



**Odero v Mwaura & another (Suing as the Legal and Personal Representatives
of the Estate of John Mwaura Thuku - Deceased) (Civil Appeal
30 of 2023) [2025] KEHC 3600 (KLR) (Civ) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3600 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CIVIL
CIVIL APPEAL 30 OF 2023
KW KIARIE, J
MARCH 24, 2025**

BETWEEN

IRENE ATIENO ODERO APPELLANT

AND

TERRY WAMAITHA MWAURA 1ST RESPONDENT

VERONICA WANJIRU MWAURA 2ND RESPONDENT

**SUING AS THE LEGAL AND PERSONAL REPRESENTATIVES OF THE
ESTATE OF JOHN MWAURA THUKU - DECEASED**

*(Being an appeal from the ruling in Engineer Senior Principal Magistrate's
SPMCC No. E067 of 2022 by Hon. Daffline Nyaboke Sure – Principal Magistrate)*

JUDGMENT

1. Irene Atieno Odero, the appellant, was the second defendant in Engineer Senior Principal Magistrate's SPMCC No. E067 of 2022. The respondents had sued for a claim of general damages and special damages following a road traffic accident involving motor vehicle KDB 658E, which lost control, veered off the road and fatally injured the deceased, who was a pedestrian.
2. The appellant moved the court through an application dated the 14th day of February 2023. She was seeking the following orders:
 - a. That the firm of Owiti, Otieno & Ragot Advocate be granted leave to come on record for the 2nd defendants.



- b. That pending the hearing and determination of the application herein, there be a stay of the ex parte judgment entered on 8th February 2023 against the 2nd defendant and all consequential orders and decrees thereto.
 - c. That the honourable court be pleased to set aside the ex parte judgment entered on 8th February 2023 against the 2nd defendant and the ex parte proceedings on 11th January 2023 and all consequential orders and decree thereto.
 - d. That the costs of this application be provided for.
3. The learned trial magistrate dismissed the application. The appellant was aggrieved and filed this appeal through Kipkenda & Company Advocates. She raised the following grounds of appeal:
- a. The honourable trial magistrate erred in law and fact and misdirected herself by dismissing the Notice of Motion application dated 14/11/2023 on the ground that there was no proof of illness on the part of the appellant.
 - b. The honourable trial magistrate erred in law and fact and misdirected herself by failing to find that the appellant had advanced plausible explanations to warrant setting aside the judgment delivered on 8/2/2023.
 - c. The honourable trial magistrate erred in law and fact by failing to consider the evidence adduced by the appellant; hence, she arrived at an erroneous decision.
 - d. The honourable trial magistrate erred in law and fact and misdirected herself by restricting herself to the 1st respondent's submissions, arriving at a biased decision.
 - e. The honourable trial magistrate erred in law and fact by failing to properly apply the principles of setting aside ex parte judgment as enunciated in the case of *Shah v Mbogo & another* (1967) EA 116.
4. The respondents opposed the appeal through Wanjohi & Wawuda Advocates. It was contended that the appeal lacked merits.
5. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.
6. Briefly, before the judgment that gave rise to the impugned ruling, the appellant was served with a hearing date. She did not attend the hearing of the case. She does not deny service but argued that her failure to attend court was due to sickness. She claimed that she had been hospitalized from the 12th day of September 2022 to the 21st day of January 2023. In the case of *Shah vs Mbogo & Another* [1967] EA 116 decided by the High Court of Kenya at Nairobi, it was held inter alia as follows:
- (iv) Applying the principle that the Court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause by justice, the motion should be refused.
7. This decision safeguards parties who may encounter situations beyond their control or where an excusable mistake or error occurs. However, it does not aim to reward parties attempting to obstruct or delay justice or to outright frustrate the other party.



8. The appellant had an opportunity to demonstrate to the court that she was admitted to hospital at the time she was required to be in court in two ways. Firstly, her advocate on record should have informed the court accordingly. Secondly, she could have attached her medical documents to the application concerning the contested ruling. However, she did not do either. At the time of hearing her application, she failed to file any submissions despite receiving directions to have the application presented by way of written submissions.
9. She cannot be heard to criticize the trial court's ruling.
10. The appeal is without merit. It is thus dismissed with costs.

DELIVERED AND SIGNED AT NYANDARUA THIS 24TH DAY OF MARCH 2025

KIARIE WAWERU KIARIE

JUDGE

