REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ITEN
CIVIL APPEAL NO. E008 OF 2024

LUCY WANJIKU GICHOHI…….APPELLANT

VERSUS

AGNETA JEPCHUMBA CHERUIYOT……..1ST RESPONDENT
TITUS KIBET KIMAIYO…….2ND RESPONDENT
(*suing as the representatives of the estate of the late EVANS KIPKIRUI MAIYO (Deceased*)

(*Appeal from the Ruling dated 3/04/2024 delivered in Iten Senior Principal Magistrate's Court Civil Case No. E012 of 2020 by Hon. C.R.T. Kutwa - SRM*)

JUDGMENT

1. This Appeal arises from the Ruling referred to above, delivered in the said lower Court suit, in which suit the Appellant was the Defendant, while the Respondent was the Plaintiff. By the Ruling, the lower Court declined to set aside the ***ex parte*** default Judgment entered against the Appellant on 19/01/2020, as well as the substantive ***ex parte*** Judgment entered subsequently on 20/09/2021 after a formal proof hearing.

2. The background of the matter is that the Respondent, through **Messrs Morgan Omusundi Law Firm Advocates**, filed the suit on 20/11/2020. The suit was for compensation for the death of the deceased, which arose from a road traffic accident. The default Judgment was entered when no appearance nor defence was filed despite there being a Return of Service indicating that the Appellant had been served with Summons. The Appellant, through **Messrs Maroa J. & Associates Advocates**, then filed the Application dated 26/10/2023, seeking setting aside of the Judgment delivered on 20/09/2021, which Application was however dismissed by way of the Ruling rendered on 3/04/2024. That Application and Ruling are now the subject of this Appeal.

3. The Application was supported by the Affidavit sworn by the Appellant in which she deponed that sometime in September 2023, she received a call from her insurer informing her that cases had been filed against her and judgments entered, and that the decree-holders had filed declaratory suits against the insurer, and in one, the decree-holder had already commenced execution. She deponed that she immediately instructed her Advocates to come on record and to take appropriate action, that the Advocates established that indeed the Judgment had been entered for a sum of Kshs 5,647,426.20.

4. She contended that she was never informed of the pendency of the suit and refuted the contents of the Return of Service alleging service of Summons upon her and pointed out that the Process Server admits that he served an unidentified driver who allegedly, was to take the documents to the Appellant. She thus termed the default Judgment as irregular, and urged that she had a good and viable defence raising triable issues.

5. In opposing the Application, the Respondent filed the Replying Affidavit sworn on 20/12/2023. She deponed that the Advocates for the Appellant were improperly on record having come on record after judgment without leave. She deponed further that the Appellant and her insurer were aware of the suit as they were served with Summons and statutory notice as evidenced by the postage receipt and Affidavit of Service. According to her, the Respondent was indolent and never gave a good explanation for failing to defend the suit.

6. As aforesaid, by the Ruling delivered on 3/04/2024, the trial Magistrate dismissed the Application. Aggrieved by the decision, the Appellant filed this Appeal on 15/05/2024. The unnecessarily lengthy Memorandum of Appeal consists of a whole 12 grounds which better drafting and brevity, could have been easily condensed to only about 3 or even 2. For the umpteenth time, in respect to the guide that grounds of appeal should generally be brief and concise, I advise Advocates to familiarize themselves with the Court of Appeal cases of **Ondieki v Omoi & 3 others [2025] KEHC**, the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR**, and the case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR**. These cases highlight the importance of brevity and the dangers of verbosity or numerous, repetitive grounds that can obscure the main issues.

7. Be that as it may, grounds preferred are as follows:

i) **THAT the Learned trial Magistrate erred both in law and in fact by misreading, misinterpreting, and misapplying the law as set out in the case of Esther Wamaitha Njihia & 2 Others vs Safaricom Ltd and Fidelity Commercial Bank Ltd vs Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR), thus finding that the Defendant failed to exhibit sufficient cause in their application to set aside the default judgment in the matter.**

ii) **THAT the Learned trial Magistrate misdirected himself in both law and fact by failing to consider the contents of the Affidavit of Service dated 16th December, 2020 in toto, thus erroneously determining that the Defendant was served with summons but did not acknowledge the same.**

iii) **THAT the Learned trial Court erred in both law and fact by ignoring, misreading, misinterpreting and/or misapplying the law as set out in Order 5 of the Civil Procedure Rules regarding service, thus wrongly finding that the Defendant was duly and properly served with summons and accompanying pleadings.**

iv) **THAT the Learned trial Magistrate misdirected himself in law and in fact by considering the Respondent's Application Annexure marked "SSK-4" and irrelevantly determining that the same showed that the Defendant's insurer was aware of the suit from way back in 2022, thus failing to find merit in the Defendant's Application.**

