



REPUBLIC OF KENYA



**Karanja & another (Suing as the Legal Representatives of the Estate  
of Alex Karanja Ndungu - Deceased) v Ngugi & 4 others (Civil  
Suit 2 of 2020) [2025] KEHC 9639 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 9639 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL SUIT 2 OF 2020  
DO CHEPKWONY, J  
MAY 5, 2025**

**BETWEEN**

**MARY NUNGARI KARANJA ..... 1<sup>ST</sup> PLAINTIFF  
DENIS NDINU NDIRANGU ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ALEX  
KARANJA NDUNGU - DECEASED**

**AND**

**PAUL NGANGA NGUGI ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH KINYANJUI KURIA ..... 2<sup>ND</sup> DEFENDANT  
PAUL NDUNGU ..... 3<sup>RD</sup> DEFENDANT  
SIMON WAMWAKI ITUTHU ..... 4<sup>TH</sup> DEFENDANT  
LILIAN NJOKI MUHORO ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this court for determination are two applications filed by the Defendant/Respondent pending applications; the first one is the Notice of Motion dated 4<sup>th</sup> July, 2022 which seeks the following orders:
  - a. Spent.
  - b. That pending the hearing and determination of the application interpartes, this Honourable Court be pleased to stay the execution of the Judgment entered on 16<sup>th</sup> June, 2022.
  - c. That pending the hearing and determination of the application interpartes, this Honourable Court be pleased to set aside the Judgment entered on 16<sup>th</sup> June, 2022.



- d. That this Honourable Court deems that the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants' Defence attached herein be deemed as duly filed and properly on record.
  - e. That the costs of this application be in the cause.
2. The second application is the Notice of Motion dated 18<sup>th</sup> August, 2022 which seeks the following orders:
- a. Spent.
  - b. Spent.
  - c. That this Honourable Court do issue a temporary injunction restraining the Plaintiff their servant and/or agents in particular Moran Auctioneers from effecting the public auction .
  - d. That pending the hearing and determination of this application interpartes on 18<sup>th</sup> October, 2023 this Honourable Court be pleased to grant an order that the status quo to be maintained.
  - e. That the costs of this application be in the cause.
3. Before delving into the merits of the two applications, it is prudent to lay a brief background of the suit so as to provide context. This suit was commenced by way of Complaint dated 3<sup>rd</sup> March 2020 following a road traffic accident which occurred on 29<sup>th</sup> April, 2017 where Alex Karanja Ndungu (deceased) was lawfully driving Motor Vehicle Registration Number KCF 624P when the Defendant's Motor Vehicle Registration Number KBX 924X Mitsubishi Lorry lost control and hit the deceased's Motor Vehicle Registration Number KCF 624P. As a result thereof, the said Alex Karanja Ndungu sustained fatal injuries while his family Mary Nungari, Allen Ndungu, Mercy Karanja and Eric Ndurungi sustained bodily injuries.
4. After filing the suit, on 4<sup>th</sup> March, 2020, the Plaintiffs sought and were granted leave to serve the Defendants by way of substituted means. The Defendants failed to enter appearance they filed Request for judgment which was later entered by this court. The matter proceeded for formal proof hearing and the court (Kasango J) delivered judgment in the matter on 16<sup>th</sup> June, 2021 awarding the Plaintiffs a total of Kshs. 28,700,000/=.
5. This judgment precipitated to the filing of the 1<sup>st</sup> application which sought stay of execution, to set aside the judgment and to have the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Defence attached deemed as duly filed. The 1<sup>st</sup> Application is based on the grounds as set out on the face of it and the Supporting Affidavit sworn by Eric Kaburu as the Advocates for the Defendants. He averred that the suit was filed on 4<sup>th</sup> March, 2020 and his firm sent its Memorandum of Appearance and Defence of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on 24<sup>th</sup> July, 2020 to Kiambu Law Courts email address kiambulawcourts@ gmail.com for assessment and filing but later realised that the said memorandum of appearance and defence were never placed in the court file.
6. The suit then proceeded ex parte without the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' participation to its conclusion and holds that the mistake of the counsel should not be visited upon his clients. He argues that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants should be given an opportunity to defend their case as they have filed the application without undue delay. On this basis, the counsel urged the court to set aside the Judgment and deem the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Defence to have been properly filed.
7. The court declined to certify the 1<sup>st</sup> application as urgent but directed that the application to be served upon the Respondent for interparties hearing. However, before then, the Respondents applied



for execution of the decree and it instructed Moran Auctioneers who proclaimed the Defendants properties intending to realise the sum of Kshs. 29,787,731/= being the decretal sum.

