REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E1283 OF 2024

JOSEPHINE WANJIKU…… APPELLANT

-VERSUS-

AUTO INDUSTRIES LIMITED……1ST RESPONDENT
PATRICK GITHAE JIRA……2ND RESPONDENT
(Being an appeal from the ruling of P. K. Rotich (SPM) in Milimani CMCC No. E10118 of 2021 delivered on 29/10/2024)

JUDGMENT

1) The appellant in this appeal was the plaintiff in Milimani CMCC No. E10118 of 2021 where she sued the two respondents seeking general damages for pain and suffering and special damages of ksh.12,190 and also damages for loss of income in respect of injuries she sustained on14/2/2021 along Gitanga road when the respondents motorcycle registration no. KMFK 175E veered off the road and hit her causing her severe bodily injuries.

2) The parties entered into a consent judgment on 19/12/2023 which was adopted by the court on 27/2/2024.

3) The respondents made an application dated 24/6/2024 seeking to set aside the exparte judgment dated 18/3/2024.

4) The trial court set aside the judgment dated 18/3/2024 and directed that the case starts denovo.

5) The appellant has appealed against the ruling dated 29/10/2024 on the following grounds;

i. ***That the Learned Magistrate erred and misdirected himself on the principles applicable in setting aside a consent judgement dated 19/12/2023 and adopted on 27/2/2024 hence arriving at a wrong conclusion.***
ii. ***That the Learned Magistrate erred in law and in fact in finding that the 1st Respondent had a formidable draft defence which raised multiple triable and weighty issues, while there was already a memorandum of Appearance and a Statement of defence duly on record on behalf of the 1 respondent.***
iii. ***That the learned magistrate erred in fact and in law in not recognizing that the 1st Respondent was duly served with pleading, but did not explain the undue delay exercised in filing the application dated 24/6/2024 hence arriving at a wrong conclusion.***
iv. ***The Learned Magistrate erred in law and in fact in totally disregarding and/or failing to give fair consideration to the Appellant's evidence vide affidavit of reply dated 4/7/2024 and submissions in the lower court hence arriving at a wrong conclusion.***
v. ***The Learned Magistrate erred in law and in fact in finding in favour of the 1st Respondent, despite the***

subject party not meeting conditions for setting aside a judgement.

vi. The learned erred in law and in fact in failing to consider that there was no allegation of fraud or coercion made by the Applicant against the firm of Samuel Gitonga & Co. Advocates in acting and/or appearing and/or acting throughout the lower court proceedings hence arriving at a wrong conclusion.

vii. The Learned Magistrate erred in law and in fact in failing to recognize that the Appellant will clearly be prejudiced to restart a suit, which the 1 respondent knew about but opted for reasons best known to then, not take action to protect their interest.

viii. The Learned Magistrate erred in law by failing to apply the requisite principles in reaching his ruling and specifically failed to consider whether or not the applicant had deliberately sought to delay or otherwise avert the course of justice and thus undeserving of the exercise of the court's discretion in his favour.

ix. The Learned Magistrate erred in law and in fact in finding that the judgement be set aside in the interest of Justice.

6) The parties filed written submissions as follows; the appellant submitted that the respondent was duly served with the summons to enter appearance and all accompanying documents in the lower court case, in compliance with Order 5 Rule 22B (2) of the Civil Procedure Rules 2020.

7) The respondent is on the record admitting that the insurance was served with a demand letter dated 28/3/2021. Also, since filling of the subject application, the firm of Samuel Gitonga and Associates has never ceased acting for the respondent neither has the firm of Taibjee & Balla Associates sought to have them withdraw their representation. The firm of Samuel Gitoga was therefore properly on record.

8) The appellant further submitted that there is evidence on record that the Respondent was served with summons to enter appearance vide email from their own website.

9) In real time, there was a Memorandum of appearance and statement of defence both dated 29/3/2022 filed by the Firm of Samuel Gitonga & Co. Advocates on behalf of the respondent.

10) The Respondent alleged defectiveness of service of summons for lack of a delivery report. the absence of the delivery report cannot in itself render service defective. The absence of the delivery report cannot in itself render service defective.

11) Mr. Olunga from the of Samuel Gitonga Advocates in appearing for the Applicant executed an impugned consent on liability

dated 19/21/2023 and adopted on 27/3/2024 as an order of the Court in his presence.

12) As it were, there is no allegation of fraud or coercion made by the Respondent against the said Advocate in the instant application, nor has the said Mr Olunga himself filed any affidavit herein alleging that he was misled or coerced into entering the consent.

13) Mr. Olunga continued to appear even after the application was filed with no objection or concern from the respondent in the course of proceedings.

14) The appellant submitted further that the respondent was served with summons to enter appearance on 31/3/2022 that is 2 years and 4 months from the date in which the lower court judgement was delivered.

