



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mpaka v Kiumbe & another (Civil Appeal 88 of 2021)
[2022] KEHC 15860 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 88 OF 2021
EM MURIITHI, J
NOVEMBER 30, 2022**

BETWEEN

CATHERINE MPAKA APPELLANT

AND

GILBERT KIUMBE 1ST RESPONDENT

WELLS FARGO LIMITED 2ND RESPONDENT

*(Being an appeal from the Ruling of Honourable S. N Abuya
(CM) delivered on 14/6/2021 in Meru CMCC No. 29 of 2009)*

JUDGMENT

1. The 1st respondent herein, the plaintiff in the trial court, sued the appellant and the 2nd respondent by an amended plaint dated 14/9/2010 seeking special and general damages, costs, interest and any other relief the court would deem just and fit to grant. When the appellant and the 2nd respondent failed to enter appearances and file their respective defences after duly being served with the summons to enter appearance and pleadings, the court on November 26, 2013 entered judgment for the 1st respondent, and the matter, after being severally adjourned, proceeded for formal proof on November 30, 2016 and December 14, 2017.
2. After the judgment was delivered on 8/2/2018, the Appellant filed an application dated 3/10/2020 seeking to have the judgment entered herein set aside and leave granted to defend the case. The court, in its ruling delivered on December 14, 2020 dismissed the said application for want of prosecution. The Appellant successfully applied for reinstatement of the said application, and after it was heard on its merits, the court, vide its ruling delivered on 14/6/2021 found that the judgment sought to be set aside was regular and proceeded to dismiss the application.



3. Aggrieved by the said dismissal of her application dated 3/10/2020 vide the ruling of 14/6/2021, the Appellant has moved this court through a memorandum of appeal dated 8/7/2021 raising 10 grounds as follows:
1. The Learned Chief Magistrate erred in law and fact for holding and for reasons that she held that the appellant was served with summons, plaint and verifying affidavit in Meru CMCC No 29/2009 whereas the appellant categorically denied being served with aforesaid documents and further there was no enough evidence to prove that the appellant was served with the aforesaid documents.
 2. The Learned Chief Magistrate erred in law and fact for holding and for reasons that she held that the judgment in Meru CMCC No 29/2009 was regular whereas there was no service of summons to enter appearance, plaint and verifying affidavit upon the appellant.
 3. The Learned Chief Magistrate erred in law and fact for holding and for reasons that she held that judgment in Meru CMCC No 29/2009 was regular whereas there was no finding and/or decision in her said ruling to the effect that the appellant was served with summons to enter appearance, plaint and verifying affidavit in Meru CMCC No 29/2009.
 4. The Learned Chief Magistrate erred in law and fact for holding and for reasons that she held that the draft defence lacked merit, did not raise triable issues and that it contained mere denials whereas the draft defence raised triable issues and the appellant had a good defence to the 1st respondent's claim.
 5. The Learned Chief Magistrate erred in law and fact in dismissing the appellant's application dated 3/10/2020 whereas the appellant had offered sufficient cause to warrant the court to set aside judgment which was entered on 8/2/2018 and any consequential decree or order.
 6. The Learned Chief Magistrate erred in law and fact for failing to exercise her discretion judiciously, thereby dismissing the appellant's application dated 3/10/2020.
 7. The Learned Chief Magistrate erred in law and fact for failing to find and for reasons that she failed to find that the 1st respondent would not suffer injustice and/or prejudice if the judgment entered on 8/2/2018 and any consequential decree or order are set aside.
 8. The Learned Chief Magistrate erred in law and fact for failing to find and for reasons that she failed to find that the appellant would suffer injustice and hardship if the judgment entered on 8/2/2018 and any consequential decree or order are not set aside.
 9. The Learned Chief Magistrate erred in law and fact for denying the appellant right to be heard by dismissing the appellant's application dated 3/10/2020.
 10. The Learned Chief Magistrate erred in law and fact for dismissing the appellant's application dated 3/10/2020 whereas even after finding that the 1st respondent had not opposed the said application.

Submissions

4. The appeal was heard by way of written submissions which were filed by the parties on 16/5/2022 and 21/6/2022, respectively. The Appellant reiterated the grounds of appeal and relied on *Remco Limited v Ministry Jadvā Parbat & Co Ltd & 2 others* Nairobi (Milimani) HCCC No 171 of 2001, *Wilson Cheboi Yego v Samuel Kipsang Cheboi* [2019] eKLR, *Richard Ncharpi Leiyagu v Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR and *Nicholas Kiptoo Arap Korir Salat*



v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR in support of her submissions.

5. The 1st Respondent urged that the Appellant was subjected to a fair trial and her draft defence raised no triable issues. He faulted the Appellant for failing to offer security for costs or throw away costs as a condition for having the *ex parte* judgment set aside. He urged that there was an affidavit of service filed in regard to service of summons, and faulted the Appellant for failing to call the process server for cross examination.

