



**Gachanja v Morusoi (Civil Appeal E075 of 2024)
[2025] KEHC 1170 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E075 OF 2024
JK SERGON, J
FEBRUARY 27, 2025**

BETWEEN

DANIEL MUGAMBI GACHANJA APPELLANT

AND

CHEPKIRUI MORUSOI RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon C. Odunga (Adjudicator/RM) delivered on 16th December 2024 in Kericho Small Claims Court Commercial Case No. E349 of 2024)

JUDGMENT

1. This appeal arises from the judgment of Kericho Resident Magistrate/Adjudicator in Small Claims Court Commercial Case No. E349 of 2024, a claim that arose from breach of a loan agreement dated 30th August 2021 as a result of which the appellant owed the Respondent Kshs. 870,000/-. The trial court found that the appellant breached the agreement and entered a default judgment in favour of the respondent in the sum of Kshs. 870,000/- plus costs and interest. The appellant filed an application dated 13th November, 2024 seeking to have the default judgment and the subsequent proceedings set aside. The trial court in its ruling dated 16th December, 2024 dismissed the said application for want of merit.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 12 grounds of appeal condensed as follows:-
 - a. The learned trial magistrate erred in law by dismissing the appellant's application dated 13th November, 2024 and failing to set aside the improper default judgment dated 13th November, 2024 and the subsequent proceedings.
 - b. The learned trial magistrate erred in law in holding that the appellant's draft response to the claim did not raise any triable issues.



- c. The learned trial magistrate erred in law by laying emphasis on pleadings and documents that were not admitted into the record.
 - d. The learned trial magistrate erred in law by failing to consider the appellant risks to be highly prejudiced by the subject ruling as he will be condemned to pay a huge decretal sum yet he was condemned unheard.
3. The appeal was admitted to hearing and fixed for hearing on 12th February, 2024. The parties made oral submissions to dispose of the appeal.
 4. The appellant conceded that he did not file a response to the claim, this notwithstanding, he contended that the default judgment was improperly entered.
 5. The appellant maintained that the trial court erred by relying on documents that were not admitted into the record. The appellant reiterated that the trial court in its ruling dated 16th December, 2024 erred by holding that the appellant's defence did not raise triable issues and that the appellant admitted the claim, one Judy Mokeira is said to have admitted the claim. The appellant was adamant that in the circumstances the instant appeal ought to be allowed.
 6. The respondent contended that the debt is due and that Judy Mokeira the wife of the debtor witnessed the debt agreement.
 7. This court finds that the issue (s) for determination in this appeal is whether the judgement entered in the matter before the Magistrate's Court was regular or irregular and whether the trial court erred in erred by dismissing the appellant's application dated 13th November, 2024 and failing to set aside the improper default judgment dated 13th November, 2024 and the subsequent proceedings.
 8. The duty of the first appellate court was set out in *Selle & another v Associated Motor Boat Co. Ltd. & Others* {1968} EA 123 where it was held as follows; "A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."
 9. As to whether the default judgment was regular and/or irregular, it is clear from the record of the trial court that the appellant was served with a notice of the first mention alongside the statement of claim and an affidavit of service filed. The appellant did not enter appearance and/or file a defence and therefore the trial court proceeded to enter default judgment in favour of the respondent.
 10. It is now well settled from numerous precedents that a distinction exists between a default judgment that is regularly entered and one which is irregularly entered. The difference between the two was elaborated in detail by the Court of Appeal in *CA No. 6 of 2015 James Kanyita Nderitu v Marios Philotas Ghika & Another* [2016] eKLR, where it was held that: "...In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer, whether in the whole it is in the interest of justice to set aside the default judgement, among others."



The considerations are however different in case of an irregular judgement. The Court stated as follows:-

“In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment.” It is the finding of this court that the default judgment that is subject of the appeal was entered regularly and that the judgment entered by magistrate/adjudicator was based on the evidence on record to wit a loan agreement and demand letter, which proved the claim against the appellant on the balance of probabilities.

11. As to whether the trial court erred in erred by dismissing the appellant’s application dated 13th November, 2024 and failing to set aside the improper default judgment dated 13th November, 2024 and the subsequent proceedings. This court finds that the subsequent ruling of the trial court dismissing the application to set aside of the ex parte judgement entered in default of appearance together with the proceedings to be sound, the trial court in its ruling highlighted that it considered the documents by respondent including a response, witness statement and bundle of documents all filed after the default judgment had been entered, and proceeded to find that there were no triable issues raised by the respondent to warrant setting aside the default judgment and re-opening the suit, contrary to the assertion by the appellant that he had been condemned unheard.
11. This court having considered the grounds of appeal and the rival submissions has come to the conclusion that the Appeal lacks merit. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 27TH DAY OF FEBRUARY, 2025

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

No Appearance for the Appellant

Chepkirui Marusoi Present in Person

