Musau v Munywoki (Civil Appeal E009 of 2024)
[2025] KEHC 15621 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15621 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E009 OF 2024

NIO ADAGI, J

OCTOBER 31, 2025

BETWEEN

RAY MUSAU C ..... APPELLANT

AND

GETRUDE MUMBI MUNYWOKI ..... RESPONDENT

(Being an Appeal from the judgment of Hon. C.N Ondieki (Mr.) SPM Delivered on 21st December, 2023 in Machakos CMCC No. E351 of 2021 between Getrude Mumbi Munywoki versus Titus Muthaka & Ray Musau Charles)

JUDGMENT

Introduction

1. Vide a Memorandum of Appeal dated 18th January 2024, the Appellant challenges the entire decision contained in the ruling of the Learned Trial Magistrate delivered on 21st December, 2023 in Machakos CMCC No. E351 of 2021.

2. The impugned ruling was delivered in respect of the Appellant's (2nd Defendant/Applicant in the Lower Court and hereinafter referred to as "the Appellant") application dated 24th August 2023 in which the Appellant sought to have the ex-parte judgment that had been delivered against him on the 5th of July 2023 set aside to enable him defend the matter and have it prosecuted inter partes on merit.

3. The Memorandum of Appeal raises three grounds of the Appeal as follows that:

    a. The Learned Magistrate erred in law and in fact in failing to set aside the ex-parte Judgment delivered on 5th July, 2023 and all consequential proceedings without any legal or evidential justification.

b. The Learned Magistrate erred in law and in fact by not granting the Appellant herein leave to defend the suit.

c. The Learned Magistrate erred in law and in fact by not considering the Notice of Motion Application dated 24th August, 2023, Supplementary Affidavit dated 2nd November, 2023, Submissions dated 2"d November, 2023 and case law filed by the Appellant.

4. Based on the grounds highlighted hereinabove, the Appellant prays that:-

a. That the appeal be allowed with costs to the Appellant.

b. That the Ruling delivered on 21st December, 2023, in Machakos CMCC No. E351 of 2021 between Getrude Mumbi Munywoki -v- Titus Wanjohi Muthaka & Ray Musau Charles be set aside and be substituted with an order/s allowing the Appellant's Notice of Motion Application dated 24th August, 2023.

c. That this Honourable Court be pleased to make such further and other orders as it may deem just in the circumstances.

5. The Appellant also invited this court to keenly consider the following documents which form part of the Record of Appeal filed herein dated 26th March 2024 in determining the issues raised herein:

i. Notice of Motion Application dated 24th August 2023.

ii. Supporting Affidavit thereto sworn by the Appellant on 24th August 2023.

iii. Draft Defence annexed to the Supporting Affidavit sworn by the Appellant on 24th August 2023.

v. Supplementary Affidavit sworn by the Appellant on 2nd November 2023 and the annexures thereto.

vi. Appellant's submissions in the Lower Court dated 2nd November 2023.

vii. The Appellants Supplementary Record of Appeal dated 12th June 2024.

Brief factual background to this appeal

6. In a letter dated 24th July, 2023, the Respondent's Advocates, Anne Kiusya & Company Advocates, wrote to the Appellant's Insurers, Britam Insurance Company, demanding for settlement of a judgment that had been entered against their insured, the Appellant herein, on the 5th of July 2023 in Machakos CMCC No. E351 of2021 between Getrude Mumbi Munywoki -v- Titus Wanjohi Muthaka & Ray Musau Charles. (See pages 57 to 58 of the Record of Appeal)

7. The Appellant's Insurers vide an email sent on 28th July 2023 sent an email to the Respondent's Advocates requested for better particulars on the matter when they were informed that the matter had proceeded as an undefended suit. The Respondent's Advocates proceeded to indicate that the Appellant's insurers had been served with a demand letter and a statutory notice.

8. It is the said communication that was made by the Respondent's Advocates to the Appellant's Insurers that prompted the said Insurers to inquire from the Appellant whether he was aware of the existence of the said suit and the judgment delivered therein at which point, the Appellant confirmed that he had never been served with Summons to Enter Appearance, Pleadings nor any Mention or Hearing Notices prior to the delivery of the Judgment in Machakos CMCC No. E351 of 2021 between Getrude Mumbi Munywoki -v- Titus Wanjohi Muthaka & Ray Musau Charles.

9. Upon retrieving copies of part of the Court documents filed by the Respondent in the Magistrate's Court being copies of the Plaint, Supporting Documents thereto and Summons to Enter Appearance, it became apparent that the Appellant was to be served by way of Registered Post as per the details captured in the Plaint and the Summons to Enter Appearance bearing the purported address of the Appellant on the Plaint as P.O Box 1757 Machakos.

