



**Rift Cars Ltd v Rotich & 2 others (Civil Appeal E012 of 2023)
[2025] KEHC 5613 (KLR) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E012 OF 2023
JK NG'ARNG'AR, J
MAY 6, 2025**

BETWEEN

RIFT CARS LTD APPELLANT

AND

ARON CHERUIYOT ROTICH 1ST RESPONDENT

LILY NGETICH 2ND RESPONDENT

M.S. KIMU AUCTIONEERS 3RD RESPONDENT

(Being an Appeal from the Ruling of the Principal Magistrate, Kibelion K. at the Principal Magistrate's Court at Bomet, Civil Suit Number E029 of 2020)

JUDGMENT

1. The 2nd Respondent (then Plaintiff) sued the Appellant (then 2nd Defendant) and 1st Respondent (then 1st Defendant) for general and special damages arising from a road traffic accident that occurred on 11th May 2019.
2. In its Judgement dated 31st August 2022, the trial court found the Defendants (now Appellant and 1st Respondent) 100% liable for causing the accident and awarded the Plaintiff (now 2nd Respondent) a net award of Kshs 5,343,995/=.
3. The Appellant filed a Notice of Motion Application dated 5th December 2022 in the trial court seeking stay of execution of the Proclamation of Attachment dated 29th November 2022 and for the trial court to set aside the Judgement and consequential Decree dated 31st August 2022. On 15th March 2023, the trial court dismissed the Notice of Motion Application dated 5th December 2022.



4. Being aggrieved with the Ruling dated 15th March 2023, the Appellant appealed against the said Ruling vide its Memorandum of Appeal dated 24th March 2023 seeking the stay of proceedings in the trial court and the default Judgment against it be set aside.
5. My work as the 1st appellate court is to re-evaluate the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR.
6. I now proceed to summarise the respective parties' cases in the trial court and their submissions in the present Appeal.

The Appellant's case.

7. Through its Notice of Motion Application dated 5th December 2022 and its Supporting Affidavit sworn by Isaac Towett on even day, the Applicant stated that the trial court delivered an ex-parte Judgement against it on 31st August 2022. That it was wrongfully sued as it was not the owner of the subject motor vehicle registration number KCN 677R as it had sold the same to the 1st Respondent through a Sale Agreement dated 24th December 2017.
8. It was the Appellant's case that it was not served with summons to enter appearance and only became aware of the existence of the suit after Judgment had been delivered and its property proclaimed for attachment. It was the Appellant's further case that the attempted execution of the Decree was unlawful and unprocedural.
9. In its written submissions dated 16th December 2024, the Appellant submitted that it was not properly served and the supposed process server was not subjected to cross examination to authenticate the veracity of his Affidavit. It relied on Order 5 Rule 16 of the *Civil Procedure Rules*. That despite raising the issue of improper service, the trial court did not address its concerns.
10. The Appellant submitted that it was not the beneficial owner of motor vehicle registration number KCN 677R. That it sold the said motor vehicle to the 1st Respondent more than two years before the time of the accident. The Appellant further submitted that its name was on the motor vehicle search solely to secure its financial interest to ensure the 1st Respondent completes paying its full purchase price. It relied on *Samuel Mukunya Kamunge v John Mwangi Kamuru* [2005] KEHC 1077 (KLR), *Securicor Kenya Limited v Kyumba Holdings Ltd* (2005) eKLR *et.al*.
11. It was the Appellant's submission that it proved that it was not the absolute owner of the subject motor vehicle and had no control over it during the occurrence of the accident. That the suit had tarnished its reputation and caused mental and financial anguish upon it and this court should allow the Appeal to allow it continue with its business.

Response.

12. Through her Replying Affidavit dated 2nd January 2023, the 2nd Respondent stated that the Application was meant to prevent her from enjoying the fruits of her Judgement. That the Appellant was served with summons to enter appearance on 23rd July 2020 and the service was acknowledged. It was her further case that despite being notified several times the Appellant failed to enter appearance and file its defence.



