a fresh order in the same manner.

Disposition

27. The appeal has no merit and it is hereby dismissed.
28. Given that the matter is still pending in the trial court, it is hereby ordered that:
- 1) As a condition for granting stay of execution, the appellant shall deposit the full decretal amount in court within 21 days of this judgment, failing which;
 - a) the application dated 05th July 2022 will stand dismissed; and
 - b) the respondent shall remain at liberty to execute for the decretal amount at the expiry of the said 21 days.
 - 2) In the event of compliance with order (1) hereinabove, the application dated 05th July 2022 shall be set down for hearing and determination upon confirmation by the trial court of payment of the decretal amount in court as ordered; and
 - 3) The costs of this appeal shall be borne by the appellant.
29. Orders accordingly.

Delivered, dated and signed at Embu High Court this 1st day of October, 2025.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Ms. Njuguna for Respondent
2. Mwanzia holding brief for Karanja for Appellant
3. Francis Munyao - Court Assistant

