



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS COUNTY

COURT NAME: MACHAKOS HIGH COURT

CASE NUMBER: HCCA/E271/2023

ONESMUS KIMWELE MWANGANGI VS BRIAN OTIENO OWITI AND CHARLES MUTUA MUTEMI

JUDGMENT

*(Being an appeal from the judgment of Hon D.N. Sure (Principal Magistrate) delivered on 19<sup>th</sup> September 2023 in Kangundo*

*MCCC No.*

*E195 of 2021*

**JUDGMENT**

1. This appeal seeks to impeach the ruling of the court below, dated 19<sup>th</sup> September 2023, which dismissed the Appellant's application by which the Appellant sought to set aside a default judgment entered against it for failure to enter appearance and file defence and seeking leave to file a defence. The gist of the application was that the Appellant was never served with summons. The Appellant also averred that his insurer was never served with the statutory notice requisite under the Insurance (Motor Vehicle Third Party Risks) Act.

2. The 1st Respondent opposed the application vide Grounds of Opposition dated 5<sup>th</sup> April 2023 wherein it was contended that the Appellant was duly served with summons to enter appearance and the pleadings on 3<sup>rd</sup> November 2021. Further, that the Appellant's insurer was served with the requisite statutory notice on 9<sup>th</sup> September 2021. 3. After considering the arguments by both sides the learned magistrate, came to the conclusion that the Appellant was duly served with



summons but neglected and/or refused to enter appearance and file defence and that the insurer had been



duly served with the notice prerequisite to filing suit, and refused to set aside the default judgment. 4. Being aggrieved, the Appellant preferred this appeal via a memorandum of appeal dated 16<sup>th</sup> October 2023. The appeal is premised on the following grounds:

**a. That the learned Magistrate erred in law and in fact by completely disregarding the draft statement of Defence filed by the Appellant and thereby rendering a decision without consideration of material facts which effectively condemned the Appellant unheard**

**b. That the learned Magistrate erred in law and in fact by failing to consider the following issues raised in the Appellants draft defence raised triable issues;**

**i. The Appellant disputed ownership of the suit motor vehicle and further stated that he did not exercise any control or derive any benefit from the use of the motor vehicle. Indeed, the motor vehicle copy of records in the 1<sup>st</sup> Respondent's bundle of documents indicated that the owner of the motor vehicle is Charles Mutua Mutemi, the 2<sup>nd</sup> Respondent herein.**

**ii. There is negligence alleged on the part of the 1<sup>st</sup> Respondent which ought to be determined by the Honourable Court.**

**c. That the learned Magistrate erred in law and in fact in failing to find that the Appellant's Application dated 17<sup>th</sup> March 2023 was not defended as the Grounds of Opposition dated 5<sup>th</sup> April 2023 filed by the 1<sup>st</sup> Respondent was bad in law as it was not**



***restricted to matters of law and the same ought to have been struck out.***

***d. The learned Trial Magistrate erred in law and fact in finding that it was upon the Appellant to cross-examine the court process server in order to establish whether service was properly effected, yet the facts deponed to in the Appellant's Supporting***



**Affidavit and Supplementary Affidavit were neither countered nor rebutted by the 1<sup>st</sup> Respondent as in the absence of a replying affidavit rebutting the averments in the Appellant's supporting Affidavit, the 1<sup>st</sup> Respondent had no claim against the Appellant.**

- e. The learned Magistrate erred in law and fact in finding that the Appellant was duly served yet in the Affidavit of Service deponed by Francis Wambua Mutiso, an alleged court process server, the deponent averred that summons and in the accompanying pleadings were purportedly served on 3<sup>rd</sup> November 2021. Service on 3<sup>rd</sup> November 2021 would have been impossible as the pleadings were filed on 11<sup>th</sup> November 2021 and Summons was issued on 11<sup>th</sup> November 2021.**
- f. The learned Trial Magistrate erred in law and fact in finding that the 1<sup>st</sup> Respondent ought to have responded to the Appellant's application by way of a Replying Affidavit but nonetheless proceeding to consider facts not deponed to and or averred by the 1<sup>st</sup> Respondent.**
- g. The learned Trial Magistrate erred in law and fact in finding that the Appellant did not dispute the mode of service yet in the Supporting Affidavit and the Supplementary Affidavit, the Appellant deponed that he was not served with the pleadings in the suit giving rise to the instant appeal.**
- h. The learned trial Magistrate erred in law and fact in faulting the Appellant for failing to annex the draft statement of defence to**



***the Application yet the deponent in the Application averred that the Appellant had not been served with the summons and the accompanying pleadings but “once copies of the pleadings are procured, the 1<sup>st</sup> Defendant shall seek leave of court to demonstrate that he has a***



***meticulous defence.” The draft statement of defence was consequently annexed to the Appellant’s supplementary Affidavit.***

- i. The learned trial Magistrate erred in law and fact in failing to consider the prejudice that would visit the Appellant by denying him the opportunity to defend the suit giving rise to the instant appeal noting that the award made in favour of the 1<sup>st</sup> Respondent was manifestly and inordinately excessive in the circumstance.***
- j. The learned Trial Magistrate erred in law and fact in failing to set aside the ex-parte judgement***

5. The Counsel for the parties consented to canvassing the appeal by way of written submissions.

6. In submissions filed on 23/06/2025, the Appellant made reference to the case of ***Blue Thaitian SRL of the no (Owners Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR), Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] e KLR, Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited [2010] Eklr*** and submitted that grounds of opposition are confined to points of law and cannot be used to traverse or deny factual averments set out in an affidavit. That in the absence of a replying affidavit by the 1st Respondent, the factual matters raised by the Appellant in the affidavit supporting the Application remained uncontroverted and must, in law, be deemed admitted.

