



**Mutua v Kimani (Civil Appeal E112 of 2023)
[2024] KEHC 7715 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E112 OF 2023**

**H NAMISI, J
JUNE 28, 2024**

BETWEEN

JACKSON MAVUTI MUTUA APPELLANT

AND

SIMON MUCHAI KIMANI RESPONDENT

(Being an Appeal from the Ruling and Orders of Hon. Atambo, Chief Magistrate in Thika MCCC/E296/2021 delivered on 28th February 2023) JUDGEMENT 1. This appeal arises from a Ruling by the learned Magistrate delivered on 28th February 2023 in respect of Notice of Motion dated 1st February 2022 by the Appellant. 2. The narration of the genesis of the matter as presented by the Appellant is that on 28th January 2022, the Appellant received a message from Upstate Kenya Auctioneers with an attached Warrant of Attachment of Moveable Property in execution of decree for money. Upon further inquiry, the Appellant learnt that default judgment had been entered against him on 9th August 2021. It is as a result of this discovery that the Appellant then filed the Notice of Motion, seeking to set aside the interlocutory judgement entered against him as well as stay of execution of the)

JUDGMENT

1. This appeal arises from a Ruling by the learned Magistrate delivered on 28th February 2023 in respect of Notice of Motion dated 1st February 2022 by the Appellant.
2. The narration of the genesis of the matter as presented by the Appellant is that on 28th January 2022, the Appellant received a message from Upstate Kenya Auctioneers with an attached Warrant of Attachment of Moveable Property in execution of decree for money. Upon further inquiry, the Appellant learnt that default judgment had been entered against him on 9th August 2021. It is as a result of this discovery that the Appellant then filed the Notice of Motion, seeking to set aside the interlocutory judgement entered against him as well as stay of execution of the Judgement and decree of 9th April 2021.



3. The Application was supported by an Affidavit deponed by the Appellant in which he stated that he had neither received the Summons to Enter Appearance nor the Notice of Entry of Judgement. The Appellant annexed a draft of his statement of Defence along with the Proclamation dated 28th January 2022. The Respondent filed his Replying Affidavit sworn on 20th June 2022.
4. The Application was canvassed by way of written submissions and the Ruling was delivered on 28th February 2023.
5. Being dissatisfied with the Ruling of the Magistrate Court, the Appellant filed a Memorandum of Appeal dated 12th March 2023 on the following grounds:
 - i. That the Learned Magistrate erred in law and fact by failing to find that the default judgement entered against the Appellant was an irregular judgement necessitating its setting aside *ex debito justitiae*;
 - ii. That the learned Magistrate erred in law and in fact by failing to find that summons to enter appearance were not effected upon the Appellant at all or in conformity with Order 5 Rule 3 of the *Civil Procedure Rules*;
 - iii. That the learned Magistrate erred in law and in fact in condemning the Appellant without affording him an opportunity to be heard through the filing of defence;
 - iv. That the learned Magistrate's ruling occasioned a miscarriage of justice by denying the Appellant access to justice;
6. Parties canvassed the appeal by way of written submissions. I have taken note of the Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal as well as the respective submissions by each party.

Analysis and Determination

7. The well-established principles of setting aside interlocutory judgements were laid out in the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 where it was stated as follows:

“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.”
8. 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.

.....

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. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986 – 1989] EA 456).”

9. The question before this Court is whether the judgement entered in the Magistrate’s court was regular or irregular.
10. The Respondent instituted proceedings in the magistrate court for special damages amounting to Kshs 749,210/- as a result of damage to his motor vehicle following a road traffic accident involving the Respondent’s and Appellant’s motor vehicles. According to the Affidavit of Service, the process server, one Donald Okonda, travelled to Kericho town with a view to effecting service upon the Appellant. It would seem that the Appellant’s whereabouts were informed by investigations conducted by Counterstrike Limited. However, the said investigation report is not attached to be Affidavit of Service, despite reference being made to it.
11. On arrival in Kericho on 24th June 2021, the Process Server stated that he called the Appellant on his mobile number 07*****55, which is the same phone number that is provided on the Police Abstract contained in the Respondent’s bundle of documents. On contacting him, the Appellant informed the process server to present the documents to one Silvia Inziani, since the Appellant was out of town. The process server then served the said Silvia, who accepted service of the documents but declined to sign, indicating that she had been instructed to receive the documents but not to sign.
12. On 14th July 2021, the Respondent filed his Request for Judgement, which judgement was duly entered on 9th August 2021. There is an Affidavit of Service dated 15th December 2021 indicating service of the Notice of Entry Judgement upon the Appellant via post. The postal address indicated is Box 6 – 00515 Nairobi.
13. In his Supporting Affidavit dated 1st February 2022, the Appellant denies knowledge of the suit, and denies ever instructing or appointing anyone to receive the Summons on his behalf. Further, at paragraph 10 thereof, he denies any association with the stated postal address.
14. What is apparent is that the Appellant has not denied the phone number, nor receiving a phone call made by the process server on 24th June 2021. He does not deny association with the Office of Planning



and Housing, County Government of Kericho. He also does not deny knowing Silvia Inziani, and only states that he did not instruct anyone to receive the summons on his behalf.

15. The issue of service in litigation is a crucial one and a court must satisfy itself that each party was properly served and afforded the opportunity to participate in the proceedings. Order 5 Rule 8 of the *Civil Procedure Rules* provides that where practicable service of summons shall be served on the Defendant in person unless he has an agent empowered to accept service.

16. This was captured in the case *Kimeu v Kasese* [1970] KLR 32, where the Learned Justice Bosire held thus:

“Where it is practicable, service of summons and any other process shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent may be effected.

....

It is not the relationship of the person served to the defendant but that he was in fact authorised to receive service. Also that the affidavit of service should specifically state that the person was authorised to receive service.”

17. In this case, service was effected upon one Silvia Inziani, who is identified by name in the Affidavit of Service. The Affidavit also clearly indicates that the said recipient indicated that she had been asked to receive the documents but not sign. This was done after the Appellant had instructed the process server on how to proceed. Silvia Inziani, was, therefore, for all intents and purposes the agent empowered by the Appellant to receive service on his behalf.

18. In the case of *Kwanza Estates Ltd v Dubai Bank Kenya Ltd (in Liquidation) & 2 others* [2019] eKLR, the Court of Appeal stated that:

“The power of the court to set aside an interlocutory judgment under that provision is discretionary. See *CMC Holdings Limited v Nzioki* [2004] 1 KLR173. For us to interfere with the exercise of discretion by the Judge, it must be shown that his decision is clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted or because he failed to take into consideration matters which he should have taken into consideration. [See *Mbogo and another v Shab* [1968] EA 93.] ”

19. Guided by the above cited authorities and the analysis of the matter before the Magistrate’s court, I find no fault on the part of the trial magistrate dismissing the application to set aside the default judgement and the consequential orders thereto. I would have arrived at the same decision.

20. I, therefore, find that the appeal fails.

21. Costs of this appeal are awarded to the Respondent.

DATED AND DELIVERED AT THIKA THIS 28 DAY OF JUNE 2024.

HELENE R. NAMISI

JUDGE

In the presence of:

.Mr. Odhiambo h/b Mr. Sang for the Appellant

.Mrs. Umba for the Respondent