v) **THAT the Learned trial Court vitally erred in law and in fact by improperly justifying the issue of service, where no conclusive proof of service had been furnished, thus concluding that the Defendant had not demonstrated sufficient cause to warrant setting aside of the default judgment entered in the matter.**

vi) **THAT the Learned trial Court erred in both law and fact by failing to consider the contents of the Defendant's Draft Statement of Defence marked as "LWG-3" in its entirety, thereby wrongly determining that the Defense exhibited mere denials; wherein it evidently raises several bona fide triable issues.**

vii) **THAT the trial Magistrate fundamentally erred in law and fact by failing to appreciate the contents in toto of the Appellant's Affidavit dated 26th October, 2023, thereby failing to take into account vital pieces of evidence and issues raised by the Appellant in the matter and failing to find that the same demonstrated sufficient cause to warrant setting aside of the default judgment in the matter.**

viii) THAT the trial Magistrate vitally erred in law and fact by failing to properly evaluate and analyze all the crucial pieces of evidence produced during the subject Application's proceedings, including but not limited to the contentious nature of service of the summons and pleadings.

ix) THAT the Learned Magistrate substantially erred in law and in fact by failing to consider the grievous nature of the case and the significant impact of the issues for determination in the matter in balancing the scales of justice; thereby casually and unfairly dismissing the Defendant's Notice of Motion Application dated 26th October, 2023.

x) THAT the Learned trial Magistrate fundamentally erred in law and fact by failing to consider the Appellant's circumstances in toto, thereby unjustly failing to accord them any opportunity to defend themselves in the matter.

xi) THAT the trial Court erred in law and fact by failing to consider the Appellant's foundations and issues raised in the Appellant's Affidavit, Submissions and authorities, thereby duplicitously and unfairly failing to find merit in the Appellant's Application dated 26th October, 2023.

xii) THAT the Learned Magistrate ultimately erred in both law and fact by misreading, misinterpreting and misapplying the laws applicable in setting aside default judgments, therein causing a great miscarriage of justice by dismissing the Appellant's Application dated 26th October, 2023 with costs.

8. The Appeal was then canvassed by way of written Submissions. The Appellant's Submissions is dated 24/02/2025, while the 1st Respondent's is dated 14/03/2025.

9. Both Counsels basically reiterated the matters already captured above, and also restated the known principles applicable in applications seeking to set aside default default or ex parte Judgments. They also cited provisions of law and authorities. For this reason, I find no necessity of recounting the contents of the entire Submissions.

Determination

10. The issue for determination herein is "**whether the trial Court erred in declining to set aside the default Judgment and the subsequent *ex parte* Judgment entered against the Appellant**."

11. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court, and draw its own conclusion (see for instance, the case of **Kenya Ports Authority vs Kuston (Kenya) Ltd [2009] 2 EA 212**.

12. In civil litigation, matters to do with the consequences of a Defendant failing to appear or attend Court, or failing to file a defence, are governed by **Order 10** of the **Civil Procedure Rules**. The provisions permit the entry of Judgment in default of entry of appearance or filing a defence, and sets out guidelines on the process of entry of such interlocutory judgments. **Order 10 Rule 11** then empowers the Court, in the exercise of its discretion, to set aside or vary such ***ex parte*** Judgments.

13. In an Appeal challenging exercise of discretion, the limits within which an Appellate Court can interfere were reiterated by the Supreme Court in the case of **Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR**, as follows:

> **"…… we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion."**

14. It is trite law that a Defendant, once served with Summons, is expected to act promptly and expeditiously in entering appearance, and subsequently filing defence or answer to the claim. The time limit provided under **Order 6 Rule 1** is 14 days for entering appearance, and, under **Order 7 Rule 1**, another 14 days to file the defence. In the event a Defendant fails to meet the set timelines and a default judgment is entered, then he will be under a legal duty, should he wish to seek setting aside of the Judgment, to sufficiently explain the reasons why he delayed to act.

15. The Court of Appeal, in the case of **Gicharu Kimani & Associates Advocates –vs- Samwel Kazungu Kambi [2020] eKLR**, in restating the difference between a default Judgment regularly entered and one, which has been obtained irregularly, and the different effects flowing therefrom, held as follows:

> **"Considering the circumstances of this motion, the facts regarding the merits or demerits of it one must take into account in exercise of discretion that it's within the ambit of the guiding principles laid down in the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another Civil Appeal No 6 of 2015* eKLR (Msa), the Court of Appeal stated as follows:**
>
> > ***"We shall first address the ground of appeal that faults the learned judge for setting aside the default Judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one, which is irregularly entered. 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 on the whole it is in the interest to set aside the default Judgment, among other. (See Mbogo & Another v Shah (supra), Patel v EA Cargo Handling Services Ltd {1975} EA 75, Chemwolo & Another v Kubende {1986/KLR 492 and CMC Holdings v Nzioki {2004/1 KLR 173})'.***

