



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbugua v Gitau & another (Civil Appeal 23 of 2019)  
[2023] KEHC 1129 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1129 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL APPEAL 23 OF 2019  
CM KARIUKI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**SAMUEL NDUNG’U MBUGUA ..... APPELLANT**

**AND**

**JANE WAMBUI GITAU ..... 1<sup>ST</sup> RESPONDENT**

**JOHN KIIHIKA KUBAI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgment of Honourable O. Momanyi  
Senior Resident Magistrate delivered on 4th April 2019 in the  
Chief Magistrate Court at Nyahururu Civil Case No. 255 of 2016))*

**RULING**

1. The Applicant filed two (2) applications dated 4/3/2022 and 23/5/2022 seeking a stay of execution of judgment delivered on 2/2/2022 pending hearing of application dated 1/3/2022 and aside the same judgment.
2. However, the Applicant seems to focus on the application dated 1/3/2022 for setting aside the judgment stated above and subsequential orders plus leave to particulate in the proceedings.
3. The application dated 1/3/2022 is supported on the face of the Notice of Motion and affidavit of Kelvin Ngure Sworn on 1/3/2022.
4. It is opposed via the affidavit of Samuel Ndungu Mbugua, sworn on 16/5/2022.
5. Subsequently application dated 23/5/2022 was lodged on 23/5/2022 seeking a stay of execution pending a hearing of the application dated 1/3/2022, which is supported by grounds on its face and affidavit of Sonia Aguko on 23/5/2022.



6. It is opposed via ground of opposition dated 28/7/2022; parties were directed to file submissions to canvass both applications
7. Applicant's case and submissions.
8. The Appellant herein had filed a civil suit against the Respondents herein in Nyahururu CMCC 255 of 2016 on 25th October 2016 seeking damages arising out of a road traffic accident that occurred on 04/03/2016 involving the respondents' motor vehicle registration number KAR 812 H. The Respondents, through their insurers at the time of the road traffic accident, M/S Direct line Assurance Company Limited appointed the firm of M/S Kairu McCourt & Company Advocates to enter appearance and defend them in the said suit.
9. The suit proceeded to a full hearing, and judgment was delivered on 4th April 2019, where the Respondents were held 100% liable and ordered to pay Kshs. 209,634/=. The Respondents, through their insurers, issued cheque No. 088234 of Kshs. 285,234/ = to settle the decree/ judgment. The cheque was forwarded through a letter dated 21st May 2019 by M/S Kairu McCourt & Company Advocates.
10. The Appellant duly received the letter and the cheque. They responded to M/S Kairu McCourt & Company Advocates through a letter dated 14th June 2019 demanding a balance of Kshs. 49,953/ in accordance with the Decree & Certificate of costs dated 4th June 2019, which they had obtained from the court.
11. In due compliance with the court order, the Respondents, through their insurers, issued another cheque, No. 088809 of Kshs. 49,953/=. It was again forwarded through a letter dated 19th July 2019 by M/S Kairu McCourt & Company Advocates. Kairu McCourt & Company Advocates fully completed the legal instructions given and, together with the insurance company, closed their respective files.
12. The firm of M/S Kimondo Gachoka & Company Advocates, who have since been granted leave by the Honourable court to now come on record for the Respondents, received a judgment notice from the appellant. Yet, they still need to be on record.
13. It is submitted that the Appellant herein failed to serve the respondent with the Memorandum of appeal, notices on when the matter has been proceeding, and even the judgment notice as required by law; hence the respondents herein did not participate in the entire appeal proceedings. Consequently, the Respondents needed to be made aware that an appeal had been filed and was proceeding.
14. As a result of this, adverse orders were issued through the judgment delivered on 17th February 2022. Consequently, the respondents herein were never given an opportunity to state their case herein so that the appeal could be heard and determined on merit.
15. Order 42 rule 23 of the [Civil Procedure Rules](#) provides that;

"Re-hearing on the application of respondent against whom ex parte decree made where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit. "
16. Essentially, setting aside an ex parte judgment is a matter of the discretion of the court. Judicial discretion should be based on what is fair under the circumstances and guided by the rules and principles of law.