13. It was the 2nd Respondent's case that the 2nd Defendant had been indolent and was never keen on defending the suit and that this court should not aid an indolent party. That the suit was heard on merit and both the Appellant and 1st Respondent were found liable.
14. The 2nd Respondent stated that she was awarded Kshs 5,343,995/= and the 1st Respondent's insurer had already paid Kshs 3,000,000/= leaving a balance of Kshs 2,343,995/= that was supposed to be paid by the Appellant. The 2nd Respondent further stated that the court had discretion to set aside a default Judgement but such discretion should be exercised in a manner that would prevent injustice and aid a party who was intent on obstructing justice.
15. Through her written submissions dated 24th March 2025, the 2nd Respondent submitted that both the Appellant and the 1st Respondents were served with summons to enter appearance and specifically that the Appellant was served on 23rd July 2020 but chose not to enter appearance. That the 1st Respondent entered appearance and defended the suit to its conclusion. She further stated that the Appellant was never interested in defending the suit and was only awoken by the Auctioneers and the present Appeal was aimed at denying her justice and the fruits of her Judgement.
16. It was the 2nd Respondent's submission that the Appellant did not seek to cross examine the process server while prosecuting its Application in the trial court and therefore every averment in the Affidavit of Service remained unchallenged.
17. The 2nd Respondent submitted that the Judgement was no longer a default Judgment as it had been partially satisfied. She relied on *K-rep Bank Limited v Segment Distributors Limited* (2017) eKLR and *Rose Chepkorir v Mwinyi Mohamed Riva & another* (2015) eKLR. The 2nd Respondent further submitted that the Judgement was regularly entered and this court should be slow to set it aside. She relied on *Simon Thuo Mwangi v Unqa Feeds Limited* (2015) eKLR.
18. It was the 2nd Respondent's submission that the court should not aid the Appellant as it was intent on obstructing justice. She relied on *Kwanza Estates Limited v Dubai Bank Kenya Limited (in liquidation) & 2 others* (2019) eKLR. It was the 2nd Respondent's case that the Appellant did not attach a draft defence for the trial court to consider if the draft defence raised any triable issue. She relied on *Nature Pharmacy Ltd & another v Gichuhi* (Civil Appeal 245 of 2016) [2022] KECA 827 (KLR).
19. The 2nd Respondent submitted that the Appeal lacked merit and ought to be dismissed.
20. I have gone through and carefully considered the Record of Appeal dated 10th May 2024, the Appellant's written submissions dated 16th December 2024 and the 2nd Respondent's written submissions dated 24th March 2025 6th February 2025. The two issues for my determination were: -
 - i. Whether the Appellant was properly served with Summons to Enter Appearance and subsequent pleadings in the trial court.
 - ii. Whether the Ruling dated 15th March 2023 ought to be set aside.
 - i. Whether the Appellant was properly served with Summons to Enter Appearance and subsequent pleadings in the trial court.

i. Whether the Appellant was properly served with Summons to Enter Appearance and subsequent pleadings in the trial court.

21. The Plaintiff in the trial court was filed on 13th March 2020 by the 2nd Respondent where she sought general and special damages against the Appellant and 1st Respondent as a result of a road traffic



accident that occurred on 11th May 2019. In the court record, I have noted that there was an Affidavit of Service sworn by Fredrick Musyoka Mwaniki on 21st August 2020. Fredrick Musyoka Mwaniki deponed that he received Summons to Enter Appearance and the Complaint from the 2nd Respondent's advocate and he proceeded to the Appellant's office situated at Nakuru and served the documents to the Appellant's legal officer who upon receipt stamped and signed the principal copy. Upon further consideration of the Affidavit of Service, I have noted that the Appellant received the Summons to Enter Appearance on 23rd July 2020.

22. The Appellant denied that it had been served and stated that it became aware of the suit after the Judgment had been delivered. By denying that it had been served, the Appellant impugned the contents of the Affidavit of Service. It is trite that the burden of proof lay with the claimant and in this case, the Appellant bore the burden of proving the alleged falsehoods contained in the Affidavit of Service. The Appellant should have the trial court for a chance to cross examine the deponent to ascertain the veracity of his Affidavit. To suggest that the trial court bore the responsibility of cross examining the deponent was missing the mark and akin to suggesting that the trial court should have prosecuted the Appellant's Application. In essence, the Appellant did not discharge his burden of proof.
23. It is my finding that the Appellant was properly served with the Summons to Enter Appearance and the Complaint.

ii. Whether the Ruling dated 15th March 2023 ought to be set aside.

24. Order 12 Rule 7 of the [Civil Procedure Rules](#) states: -

Where under this Order judgement has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgement or order upon such terms as may be just.

25. In relation to setting aside default Judgements, the court in *Shah v Mbogo* (1967) EA 116 and *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 held: -

“it 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 course of justice.” (Emphasis added)

26. Similarly, I concur with Namisi J. in [Wainaina t/a Boviqiun Suppliers v Highchem Marketing Limited](#) [2025] KEHC 253 (KLR) where she held: -

“The jurisdiction to set aside default judgement is wide and unfettered and the appellate court will not interfere with the decision of the trial court unless it is satisfied that the court misdirected itself in some matter and consequently, arrived at a wrong decision, or unless it is manifest from the case as a whole that the court had been wrong in the exercise of its discretion.....”

27. I have gone through the record and I have noted that the trial court did not take into account the issue of ownership raised by the Appellant. It goes to the root of this matter if proved and is a key triable issue. The outcome will obviously have a direct bearing to the outcome of the proceedings that would ensue.
28. In the final analysis, I do find fault with the trial court's Ruling dated 15th March 2023 and I therefore disturb the same.



29. In the end, the Appeal dated 24th March 2023 has merit and is allowed.
30. Taking into account the nature of this appeal, I do order that the Appellant will bear the costs of this appeal having been served. I therefore award costs of kshs. 30,000.
31. Hearing be dealt with on a priority basis.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 6TH DAY OF MAY, 2025.

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the absence of the advocate for the Appellant and in the presence of Mr. Kadet for the Respondents. Siele/Susan (Court Assistant).

