



REPUBLIC OF KENYA



**Mutinda v Mwonga (Civil Appeal E090 of 2022)
[2024] KEHC 9318 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E090 OF 2022
JK NG'ARNG'AR, J
JULY 25, 2024**

BETWEEN

JERALDINE MUMBUA MUTINDA APPELLANT

AND

JAMES MUTINDA MWONGA RESPONDENT

*(An appeal from the ruling and order of the Chief Magistrate's Court at Mavoko
(B. Kasavuli, PM.) delivered on 26th May 2022 in CMCC No. E021 of 2020)*

JUDGMENT

1. Vide a plaint dated 14th October 2020, the respondent sued the appellant. He stated that as the owner of motor vehicle registration number KCG 015G, he took out an insurance policy from Occidental Insurance Company Limited vide insurance policy No COMM/07/62457/05. The respondent averred that on 30th June 2018 at 6:00 p.m., he was driving the said vehicle along the Nairobi – Namanga road towards Kitengela when the appellant drove and/or controlled motor vehicle registration number KAJ 669X causing an accident. As a result of the accident, the respondent's vehicle was extensively damaged on the rear. He continued that from the investigations conducted by police officers, the appellant was found liable. He thus sought special damages in the sum of Kshs 353,670.00 for repairing the vehicle, assessor fees and a motor vehicle search pursuant to the doctrine of subrogation. He also prayed for general damages, costs of the suit and interest.
2. On being satisfied that the appellant was properly served with summons but failed, refused and/or neglected to enter appearance and file his statement of defence, the trial court entered interlocutory judgment in favor of the respondent on 6th September 2021 for reasons that in spite of service of the summons, the appellant failed to enter appearance and file his statement of defence.
3. Aggrieved by those findings, the appellant filed a Notice of Motion dated 1st November 2021. It was supported by the grounds on its face and her supporting affidavit. She sought a stay of execution



of the decree issued on 18th October 2018. She further prayed that the interlocutory judgment be set aside for reasons: that she was never served with summons to enter appearance and the notice of entry of judgment; that the summons was served upon the wrong party; that she became aware of the judgment on 22nd October 2021 when her husband informed her of a proclamation notice and warrant of attachment given to him; that the auctioneer prepared a proclamation notice without coming into the appellant's house; that as such, the goods listed in the proclamation notice were speculative; that the person served with the summons did not have authority to accept service on her behalf; that as such, the judgment ought to be set aside as of right; that she had a defence which draft was attached to the application.

4. The application was heard on its merits on the basis of the parties' rival written submissions. In its ruling delivered on 26th May 2022, the trial magistrate found that the application lacked merit and was resultantly dismissed with costs. The aforementioned findings have implored the appellant to file a memorandum of appeal dated 20th June 2022. The appellant challenged the findings of the trial magistrate by raising six grounds disputing those findings. She lamented that the trial magistrate improperly dismissed her application thereby infracting her constitutional right to be heard when she had a cogent defence. She added that service of summons was not personal and thus improper and for those reasons, the judgment ought to be set aside ex debito justitiae. In the circumstances, the appellant prayed that the appeal be allowed, the application be allowed by setting aside the interlocutory judgment dated 18th October 2021 and that she be granted costs.
5. The appeal was directed to be canvassed by way of written submissions. The appellant's submissions dated 28th February 2023 and filed on 5th March 2024 argued that the trial court exercised its discretion injudiciously. Furthermore, that her defence raised triable issues as to warrant the suit to be heard on its merits. On whether she deserved a right to fair trial, the appellant submitted in the affirmative and relied on Article 50 (1) of the *Constitution*. Finally, the appellant submitted that she was not served with the filed pleadings in line with the dictates of order 5, rule 8 of the *Civil Procedure Rules*. For those reasons, the appellant urged this court to allow her appeal.
6. The respondent opposed the appeal. In his written submissions dated 6th June, 2024, the respondent submitted that the appellant was properly and duly served with the summons and the subsequent notice of entry of judgment by dint of the provisions set out in order 5, rule 12 of the *Civil Procedure Rules*. He submitted that the appellant was imploring delaying tactics to deny him the fruits of his judgment. For that reason, he urged this court to dismiss the appeal. Taking into account the fact that the interlocutory judgment was proper, the six-month delay in lodging the application to set aside the judgment and no sufficient reasons advanced to set aside the judgment, the respondent urged this court to dismiss the present appeal with costs.
7. I have considered the disputed ruling, examined the memorandum of appeal and the parties' written submissions and analyzed the law. This is an appeal against the trial court's exercise of its discretionary powers in setting aside an ex parte judgment. In *Pindoria Construction Ltd v Ironmongers Sanytaryware* Civil Appeal No 16 of 1976, it was held that:

