



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 320 OF 2017

TITUS MACHARIA.....APPELLANT **MWANGI**

VERSUS

PETER KANYI.....RESPONDENT **NDIRANGU**

(Being an appeal from the Ruling and Order of Honourable E. Nyaloti (Mrs) (CM) dated 13th June, 2017 in CMCC No. 10733 of 2006)

JUDGEMENT

1. The Appeal herein arises from the lower court's Ruling delivered on 13th June, 2017 by which the Appellant's Notice of Motion dated 26th August 2016 filed in the above cited suit seeking *inter alia* setting aside of default judgement entered against him, was allowed on condition that thrown away costs assessed at Kshs. 100,000 were paid to the

Respondent within 14 days of the Ruling , among other orders of the court.

2. The Respondent had sued the Appellant for injuries he sustained as a result of a road traffic accident which occurred on 6th May, 2006 after the Appellant's vehicle registration number KAM 200 H knocked him down thereby occasioning him bodily injuries.
3. Having failed to enter appearance and/or filed defence to the suit, the trial court entered the default judgement against the Appellant on 6th September, 2008. That judgement was subsequently set aside subject to certain conditions including the condition alluded to above.
4. Being aggrieved by the trial court's Ruling, the Appellant filed a Memorandum of Appeal dated 14th June in which he raised the grounds reproduced in verbatim as follows, that:-

a) The Learned Magistrate erred in law and in fact by awarding throw away costs in favour of the Plaintiff as against the Defendant as a condition for filing the defence after having already found that the ex-parte judgment entered against the Defendant was irregular.

- b) The Learned Magistrate erred in law and in fact and /or misdirected herself and misapplied the rationale behind throw away costs by awarding and assessing the same at Kshs. 100,000 in soft tissue injury claim whose general damages and special damages had been assessed at Kshs 101,000.**
- c) The Learned Magistrate erred in law and in fact and or failed to exercise her discretion fairly and in a judicious manner by awarding and assessing throw away costs in an excessively high and punitive sum of Kshs. 100,000 without a legal basis;**
- d) The Learned Magistrate erred in law and in fact by failing to make any or any definitive findings on the issues raised in the Defendants Application dated 26th August, 2016 including;**
- i) Whether or not the Defendant was served with the Summons to Enter Appearance.**
 - ii) Whether or not the Defendant was served with a Notice of Entry of Judgement.**
 - iii) Whether or not the Defendants motor vehicle KAM 200H was at the time of the alleged accident (6th May, 2006) insured by Blue Shield Insurance Company Limited.**

iv) whether or not the Defendant's said insurer was under statutory management and/or had a moratorium on payments to its policyholders and all creditors as at the time the Plaintiff sought to execute the decree against the Defendant.

5. The Appellant prays that the Appeal be allowed, the Ruling and Order of 13th June, 2017 to the extent relating to the award and assessment of the throw away costs as a condition for filing of the Defence be set aside; the Defendant be granted unconditional leave to file his defence and the costs of the Appeal and Application dated 26th August, 2016 be granted to the Appellant.
6. The Court directed that the Appeal would be heard by way of written submissions.

Appellant's Submissions

7. Firstly, Counsel submitted that that the trial Court misapplied the law in awarding thrown away costs as it had already found that the *ex-parte* judgement was irregular

and instead ought to have set the judgement aside unconditionally. Reliance was placed in **John Muthee Ngunjiriv Ali Ibrahim [2021] eKLR** and **James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another [2016] eKLR.**

8. Secondly, the Appellant submitted that the Trial Court exercised its discretion non-judiciously and unfairly. It was argued that the discretion donated by **Order 12 Rule 7** of the **Civil Procedure Rules** ought to be exercised judiciously as was held in **CMC Holdings Ltd vs Nzioki [2004] (CAK) 1 KLR 173** and in **Shah vs Mbogo and Another [1966] EA 166.** It was further argued that even if the *ex-parte* Judgment was regular, the Respondent would have been entitled to final Party to Party costs of Kshs. 19,500/- only, being 65% of Kshs. 30,000/- as set out in **Paragraph 1(a) of Schedule 7** of the Advocates Remuneration Order.
9. The Appellant submits that this Court has the power to interfere with the discretionary power of the Trial Court where it is demonstrated that the Trial Court misdirected

itself in law and, reference being made to the judicial determination in **Kenya Power and Lighting Co. Limited vs. Abdulla Mohamed and another** [2017] eKLR.

10. Reliance was also placed on **Sheila Wambui Muturi v Peter Macharia Muiru** [2021] eKLR, where the Court set aside an award of thrown away costs of Kshs. 100,000/= on the basis that the court's arrival at that figure was not explained considering that what was being sought to be set aside was a default and not final judgment.

Respondent's Submissions

11. The Respondent in opposing the Appeal relies on the case of **Jesse Kimani vs Mc Connel** [1966] EA 547 where the Court highlighted the issues to be considered in the exercise of the judicial discretion to set aside an *ex-parte* judgment.
12. The Respondent also relied on the **Nairobi Flour Mills vs Johnson Kithete** [2005] eKLR case to submit that the burden of proof lay on the Appellant to demonstrate that he was not properly or lawfully served the suit documents.