10. There being an imminent risk of execution of the judgment of the Magistrate's Court, the Appellant thus instructed his Advocates on record to proceed and set aside the ex-parte Judgment.

11. The Appellant thus filed an application dated 24th August 2023 in which he prayed for the following orders:

    a. That the matter be certified urgent and the same be heard ex-parte in the first instance pending the service thereof to the Plaintiff/Respondent.

    b. That execution of the judgment delivered on 5th July 2023 and decree thereof and all consequential proceedings be stayed pending the hearing and determination of this application.

    c. The ex parte judgment delivered on 5h July 2023 and all consequential proceedings be set aside and the 2nd Defendant be given leave to defend the suit.

    d. That costs of the application be in the suit,

12. In response to the Appellant's Application dated 24th August, 2023, the Respondent filed a Replying Affidavit sworn on 3rd October, 2023, in which she stated inter alia that service of Summons to Enter Appearance, Pleadings and Notices was effected physically upon the Appellant (in fact, against both Defendants before the Lower Court) and proceeded to annex to her Affidavit, Affidavits of Service sworn by Andrew Kyalo Mwanzia, Court process server on 15th June 2022 and 7th March 2023.

13. Upon considering the Appellant's application dated 24th August 2023, the Learned Magistrate found the same to be without merit and on 21st December 2023, he dismissed it with costs to the Respondent prompting the filing of this Appeal.

14. The Appeal was canvassed through written submissions. The Appellant's submissions are dated 18th October 2024 whilst the Respondent's submissions are dated 29th January 2025.

Analysis and Determination

15. I have carefully perused, re-analysed and considered the Record of Appeal, the Memorandum of Appeal and the Submissions filed by the Parties' Advocates to the Appeal. The single issue I form for determination is whether the Appellant's application dated 24th August, 2023 seeking to have the ex parte judgment delivered on 5h July 2023 and all consequential orders be set aside and the Appellant be given leave to defend the suit was merited.

16. Order 10 Rule 11 of the Civil Procedure Rules, 2010 empowers the Court to set aside or vary a default judgement entered in default of Appearance or Defence and any consequential decree or Order upon such terms as are just. It provides that:-

> " Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

17. This being a first appeal, this court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the trial court are to stand and give reasons either way. That was the pronouncement of the court in the case of Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR. The court held that a first appellate court has a duty to re-evaluate, re-assess and re-analyse the record and make its own conclusions.

18. The circumstances in which an appellate court can upset the exercise of discretion of a trial court were laid down by the Court of Appeal in Mbogo and Another v Shah [1968] EA and further in the case of Wachira Karani v Bildad Wachira (2016) eKLR, wherein the court had the following to say:

> " Mulla, the Code of Civil Procedure (2) has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgment/ decree. Essentially, setting aside an ex parte judgment is a matter of the discretion of the court. In the case of Esther Wamaitha Njihia & Two Others v Safaricom Ltd (3) the court citing relevant cases on the issue held inter alia: -
>
> "the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel v E.A. Cargo Handling Service Ltd (4) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah v Mbogo.] The nature of the action should be considered, the defence if any should also be considered; It also goes without saying that the reason for failure to attend should be considered."

19. In Francis Wambugu v Babu Owino & Others, SC Petition No. 15 of 2018, on the issue of an appellate court entertaining an appeal founded on exercise of discretion of the trial court, it was stated:

> " (76) In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court's decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court's judicial independence and exercise of discretion."

20. The well-established principles of setting aside interlocutory judgments were laid out in the case of Patel v East Africa Cargo Handling Services Ltd (1974) EA 75 as per Duffus P. who stated as follows:

> " 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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

21. It is now well settled from numerous precedents that a distinction exists between a default judgment that is regularly entered and one which is irregularly entered. The difference between the two was elaborated in detail by the Court of Appeal in CA No. 6 of 2015 James Kanyita Nderitu vs. Marios Philotas Ghika & Another [2016] eKLR, where it was held that:-

> "....In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer, whether in the whole it is in the interest of justice to set aside the default judgement, among others."

22. The considerations are however different in case of an irregular judgement. The Court stated as follows:-

> "In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiciae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment.The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v Attorney General [1986 – 1989] EA 456)."

23. At this juncture, I pose to ask myself whether the exparte judgement entered by the trial court in Machakos CMCC No. E351 OF 2021was regular or irregular.

