



Nkatha (Suing as the Legal Representative of the Estate of Dickson Kimotho Maina alias Maina Kimotho) v Monarch Insurance Company Limited (Civil Appeal E123 of 2023) [2025] KEHC 2405 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E123 OF 2023
CJ KENDAGOR, J
FEBRUARY 27, 2025**

BETWEEN

GLANDIS NKATHA ALIAS GLADYS NKATHA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DICKSON KIMOTHO MAINA ALIAS MAINA KIMOTHO) APPELLANT

AND

MONARCH INSURANCE COMPANY LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of the Chief Magistrate Court of Kenya at Meru delivered on 18th July, 2023 by Hon. D.W. Nyambu (C.W) in Meru CM Civil Case No. E010 of 2020)

JUDGMENT

Introduction

1. The Appellant was the Plaintiff in Meru CMCC 306 of 2016 where she sued James Chabari and Kiria Nkuene blaming them for causing a fatal accident that killed Dickson Kimotho Maina. She sought compensation and damages from the two for the loss. The matter was heard and judgment was entered in favor of the Appellant against the said Defendants. James Chabari was held 90% liable to compensate the Appellants for loss and damage while Kiria Nkuene was held 10% liable. James Chabari was insured by the Respondent.
2. The Appellant filed a declaratory suit against the insurers of James Chabari - the Respondent- vide a Plaint dated 18th September, 2020. The suit was registered as Civil Suit No E10 of 2020 and she sought the following prayers;
 - a. A declaration that the [Respondent] is contractually and /or statutorily bound to satisfy the decree in Meru CMCC 306 of 2016 as per the judgment dated 26/11/2018.



- b. An order directing the [Respondent] to pay all the monies awarded to the Appellant in Meru CMCC 306 of 2016 being Kshs.6,414,754.50/= plus interest from 26/11/2018 and Kshs.334,565/= being costs of the suit.
 - c. In the alternative and without prejudice to prayer (i) and/or (ii) hereinabove, if the court awards any other amount instead of the sums stated in prayer (ii) herein above, the interests of the said sum(s) do start running from the 26/11/2018 until payment in full.
3. The Respondent was duly served but it did not enter appearance nor file defense. The court entered interlocutory judgment against him on 11th February, 2021 and the matter proceeded for formal proof. It delivered a judgment on 7th June, 2022 in favour of the Appellant against the Respondent in the following terms; the Respondent was to pay Kshs.6,414,745.50/= plus interest from 26th November, 2018 until payment in full. It ordered the Respondent to pay Kshs.301,108.50/= being 90% of costs awarded in parent suit. It awarded the Appellant costs and interests of the suit.
4. The Appellant extracted a decree dated 22nd June, 2022 indicating the Decretal amount as Kshs.6,790,692.69/=. It served the Respondent with warrants of attachment and the Respondent paid the Decretal Sum Kshs.6,790,692.69/=. Later, the Appellant discovered that the Court's tabulation of the Decretal amount was erroneous and that the actual figure should have been Kshs.10,158,433/= . It wrote to the court notifying it of the said error.
5. The court noted the error on the face of the decree and sua sponte corrected the same and re-issued a corrected decree dated 22nd February, 2023 indicating the Decretal Sum as Kshs.10,158,433/= . The Appellant sought to execute on the unpaid balance as per the corrected decree. It served the Respondent with warrants of attachment together with proclamation of their movable assets all dated 24th February, 2023. The Appellant was seeking to recover from the Respondent the sum of Kshs.3,687,716.50/= tabulated as taxed costs, interests, further costs and collection fees.
6. The Respondent opposed the execution and sought to stop it. It brought an application dated 2nd March, 2023 in which it sought the following orders;
 - a. That this Court be pleased to order a Stay of execution of the Judgment/decree and warrants of attachment pending hearing of this application.
 - b. Setting aside of the ex-parte judgment and decree dated 7th June, 2022 and all consequential orders arising therefrom.
 - c. The [Respondent] herein be granted leave to file their defense and counter claim out of time, and defend this suit on merits.
7. The Respondent argued that the ex-parte judgment and decree issued for the sum of Kshs.6,793,642.69/= are prima facie illegal for violation of Sections 5 (b) & 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap. 405) which limits the [Respondent's] liability for any claim to a maximum sum of Kshs.3,000,000/=. It argued that it committed an error in paying the Decretal sum of Kshs.6,793,642.69/= and that it should have paid only Kshs.3,000,000/=. For this reason, the Respondent it is in the interest of justice that execution be stayed and proceedings be reopened to enable it challenge the irregular warrants of attachment and illegal ex-parte Judgment and Decree.
8. The Court delivered a ruling on 18th July, 2023 in which it found merit in the application and granted the prayers. It found that the proposed defense raised triable issues. It reopened the case and ordered



the Respondent to file and serve the draft statement of defence and counter-claim within 14 days of the ruling.

