Midigo v Mwangi (Civil Appeal E243 of 2023)
[2025] KEHC 9125 (KLR) (Civ) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9125 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E243 OF 2023

AN ONGERI, J

JUNE 26, 2025

BETWEEN

DOMINIC ABALA MIDIGO ..... APPELLANT

AND

SAMUEL KAREITHI MWANGI ..... RESPONDENT

(Being an appeal against the Order of H. M. Nyagah (CM) in Milimani CMCC 955 of 2018 delivered on 17th March 2023)

JUDGMENT

1. The trial court delivered an exparte judgment on 11th March 2020 in favour of the Respondent against the Appellant in the sum of Kshs. 905,500/= together with costs of the suit and interest in respect of injuries sustained by the Respondent on or about 28th July 2017 when the Respondent who was a pedestrian was knocked down by the Appellant's motor vehicle registration number KAH 760S along Ring Road Nairobi.

2. The Appellant subsequently made an application dated 11th April 2022 seeking setting aside of the exparte judgment and also lifting of warrants of attachment of his property and for orders that the case starts de novo.

3. The trial court in its ruling dated 17th March 2023 declined to set aside the exparte judgment for reasons that the Appellant entered appearance in the case and the application was made two years after entry of the exparte judgment.

4. The Appellant has appealed against the Ruling delivered on 17th March 2023 on the following grounds:-

a. The learned Magistrate erred in its finding that the Appellant was properly served with summons to enter appearance in the absence of evidence to prove such service and against the rules on service.

b. The learned Magistrate erred when he believed without evidence that the Respondents Advocate called the Appellant on his mobile telephone number, invited him to his office and served him whereupon he received service and refused to sign the summons, without proof by evidence and affidavit of service.

c. The learned Magistrate erred in considering the age of the judgment in persuading himself not to set aside the judgment at the expense of the right to fair trial and natural justice even when the Appellant only learnt of such judgment when his property was proclaimed for attachment.

d. The learned Magistrate erred in basing on the entry of appearance by the firm of J. Mburu & Company Advocates to conclude that the Appellant was duly served or that the said firm entered appearance by the Appellant's or his insurer's instructions in the absence of evidence on record confirming such instructions.

e. The learned Magistrate erred when he considered the lack of letter of complaint against the firm of J. Mburu & Company Advocates to imply that the said firm had acted by the Appellant's or his insured's instructions.

f. The learned Magistrate erred in his ruling when he allowed the consequences of the omissions of the firm of J. Mburu & Company Advocates to be visited upon the Appellant.

g. The learned Magistrate erred when he found that the entry of appearance by the firm of J. Mburu & Company Advocates had overtaken the need to file an affidavit of service by Respondent's Advocates when the rules make it mandatory to file the affidavit as a confirmation of service and the manner thereof.

h. The learned Magistrate erred and misapplied his discretion in making a presumption of service in the absence of evidence and without considering the circumstances under which the Appellant challenged service.

i. The learned Magistrate erred in his consideration of the lack of a defence on record by the Appellant to deny the orders sought whereupon the Appellant had no access to the pleadings in the matter by the time the application was filed to be able to prepare his defence.

j. The learned Magistrate generally misapplied the law and procedural rules to the circumstances of the case in disallowing the application of the Appellant.

5. The parties filed written submissions as follows:- the appellant submitted that according to Order 5 of the Civil Procedure Rules, proof of service is dome by filing an affidavit of Service prepared by a duly authorized court process server detailing the manner of service in accordance with the stipulated rules.

6. Further, that no such affidavit of service was filed by the respondent as proof of the same. The respondent further failed to produce proof of the purported telephone calls to the appellant informing him to visit the offices of the respondent advocates to collect the summons upon which the appellant refused to sign in acknowledgement.

7. The appellant submitted that the firm of J Mburu & Company Advocates having entered appearance and abandoning the matter midway before hearing, and with the appellant having no reason as to why the said firm could act in such a manner, he was left to speculate.

8. The appellant initially speculated that the respondent advocates could have opted to serve the appellant's insurer, AMACO and stated that this was against the rules as the insurer was not an authorized agent.

9. To receive service for the appellant as required under the rules. Insurance policy holders are served personally and it is their duty to inform the insurers of the case filed in court against them.

10. It was the appellants argument that in addition to the contested service of summons, the appellant having demonstrated that he was never served with summons, could not have possibly instructed the firm of J. Mburu & Company to act for him in the matter.

11. The appellant argued that he was never aware of the matter and if at all he had instructed the advocates, he would have constantly sought updates from the firm and known about the dates give therefore the hearing would have never proceeded ex-parte.

12. The respondent's written submissions argued alternatively that the appeal should be dismissed as it lacks merit and is based on unfounded claims.

13. That the appeal arises from a ruling by Hon. H.M. Nyaga, who dismissed the appellant's application dated April 11, 2022, finding it without merit.