13. The Respondent further submits that the Appellant gave contradictory information as to when he found out about the existence of the *ex-parte* judgment and that the Appellant is guilty of *laches* as he never gave a plausible explanation as to why he took ten months to file the Application after being notified of the existence of the impugned judgment. Reliance was further placed on **Trading Company Ltd vs Isiolo County Council [2006] eKLR** for the contention that the conduct of an Applicant should be considered in exercise of the court's discretionary power.
14. The Respondent argued the Appellant never produced evidence that the Motor Vehicle in question was insured by Blue shield Insurance Company and that even if the motor vehicle was insured by the insurance company, the judgment was entered before the moratorium came into effect. The Respondent continues to state that existence of a moratorium cannot be a ground for setting aside *ex-parte* judgment and that the prosecution of the suit did not flout any Court order or the Moratorium.

15. The Respondent further did submit that the Appellant did not have judgment against the insurance company which requires the insurer to settle the amount in order to be shielded under **Section 67(c)(11)** of the **Insurance Act**. The Appellant is said to have failed to avail to the Court any information to demonstrate that the insurer is obligated to pay the decretal sum.

Analysis and Determination

16. Having considered the grounds of appeal, the evidence on record and both parties' rival submissions I find the issues falling for determination to be as follows:-

a) Whether the Trial Magistrate erred in law and fact in law in awarding the Respondent thrown away costs of Kshs.100,000.

b) Whether this Honourable Court should interfere with the Trial Court's discretionary power as exercised in the impugned Ruling.

c) Who bears the costs of this Appeal ?

17. The Appellant faults the trial Court for awarding thrown away costs of Kshs. 100,000/= despite finding that the

interlocutory judgement was irregular, and for not making a definitive finding on the issues raised by the Appellant in his Application dated 28th August, 2018 as to whether the *ex-parte* judgment entered was regular.

18. The Trial Court at **Paragraph 10** of its Ruling under review found that:-

“..... the ex-parte judgement entered against the Defendants was irregular.”

19. Granting of costs is a matter of the court's discretion as provided for under **Section 27** of the **Civil Procedure Act**. The rationale behind an award of thrown away costs includes the need to cure a prejudice occasioned to a party as a result of delay, or misdeed on the part of one party or deferment of enjoyment of a right.
20. The question to be asked in this regard is whether the award of thrown away costs was rational and reasonably supported by law.
21. This Court draws guidance in **Ibrahim Ahmed vs Halima Guteti High Court at Mwanza Number 128 of 1967** **1968 THCD** as cited in **Millicent Wamaitha Njogu vs**

Pauline Nyambura Waweru [2022] eKLR where the Court held *inter alia*;-

“The question for a court on appeal is whether the decision below is reasonable and can be rationally supported if so the lower court should be affirmed. The appeal judge may not in effect try the case de novo, and decide for the party he thinks should win.....”

22. The Trial Court did not extensively delve into the issues on whether the interlocutory judgement was irregular or otherwise although the parties made extensive submissions in support of their respective positions. The Appellant specifically raised concerns regarding the manner in which service of summons was effected and the issuance of the notice of entry of judgment. At that stage, the Court was under a duty to interrogate the question of service as it formed the foundation upon which the interlocutory judgment rested.
23. **Order 5 Rule 16** of the **Civil Procedure Rules** provides that:

“On any allegation that a summons has not been properly served, the court may examine the serving

officer on oath or cause him to be so examined by another court, touching his proceedings and may make such further inquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit.”

24. The Appellant disputed both his presence at the location where the process server claimed to have effected service and the validity of the service itself. These were material questions that required judicial interrogation, and a proper record should have reflected how they were addressed. Nevertheless, the Trial Court, without providing reasons, concluded that the interlocutory judgment was irregular and proceeded to hold that the law permits the setting aside of an *ex -parte* judgment, relying on the authority of **Patel vs EA Cargo Handling Services Limited [1975] EZ 75.**

Determination

25. It is therefore my view that the Trial Court ought to have interrogated the issue of service extensively and satisfy itself that the Appellant was in deed duly served before condemning him to pay such high thrown away costs.

26. It is unclear why, having found the interlocutory judgment to be irregular, the Court proceeded to order the Appellant to shoulder the costs of his Application. In doing so, the Court unfairly condemned the Appellant to pay throw-away costs in respect of a judgment it had itself declared irregular. Such an order was unjustified, as costs should not be imposed upon a party who successfully demonstrates that a judgment was improperly entered.
27. The judgment ought to have been set aside as matter of right or *ex debito justitiae* (see **Arithi Selasio Murungi vs Bright Wanja Julius [2020] eKLR** and **Yooshin Engineering Corporation vs Aia Architects Limited [2023] KECA 872 (KLR)**).
28. In the premises, it is my considered view that this is a proper case in which this Court is entitled to interfere with the discretion exercised by the Trial Court. The upshot of the above is that the appeal is allowed in the following terms.

- a) **The Trial Court's decision to set aside the default judgment entered on 5th September, 2006 is affirmed as the same was found to be irregular.**
- b) **The Order awarding the Respondent thrown away costs of Kshs. 100,000/= is hereby set aside and substituted with an order granting the Appellant unconditional leave to defend the suit.**
- c) **The parties shall bear their own costs of the Appeal as the trial court was the one in error.**

J. M. NANG'EA - JUDGE.

Judgement Delivered Virtually this 15th day of April, 2026.

In the presence of;

Appellant's Advocate, Ms Muli for Mr. Makumi

Respondent's Advocate, Ms Mwende for Mr. Muli

Court Assistant (Mr. Ng'eno)

J. M. NANG'EA - JUDGE.

ORIGINAL