16. Therefore, even where the Judgment is regular, the Court still retains the power to set it aside if justice of the case demands, for instance, where the Defendant demonstrates that he has a good defence, and/or where prejudice caused may be compensated by an award of costs. This is what

the Court of Appeal affirmed in the case of **Tree Shade Motors Limited v D T Dobie and Company (K) Ltd and Another [1998] eKLR).**

17. In this case, in dismissing the Application seeking setting aside of the default Judgment, the trial Magistrate found as follows:

> ***"A perusal of the pleadings shows that the defendant was served with summons but she did not acknowledge the same. The defendant however did not enter appearance and the matter proceeded for hearing ex-parte. The annexture marked SKK 4 clearly show the defendant's insurer was aware of the suit from way back in 2022. A careful consideration of the grounds set out in the Notice of Motion and its Supporting Affidavit does show that, quite apart from the fact that no explanation has been given for the failure by the Defendant to appear and defend the case, the Defense exhibited is a mere denial.***

18. I have perused the Affidavit of Service filed by the Process Server, one **George Ochieng**, sworn on 16/12/2020. Quoted verbatim, he depones as follows:

> ***"2. THAT on 15th December 2020, I received summons, plaint, ……. with instructions to serve upon the defendants herein.***
>
> ***3. THAT on the same day I proceeded to ITEN town then to Kabarnet stage to the office of Trans valley offices whereupon inquiry from the secretary, she directed me to the stage where to find the drive of motor vehicle KBU 771M. I proceeded to Kabarnet stage where upon inquiries I was shown the driver of the motor vehicle KBU 771M.***
>
> ***4. THAT I approach the driver and after the purpose of me looking for owner of the motor vehicle. He told she is not around but accepted to receive on her behalf but declined to sign on the said copies."***

19. Considering the state of the Return of Service cited above, I am constrained to disagree with the trial Magistrate's findings. The Affidavit is evidently insufficient. First, it was admittedly served upon a third party, alleged, without any ***prima facie*** evidence, that he was the Appellant's agent. The alleged driver is also unnamed and thus anonymous. Further, there is no allegation that the Appellant even authorized the alleged driver to receive Summons on her behalf. There is no evidence that the alleged driver, if indeed he received the Summons, forwarded or handed over the same to the Appellant. Although I note that the person served was alleged to have been the

driver of the "***matatu***" registration number **KBU 177M**, the same motor vehicle the subject of the suit, my finding is that the Affidavit contained too many loopholes to sustain the retention of the default Judgment entered against the Appellant. In my view, the Affidavit did not thus contain sufficient material to withstand the Appellant's denial of service. Being an irregular judgment therefore, the Appellant ought to have been unconditionally granted leave to defend suit.

20. Although there is indication, from a reading of the Appellant's Supporting Affidavit that her insurer was notified of the suit, and was thus aware of it at all material times, there is no evidence that the insurer relayed or conveyed that information to the Appellant. While it is true that an insurer and its insured maintain an agency relationship, no law dictates that this agency relationship always extends to receipt of Court process. Each case must be construed on the basis of its own facts and circumstances. I therefore do not find any basis to "tie" the Appellant to the insurer's knowledge of existence of the suit.

21. The draft defence presented by the Appellant, although not raising very serious legal issues, still denied the allegations of fact made in the Plaint, including the particulars of negligence. I would not therefore dismiss it as not raising any triable issues. It is one that, in my view, is capable of sustaining a defence at the trial.

22. In the circumstances, although I appreciate that this was a case of exercise of discretion by the trial Court, I find that in refusing to set aside the default Judgment, which had clearly been entered irregularly, the trial Court ignored relevant facts or disregarded the principles of the governing law thus leading to the eventuality that the trial Court perpetuated the retention of an unjust order. I therefore agree with the Appellant that the discretion was improperly exercised.

Final Orders

23. The upshot of my findings above is that this Appeal succeeds, and is accordingly allowed. Consequently, I direct and order as follows:

i) The order made by the trial Court on 3/04/2024 in **Iten SPMCC No. E012 of 2020** dismissing the Appellant's Notice of Motion dated 26/10/2023 is hereby set aside, and substituted with an order allowing the Notice of Motion, in terms of prayers (3) and (4) thereof

ii) The default Judgment entered in favour of the Respondent against the Appellant in the said suit on 19/01/2021, and all consequential orders and proceedings arising therefrom, including the subsequent substantive Judgment dated 20/09/2021 is accordingly set aside, and the Appellant is granted unconditional leave to file her Statement of Defence, which the Appellant is hereby directed to do within **fourteen (14) days** from the date hereof. Costs of the trial Court proceedings shall be in the cause.

iii) Since it would be unjust to condemn the Respondent for applying for the default Judgment or for mounting a defence to this Appeal, as it was within her rights to do so, I order that each party bears her own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF NOVEMBER 2025

……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Maroa for the Appellant

N/A for the Respondent

Court Assistant: Brian Kimathi