

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E677 OF 2023

NAIROBI CITY WATER
& SEWERAGE COMPANY LIMITED.....
.....**APPELLANT**

VERSUS

ANTHONY KHAEMBA MANYONGE
(suing as the Administrator of the Estate of the late
FLOICE AYUMA (Deceased).....**RESPONDENT**

**(Appeal from orders made in a ruling, by Hon. Rawlings Musiega,
Senior Resident Magistrate, SRM, delivered on the 21st July, 2023, in
Busia CMCCC No. E11961 of 2021)**

JUDGEMENT

1. This appeal arises from a ruling, that was delivered by the trial court, on 21st July 2023, according to the Memorandum of Appeal, dated 21st July 2023, where the trial court dismissed an application, dated 5th July 2023.
2. The suit, at the trial court, was by the respondent herein, against the appellant. The suit sought compensation, founded on the tort of negligence, following a fatal fall into a manhole, full of sewage. The matter proceeded by way of formal proof, for the appellant did not enter appearance nor file defence. Interlocutory judgement was entered on 6th May 2022. The formal proof happened on 13th March 2023, when the respondent testified. Judgement was delivered, on 6th April 2023, for a total of Kshs. 5,181,160.00, covering general and special damages, plus costs and interests.
3. Upon the judgement being entered, and execution proceedings commencing, the appellant moved the trial court, vide an application, dated 5th July 2023, seeking stay of execution of the resultant decree, the setting aside of the judgement of 6th April 2023, and leave to defend. The application was canvassed, by way of written submissions. In the ruling of 21st July 2023, the trial court found that there had been proper service, but the appellant had not offered any explanation for the failure to appear and file defence. Secondly, it found that the draft defence did not disclose a defence, raising triable issues, for it merely

raised the issue of contributory negligence, yet the deceased was only 7 years old, and, going by *Rahima Tayab & Others vs. Anna Mary Kinanu* [1983] KLR 114 [1981] 1 KAR 90 (Law, Potter & Hancox, JJA), liability cannot attach on a person below 10 years.

4. The appellant was aggrieved, hence the instant appeal. The grounds are that the conduct of the auctioneer was *ultra vires*; the trial court misapplied the principles on setting aside of an *ex parte* judgement; the application of 5th July 2023 was dismissed without consideration of all the grounds, discretion was not exercised judiciously, and the fair hearing principles, in Articles 47 and 50 of the Constitution, were not considered; the court did not consider that the appellant was exposed to the risk of execution; and costs ought not have been awarded.
5. Directions were given, on 12th February 2024, for canvassing of the appeal, by way of written submissions. Both sides complied, by filing their respective written submissions.
6. The principal argument is that the auctioneer did not issue a notice of entry of judgement and a proclamation notice. There are also arguments about there being a defence, with triable issues, and fair trial or hearing issues around Article 50(1) of the Constitution. The respondent argues around the failure by the appellant to explain why it did not enter appearance upon being served.
7. An interlocutory judgement cannot be overturned over issues relating to failure to notify the other party of entry of the said judgement, or over issues relating to failure by an auctioneer, levying execution of that judgement, or the resultant decree, to comply with the rules governing such executions. Lapses, in post-interlocutory judgement processes, relating to execution of the decree or judgement, should have no impact on the validity of the entry of the interlocutory judgement. The same cannot be set aside for reasons to do with how the decree-holder acts, after obtaining or getting the interlocutory judgement. Such lapses can only have an effect on the execution process, and not the process leading up to the entry of the interlocutory judgement.
8. Such a judgement can only be set aside on 2 possible grounds or reasons. One, upon it being established that there was no proper service of the summons to enter appearance, hence rendering the entry of the interlocutory judgement irregular. Two, where there was

proper service, and a regular entry of judgement, the court may still set aside the judgement, if some plausible explanation is given, of the failure to act, upon being served, or, in the absence of such explanation, where it is demonstrated that the judgement-debtor had a defence, which raises triable issues. It is only under those circumstances that the trial court would exercise discretion to set aside the interlocutory judgement.

9. The affidavit, in support of the application, dated 5th July 2023, does not address issues regarding service of the summons to enter appearance. It offers no explanation, at all, as to why appearance was not entered, nor defence filed, on time. Indeed, it says nothing about whether summons to enter appearance was ever served on it. It concentrates on what happened after the judgement was entered, particularly that no notice was served of the entry of that judgement. It was on that account that the trial court concluded that the service, of summons to appear, was proper, and the entry of the interim judgement was regular.
10. The case, by the appellant, is not about entry of the interlocutory judgement, but about how the execution process was being conducted. Complaints about the execution process cannot be a ground for overturning or vitiating a regular interlocutory judgement.
11. The relief for setting aside a regular judgement is available to a party who has some explanation for not acting. Discretion can be exercised in favour of a party who honestly says that he was served, but misplaced the documents, or simply got too busy and forgot about the whole matter. Surely, it cannot be available to a party who cannot even acknowledge proper service, and is, instead, keen on finding fault with the other party, when it is the author of its own misfortune.
12. Articles 47 and 50 of the Constitution are cited, with respect to fair hearing. I do not quite understand how the issues of these Articles of the Constitution would come up. The respondent did nothing to deny the appellant of its rights under Articles 47 and 50. All what was required, of the respondent, upon filing the suit, was to serve the papers on the appellant, so that the appellant could respond, upon which a trial would be conducted, where both sides would be heard. The respondent did what was required of him. He served the court process. The appellant has not questioned that. Indeed, the appellant does not explain why it did not file its papers in response, which would

have afforded it a platform, at the hearing, to be heard. It was the author of its own misfortune.

13. On the issue of a plausible defence, with triable issues, I do not think that is even an issue here, given that the appellant has not raised any issues about the regularity, or otherwise, of the judgement. It does not challenge the judgement. It complains only about the notice of its entry not being given, and there being issues with how the auctioneer attached its property. Such complaints cannot be a basis for setting aside a regularly entered judgement, for such complaints would only relate to the execution process. The issue of a draft defence and triable issues would arise only where a case is made out, of setting aside of the interlocutory judgement. The entry of the interlocutory judgement herein is not being challenged, the challenges are about what transpired after it was entered.
14. I am not persuaded that the trial court did not exercise discretion properly. It handled what was placed before it, based on the facts deponed in support of the application. It properly handled the application, based on those facts, and arrived at the correct findings and conclusions.
15. There can be no merit in the appeal herein, and I hereby dismiss the same, with costs. Let the original trial court records be returned to the trial court, while the instant appeal file shall be closed. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT
BUSIA, ON THIS 16TH DAY OF DECEMBER 2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Jeruto, instructed by Brian Otieno & Company, Advocates for the appellant.

Mr. Kiptanui, instructed by Waiganjo Wachira & Company, Advocates for the respondent.