9. The Appellant was dissatisfied with the Ruling and appealed to this court vide a Memorandum of Appeal dated 31st July, 2023. It raised the following Grounds of Appeal;

1. That the learned Magistrate erred in law and in facts by failing to consider or take into consideration that the honourable court had sua sponte amended its own initial decree dated 22/6/2022 due to errors on the face of the decree, especially the computation of interests as per the judgment dated 7/6/2022 and re-issued an amended decree dated 22/2/2023 depicting the correct interest amounts accrued on the judgment amount thereby arriving at an erroneous conclusion.
2. That the learned Magistrate erred in law and in facts by finding that the Appellant acted in bad faith in computing execution whereas there was an amended decree Issued By The Honourable Court dated 22/2/2023 that was the basis of the warrants of attachment that led to proclamation for the balance of the unpaid Decretal sums as per warrants of attachment aimed at recovering the unpaid amounts from the Respondent thereby arriving at an erroneous conclusion.
3. That the learned Magistrate erred in law and in facts while she failed and/or inadvertently ignored to find and hold that the attachment by the Appellant was for the balance of the unpaid Decretal sums only and not for the whole Decretal sums to wit amounted to Kshs.3,687,716.50/= only, being the balance of unpaid Decretal sums thereby arrived at a wrong conclusion and finding.
4. That the learned Magistrate erred in law and in facts by failing to appreciate the fact the defendant had been served with the initial decree, served with the bill of costs, served with the warrants of attachment, paid Kshs.6,793,642.69/= in compliance with the initial warrants of attachment, an amount over and above Kshs.3,000,000/=, the alleged capping on the [Respondent's] obligation and therefore the Respondent was estopped by its own conduct from relying on provisions of Section 5 (b) (iv) of the Insurance (Motor-Vehicle Third Party Risks) Act, Cap. 405 and thereby arrived at an erroneous conclusion.
5. That the learned Magistrate erred in law and in facts by wrongly and capriciously exercising her discretion to allow the Respondent reopen its case against overwhelming evidence to the effect that the Respondent had been served with summons, pleadings, and documents in the case on multiple occasions but failed to respond and/or file any document leading to entry of interlocutory judgment thereby fell into error in its conclusion and decision.
6. That the learned Magistrate erred in law and in facts by failing to find and uphold the existence of a regular judgment before the trial court that was not impeached by the Respondent thereby arriving at an erroneous conclusion.
7. That the learned Magistrate erred in law and in facts by failing to find that the application by the Respondent to set aside the regular judgment, re-open the case and file the defence and counterclaim was an afterthought to avert pending execution for the balance of the unpaid Decretal sums and therefore mala fides and an abuse of court process and therefore unmeritorious thereby arriving at an erroneous conclusion.
8. That the learned Magistrate erred in law and in facts by taking into consideration and/or failing to take into consideration factors which she ought to have taken into consideration thereby



wrongly exercising her discretion to re-open the Respondent's case under the circumstances of evidence before the court and thereby arriving at an erroneous decision.

9. That the Ruling and Order of the Learned Magistrate dated 18/7/2023 is against the weight of evidence, submissions, and authorities placed before the court therefore erroneous.
10. That the Ruling of the Learned Magistrate (Hon. D.W. Nyambu) dated 18/7/2023 is bad in law.
10. She asked the Court to allow the appeal and set aside the decision of Hon. D.W. Nyambu-C.M dated 18th July, 2023. She also asked the court to re-affirm the judgment and decree dated 7th June, 2022 and 22nd February, 2023 respectively as against the Respondent.
11. The appeal was canvassed by way of written submissions.

Appellant's Written Submissions

12. The Appellant submitted that the lower Court should not have exercised its discretion in favor of the Respondent because the application dated 2nd March, 2023 was an afterthought and an abuse of the court process. In addition, she argued that the ruling dated 18th July, 2023 was not founded on the principles for setting aside a regularly obtained default judgment. She submitted that the Respondent's defense does not have merit and does not raise a triable issue, and thus it was improper for the Court to set aside the judgment. In addition, the Appellant argued that the lower court should not have set aside the judgment because Respondent did not offer a satisfactory reason for the delay.