24. The original file in the trial court case is before me. My perusal at the ruling dated 21st December 2024 reveals that the Learned Magistrate while relying on the Ongom Case (supra), (which case I have been unable to trace in the entire ruling), stated that:

> "..... before setting aside an interlocutory decision or proceedings, a court must be satisfied about one of the two things namely that either that the Defendant was not properly served or if the Defendant was properly served, if there is a sufficient cause which prevented the Defendant from entering appearance and filing a Defence or attending the hearing hereof.
>
> He proceeded to state that, therefore, in order to answer this question abundantly, I will first seek to establish whether the Applicant was on notice of the proceeding that led to the said judgement. In this regard, the burden rests on the party which affirms, the Respondent in this case. What is disputed is that the Memorandum (Summons) to Enter Appearance and a copy of the Plaint were not served upon the Applicant on account that the service of the

> Process was effected through registered post office address number 1757 Machakos which does not belong to the Applicant and that the Applicant's address is 58266-00200, Nairobi. The Respondent on the other hand asserts that the Applicant was served personally, at Machakos Bus Station, on 14th June 2022 but he declined to acknowledge receipt by signing. It is further deposed that the Applicant was served with a hearing notice on 8th March 2023 and 8th December 2022. In this regard, affidavits of service have been exhibited marked GMM4A & 4B and that on 24th July 2023, the Defendants were served with a copy of the judgement.
>
> What emerges is that the Respondent, ab initio, including the request for interlocutory judgement has always asserted that the Applicant and the 1st Defendant were served on the same date and at the same place personally. The ground advanced by the Applicant is thus divorced from the mode of service asserted by the Respondent and undenied by the Applicant and consequently unhelpful to the Applicant's course. Besides, the Applicant did not displace the evidence that he was served with both mention and hearing notices. In the circumstances, the personal mode of service asserted by the Respondent is thus found unshaken by the Applicant. It is on the foregoing basis that this court reaches a conclusion that the Applicant was on notice".

25. From the above extract of the ruling, there is no doubt that the Learned Magistrate was persuaded that the Applicant was personally served with the Summons to Enter Appearance, Mention and Hearing notice by the Process server as per the filed affidavits of service. The substantive information on the services is at paragraph 3 and I quote them as hereunder:-

> 1st Affidavit Of Service
>
> "that on the same day, I proceeded to Machakos bus station where I found both defendants who were personally known to me. That after greetings, I explained to them the purpose of my approach and after a short discussion, I tendered to them copies of the said Summons which they accepted but declined to acknowledge receipt by signing on the principal copy but they promised that they will take the said court documents to their insurer for appearance in court."
>
> 2nd Affidavit Of Service
>
> "That on the same day, I proceeded to Machakos bus station where the offices of the defendants are. That after greetings, I explained to them, the purpose of my approach and effected service of the said Hearing notice upon them but declined to acknowledge receipt by signing on the principal copy which I return to this Honourable Court duly served".

26. The Appellant in his Supplementary Affidavit sworn on 2nd November 2023 denied ever meeting the process server herein who allegedly effected service on him on 14th June, 2022 and 13th December 2022 at Machakos Bus Station. The Appellant denied working at Machakos Bus Station or resided in Machakos. He also stated that he is employed with National Treasury in Nairobi, in his thirty second (32) year of employment since 1991 and he attached his job and business cards in that regard. He maintained that on the days of the alleged services, he was at his work place. He has never engaged in the Public Service transport sector offering passenger services.

27. I have analysed the contents of paragraph 3 of the two affidavits of service quoted above and I establish the following:-That the contents of paragraph 3 in both affidavits are almost similar save for the documents that was being served.The Processer server failed to show how the Appellant was personally known to him.The Process server does not disclose the time he met the Appellant and the other

Defendant and what they were doing at that particular time.The Process server does not state what the short discussion they had was about after he explained the purpose of his approach.He does not disclose where the alleged offices of the Defendant are located and if they are in a particular building or street.He is not clear whether he served the Appellant at the Machakos Bus Station or at his Offices.

28. From the foregoing, it therefore follows, that the Appellant could not have been served as alleged. It is my considered view that the process server filed false affidavits of service. The proceedings leading to the exparte judgement and consequential orders thereof are therefore a nullity and can be set aside ex debito justitiae as was stated by my brother Judge, Justice Olola in the case of Nicholas Kombe Pembe –Vs- Kenga Kombe & 3 others (2017) eKLR.

29. Guided by the authorities I have cited above and the analysis of the matters before the trial court and in the affidavits of the process server one Andrew Kyalo Mwanzia, I find that Appellant's application dated 24th August, 2023 seeking to have the ex parte judgment delivered on 5h July 2023 and all consequential orders be set aside and the Appellant be given leave to defend the suit was merited.

30. The Learned Magistrate erred in dismissing the Applicant's application dated 24th August 2023.

31. In the end, I allow the Appeal herein, set aside the ruling delivered on 21st December 2023 and grant leave to the Appellant to defend the suit in Machakos CMCC No. E352 of 2021 between Getrude Mumbi Munywoki versus Titus Muthaka & Ray Musau Charles.

32. The Appellant is awarded the costs of this Appeal.

33. This file is closed.

It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST OCTOBER 2025

NOEL I. ADAGI

JUDGE