Makata Savings and Credit Co-operative Society Limited v Kioko (Civil Appeal E066 of 2022) [2025] KEHC 9490 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9490 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E066 OF 2022

EN MAINA, J

JUNE 26, 2025

BETWEEN

MAKATA SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED ..... APPELLANT

AND

PHILIP KIILU KIOKO ..... RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate Hon. A.G.Kibiru delivered on the 16th June 2021 in the Chief Magistrate's Court at Machakos in CMCC Case No. 147 of 2020)

JUDGMENT

1. The Appellant filed this appeal dated 30th May 2022 seeking to have the ruling of Hon A.G. Kibiru in Machakos PMCC No 147 of 2020 set aside and he be granted leave to defend the suit unconditionally on grounds that;

> " a. The learned Trial Magistrate erred in law and fact by dismissing the Applicant's application dated 9th July 2021 that sought setting aside of the ex-parte judgment delivered on 16th July ,2021;
>
> b. The learned Trial Magistrate erred in law and fact by disregarding all the evidence that was adduced by the Appellant that they were not served with a notice of entry of judgment;
>
> c. The learned Trial Magistrate erred in law and fact by delivering judgment despite the fact that the appellant herein had not participated in the proceedings;
>
> d. The learned Trial Magistrate erred in law and fact in failing to appreciate that the court's duty is to serve justice to all without undue regard to technicalities;

e. The Trial Magistrate erred in fact and law in failing to consider the Appellant's draft statement of defence."

2. The appeal was canvassed by way of written submissions.

3. In the submissions dated 21st March 2025, the Appellant stated that it was never served with notice of entry of judgment by the Respondent or by the court and therefore was not able to take action on the judgment and hence suffered irreparable harm. It was contented that the notice is important as it prevents unnecessary execution and ensures the judgment debtor makes necessary arrangements to either pay the decretal sum or appeal in the event the judgment is unfavorable, as is the case here. The court was urged to set aside the judgment. Reliance was placed on the case of *David Tanui Yego and 134 others v Benjamin Rono & 3 others* [2021] e KLR. The Appellant also prayed for costs.

4. The Respondent's submissions are dated 24th March 2025 and it is submitted that the trial court found that the counsel for the Appellant was present in court when the date for delivery of the judgment was fixed. Reliance was placed on the case of *James Kanyita Nderitu v Marios Philotas Ghika & Another* [2016] eKLR, *Bouchard International Services Limited v M'Mwereria* [1987] KLR 193.

5. It was also submitted that the Respondent did not fully participate in the proceedings despite service of mention and hearing notices. That the matter was fixed for mention on 27th April 2021 by consent of Counsel for both parties and on the same day judgment was set for delivery on 16th June 2021 and thus should not therefore set aside the judgment. It was further contended that the Appellant should have sought fresh leave from this court in order to file the record of appeal as leave lapsed on 25th July 2022 and the record herein was filed on 15th May 2024, approximately 399 days later, which amounts to inordinate and inexcusable delay. The Appellant contended that the appeal was an abuse of the court process and should be dismissed. Reliance was placed on the cases on *Masista v Standard Global East Africa Limited* [2023] KEELRC 3440 (KLR), *Sino Hydro Corporation Limited v Tumbo t/a Dominion Yards Auctioneers* [2022] KEHC 15545 (KLR) and *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR.

Determination

6. Having considered the record of the trial court and the submissions of the parties, I find that the issues for determination are;

   a. Whether the Appellant was given a chance to participate in the proceedings of the lower court.

   b. Whether the judgment delivered on 16th July, 2021 be set aside.

7. The Appellant contends that he was not served with a notice of entry of judgment and thus was not able to take action on the judgment contrary to Order 22 Rule 6 of the *Civil Procedure Rules*. The said order provides as follows;

> "Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:
>
> Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address

for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

8. This order comes into play at the point of execution of a judgment entered in default of appearance or defence but not in the present circumstances as the Appellant would like this court to believe. He was all along aware of the proceedings and the date of the judgment which was fixed in his Advocate's presence but he chose not to participate. In his case, the judgment was heard upon hearing the case exparte for non-attendance. Appearance had been entered and a defence had been filed.