Analysis and Determination

6. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123).
7. Grounds 1, 2 and 3 touch on service and the regularity of the judgement of the court while ground 4 touches on the question whether there are triable issues raised in the draft defence and grounds 5, 6, 7, 8, 9 and 10 are on setting aside of the judgment. Therefore, the issues for determination are whether service was proper; whether there is a defence on the merits; and whether the judgment was regular.
8. Order 10 rule 2 of the *Civil Procedure Rules* provides that,

“Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant he shall file an affidavit of service of the summons unless the summons has been served by a process-server appointed by the court.”
9. Order 10 rule 11 provides for setting aside judgment as follows:

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
10. According to the affidavit of service sworn by Mercy Kaume Advocate on October 28, 2013, she effected personal service of the summons and pleadings herein upon the Appellant on 6/4/2009 at Mwithumwiru Primary School where she worked as a teacher, and she acknowledged service but declined to sign. On 8/10/2013, the said Mercy Kaume Advocate served the 2nd Respondent with the summons and pleadings herein through registered post receipt No 2226, and the said documents have never been returned as unclaimed.
11. After the Appellant and the 2nd Respondent neglected to enter appearances and/or file their respective defences within the stipulated time, the 1st Respondent requested for judgment on October 19, 2013 which was entered on November 26, 2013. When the matter came up for formal proof hearing on October 26, 2016, Miss Wainwa who was holding brief for Miss Kaume for the plaintiff told the court that,

“The defendant is in person. He comes as for hearing. He is coming to proceed. He seeks matter be placed aside.”
12. Due to some unforeseen reasons, the matter did not proceed for hearing as anticipated but was heard on November 30, 2016 when the 1st Respondent and his witness testified. The court vide its judgment delivered on 8/2/2018 found in favour of the 1st Respondent, held the Appellant and the 2nd Respondent to be 100% liable for the accident and awarded Kshs 200,200 plus costs and interests



at court rates. In its ruling dated 14/6/2021, the trial court dismissed the Appellant’s application for setting aside the said judgment on the basis that service was proper.

13. An irregular judgment, which ought to be set aside *ex debito justitiae*, must be distinguished from a regular judgment. The distinction between the two was made by the Court of Appeal in [*James Kanyita Nderitu v Maries Philotas Ghika & another*](#) [2016] eKLR as follows:

“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 on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & another v Shah (supra)*, *Patel v EA Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).

In an irregular default 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 issue 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). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711:

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

14. This court, without any doubt finds that the judgment herein was regular as service was proper.
15. Having found that the service herein was proper and therefore the judgment was regular, the questions whether the same ought to be set aside and whether the Appellant’s defence raised triable issues arise for consideration. The trial court considered these before its ruling of 14/6/2021 as follows:

“I have perused the application, the affidavit in support, and the Applicants’ written submission.



In this application to set aside the judgment it was noted that the Applicant denies being served with the summons and further states on 1/10/2020 when she was served with the proclamation notice & warrant of attachment of movable property is when she became aware of this case. While the Respondent did not file a replying affidavit. However I find the Applicant was duly served with summons as in para 2 of the affidavit of service by Mrs Mercy Kaume Advocate dated 28/10/13, the said advocate who is the plaintiff / respondent's counsel stated that on 6/4/2009 she served the 1st defendant with a copy of the summons, plaint and verifying affidavit at Mwithumwiru Primary School where she was teacher, she accepted service and she declined to sign on her copy but even though the applicant denied service, the applicant acknowledged being served with the proclamation notice and warrant of attachment and admitted that she was a teacher. For this reason I find the Judgment which was granted herein was regular.

Having found that the judgment sought to be set aside is regular I have to consider if there is a defence to the plaintiff's claim. I have perused the draft defence annexed to the application and find it lacks merit as it does not raises triable issues and it contain mere denials.

Having stated the above I find the application dated 3rd October lacks merit and dismiss it with no orders as to costs. Right of Appel 30 days.

Ruling delivered this 14th day of June, 2021 via Email.

SN Abuya

Senior Principal Magistrate”

16. This being an appeal from the exercise of discretion by the trial court, the principle of *Mbogo v Shah* (1968) EA 93 applies as follows:

“ [A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

17. On its part, this court has considered whether there were trial issues, and from the defence herein it is not possible to say that there are no trial issues on the questions as to whether the accident was caused by the negligence of the plaintiff. See paragraph 6 of the Defence dated 3/10/2020 set out as follows:

“ 6. The 1st defendant avers that the alleged accident was entirely/solely cause by the negligence of the plaintiff.

Particulars of the negligence of plaintiff

- a. Riding a bicycle at an excessive speed in the circumstances.
- b. Riding a bicycle on the wrong side of the road.
- c. Causing the accident.
- d. Abruptly riding a bicycle onto the lane of motor vehicle No KBA 080A.
- e. Failed to heed to the hooting by the driver of motor vehicle reg No KBA 080.
- f. Allowed the bicycle to collide with motor vehicle reg No KBA 080A.



- g. Failed to observe the provisions of the Highway Code and the *Traffic Act*.
 - h. Riding a bicycle recklessly.
 - i. Riding a bicycle without any care and look out or any sufficient regard for other road users particularly M/V reg No KBA 080A.
 - j. Failed to keep to his lane.
 - k. Failed to stop, apply brakes, slow down, swerve and/or reasonably control the bicycle so as to avoid the accident.
 - l. Abruptly and negligently turning to the lane of motor vehicle reg No KBA 080A.
18. The trial court ought to have given leave to defend in view of the triable issue, and there, consequently, is a misdirection as to presence of a triable issue for which this court is entitled to interfere.
19. The Court notes that the default judgment herein was regular and leave to defend is only given on account of the trial issue set out into the defence as to the causation of the accident and the court shall, therefore, give conditional leave to defend conditional upon deposit of the decretal sum as security.

Orders

20. Consequently, for the reasons set out hereinabove, the court makes the following orders;
1. The appeal is allowed.
 2. The appellant's defence in the trial court shall proceed to hearing on the merits.
 3. As condition for the grant of leave to defend, the applicant shall deposit the decretal sum in a joint interest earning account in names of the counsel for the parties within thirty (30) days.
 4. Cost of the appeal shall be costs in the cause.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF NOVEMBER, 2022.

EDWARD M MURIITHI

JUDGE

Appearances

M/S J. G. Gitonga & Co. Advocates for the Appellant.

M/S M. G. Kaume & Co. Advocates for the Respondent.