7. According to the Appellant, it was apparent that the 1st Respondent has not demonstrated that the Appellant and the 2nd Respondent were duly served with summons to enter appearance, the Plaint and all other accompanying pleadings. In addition, it was submitted that the draft



defence raises triable issues and should be allowed. To support this position, reliable was placed on the following cases; ***Mbogholi v Harrison Tunje Chilyalya [2017] e KLR, Sheikh Abdulqadir Mohamed Ahmed Shallo -V- Julius Mutiso Mumo (2018) Eklr, Gulf Fabricators v***



**County Government of Siaya [2020] KEHC 5952 (KLR)  
and Moses Kibiego Yator v Eco Bank Kenya Limited  
[2014] e KLR.**

8. On the other hand, the 1<sup>st</sup> Respondent in submissions dated 25/05/2025 contended that the court considered the submissions filed by both parties and the draft defence attached to the application before arriving at the ruling that was delivered. That the Appellant's insured already admitted liability by settling CMCC NO E194 OF 2021 which arose from the same accident. It was submitted that that the issue of service of summons is an issue of fact and not law so the grounds of opposition filed by 1<sup>st</sup> Respondent were properly before this court; that the Appellant should have called the process server for cross examination and lastly, that the court would not have known that the defence raised triable issues since it was not annexed.

**Analysis and determination.**

9. The issues that arise for determination are as follows;

- k.* Whether the Appellant was served with the Summons to enter Appearance, Plaint and statutory notice.
- l.* Whether the Application was opposed by failure to file a Replying Affidavit.
- m.* Whether this court can set aside the ex parte judgment
- n.* Whether the Appellant should be granted leave to file a defence.

**Whether the Appellant was served with the Summons to enter Appearance, Plaint and a statutory notice**

**10.** *The rules require that once a suit is filed the defendant be served with summons within fifteen days. The Plaintiff then files an affidavit of service as proof of service. Order 8 Rule 1 of the Civil Procedure Rules provides as follows;*

***“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent***



***empowered to accept service, in which case  
service on the agent shall be***



**sufficient.”**

11. In the case of **Agigreen Consulting Corp Limited v National Irrigation Board 2020KEHC3507(KLR)** it was held that-

**“An affidavit of service must prima facie disclose proper and actual service for it is on the basis of this service that judgment is entered.”**

12. The record of the court below contains an affidavit of service sworn by one Francis Wambua Mutiso who deponed that he received a summons to enter appearance, plead and verify affidavit with instructions to serve the 1<sup>st</sup> Defendant and that the summons were duly served upon the Appellant in person. I have perused that affidavit of service and it is my finding that the same discloses proper and actual service. At paragraphs 4,5,6,7,8,9,10 and 11 the process server graphically describes how he met the Appellant and served him although the Appellant refused to acknowledge service.

13. It is also apparent that the Appellant’s insured was duly served with a statutory notice dated 9<sup>th</sup> September 2021. For all intents and purposes therefore, the impugned judgment was a regular judgment and the same can only be set aside if it be shown, inter alia, that there is a defence on the merits. This then brings me to the next issue.

***Whether this court can set aside the ex parte judgment.***

14. In the case of **Mureithi Charles & Another v. Jacob Atina Nyagesuka [2022] KECH 1805 (KLR)**, the court held as follows: - “

**28. In considering whether or not to set aside a judgement, a judge has to consider 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 and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an 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 invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647."***

15. I have carefully considered the statement of defence filed by the Appellant herein and it is my finding that it is a general denial: it does not



raise any triable issues. Moreover, the claim having been one for personal injuries and it being apparent that this appeal was filed merely to buy time, it would be unjust to set the judgment aside. That what was filed to counter the application were grounds of opposition is not fatal as the facts were clear from the court record as opposed to facts especially within the knowledge of a party. Moreover, the Respondent did file a supplementary affidavit which adequately addressed the issues raised by the Appellant.



***Whether the Appellant should be granted leave to file a defence.***

16. Having come to the conclusion that the draft defence filed consists of mere denials, I see no reason to warrant this court to permit the Appellant to file a defence.

17. The upshot is that this appeal has no merit and it is dismissed with costs to the Respondent.

**Judgment signed, dated and delivered virtually on this 19<sup>th</sup> March 2026.**

**IN PRESENCE OF:**

**Ms Mutonyi Adv for the Appellant.**

**Ms Omari Adv for Mutunga for the**

**Respondent. Mary Court Assistant.**

2 | Page

SIGNED BY/FOR:  
HON. LADY JUSTICE E.N. MAINA



THE JUDICIARY OF KENYA.  
MACHAKOS HIGH COURT  
HIGH COURT DIV  
DATE: 2026-03-27 14:25:11