14. The respondent addressed each ground of appeal, beginning with the claim that the appellant was not properly served.

15. The respondent asserted that personal service was indeed effected, as evidenced by the appellant's acknowledgment of his phone number, which the respondent's advocates used to contact him.

16. The court rightly found no need for an affidavit of service since the appellant entered an appearance and filed a defence, making such an affidavit unnecessary unless seeking a default judgment.

17. On the issue of disputed representation, the respondent contends that the appellant's claim of not instructing his legal representatives, J. Mburu & Company Advocates, is unsubstantiated.

18. That the law does not require a party to verify whether an opposing party properly instructed their advocate.

19. The respondent argued that if the appellant genuinely believed he was misrepresented, he should have raised the matter directly with the law firm or lodged a complaint with the Advocates Complaints Commission, neither of which he did.

20. That the lower court correctly found no evidence of a dispute over representation, as the appellant failed to provide any correspondence or proof challenging his legal representation.

21. The respondent further argued that the appellant's failure to annex a draft defence to his application to set aside the judgment was a fatal flaw.

22. That the law mandates this requirement to allow the court to assess the viability of the defence, and the appellant's excuse of lacking access to the pleadings is not true, given that his application references details from the court file.

23. In conclusion, the respondent urged the court to dismiss the appeal, emphasizing that it is grounded in speculation and falsehoods, with no tenable arguments to overturn the lower court's ruling.

24. Finally, the respondent submitted that the costs should be awarded to the respondent for defending an unmeritorious appeal.

25. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether it would support the findings of the trial court. In Selle –Vs- Associated Motor Boat Co. [1968] EA 123 it was held in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> 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 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.
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> 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

26. The sole issue for determination is whether the exparte judgment should be set aside.

27. Order 10 Rule 11 of the Civil Procedure Rules grants courts the authority to set aside or vary exparte judgments on such terms as are just.

28. This discretion was articulated in James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR, where the Court of Appeal emphasized that the primary consideration is whether the defendant has a reasonable defence and whether the application to set aside was made without undue delay.

29. In this case, the absence of a defence on record should not be held against the Appellant, as he claims he had no access to the pleadings at the time of filing the application.

30. The trial magistrate's reliance on the lack of a defence and the age of the judgment, without addressing the substantive issue of service, was a misdirection.

31. I find that it is evident that the Appellant moved the court promptly upon learning of the judgment when his property was proclaimed for attachment.

32. The delay of two years, while not insignificant, do not appear to have been deliberate, given his assertion that he was unaware of the suit.

33. The appellant demonstrated that he was unaware of the proceedings until his property was proclaimed for attachment, raising legitimate concerns about the validity of service.

34. The absence of an affidavit of service, as required under Order 5 of the Civil Procedure Rules, further undermined the respondent's claim that the appellant was duly served.

35. I find that proof of service is a fundamental requirement, as held in Technostar Limited v Gianfranco Manenti & 2 Others [2019] eKLR, where the court stressed that service must be strictly proved to validate subsequent proceedings.

36. The trial magistrate's presumption of service, despite the lack of evidence, was erroneous and contravened the principles set out in Mabrouk Wine Stores v Equity Bank (K) Ltd [2014] eKLR, which held that courts cannot presume service where the rules mandate specific proof.

37. Moreover, the appellant's contention that he never instructed the firm of J. Mburu & Company Advocates to enter appearance was a critical factor.

38. In the case of Patel v E.A. Cargo Handling Services Ltd [1974] EA 75, it was held that a party should not suffer due to the negligence or unauthorized actions of an advocate.

39. The trial magistrate's failure to consider this amounted to a miscarriage of justice, as the appellant was effectively denied an opportunity to present his defence.

40. Also in the case of Philip Chemwolo & Another v Augustine Kubende [1986] eKLR, the court emphasized that courts should lean towards allowing a litigant to be heard unless the delay is inordinate or inexcusable.

41. In the case of Shah v Mbogo [1967] EA 116, the court underscored that justice should not be sacrificed at the altar of procedural technicalities.

42. Ultimately, this court upholds the constitutional imperative of fair administrative action under Article 47 and the right to a fair hearing.

43. The right to a fair hearing is a basic right underArticle 50(1) of *the Constitution* of Kenya, 2010.

44. There is no prejudice that can be suffered by the Respondent that cannot be compensated by an award of damages.

45. I set aside the exparte judgment and direct that the case starts de novo.

46. The file to be remitted back to the trial court for hearing and fresh summons to be issued.

47. The appellants to be served with the summons to enter appearance and to file their defence.

48. The Appellant to pay thrown away costs of Kshs.30,000/= before the case is heard.

DATED, SIGNED AND DELIVERED THIS 26TH JUNE 2025 VIRTUALLY VIA MT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

.....for Appellant

.....for Respondent