9. The record further indicates as follows;

   a. The plaint was filed on 20.05.2020

   b. The defendant entered appearance through the firm of Kimondo Gachoka & Company Advocates,on 20.07.2020 and filed a defence on the same date

   c. The defendant participated in the proceedings for pre- trial on 3.11.2020. That after several pre-trial case management sessions, the case was fixed for hearing on 24th March 2021.

   d. Despite being served with a hearing notice dated 3.04.2020 as evidenced by the Affidavit of Service dated 23.03.2021, the Defendant did not appear for the hearing that was scheduled on 24.3.2021 and the learned magistrate proceeded ex parte.

   e. On 3.04.2021, the matter came to confirm filing of submissions and only the Plaintiff's submissions were on record. As shown in the proceedings of 27th April, 2025, the Defendant was given 14 days to comply. In the said proceedings it is stated:-

      "....

      Ms. Kamene holding brief for Ms. Kui for the Plaintiff/Respondent

      Ms. Mwema holding brief for Ms Wataka for

      Defendant.

      Ms Kamene: Plaintiff has filed written submissions. We pray for a judgment date.

      AG Kibiru

      Chief Magistrate

      Court: Defendants to file written submissions within 14 days from today. In the meantime Judgment on 16.06.2021.

      AG Kibiru

      Chief Magistrate"

10. It is evident that despite being granted time to file submissions, the Advocate for the Appellant did not do so and judgment was delivered on 16th June 2021.

11. Order 12 Rule 2 of the *Civil Procedure Rules* gives the court discretion to hear a case *ex parte* where the Defendant fails to appear and there is proof of service of the hearing date. This is reinforced by Order 17 Rule 3 of the *Civil Procedure Rules*. Order 12 Rule 7 of the *Rules* however gives discretion to the court to set aside a judgment where the case proceeded ex parte. One such application was made before the learned Magistrate but it was dismissed hence this appeal.

12. As was stated by the Court of Appeal in the case of *Bouchard International (Services) Ltd v Philip Nzioki M'mwereria* [1987] KECA 75 (KLR) setting aside a judgment is a discretionary remedy. That;

> " If service of notice of hearing or summons to enter appearance have been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty; and the exercise must be judicial."

13. In the case of *Evans v Bartlam* [1937], 2 All ER 64 it was held that the exercise of discretion should not be set aside lightly. It was stated;

> " It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order, unless he has shown to have applied a wrong principle.
>
> The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order. Otherwise, in interlocutory matters, the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and may be one which requires a careful examination by the Court of Appeal."

14. In this case, the Defendant was served with a hearing notice dated 3rd April 2020. This can be seen from the stamp of its Advocate's on the hearing notice. The stamp indicates that the notice was received on 7th December 2020, three months before the said hearing date. Further, it is clear, that the Advocate for the Appellant was present when the judgment date was fixed.

15. For this court to set aside the judgment, it must be satisfied that the exercise of discretion was wrong and in this case, I find no error on the part of learned Magistrate. In this era of the double oxygen rule (O2) Sections 1A and 1B of the *Civil Procedure Act*, the court ought not to entertain parties who are indolent as opposed to those who may have committed a genuine mistake. Counsel for the Appellant was in court and was granted more time to file submissions but refused and/or neglected to do so. The judgment was therefore a regular judgment and the want of the notice of entry of judgment whose date was in any event communicated to Counsel for the Appellant in court cannot affect the judgment, it could only affect the execution of the judgment. This Appeal clearly has no merit and it is dismissed with costs to the Respondent.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 26TH DAY OF JUNE, 2025.

E. N. MAINA

JUDGE

In the presence of:

Ms Wanjira for Njuguna for Appellant

Ms Kabuu for the Respondent

Geoffrey – Court Assistant