15) The unreasonable delay in bringing the application was not explained at all. In **Eman Kamunya Kithaka v Peter Kinyua Kamunya [2017] eKLR** the court found that unexplained delay of 4 months was unreasonable. It stated-

> ***"I therefore find the delay of four (4) months, which is not even explained, to be unreasonable***

and in the circumstances, the application for review must be dismissed."

16) The Applicant is a corporate body, with no doubt a legal department with knowledge of the E- fling portal which not utilized by the Respondent to track the progress of their own case. Now that an adverse verdict is out, the respondent is inching means to escape liability.

17) The 1st respondent alternatively submitted that the jurisdiction to set aside ex parte or default judgments is derived from Order 10 Rule 11 of the Civil Procedure Rules, 2010, which provides:

> ***"Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

18) The 1st Respondent's uncontested position, as demonstrated before the trial court, was that it was never served with summons to enter appearance.

19) The process server allegedly served Monarch Insurance Company Limited, which is not an agent or employee of the 1st Respondent.

20) Under Order 5 Rule 22B of the Civil Procedure Rules (Amended), where service is effected by email, it shall only be deemed valid if accompanied by a delivery receipt confirming transmission, which must be annexed to the affidavit of service.

21) The Appellant failed to produce such proof before the trial court.

22) The 1st respondent demonstrated that it only became aware of the proceedings upon execution of the decree by auctioneers.

23) The issues for determination in this appeal are as follows;

(i) Whether the learned trial magistrate erred in law by setting aside a consent judgment duly adopted by the court.

(ii) Whether the first respondent proved that it was not duly served with summons.

(iii) Whether the firm of Samuel Gitonga & Co. Advocates had the requisite authority to enter into a consent judgment on behalf of the first respondent.

(iv) Whether there was an inordinate and unexplained delay by the first respondent in filing the application to set aside the judgment.

24) The appeal before this court challenges the decision of the trial court to set aside a judgment and order a trial de novo.

25) A fundamental misapprehension of the law is evident in the trial court’s approach.

26) The record indicates that the parties entered into a consent judgment on 19th December 2023, which was formally adopted by the court on 27th February 2024.

27) Despite this, the first respondent applied to set aside what it termed an "ex parte judgment" dated 18th March 2024.

28) The law in Kenya distinguishes strictly between a default judgment, which is entered due to a party's failure to appear or plead, and a consent judgment, which arises from an agreement between the parties.

29) The principles for setting aside a consent judgment are far more stringent than those for a default judgment under Order 10 Rule 11 of the Civil Procedure Rules.

30) A consent judgment creates a contract between the parties and can only be set aside on grounds that would justify the rescission of a contract, such as fraud, collusion, mutual mistake, or the agreement being contrary to public policy.

31) The learned magistrate erred by treating the matter as a standard application to set aside an ex parte judgment,

thereby failing to require the first respondent to meet the high threshold of proving fraud or material mistake.

32) Regarding the issue of service, the first respondent contended that it was never served with summons.

33) However, the appellant provided evidence of service via email. While the first respondent relied on Order 5 Rule 22B of the Civil Procedure Rules, arguing that the absence of a "delivery receipt" invalidated the service, this court notes that a technical omission in a delivery report does not automatically nullify service where there is subsequent participation.

34) The record shows that the firm of Samuel Gitonga & Co. Advocates entered an appearance and filed a statement of defence on behalf of the first respondent.

35) A party is bound by the actions of the advocate they have put on record. Since the first respondent did not allege fraud or coercion against the advocate who signed the consent, they are bound by that advocate’s actions.

36) Furthermore, the first respondent's delay in seeking to set aside the judgment is fatal.

37) The application was filed on 24th June 2024, nearly four months after the consent was adopted and over two years after the suit commenced.

38) The first respondent, being a corporate entity with a presumed legal department, cannot claim ignorance of a case where its own advocates were actively participating in the registry and filing pleadings.

39) To allow the case to start de novo after a valid consent had been recorded would cause the appellant undue prejudice and violate the principle of finality in litigation.

40) Consequently, the learned magistrate exercised his discretion on wrong principles.

41) There were no triable issues to be considered once a valid consent judgment had been entered, as the consent itself resolved the issues of liability and quantum by agreement.

42) The first respondent failed to prove any grounds for rescinding the "contract" embodied in the consent judgment.

43) The appeal is hereby allowed. The ruling and order of the trial court delivered on 29th October 2024 setting aside the judgment and directing a trial de novo is set aside.

44) The consent judgment adopted on 27th February 2024 is reinstated in its entirety.

45) The appellant shall have the costs of this appeal and the costs of the application in the lower court.

46) Orders to issue accordingly.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 7th day of May, 2026.

A. N. ONGERI

JUDGE

In the presence of:

Miss Kioko for the Applicant

Miss Kubai holding brief Odoyo for the Respondent