17. In the case of *Esther Wamaita Njibia & two others vs. Safaricom Ltd*, the court, citing relevant cases on the issue, held inter alia: -

“... the discretion is free, and the main concern of the courts is to do justice to the parties before it. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. Still, it is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.

The nature of the action should be considered. The defence, if any, should also be considered, and so should the question as to whether costs can reasonably compensate the plaintiff for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court.

It also goes without saying that the reason for failure to attend should be considered...”

In *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022], eKLR Justice G.V Odunga set aside a judgment by finding that;

“... I find the appeal merited. First, the proceedings were unprocedural and conducted in breach of the Appellant’s right to be afforded an opportunity of being heard. Secondly, the Learned Trial Court did not sufficiently address the principles that govern setting aside judgments and misdirected itself in exercising its discretion.

18. The Respondents herein fully complied with the decretal judgment in Nyahururu CMCC 255 of 2016. However, the Appellant herein should have duly served the respondent with the Memorandum of appeal, notices on when the matter has been proceeding, and even the judgment notice as required by law; hence the respondents herein did not participate in the appeal proceedings.
19. It is a constitutional right for every person to be heard fairly and justly before a court of law which is a right the respondents have been denied.
20. Aside from that, Article 159 (b) of *the Constitution* of Kenya, 2010 mandates courts to determine matters without denying justice to anyone. In the interests of justice, the Respondents should be given a fair and reasonable opportunity to present their case to enable the court to consider the same on merit and decide thereof.
21. This application has been filed without delay. It was done immediately after the defendant/applicants learned about the matter through the clerk after seeing the 1<sup>st</sup> defendant’s name on the cause list.

### **Respondent Submissions**

22. The respondent, in opposing the two applications, filed a replying affidavit sworn by the respondent and filed in court on 16/ 5/2022 together with Grounds of opposition which they relied on entirely on
23. For a prayer on Stay of Execution, a party ought to satisfy the following requisite requirements as provided for under Order 42 Rule 6 (1) and (2)
24. Guided by the said provisions, it is submitted that the applicant still needs to meet the threshold imposed to warrant being granted stay orders. The applicant needs to demonstrate that they will suffer substantial loss unless the stay orders are granted. No evidence has been rendered at all to persuade the court to that effect. They only allude to fears of the appellants’ ability to refund the amounts as unknown, as seen in the annexed affidavit filed in court.



25. In the case of *Kanguru Estate Limited —vs.- Beatrice Wamela Karanja* (2012) eKLR, ;

“On the application for stay, ram is not inclined to grant the same in the absence of evidence of substantial loss that the applicant stands to suffer; mere poverty of the judgment debtor, it has been held, does not justify the denial of a successful litigant's right to enjoy the fruits of the judgment. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since granting a stay would mean that the status quo should remain as it were before the judgment, and that would be denying a successful litigant of the fruits of his judgment which should not be done if the applicant has not given to the court sufficient materials to enable it to exercise its discretion in granting the order of stay”.

“In other words, the applicant is obliged to lay a basis for calling upon the respondent to show her financial status. An allegation of impecuniosity alone, it has been held, is not a ground for allowing a stay of execution”. (Underlining ours)”.

