**Laikipia University College v Kibia (Suing as the Legal Representative of the Estate of Peter Maina Mwaura (Deceased)) (Civil Appeal E022 of 2023) [2025] KEHC 9600 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9600 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYAHURURU**

**CIVIL APPEAL E022 OF 2023**

**LN MUTENDE, J**

**JUNE 30, 2025**

**BETWEEN**

**LAIKIPIA UNIVERSITY COLLEGE ..... APPELLANT**

**AND**

**FRANCIS MWAURA KIBIA ..... RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER MAINA MWAURA (DECEASED)**

## JUDGMENT

1. Francis Mwaura Kibia, the Administrator of the Estate of Peter Maina Mwaura (deceased), as well as his father, brought an action against the Appellant for the benefit of his estate under the Law Reform (Miscellaneous Provisional) Act. This was following an accident that occurred on 12th November, 2015 involving motor vehicle Reg. No. KBT 515N stated to be owned by the Appellant in which the deceased was travelling as a passenger. The claim was for damages under *Fatal Accidents Act*, *Law Reform Act*; pain and suffering, expectation of life, costs and interest.

2. The Appellant entered appearance and filed a statement of defence denying liability for the alleged negligence. It argued that if the accident occurred it was caused wholly and/or substantially contributed to by the deceased.

3. The matter came up for hearing thrice with the Appellant making no appearance. In the result the matter proceeded as the Appellant duly was served with a hearing notice. The Respondent testified on 19th January, 2022 and the case was closed.

4. Judgment was entered in the matter on 9th March, 2022, for the Respondent as follows;

   Pain and suffering – Kshs. 200,000/-

Loss of dependency – Kshs. 3,000,000/-

Special damages – Kshs. 70,550/-

Total – Kshs. 3,370,550/-

Costs and interest

5. In the result, the Respondent applied for execution of the decree, the total sum sought being Kshs.4,118,869/-.

6. Through an application dated 19th April, 2022, the Appellant sought to have the ex-parte proceedings and judgment entered on 9th March, 2022 and all consequential Orders arising therefrom set aside so that the suit could be set down for hearing, to be determined on merit. The application was based on grounds that the Respondent was not notified of the hearing. That they learnt of the matter having proceeded ex-parte on 14th December, 2022. That the alleged e-mail used to serve them was not operational and has never been used by the firm of Raydon Mwangi Associates.

7. That failure to attend court by the Appellant was not intentional. Similarly, they were not served with a mention date for pre-trial directions confirming compliance a requirement under Order 11 of the *Civil Procedure Rules*; they have a good defence raising triable issues and the Plaintiff does not stand to be prejudiced.

8. In a response thereto through a replying affidavit deposed by counsel for the Respondent it is urged that at the outset he served the hearing notice through cell phone No. 0727xxxx13 to the Appellant advocate's phone number 0722xxxx07. Further, that he served the notice through their e-mail address and there was no reverse message to indicate the e-mail was not received. That the e-mail address was obtained from the Appellant's website info@raydonlaw.co.ke which was operational and not archived and the Appellant showed no incapacity that could make them not arrest the judgment prior to being delivered.

9. Also filed by the Respondent was a preliminary objection dated 3rd June, 2020 on points of law. Seeking dismissal of the application for being res judicata as full judgment was delivered on 9th March, 2022.

10. The learned trial Magistrate Hon. S. Lesantos Larabi considered the application and through a ruling dated 8th May, 2023, dismissed the application on grounds that the Applicant failed to satisfy the conditions for stay of execution as provided under Order 42 Rule 6(3) (b) of the *Civil Procedure Rules*, 2010.

11. Aggrieved, the Appellant proffered an appeal against the ruling and orders made on 8th May, 2023, on grounds as follows;

    1. That the learned Magistrate erred in law and fact by failing to appreciate that the matter before him was an application to set aside an ex-parte judgment and not for stay of execution pending appeal.

    2. That the learned Magistrate erred in law and fact by applying the wrong provisions of the law to dismiss the Appellant's application and outrightly favour the Respondent.

    3. That the learned Magistrate erred in law and fact by relying on the wrong facts to dismiss the Applicant's application.

4. That the learned Magistrate erred in law and fact in failing to consider the weight of the Appellant's defence on record which raised triable issues thus denying the Appellant's chance to be heard.

5. That the learned Magistrate erred in law and fact in failing to find that the Appellant was never served with a hearing notice.

6. That the learned Magistrate erred in law and fact by failing to consider the Appellant's submissions.

12. Following directions agreed upon, the appeal was disposed through written submissions. It is urged by the Appellant that the learned Magistrate applied wrong provisions of the law and seemed to have taken into consideration facts of a different case of 2009 when the instant case was non-existent as they were not raised by either party.

13. That according to Order 5 Rule 22B of the *Civil Procedure Rules* summons sent by electronic mail service should have been sent to a confirmed used e-mail address which was not the case. The mobile number 0722xxxx07 is also disputed.

14. The Defence of the Appellant denying liability that the Deceased jumped out of a moving bus causing the accident is argued to be substantial which calls upon hearing the matter on merit. In this regard reliance is placed on *David Gicheru v Gicheha Farms Ltd & Another* [2020] eKLR where it was held that;

> " The fundamental duty was to do justice between the parties by allowing each party a proper opportunity to put their cases upon the merits of the matter."

