**Mulee v Daud & another (Suing as the next of kin and legal representative of the Estate of Musyoki Daudi - Deceased) (Civil Appeal E093 of 2022) [2025] KEHC 17877 (KLR) (27 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17877 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL E093 OF 2022**

**EN MAINA, J**

**NOVEMBER 27, 2025**

**BETWEEN**

**MATHEW MBITHI MULEE ..... APPELLANT**

**AND**

**JOYCE NDULU DAUD & PATRICK MUSYOKA KANYASYA (SUING AS THE NEXT OF KIN AND LEGAL REPRESENTATIVE OF THE ESTATE OF MUSYOKI DAUDI - DECEASED) ..... RESPONDENT**

***(Being an appeal from the ruling of M A Otindo PM delivered on 29th June 2022 in the Chief Magistrate Court at Machakos Civil Case No. 419 of 2018)***

## JUDGMENT

1. By Plaint dated 22nd January, 2018 the Respondents sued the Appellant for general and special damages for fatal injuries suffered by their kin in an accident which occurred on 28th July 2014 when the deceased was lawfully riding a motor cycle Reg. No. KMCZ 721M along the Machakos- Kangundo Road at a place called Charity. The Respondents blamed the Appellant, his authorized driver, servant and or agent, for not controlling and/or managing his motor vehicle Reg. No. KXH 888 causing it to veer off its lane and into the lane of the motor cycle No. KMCZ 721M hitting and knocking the deceased down.

2. The defendant did not enter appearance and interlocutory judgement was entered against him on 6th June 2019. He subsequently filed an application seeking to set aside that judgment and that sought leave to defend the suit but the application was dismissed.

3. Thereafter the learned Magistrate heard the formal proof and then entered judgment for the Respondents as follows:-

    a. Liability 100% In favour of the Plaintiff

b. Pain and suffering Kshs 20,000

c. Loss of expectation of life Kshs 300,000

d. Loss of dependency Kshs 2,640,000

e. Special damages Kshs 55,670

f. Costs and interest

4. Being aggrieved the Appellant preferred this appeal. The same is premised on grounds that;

> "a. The trial court erred in law and in fact in finding that the appellant's application dated 9th may 2022 lacks merit.
>
> b. The trial erred in law and in fact in finding that the appellant was notified of the entry of the judgement vide postal address despite the fact that there was no evidence of service either on record or adduced by the respondent.
>
> c. The trial court erred in law and in fact by in finding that the receipt of postage was sufficient proof of service of entry of judgement to the appellant.
>
> d. The trial court erred in law and in fact in failing to consider the appellant had raised a defence with Triable issues
>
> e. The learned trial magistrate erred in law and in fact in her ruling that the appellant was estopped from raising the issue of inquest exonerating him from liability.
>
> f. The Trial court did not sufficiently address itself to the principles that govern setting aside of judgments and hence misdirected itself in exercise of its discretion.
>
> g. The trial magistrate erred in law and in fact by not appreciating the overriding objective of section 1A and 3A of the *Civil Procedure Act* & Article 159(2) (d) &(e) of *the Constitution* and that the right to a fair hearing which was guaranteed under article 50 (1) of *the Constitution* encompasses notifying the appellant of all the stages of proceedings before the trial court
>
> h. The trial court erred in law and in fact by failing to appreciate that disputes ought to be determined on merits and that lapses ought to not necessarily debar a litigant from pursuing his rights."

5. The Appeal was canvassed by way of written submissions.

6. Drawing from the case of Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 Others Civil Appeal No. 238 of 2003, Ephraim Njugu Njeru v Justin Bendan Njoka Muturi & 2 Others Civil Appeal No. 314 of 2003 (2006) eKLR Counsel for the Appellant submitted that one must seek leave of the court when undertaking substituted service and must satisfy the court that the defendant cannot be served physically. Counsel submitted that having established that the Respondent herein did not seek leave of the court to serve the pleadings through substituted service, it is clear that the interlocutory judgement entered against the appellant herein was irregular and the receipt of postage as not sufficient proof of service.

7. Counsel contended that the annexed draft statement of defence raised serious triable issues which needed to be interrogated during hearing. He relied on the cases of Gupta v Continental Builders Ltd [1976-80] 1 KLR 809, and James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another [2016] KECA 470 (KLR).

8. While relying on the cases of Co. Ltd CA 38 of 1998 and Mania -v-Muriuki (1984) KLR 407, Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR, learned counsel submitted that that the discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is unfettered one and is intended to be exercised to avoid injustice. He urged the court to allow the appeal and set aside the judgement of the trial court.

9. For the Respondents, it was submitted that the Respondents satisfied the requirements under Order 10 of the Civil Procedure Rules in order to qualify for the interlocutory judgment and the final judgment. Counsel contended that they produced a return copy of the summons to enter appearance which clearly had the Appellant's signature at the back together with the date and time the summons were received and filed an Affidavit of service dated 25th April 2019 sworn by one Catherine Mwikali which was sufficient proof that the appellant received the pleadings. Counsel urged this court not to disturb the ruling of the trial court but instead uphold the same and dismiss this appeal with costs to the Respondents.

**Determination**

10. I have considered the pleadings, the rival submissions and the law.

11. The genesis of this matter is the dismissal of the Applicant's application which sought to set aside the defendant judgment entered on 6th June 2019 and leave to defend the suit. In that application the Appellant averred that he was only served with the summons to enter appearance but not the plaint.

12. The Respondents on the other hand averred that the appellant was served with the pleadings but failed to enter appearance and was also notified about the judgement on 18th December 2019.

13. Order 5 of the Civil Procedure Rules state as follows in respect to service of summons:

> " 1. When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.(3)Every summons shall be accompanied by a copy of the plaint.(4)The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days. (5)Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.(6)Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate."

14. The Appellant admitted that he was served with the summons to enter appearance but denied service of the plaint. However, there is a return of service dated 25th April 2021 which indicates that he was on 13th September 2018 served with the summons to enter appearance and a copy of the plaint together with annexures. Order 10 of the Civil Procedure Rules sets out the consequences of non-appearance, default of defence and failure to serve and it is upon this order that the impugned judgment was entered. Whether or not to set aside ex parte judgement is discretionary. The discretion is unfettered but it must not be exercised judiciously but whimsically or capriciously. The discretion is intended to be exercised

to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

15. In the case of Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233 the Court set out the principles guiding setting aside ex parte judgments as follows:

> "(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside ex debito justitiae (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.
>
> (ii) if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules."

16. In the case of CMC Holdings Ltd v James Mumo Nzioki [2004] KECA 143 (KLR) the Court of Appeal stated:-

> "In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle....."

17. The Appellant herein was duly served with the plaint. He did not enter appearance and the Respondent was entitled to apply for an interlocutory judgment. The court below cannot be faulted for granting the interlocutory judgment and for proceeding with formal proof and subsequently entering final judgment. I have considered the draft defence filed by the Appellant and in my view the same was a mere denial and did not raise any triable issues. In the premises this appeal is devoid of merit and it is dismissed with costs to the Respondent.

It is so ordered.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF NOVEMBER 2025.**

**E. N. MAINA**

**JUDGE**

In Presence Of:

Mr. Kirui for Appellant

Mr. L. M. Wambua for Respondents

C/A: Geoffrey