

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E466 OF 2023

**AZAN MOTORS
LIMITED.....APPELLANT**
VERSUS
**FRANCIS MUTUA MWANGI.....1ST
RESPONDENT**
**JAMES MUTISYA.....2ND
RESPONDENT**

*(Being an Appeal from the Judgment of Hon. E. Wanjala
delivered on 27th May 2022 in Nairobi CMCC No. 2836 of
2017)*

JUDGMENT

1. The 1st Respondent was the Plaintiff before the trial court where he sued the Appellant and the 2nd Respondent for damages arising out of a road traffic accident that occurred on 6th June 2016 involving motor vehicle registration number KCF 839N, in which the 1st Respondent sustained injuries.
2. Interlocutory judgment was entered against the Defendants and the matter proceeded to formal proof, culminating in judgment in which the trial court held the Defendants 100%

liable jointly and severally, and entered judgment for the 1st Respondent as follows: -

a) General damages: Kshs. 500,000/=

b) Special damages: Kshs. 14,453/=

c) Total: Kshs. 514,453/=

3. The Appellant filed an application dated 1st July 2022 seeking to set aside the judgment and to be allowed to defend the suit. The Appellant contends that it only learnt of the suit after judgment, asserting that it had never been served with summons to enter appearance, and therefore did not participate in the proceedings.
4. The application was dismissed in a ruling delivered on 28th November 2022, on the ground that the Appellant had not annexed a draft statement of defence.
5. The Appellant thereafter filed another application dated 30th November 2022, seeking review and/or setting aside of the ruling, which application was also dismissed.
6. The Appellant subsequently lodged the present appeal challenging the judgment and the manner in which the trial court exercised its discretion.
7. The Appellant contends that it was condemned unheard, challenges the entry of judgment against it, and argues that it ought to have been allowed to defend the suit on merit.
8. The appeal was canvassed by way of written submissions which I have considered.

Appellant's Submissions

9. The Appellant submits that it was not served with summons to enter appearance and that the proceedings and judgment against it were therefore irregular.
10. The Appellant further argues that the omission to annex a draft defence to its application was an inadvertent mistake by counsel which ought not to have been visited upon the Appellant.
11. The Appellant maintains that it has a defence raising bona fide triable issues, particularly on ownership and liability, because it had sold motor vehicle KCF 839N to a third party one Maurice Makite Mbithi under a Hire Purchase Agreement dated 22nd December 2015, which it entered into through its authorised agent, Moiz Motors Limited.
12. It is contended that as at 6th June 2016, the third party had actual possession and beneficial ownership of the vehicle, and therefore liability could not properly attach to the Appellant.
13. The Appellant also disputes vicarious liability on the basis that the 2nd Respondent was neither its servant nor agent.
14. The Appellant relies on several authorities including, among others:

1st Respondent's Submissions

15. The 1st Respondent's position, as gleaned from the record and the trial court's judgment, is that he sustained injuries in the accident and was entitled to compensation as awarded by the trial court.

16. The 1st Respondent maintains that judgment was properly entered and urges that the appeal be dismissed.

Issues for Determination

17. I have carefully reviewed the record of appeal and the rival submissions. I find that the following issues fall for my determination: -

a) Whether the Appellant was properly served with summons to enter appearance and whether the default/ex parte judgment was regular.

b) Whether the trial court properly exercised discretion in dismissing the Appellant's application(s) on account of failure to annex a draft defence.

c) Whether the Appellant demonstrated the existence of a reasonable defence and triable issues warranting setting aside of the judgment.

Analysis and Determination

Service of Summons on the Appellant

18. The Appellant's case was that it was not served with summons to enter appearance and only learnt of the suit after judgment had been entered against it.

19. Service is a fundamental step in civil proceedings as it accords a party notice and the opportunity to be heard. The court must therefore be cautious not to enforce a default judgment where service is contested and where the Defendant plausibly asserts that it was condemned unheard.

20. While this Court is not determining the ultimate factual question of service at this stage, it is clear that the Appellant

raised a serious question that ought to have been considered substantively in deciding whether or not to set aside judgment.

21. This Court is cognizant of the principle that judicial discretion must be exercised to avoid injustice, as stated in ***Shah vs. Mbogo & Another [1967] EA 116***, where it was held that discretion exists to avoid hardship resulting from accident, inadvertence or excusable mistake, but not to aid deliberate delay.
22. This Court is satisfied that the contest on service constituted a weighty matter which deserved substantive interrogation rather than a summary dismissal.