26. Just merely indicating they are not sure the Appellant’s capacity to pay the decretal sum is not enough to prove substantial loss will be occasioned, and furthermore, it is not guaranteed that the application date’s chances of success.
27. The applicants have yet to explain the delay of over three months in filing the instant application. The explanation given in the application dated 23/5/2022 is based on the fact that the prayer was erroneously omitted while preparing and filing the application dated 4/3/2022. The stay is dire as, at the time, that ought to have been the first prayer sought before proceedings to seek orders for aside.
28. The application, as it is, is, therefore, an afterthought seeking to delay the Appellant’s quest for the ends of justice and enjoyment of his rightful judgment.
29. The applicants have offered no security as a requisite requirement for the grant of stay orders. Based on that, it is submitted that the application is unmerited and ought to be dismissed with costs.
30. Whether the judgment dated 17/2/2022 ought to be set aside.
31. The Appellant, being aggrieved by the decision of the lower Court, filed the instant Appeal and of the Memorandum of Appeal being annexure “SNM2” was duly served upon the firm of Messers Kairu & MC Court & Company Advocates, who, at the time the firm of record on behalf of the Respondents, having handled the suit to its conclusion before the trial court as evidenced by annexure 1” being a copy of the memorandum of appearance.
32. The copy of the memorandum of appeal was duly served as evidenced by date stamping on the face of the memorandum of appeal as seen in annexure 2” thus, the firm acknowledged receipt.
33. On 9/7/2021, the instant appeal was dismissed for want of prosecution, prompting the Appellant to file an application dated 14/7/2021 seeking to reinstate the same, and the application was duly served upon the firm of Messers Kairu & MC Court as evidenced by an affidavit of service annexed as “SNM3”. Accordingly, the appeal was reinstated, and the firm duly served with the Record of Appeal and mention notice as directed by the court.
34. The said firm send an email annexed as “SNM4” to the effect that they were no longer acting on behalf of the respondent and that the firm of Kimondo Gachoka & Co Advocates had now taken over the instructions and though the proper procedure was not followed where there is a change of advocates after a judgment has been delivered as is pursuant to Order 9 Rule 9 of the Civil Procedure Rules,



the appellants still went ahead and served the firm of Kimondo Gachoka as evidenced by annexure "SNM5".

35. Parties were directed to dispose of to appeal by way of virtue submissions, and the Appellants' Counsel served both the firms of Kimondo Gachoka and Kairu and MC Court Advocates with the Notice evidenced by annexure 6" which shows that both firms were served.
36. Both firms have been aware of the existence of the instant appeal and particularly the firm of Kimondo Gachoka & Co Advocates, which was duly served on 1/11/2021 as evidenced by annexure "SNM5" and the email address used has not been challenged as the same is the official communication platform used by the said firm.
37. Having the above, it is submitted that the judgment entered on 17/2/2022 was a regular judgment. Under Order 51, Rule 15 of the Civil Procedure Rules provides that: -"The court may set aside an order made ex parte."
38. From the above provisions, this gives the court the direction to either set aside or not set aside an ex parte judgment. Such direction, however, ought to be excised judiciously.
39. Having been duly served as evidenced by annexures "SNM5 and 6," the respondents cannot be seen to move court or seek shield under the Provisions of Orders 10 Rule 11 of the [Civil Procedure Rules](#).
40. Now, having proved the judgment was regular, the Court of Appeal in the case of the court of [James Kanyita & Another](#) (2216) eKLR  

"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 defense, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defense raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole, it is in the interest of justice to set aside the default judgment, among others."
41. The Appellate court had the luxury to peruse the trial court file in its entirety, thus being able to see the respondent's defense and submissions filed before the trial court. The judgment was in light of all the facts and in which it is submitted that reopening the case would mean having to relitigate the same issues again before the Appellant court, thus re-judicata against the provisions of Section 7 of the [Civil Procedure Act](#). The court is now functus officio in this matter.
42. Further, the delay in filing the application dated 4/3/2022 has yet to be explained before this court based on the fact that a judgment notice was already issued to both firms in this case. Furthermore, explanations have yet to be given as to why the respondents failed to defend the appeal despite both firms being duly swerved with pleadings at all material times.
43. The damages awarded by this Court were enhanced with respect to what was awarded before the trial court. Accordingly, the Appellant only seeks to claim the balance upon deduction of what has already been said by the respondents and, as such, no unjust enrichment.
44. The respondent thus only seeks to delay the Appellant meeting the ends of justice and his right of enjoyment to lawful judgment, and not to mention this only creates a backlog in the court system, thus a waste of the court's judicial time.
45. Pray that both applications filed by the respondent be dismissed with costs to the Appellant as the applications lack merit.