8. In response to the first application, the Plaintiffs’ filed a Replying Affidavit sworn by Mary Nungari Karanja on 4<sup>th</sup> August, 2022. She avers that upon filing the suit, Summons to Enter Appearance were issued and the same were served upon the Defendants upon leave to serve by way of substituted service. That the 4<sup>th</sup> Defendant was served through whatsapp on cell phone No. 0723 200 222 on 9<sup>th</sup> March, 2020 and Newspaper Advertisement was done on 13<sup>th</sup> November, 2020 but none of the Defendants entered appearance and thus matter proceeded to formal proof hearing and judgement was entered. He holds that the Defendants have not met the threshold to set aside the default judgment and it is the duty of litigant to keep the advocate informed of the progress of the case and she should thus be allowed to enjoy the fruits of the Judgment.
9. In the 2<sup>nd</sup> Application, the Applicants sought orders to stay execution through public auction against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants alongside a temporary injunction restraining Moran Auctioneers from effecting the public auction. The Application is based on the grounds as set out on the face of it and the Supporting Affidavit of Eric Kaburu on 18<sup>th</sup> August, 2022. He avers that the Respondents proceeded to execute the judgment through warrants of attachment and sale against the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants and they have proclaimed their movable properties and household goods . He holds that the application has been brought without undue delay and state that it will be in the interest of justice that the application be allowed.
10. The Applications have been canvassed by way of written submissions which the Applicants filed theirs dated 18<sup>th</sup> January, 2024 and the Respondent’s submissions dated 25<sup>th</sup> January, 2024 which the court has read and considered.
11. Having considered the two applications, the responses, and the submissions filed by parties, the main issues for determination are as follows:-
  - a. Whether the judgment of the court of 16<sup>th</sup> June, 2021 should be set aside.
  - b. Whether the court should grant stay of execution orders against the Auctioneers.
  - c. Whether the court should grant temporary injunction.

**Whether the Judgment of the court of 16<sup>th</sup> June, 2021 should be set aside.**

12. The first port of call is to establish whether the judgment was regularly or irregularly obtained for the court to determine whether to set it aside or not. This court is guided by the Judgment in the case of Mwala –vs- Kenya Bureau of Standards EALR [2001] 1 EA 148 where the court held as follows:-

“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.



13. In this case, it is not in doubt that the judgment herein was obtained regularly as there is proof of service to the Defendants through Newspaper Advertisement. The Defendants do not dispute service but allege that they sent Memorandum of Appearance and statements of defence to the court's email but unfortunately the documents were not placed in the court file.

14. It is trite that the power of the court to set aside *ex parte* Judgment is discretionary as was explained in the case of *Mbogo & Another –vs- Shah*

(1968) 1 EA 93, where the Court stated;

“Applying the principle that the Courts discretion to set aside an *ex-parte* judgement 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 of justice, the motion should be refused.”

15. In this Court's view, the explanation by the Applicant's Counsel that they sent their Memorandum of Appearance and Defence to the court email in 2020 does not hold water as they ought to have done more by either visiting the court registry or making a follow up call or email to confirm that indeed the documents were received and filed in court. In any event the suit belongs to a litigant and not the counsel and therefore it was incumbent for the Defendants to follow up on the progress of the matter after instructing their advocates to file a defence in 2020. The matter proceeded for formal proof and Judgment was delivered on 16<sup>th</sup> June, 2021. That a year later, after the Defendants had purportedly instructed their advocate. No evidence has been tendered to show that the Defendants has attempted to follow up on the matter. In any event, the 1<sup>st</sup> application was filed a year late after the Judgment was delivered. In my view, the Defendant's conduct reflect the conduct of a lethargic litigant who was not interested in the case.

16. The court is alive to the position that litigants have a duty to follow up with their case from the onset until conclusion. The same position was embraced by the court in the case of *Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002 (U.R)* where the court held that:-

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default Judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.”

17. Equity aids the vigilant but not the indolent hence the Defendant having depicted on indolent conduct, the only thing that would save the Application is if the Defence attached raises triable issues.



A reading through the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Statement of Defence as attached shows that the same contain mere denials to the contents of the Plaint as such court finds that it does not raise triable issues to warrant the court to set the judgment aside. A Judgment which was lawfully entered more than four (4) years ago.

18. Therefore, having found that the Judgment was obtained regularly, and there being no lawful reason why the same should be set aside, this court finds that it cannot grant stay of execution orders or even temporary injunctive orders sought as they will be an exercise in futility.
19. In the upshot, the Notice of Motion application dated 4<sup>th</sup> July, 2022 and the Notice of Motion application dated 18<sup>th</sup> August, 2022 both lack merits and they are hereby dismissed with costs to the Respondents.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 5<sup>TH</sup> DAY OF MAY. , 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:-

M/S Wairimu holding brief for Mr. Muhoro counsel for Plaintiff

Mr. Mugambi counsel for Defendants/Applicants

Court Assistant - Martin

