



REPUBLIC OF KENYA



**Karuga v Thiongo (Civil Appeal E1050 of 2024)
[2025] KEHC 9858 (KLR) (Civ) (8 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1050 OF 2024

WM MUSYOKA, J

JULY 8, 2025

BETWEEN

DANIEL NDEGWA KARUGA APPELLANT

AND

BENARD NG'ANG'A THIONGO RESPONDENT

(Appeal from the orders made in the ruling of Hon. Wamae EM Muindi, Resident Magistrate (RM) and Adjudicator, delivered on 10th September 2024, in Nairobi SCCCOMM No. E128 of 2024)

JUDGMENT

1. The claim, at the primary court, was by the respondent against the appellant, for recovery of Kshs. 660,000.00, being in respect of a soft loan advanced, but not repaid.
2. The appellant did not enter appearance, nor file defence, and a judgement, in default, was entered, on 8th May 2024. The appellant filed a Motion for stay, and for leave to defend. The Motion was denied, on 10th September 2024, on grounds that the appellant had not denied receipt of service of the pleadings, and other notices, and, although he was raising issue with the amount claimed, he had availed no proof that he had settled the amount, hence no triable issues existed.
3. The appeal arises from the ruling of 10th September 2024. The grounds revolve around the preliminary objection, by the appellant, on jurisdiction, not being heard and determined; the court not finding that he had an arguable defence; failing to consider the cash disbursements made to the respondent; failing to consider that no prejudice would have been suffered if the application had been allowed; the right to be heard on merit; and the claim conflicting.



4. Directions were given on 6th February 2025, for canvassing of the appeal by written submissions. Both sides did file their respective submissions, which I have read through and noted the arguments made.
5. I note that a stay of execution order had been granted, subject to deposit in court of Kshs. 200,000.00. The stay orders were to lapse in the event of default. The said orders lapsed, but that had no effect on the appeal itself.
6. The appellant raises two issues, on appeal, being the matter of his preliminary objection not being considered, and the court declining to allow him to defend. These are the two issues for determination.
7. On the first issue, the appellant had filed a notice of preliminary objection, dated 19th August 2024, saying the trial court had no jurisdiction on the matter, as there was an arbitration clause in the money lending agreement, which provided for reference to arbitration in the first instance. He argued that the filing of the suit, without reference to that arbitration clause, made the claim procedurally improper, and an abuse of court process, which meant that it ought to be struck out.
8. The trial court did not advert to the issue of the preliminary objection at all, in its impugned ruling. It would appear, though, that, when the appellant argued his application on 10th September 2024, he did not argue the preliminary objection. He only prayed for leave to defend. As the issue of the preliminary objection was not raised, there was no basis for the trial court to address it. An appellant is not entitled to raise, on appeal, issues that did not arise at the trial. He filed a notice of preliminary objection, but he did not argue it. The trial court should not have been expected to rule on what was not argued.
9. The presentation, that was made on behalf of the appellant, on 10th September 2024, was recorded by the Adjudicator, as follows:

“The Resp/App prays for leave to defend the suit as the loan amount is disputed. The Resp/App does not dispute that service was done. The demand letter dated 31st/March/2021 was for Ksh. 532,000/-. The statement of claim dated 12/Feb/2024 is for Ksh. 660,000/-. The Resp has also filed a counterclaim against the Claimant.”
10. The reply, made on behalf of the respondent, was recorded thus:

“The Resp was served with pleadings which they acknowledge. The variation in amount is due to interest charged. The judgement in default is thereby regular.”
11. The other issue is on whether the trial court should have exercised discretion to allow the appellant to defend the claim. The appellant acknowledged that he was served. As the issue was not service, it meant that the entry of default judgement was regular. The record reflects that many efforts were made to serve the appellant, but he ignored the summonses, and only moved to court after execution proceedings commenced. If he really had a defence, he should have come out and filed his papers, within the timelines given, to defend the claim, and pursue the counterclaim he now says he has. I note that he has not made any effort to explain what prevented him from filing his responses upon being properly served.
12. In *Mbogo & Another v Shah* [1968] EA 93, it was held that the appellate court ought not interfere with the exercise of jurisdiction or discretion by an inferior court, unless its decision is clearly wrong on account of misconduct or something. The decision of the trial court herein cannot at all be faulted. There was proper service, the appellant failed to hasten to the call to file his papers in defence, and a judgement was entered regularly.



13. In *CMC Holdings Ltd v Nzioki* [2004] KLR 173, it was said that it would be improper use of discretion for the court to turn its back to a litigant who clearly demonstrates that he was unable to file defence due to an excusable mistake, inadvertence, accident or error. The appellant herein has not sought to demonstrate that there was a mistake or inadvertence or accident or error, which caused him not to file his response, after he was served. Whether there is a triable case or a counterclaim is for consideration only if it can be demonstrated that the appellant had an excuse for not acting in time. Discretion is not available for a party who merely wishes to obstruct or delay the process.
14. I am alive to the position, stated in a number of decisions, such as *Patel v East Africa Cargo Handling Services Limited* [1974] EA 75, *Geita Nasipondi Bukunya & 2 Others v Attorney General* [2019] eKLR and *Wachira Karani v Bildad Wachira* [2016] eKLR, that the concern of the court should be to do justice to the parties, to uphold the principle of natural justice and to give a fair hearing to all. However, justice cuts both ways. It must be alive to both sides. For discretion to be exercised in one's favour it must be demonstrated that they deserve justice. Premium is paid to clean hands. For a regular judgement to be overturned there must be a plausible reason or justification, and not just that there is a defence which raises triable issues or there exists a counterclaim. The other considerations can only be in addition to the excuse given for failing to act upon being effectively served.
15. It was stated, by the Court of Appeal, in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2019] eKLR and *In re Estate of Richard Ochana (Deceased)* [2025] KECA 822 (KLR), that, where there is a delay by a party to file court papers, or to do something required of them by the rules of procedure, within a given duration, and a party approaches a court to extend time for the doing of that thing, the discretion, exercisable in the circumstances, will only be unlocked upon a plausible and satisfactory explanation of the delay being given. Discretion would only be exercised favourably where valid and clear reasons are given for the delay or failure to act in time. Where no reason is given, there would be no justification for the court to find the excuse for the delay reasonable, to justify exercise of discretion in favour of the applicant.
16. I am not persuaded that the trial court made any error, or exercised discretion improperly or capriciously, in declining to set aside the default judgement. The appeal herein is not merited. I dismiss it. The respondent shall have the costs of the appeal. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 8TH DAY OF JULY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Caroline Oyuse, Court Assistant, Milimani, Nairobi.

Ms. Azenga Alenga, Legal Researcher.

Advocates

Mr. Kariuki, instructed by Kamweti Njuguna & Company, Advocates for the appellant.

Mr. Seda, instructed by Orwa Seda & Company, Advocates for the respondent.