“It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the *Civil Procedure Rules*. It is also well settled that the Court of Appeal will 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 injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of



hearing. He delayed considerably in filing his application to set aside the ex parte judgment. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

8. The issue for determination is whether the trial court injudiciously exercised its discretion to deny the appellant leave to defend suit and in the process, failed to set aside its judgment. The principles enunciated in an application for setting aside have been well settled in our jurisdiction. In *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, the court held that:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

9. In the case *Mohamed & another v Shoka* (1990) KLR 463, the court set out the tenets a court should consider in entering interlocutory judgment to include:

- i. Whether there is a regular judgment;
- ii. Whether there is a defence on merit;
- iii. Whether there is a reasonable explanation for any delay;
- iv. Whether there would be any prejudice.

10. It is also critical to distinguish between a regular and irregular judgment. The same was prominently addressed by the court in *Mwala v Kenya Bureau of Standards* EA LR (2001) 1 EA 148 where it was distinguished as follows:

"To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.

... [J]udgment 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.

11. Once the respondent filed suit, he obtained summons to enter appearance which were served upon the appellant. According to the return of service dated 20th August 2021, one Robert Khamis Mutuku, the deponent and process server deposed as follows:

“ 3. That acting on the said instructions, I perused the abstract from the police on road accident and got a telephone number being 0722634769 provided by the defendant at the time of the accident.

4. That I immediately called the number and was received by a gentleman whom after introducing myself and explaining to him the purpose of the telephone call, he confirmed to me that his name was Mr. Musyoka and that Mrs. Jeraldine Mumbua Mutinda was his wife and that he was aware of the said accident and that his wife was in school, and he has authority to receive all court summons on her behalf and arrange for the settlement of the said claim.

... 7. That the rider took me there where I found him, that I then introduced myself again and he indeed confirmed to me that he was Mr. Musyoka.

8. That I then tendered to him in duplicate copies of the summons to enter appearance and with plaint annexed requiring him to accept receipt by retaining one copy and acknowledged receipt on my copy by signing as proof of service to this Honorable Court.”

12. Was this service proper? order, 5 rule 8 of the *Civil Procedure Rules* provides that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient. The definition of an agent is not provided for in the substantive statute. It thus encompasses a wide area of discretion as to who may be an agent empowered to accept service on behalf of a defendant. What will determine whether the said person is an agent empowered to accept service will depend on the facts and circumstances of the case.
13. In the present case, the person served was the appellant’s husband. That fact is not controverted or countermanded by the appellant. He went ahead to inform the process server that he was properly authorized to receive summons on behalf of the appellant. That fact is also not disputed. All the appellant is alleging is that since service was not personal, then the proceedings were improper and must suffer their fate. However, that argument cannot stand. It appears that all along she knew about the matter and elected to willingly not participate. Her husband was duly informed and as such she was duly aware of the substantive proceedings. She cannot thus now cry foul when she had every opportune moment to have her defence ventilated in the trial court.
14. While this court agrees that Article 50 (1) of the *Constitution* embraces a person’s right to a fair hearing, that right should not be used to succor a litigant that elected to sleep on his or her rights and on waking up on its slumber, inject the said provision. That was not the intention of the drafters of that provision and this court will not entertain that conduct. Be that as it may, this court also observes that from the draft defence filed, the same contained mere denials and did not whatsoever raise any triable issues. The trial magistrate properly exercised her discretion. I find that not only was there a regular judgment but also no reasons have been advanced as to demonstrate improper exercise of discretion.
15. The upshot of the foregoing is that the present appeal is devoid of merit. It is hereby dismissed with costs to the respondent.



It is so ordered.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Adegale Advocate for the Appellant

No appearance Advocate for the Respondent

Court Assistant – Peter Ong'idi

