



**Kibunja v Njurai (Suing as legal Administrator of the Estate of the  
Late Agnes Wambui Njoroge) & another (Civil Appeal E007 of 2024)  
[2025] KEHC 13001 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13001 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL APPEAL E007 OF 2024  
LN MUTENDE, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**JOHN CHEGE KIBUNJA ..... APPELLANT**

**AND**

**PETER NJOROGE NJURAI (SUING AS LEGAL ADMINISTRATOR OF THE  
ESTATE OF THE LATE AGNES WAMBUI NJOROGE) ..... 1<sup>ST</sup> RESPONDENT**

**AGNES WAMBUI NJOROGE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Respondents herein instituted a suit against the Appellant pursuant to the *Fatal Accidents Act* and *Law Reform Act*. This was following a road traffic accident that occurred on 18.06.2022 along Muhotetu-Sipili Road involving motor-vehicle registration number KCM 099C stated to be owned by the Appellant, in which the deceased was travelling as a passenger whereby she suffered fatal injuries.
2. There having been no appearance made in the matter, there was a request for entry of judgment which was made. Subsequently an interlocutory judgment was entered on 04/05/2023 and the matter proceeded to formal proof where after judgment was entered on 26/07/2023. Liability was set at 100% and quantum on damages was at Ksh. 1,218,370/-
3. Through a Notice of Motion dated 04/12/2023, the Appellant sought stay of execution and setting aside judgment entered and all consequential orders so that the Appellant could have leave to defend the suit. The application was premised on grounds that there was no service of summons to enter appearance and/or plead. That the Appellant only became aware of the suit upon being served with the decree and proclamation Notice of Motor-vehicle registration Number KCB 860 D; KCM 099C and other household items.



4. In response it was urged that service of the pleadings and summons to enter appearance through Whatsapp was procedural and proper as the Respondent complied with Order 5 Rule 22 B of the Civil Procedure Rules.
5. In the Ruling dated 07/03/2024, the trial court reached a finding that service was effected and the draft defence did not raise triable issues hence dismissed the application.
6. Aggrieved, the Appellant appealed on grounds that:
 

The the learned Trial Magistrate erred in law and fact in finding that the Appellant was properly served via whatsapp with the summons to enter appearance, plaint and other pleadings; in finding that the Appellant did not have a defence deserving a hearing and that the draft defence annexed to the supplementary affidavit dated 16/1/2024 was an afterthought; in finding that the Appellant had not satisfied the conditions for setting aside of the exparte judgment entered against him on the 26/7/2024; in declining to set aside the exparte judgment entered on the 28/7/2023 where the Appellant was condemned to pay Ksh. 1,218,370/- as damages; in failing to accord the Appellant a chance to defend the suit and in dismissing the application dated 4/11/2023 with costs.
7. The appeal was canvassed through written submissions. It is urged by the Appellant that requirements under Order 5 Rule 22C of the Civil Procedure Rules (CPRs) 2010 were not complied with as required by the electronic service. That contrary to the finding by the trial court that there was service as there were two (2) ticks, no delivery receipt was exhibited/annexed to the verifying affidavit. That this having been the first service, personal remains the best service. Reliance in this respect is placed on the case of Omar Shallo v Jubilee Party of Kenya Another [2017] KEHC 5055(KLR).
8. That contrary to Order 5 Rule 13 of the Civil Procedure Rules where acknowledgement of service of summons is necessary, neither the Appellant nor the agent acknowledged any summons to enter appearance of other court pleadings.
9. That it was erroneous for the trial court to dismiss the draft defence as raising no triable issues. Reliance is placed on Continental Vutchery Limited v Nthiwa [1978] eKLR as cited in Elizabeth Kavere & Another v Lilian Atho & Another [20201] eKLR where the court held that:
 

“... If a bonafide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences are a sham”.
10. The Respondent submitted that there was properly effected service and the Appellant deliberately failed to enter appearance. That indeed the draft statement of defence was a fatal omission which was rectified after the Respondent pointed out through the replying affidavit, hence was an afterthought. That the court exercised its discretion in dismissing the application after it found the same to be an afterthought.
11. Appreciating that the power of the court to grant or refuse an application to set aside or vary a judgment or any consequential decree or order is discretionary but urged that it must be exercised judiciously as found in Shah v Mbogo & Another [1967] EA 116A.
12. That to date the Appellant has not complied with conditions of stay of execution granted by the High Court which clearly show the Appellant’s intention to frustrate the Respondents.



13. This being a first appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions...”

14. On the question whether the Ex-parte judgment was regularly entered such that the learned magistrate exercised the discretion aptly, Order 10 Rule 11 of the Civil Procedure Rules provides thus:

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

15. The power granted to the court is discretionary. What the court should ensure is justice being done to parties. The applicant would be obligated to demonstrate valid reasons for setting aside the default sentence. In *James Kanyiiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) the Court of Appeal delivered itself thus:

“...From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, 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 defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173.”

16. Pleadings herein were electronically served on the Appellant per the argument put forth by the Respondents. Order 5 Rule 22C of the Civil Procedure Rules provides as follows:

Mobile-enabled messaging Applications [Order 5, rule 22C]

- (1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.
- (2) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- (3) Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.



- (4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.
17. According to the affidavit of service deposed by Victor Ngotho Waweru, learned counsel seized of the matter, the Appellant was served through WhatsApp. He avers that he served the defendant (Appellant) through WhatsApp on 06/03/2023 at 14:39 Hrs through phone No. 0723 XXXXXXX with summons to enter appearance, plaint, verifying affidavit and other documents. Attached is a copy of the screenshot indicated as document 51 pdf and Document 156pdf. What was not annexed was evidence of delivery.
18. The Respondents established on a balance of preponderance through mobile money transfer (Mpesa) to John Kibunja with an image stated to be of the Appellant. The argument put forth is that the mobile phone belonged to the Appellant but emphasis was not placed on the question of delivery receipt. An in-depth scrutiny of the WhatsApp delivery receipt /read receipt /status of the message there are two (2) grey ticks which establish the fact of the message having been successfully delivered.
19. However, there is no indication of the two grey ticks having turned blue which would be proof of the fact that the recipient read the information. The Respondents who made the averment were obligated to prove that fact which was not done.
20. The draft defence attached is dismissed as lacking triable issues. The question would be whether the assertions per the draft defence available would be plausible enough calling for interrogation by the court?
21. In *Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR, the Court of Appeal stated as follows:
- “It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”
22. The Respondents pleaded that the Appellant was the owner of the motor-vehicle that the deceased was travelling aboard as a passenger, averments denied by the Appellant. He particularly denies the allegations of negligence. It is further denied that he received the demand letter which is indicated as having been mailed to him. In the interest of justice, this is not a defence that should be dismissed as a sham, it should be subjected to hearing. In any case justice would demand that that a party be heard to determine the truth of the matter.
23. In the upshot, I find and hold that the trial court erred in dismissing the application dated 04/12/2023, hence the appeal succeeds and is allowed and I make orders thus:
- a. The Ruling delivered on 7<sup>th</sup> March, 2023 in SPMCC No. E002 of 2023 is quashed and set aside.
  - b. The Judgment thereof of the trial court dated 26<sup>th</sup> July, 2023 and all subsequent orders thereto be and are hereby set aside.
  - c. The suit is hereby remitted back to the Magistrate’s Court, Rumuruti, for hearing and determination on merit on priority basis.
  - d. The error having been occasioned by the court, each party to bear their own costs of the appeal and at the lower court.
24. It is so ordered.



DATED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.

L. N. MUTENDE

JUDGE