Failure to Annex a Draft Defence

23. The trial court dismissed the Appellant's application on the basis that the Appellant had failed to annex a draft defence to the said application.
24. It is not in doubt that a draft defence is an important document in an application seeking to set aside a default judgment, as it enables the court to evaluate whether the Defendant has a defence on the merits or triable issues deserving a hearing. In ***CMC Holdings Ltd vs. James Mumo Nzioki [2004] eKLR***, the Court of Appeal held that where a draft defence is tendered, the court is obliged to consider whether it discloses a reasonable defence.
25. I however find that failure to annex a draft defence is not, in every case, automatically fatal. The court must still consider

the justice of the case, the explanation given for default, the existence of triable issues, and whether any prejudice can be compensated by costs.

26. The court's discretion under **Order 10 Rule 11 of the Civil Procedure Rules** must be exercised judiciously and in a manner that promotes substantive justice. In ***Patel vs. East Africa Cargo Handling Services Ltd (1974) EA 75***, the court emphasized that the main concern is to do justice to the parties and that the discretion is wide.

27. In the circumstances of this case, where the Appellant disputed service and asserted it had a substantive defence on ownership and liability, I find that it was incumbent upon the trial court to consider whether justice would be better served by hearing the matter on merit rather than shutting out the Appellant on account of a curable omission.

28. I therefore find that the trial court erred in dismissing the Appellant's application, purely on the basis of failure to annex a draft defence, without sufficiently weighing the wider justice of the case.

Triable issues

29. It is settled that a defence on the merits need not be one that will succeed, but only one that raises at least one triable issue. In ***Tree Shade Motors Ltd vs. D.T. Dobie & Co. (K) Ltd & another [1998] eKLR***, the Court emphasized that where triable issues exist, courts ought to lean towards allowing a hearing on the merits rather than locking out a party from the seat of justice.

30. Similarly, in ***Lalji t/a Vakkep Building Contractors vs. Carousel Ltd (1989) KLR***, the court held that a trial should be ordered where triable issues exist and the court should avoid determining the merits prematurely. I note that the Appellant's intended defence raises key triable issues including: -

a) Ownership and beneficial possession of motor vehicle KCF 839N at the time of the accident.

b) Whether liability can attach to the Appellant where it contends that the vehicle had been sold under a hire purchase agreement and that the third party had possession and beneficial ownership.

c) Whether vicarious liability arises in the absence proof of employment or agency relationship between the Appellant and the 2nd Respondent.

31. I note that ownership of motor vehicles, in traffic claims, is not proved solely by a logbook. The presumption in Section 8 of the Traffic Act is rebuttable, and courts have recognized beneficial or possessory ownership. The said section stipulates as follows: -

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

32. In ***Securicor Kenya Ltd vs. Kyumba Holdings Ltd [2005] 1 KLR 748***, the Court recognized that actual possession and beneficial ownership may pass even where registration remains unchanged.

33. In ***Osapil vs. Kaddy [2000] 1 EALA 187***, the Court held that a registration card is prima facie evidence of ownership

and the presumption may be displaced by evidence to the contrary.

34. In ***Nancy Ayemba Ngaira vs. Abdi Ali [2010] eKLR***, the Court held that registration is not final proof that the person named is the sole owner and recognized other categories of ownership.

35. On vicarious liability, the Appellant argued that the 2nd Respondent was neither its employee nor agent. This Court agrees that vicarious liability requires proof of such nexus, and that mere presence of a name in the logbook does not automatically impose liability for every negligent act by another driver.

36. I am also alive to the principle in ***Karugi & another vs. Kabiya & 3 others [1983] eKLR***, that he who alleges must prove.

37. I am therefore persuaded that the Appellant disclosed triable issues deserving determination on the merits, and that the justice of the case favours granting the Appellant an opportunity to be heard.

38. The Court is satisfied that the Appellant raised an arguable dispute on service and disclosed triable issues on ownership and liability, and that the trial court ought to have exercised discretion in favour of setting aside the judgment on appropriate terms.

39. The Court also notes that while the 1st Respondent is entitled to the fruits of judgment, any prejudice occasioned by setting aside can be compensated by costs and strict timelines for compliance.

Disposition

40. Having regard to the findings and observations that I have made in this judgment, I find that the appeal is merited and I therefore allow it in the following terms: -

- a) The judgment delivered on 27th May 2022 in Nairobi CMCC No. 2836 of 2017, and all consequential orders, are hereby set aside as against the Appellant (Azan Motors Limited).***
- b) The Appellant shall enter appearance and file its statement of defence within fourteen (14) days from the date hereof.***
- c) The matter shall be mentioned before the trial court for directions and fixing of a hearing date on priority basis.***
- d) Throw-away costs of the setting aside applications in the trial court and of this appeal shall be paid by the Appellant to the 1st Respondent, the quantum thereof to be assessed by the trial court if not agreed.***
- e) Costs of the suit shall abide the outcome of the trial.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2026.

HON W. A. OKWANY
JUDGE

In the presence of
Ms Osoro for Appellant

**No appearance for Respondent
Abdirzak - Court Assistant**

ORIGINAL