15. That the Respondent did not indicate the prejudice to be suffered if the judgment is set aside, reliance being placed on *Kapadia Kamlesh* [2022] eKLR where it was stated that;

> " From my study of the appellant's draft statement of defence, I observed that he is essentially challenging the claim of his ownership of the second motor vehicle at the time of the accident is being challenged.
>
> In my view, the foregoing consists of a triable issue which can only be adequately ventilated at the hearing of the suit.
>
> The third limb of appeal and condition for consideration in setting aside an interlocutory/ default judgment has to do with whether the respondent stands to be prejudiced. Upon my perusal of the record, I observed that the learned trial magistrate did not address her mind to this condition.
>
> Going by the record, it is apparent that the respondent indicated that she would be prejudiced since she had filed the suit back in 2008 and it is apparent that the appellant had no interest in defending the claim."

16. The Respondent in upholding the duty of the first appellate court urged that on all occasions the Appellant was served/ notified through his legal representative but he never appeared. That in misleading the court the Appellant has failed to tell the court the incapacity they had to arrest the delivery of the judgment and why they waited for 2 months period upon learning of the judgment having been delivered. That there was laxity on the part of the Appellant and indeed their website was operational.

17. Further, that none of the e-mail was reversed back to the Respondent. In that respect reliance is placed on the case of *Peter Ndeti Ndolo v William Mutisya Muindi* [2021] KEHC (KLR) where the court gave regard to the decision of the Court of Appeal in *Baiywo v Bach* [1987] KLR 89; [1986 – 1989] EA 27 where it was held that;

> " There is a presumption of service as stated in the process server's report, and the burden on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest, it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross – examination given to those who deny the service."

18. That the court has the discretion to set aside a regular ex-parte judgment but the discretion must be exercised judiciously and any conditions imposed must be just of both parties.

19. This being a first appellate court, the duty of the court is to analyse afresh evidence adduced at trial, re-evaluate and reconsider it so as to reach an independent determination bearing in mind the fact of not having seen or heard witnesses who testified. In the celebrated case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 it was stated as follows;

> " This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate 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 allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and Others* [1968] EA 123 and *Williamson Diamonds Ltd. v Brown* [1970] EAI
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> As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this court said in *Peters v Sunday Post Ltd* [1958] EA 424. In its own words;
>
> > " whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide..."

20. The judgment in the matter was entered after the Appellant failed to appear in court. To set aside such a judgment the court should be guided by Order 12 Rule 7 of the *Civil Procedure Rules* that provides thus;

> Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

21. The court provided guidance on principles to guide the court in exercising the discretion in *Thorn PLC v Macdonald* [1999] eKLR as follows;

i. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

ii. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

iii. The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

iv. Prejudice (or the absence of it) to the claimant also has to be taken into account.

22. On the question of the party having moved to set aside the Judgment, Hon. P. Gichohi CM (as she then was) who was seized of the matter entered a judgment on 9th March, 2022. The application seeking to set aside the ex-parte proceedings and judgment was dated 19th April, 2022, it is explained that the Appellant officials are the ones who received the information that the proceedings did proceed ex-parte on 14th March, 2022, promptly caused for the Appellant to act. This suggest indolence on the part of counsel who was seized of the matter who did not act as expected.

23. The advocate had the duty of acting diligently but as it is evident he did not follow up the matter hence the question whether the Appellant should be punished for the mistake of an advocate who did not act accordingly.

24. The explanation given by Appellant's counsel for not acting was lack of notice. All along per the affidavits of service filed, service was effected through Whatsapp No. 0722xxxx07 and subsequently e-mail address info@raydonlaw.co.ke in accordance with Order 5 Rule 22B which are challenged. I note that when counsel for the Appellant filed a statement of defence the only contact he gave was a postal address, Box 182 – 20100 Nakuru. Also added in the memorandum of appearance was his physical address – Gibcon House, 1st Floor. And, when he wrote to court to confirm whether judgment had been entered the letter head had a telephone number 0722xxxx07 and e-mail address raydonmwanginiaassociates@gmail.com

25. I do note the possibility of the Appellant's counsel having been notified of the matter and not acted but the claimant (Appellant) who stands prejudiced makes this court consider whether the defence put up suggest existence of triable issues.

26. In *Kenya Power & Lighting Co. Ltd v Abdulhakim Abdalla Mohamed & Another* [2017] eKLR the court stated that;

> " The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties. (See *Mbogo & Another v Shah*, (*supra*)."

27. Looking at the circumstances of this case the allegation is that the deceased jumped out of the moving vehicle. This is a triable issue that cannot be overlooked in the interest of justice.

28. A consideration of the ruling delivered dated 8th May, 2023, it is evident that it was based on wrong facts and provisions of the law. This was a misdirection on the part of the court. The Notice of Preliminary Objection filed urging that the matter was res judicata is misplaced for the suit herein cannot be alleged to be a later suit which cannot be relitigated.

29. From the foregoing, having considered the appeal in its entirety I find this a proper matter calling for exercise of the discretion. Accordingly, I allow the appeal and order as follows;

i. The ruling dated 8th May, 2025 be and is hereby set aside.

ii. The case shall be opened for the Appellant (Defendant) to defend the case on merit.

iii. The case shall be heard on priority basis.

iv. Each party shall bear their costs.

30. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE, 2025.**

**.....**

**L.N. MUTENDE**

**JUDGE**