Respondent's Written Submissions

13. The Respondent submitted that the learned magistrate in making the impugned Ruling did not exhibit an error in reasoning or violate any legal principle. It submitted that the learned magistrate enjoyed unlimited discretion to set aside the ex-parte judgment. It argued that the magistrate's Ruling was not arbitrary because the Court identified 2 triable issues raised by the Respondent in its proposed defense and counter-claim. It submitted that one of the triable issues is the imposition of liability exceeding the Kshs.3 million statutory-limit protection for insurers. It argued that the lower court was justified in reopening the case and giving it the opportunity to prosecute their defense and counterclaim.

Issues for Determination

14. Having considered the Grounds of Appeal and the submissions from both parties, I opine that there is one issue for determination
 - a. Whether the lower court was right in setting-aside the ex-parte Judgment.

The Duty of the Court

15. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some



point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the lower court was right in setting-aside the ex-parte Judgment

16. The central issue for determination in this Appeal is whether the Respondents satisfied the requirements for setting aside an ex-parte judgment.

17. The principles for setting aside a default judgment were spelt out in the case of *Patel v East Africa Cargo Handling Services Ltd* [1974]EA 75 thus;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan, J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

18. The Court of Appeal in *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR made a similar finding where it stated that a Court ought to consider whether a litigant’s defence raises a triable issue. The Court held:

“The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.”

19. The Appellant argues that the lower Court’s ruling was not merited because the Respondent’s drafted defense does not raise a triable issue. She submitted that the drafted defence constitutes mere denials and the issues raised in the counterclaim are not meritorious. On the other hand, the Respondent maintains that their defense and counterclaim raises triable issues. This invites the Court to relook at the pleadings placed before the lower court to determine whether the Respondent’s draft defence and counterclaim raises a triable issue.

20. The genesis of this dispute is that the Appellant filed a declaratory suit against the Respondent vide a Plaint dated 18th September, Appellant sought the following prayers;

- a. A declaration that the [Respondent] is contractually and /or statutorily bound to satisfy the decree in Meru CMCC 306 of 2016 as per the judgment dated 26/11/2018.
- b. An order directing the [Respondent] to pay all the monies awarded to the Appellant in Meru CMCC 306 of 2016 being Kshs.6,414,754.50/= plus interest from 26/11/2018 and Kshs.334,565/= being costs of the suit.

21. The Respondent did not enter appearance nor file defense as a result of which the ex-parte judgment was entered. It alleged that it did not defend the suit because it was not served with pleadings. It now wishes to respond and defend the claim, and has provided a draft defence and counter-claim.

22. I have seen the said Draft Statement of Defence and Counter-Claim. I have relooked at its contents and averments to ascertain whether it raises triable issues. One of the issues raised in the defence is that the amount being sought as per the Plaint violates Sections 5 (b) & 10 (1) of the Insurance (Motor Vehicle



Third Party Risks) Act (Cap. 405) because the sought award exceeds the Kshs.3,000,000/= capping set by the said provisions.

23. For clarity, I have reproduced the above provisions. Sections 5 (b) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap. 405) provides as follows;

5. Requirements in respect of insurance policies.

In order to comply with the requirements of Section 4, the policy of insurance must be a policy which—

- a. is issued by a company which is required under the *Insurance Act* (Cap. 487) to carry on motor vehicle insurance business; and
- b. insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

- i. liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
- ii. except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or
- iii. any contractual liability;
- iv. liability of any sum in excess of three million shillings, arising out of a claim by one person.

24. Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap. 405) provides as follows;

10. Duty of insurer to satisfy judgments against persons insured.

- (1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.



25. The Respondent bases its Defence and Counterclaim on the above provisions. On the face of it, it is clear that the Appellant sought to impose liability that exceeds Kshs.3,000,000/=. It argues that the awards being sought against it as per the Plaint dated 18th September, 2020 cannot be issued as prayed because the sought awards violate the above statutory provisions. In my view, and without commenting on the merit of the defense, this is a triable issue which the Respondent should be allowed to ventilate at the lower Court. For this one reason, I cannot fault the lower Court for setting aside the ex-parte judgment and for reopening the case.

Disposition

26. The Appeal lacks merit and is hereby dismissed with costs to the Respondent.

27. The Ruling of the Hon. D.W. Nyambu dated 18th July, 2023 is hereby upheld.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 27TH DAY OF FEBRUARY, 2025.**

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Parties absent