## Issues, Analysis, And Determination

46. After going through the affidavits, records, and submissions, I find the issues are whether the application has merit and what is the order as to costs.
47. The Appellant, being aggrieved by the decision of the lower Court, filed the instant Appeal and of which the Memorandum of Appeal being annexure "SNM2" was duly served upon the firm of Messers Kairu & MC Court & Company Advocates who at the time the firm of record on behalf of the Respondents having handled the suit to its conclusion before the trial court as evidenced by annexure "SNMI" being a copy of the memorandum of appearance. The applicants do not rebut this fact.
48. The copy of the memorandum of appeal was duly served as evidenced by date stamping on the face of the memorandum of appeal as seen in annexure "SNM2"; thus, the firm acknowledged receipt, which fact is also not rebutted.
49. On 9/7/2021, the instant appeal was dismissed for want of prosecution, prompting the Appellant to file an application dated 14/7/2021 seeking to reinstate the same, and the application was duly served upon the firm of Messers Kairu & MC Court as evidenced by an affidavit of service annexed as "SNM3". Accordingly, the appeal was reinstated, and the firm duly served with the Record of Appeal and mention notice as directed by the court.
50. The said firm sent an email annexed as "SNM4" to the effect that they were no longer acting on behalf of the respondent and that the firm of Kimondo Gachoka & Co Advocates had now taken over the instructions. However, the appellant's counsel still went ahead and served the firm of Kimondo Gachoka, as evidenced by annexure "SNM5," a fact not denied.
51. Parties were directed to dispose of the appeal by virtue submissions, and the Appellants' Counsel served both the firms of Kimondo Gachoka and Kairu and MC Court Advocates with the Notice evidenced by annexure "SNM6," which shows that both firms were served.
52. Both firms have been aware of the existence of the instant appeal and particularly the firm of Kimondo Gachoka & Co Advocates, which was duly served on 1/11/2021 as evidenced by annexure "SNM5" and the email address used has not been challenged as the same is the official communication platform used by the said firm. Accordingly, having the above in mind, it is this court's view that the judgment entered on 17/2/2022 was a regular judgment.
53. Under Order 51, Rule 15 of the *Civil Procedure Rules* provides that: "The court may set aside an order made ex parte." From the above provisions, this gives the court the direction to either set aside or not set aside an ex parte judgment. Such direction, however, ought to be excised judiciously."
54. Having been duly served as evidenced by annexures "SNM5 and 6," the respondents cannot be seen to move court or seek shield under the Provisions of Orders 10 Rule 11 of the *Civil Procedure Rules*.
55. Now, having proved the judgment was regular, the Court of Appeal in the case of the court of *James Kanyita & Another* (2216) e KLR held that;

"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 defense, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defense raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole, it is in the interest of justice to set aside the default judgment, among others."



56. Thus, reopening the case would mean having to relitigate the same issues again before the Appellate court, which is akin to re-judicata against the provisions of Section 7 of the Civil Procedure Act. Accordingly, the court is now fuctus officio in this matter.
57. Further, the delay in filing the application dated 4/3/2022 has yet to be explained before this court based on the fact that a judgment notice was already issued to both firms in this case. Furthermore, explanations have yet to be given as to why the respondents failed to defend the appeal despite both firms being duly swerved with pleadings at all material times.
58. The damages awarded by this Court were enhanced concerning what was granted before the trial court. The Appellant only seeks to claim the balance upon deduction of what has already been said by the respondents and, as such, no unjust enrichment.
59. The respondent thus only seeks to delay the Appellant's harvest of the fruits of his judgment, thus defeating the ends of justice and his right of enjoyment to lawful judgment, not to mention this only creates a backlog in the court system, thus a waste of court's judicial time.
- i. Thus, the court finds no merit in both applications filed by the respondent; therefore, are dismissed with costs to the Appellant.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

