Btnine Investments c/o Mzizi Sacco v Lyann (Civil Appeal E026 of 2023)
[2026] KEHC 2030 (KLR) (23 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2030 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E026 OF 2023

WA OKWANY, J

FEBRUARY 23, 2026

BETWEEN

BTNINE INVESTMENTS C/O MZIZI SACCO ..... APPELLANT

AND

ONYIEGO TIMOTHY LYANN ..... RESPONDENT

(Being an Appeal against the Ruling of Hon. C. Ombija – SRM – Keroka dated and delivered on 7th June 2023 in the Original Keroka CMCC No. 115 of 2019)

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court where he sued the Appellant/Defendant for damages arising out of injuries that he had sustained in a road traffic accident.

2. On 19th November 2019, the trial court entered interlocutory judgment in favour of the Plaintiff upon finding that defendant had not entered appearance or filed a defence despite proper service with the Plaint and Summons to Enter Appearance.

3. The matter was thereafter set down for formal proof after which ex-parte judgment was delivered on 25th August 2021.

4. The Appellant/defendant however entered appearance and filed its defence dated 20th February 2022. The defendant also filed an Application dated 18th March 2022 seeking, inter alia, stay of execution of the ex-parte judgment, stay of further ex-parte proceedings, an order to vary, rescind, set aside and/or review the ex parte judgment, leave to file a Statement of Defence and consequential documents out of time.

5. The Respondent/Plaintiff opposed the said application and in a ruling delivered on 7th June 2023, the trial court dismissed the Application in totality thereby triggering the instant appeal in which the Appellant listed the following grounds of appeal: -

1. That the Learned Trial Magistrate erred in law and in fact in dismissing the Application dated 18th March 2023 seeking to set aside the ex parte judgment without any valid reasons.

2. The Learned Trial Magistrate erred in law and in fact by failing to take note of the fact that the Defendant was bot served with summons to enter appearance.

3. The Learned Trial Magistrate erred in law and in fact in failing to act as an independent, impartial and fair arbiter in determining the real issues raised in the Application dated 18th March 2022 thereby ousting the Defendant from the seat of justice.

4. The Learned Trial Magistrate erred in law and in fact in failing to consider or sufficiently consider the explanation provided by the Appellant in relation to the delay in filing the Application to set aside the ex parte judgment.

5. The Learned Trial Magistrate erred in law and in fact by failing to consider that our defence raised triable issues.

6. The Learned Trial Magistrate erred in law by exercising his discretion in a capricious manner to the detriment and prejudice of the Appellant.

7. That the Learned Trial Magistrate erred in law and in fact by failing to consider and appreciate the rules of natural justice and the applicable principles in dealing with the Application dated 18th March 2022.

6. The Appeal was canvassed by way of written submissions which I have considered.

7. In Attorney General & 2 Others v. IPOA & 2 Others, CA. No. 324 of 2014 the court discussed the duty of the first appellate court and held thus: -

> "On our part, as a first appellate court, it is not lost on us that we have the duty, and responsibility to re-evaluate the evidence adduced before the High Court and arrive at our own independent decision. This re-evaluation is not merely a rehashing of the evidence or findings of the trial court. It entails reconsidering the evidence afresh with a clear mind devoid of any influence from the findings of the trial court. This is as required of us under Rule 29(1) (a) of this Court's Rules and as we have variously stated in a litany of decided cases."

8. I have carefully considered the record of appeal and the submissions filed herein. I find that the main issue for my determination is whether the Appeal is merited.

9. The trial court exercised its discretionary powers in declining to set aside the ex parte judgment. The issue that this court had to grapple with is whether this Court can interfere with the trial court's said discretion. In Pindoria Construction Ltd v Ironmongers Sanytaryware Civil Appeal No. 16 of 1976, it was held thus: -

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest, from the case as a whole, that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of

hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

10. In Kiriisa v Attorney-General and Another [1990-1994] EA 258,the Supreme Court of Uganda held that discretion must be exercised judiciously and that an appellate Court would not normally interfere with the exercise of the discretion unless it can be demonstrated that the same was injudicious.

11. The principles governing the setting aside of ex parte judgments were set out in the oft-cited case of Patel v EA Cargo Handling Services Ltd. (1974) EA 75, where the court held that: -

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

12. In Mohamed & Another v Shoka (1990) KLR 463, the court set out the parameters for setting aside an interlocutory judgment as follows:-

    i. Whether there is a regular judgment;

    ii. Whether there is a defence on merit;

    iii. Whether there is a reasonable explanation for any delay;

    iv. Whether there would be any prejudice.

13. In Bouchard International (Services) Ltd v M'mwereria [1987] KLR 193 the Court of Appeal stated thus: -

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so 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 has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
>
> A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The

principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure."

14. My understanding of the reasoning in the above cited cases is that where service was not effected and judgment is entered prematurely, the same would lead to the inescapable conclusion that the subsequent decision was irregular and must be set aside as a matter of right. This is so because the party against whom such judgment was entered was condemned unheard and denied an opportunity to respond to the claims brought against him. This right is sacrosanct as it is rooted in the fabric of the justice system.

15. Conversely, where the court finds that judgment was regular, it may still opt to exercise its discretion to allow the ex parte judgment to be set aside. Ultimately, the overriding objective is the interests of justice.

16. In the present case, the Appellant contended that they were not served with the Summons to enter Appearance and Plaint. The Appellant maintained that they only became aware of the suit when they were served with the Notice of Entry of Judgment on 12th August 2021. A perusal of the record however reveals that an affidavit of service dated 24th September 2019 was filed by one Mr. Joseph Mogaka Moemi. The process server indicated that he served the Defendant/Appellant's director with copies of the Summons and Plaint. It is therefore apparent that the Appellant was all along aware of the existence of the case.

17. I note that the Appellant entered appearance on 20th February 2022 yet the record shows that the Appellant's Director wrote a letter dated 22nd November 2021 to its Insurer's Claims Department, over the instant case. To my mind, the said letter is a clear demonstration that the Appellant's insurer was also aware of the existence of the suit.

18. This Court is taken aback by the Appellant's inordinate delay in entering appearance despite being served with the Notice of Entry of Judgment on 12th August 2021. It can also be deduced, from the timelines, that the Appellant entered appearance two years after service with summons to enter appearance had been effected. The fact that the Appellant also wrote to its Insurer on 22nd November 2021 and then entered appearance almost three months later shows lack of diligence in pursuing the matter. My finding is that the Appellant was guilty of laches and did not furnish this Court with sufficient reason to enable it exercise discretion in its favour.

19. It is also my finding that a party who has successfully prosecuted his case ought not to be unduly precluded from enjoying the fruits of his judgment. The Respondent herein obtained judgment on 25th August 2021 and has to-date not benefitted from the proceeds of the said judgment. I therefore concur with the trial court's holding that justice delayed is justice denied. I find guidance in the decision in Pithon Waweru Maina v Thuka Mugiria [1983] eKLR, Civil Appeal No 27 of 1982, where it was held thus: –

> " 2. The principles governing the exercise of judicial discretion to set aside an ex-parte judgment obtained in default of either party to attend the hearing are: -
>
> a. Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.
>
> b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or

> excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48…"

20. In the final analysis, I find no merit in the Appeal and hereby dismiss it with costs to the Respondent.

21. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS ON THIS 23RD DAY OF OCTOBER 2025.

W. A. OKWANY

JUDGE