Kentrack Auctioneers & another v Macharia & another (Suing as the Personal Representatives of the Late Nahashon Mwangi Macharia - Deceased) (Civil Appeal E016 & E019 of 2024 (Consolidated)) [2025] KEHC 12668 (KLR) (9 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E016 & E019 OF 2024 (CONSOLIDATED)

FN MUCHEMI, J

SEPTEMBER 9, 2025

BETWEEN

KENTRACK AUCTIONEERS ..... 1ST APPELLANT

GEORGE GATITU THUI T/A FEDHA MICROLINK ..... 2ND APPELLANT

AND

KELVIN KARANJA MACHARIA ..... 1ST RESPONDENT

LUCY NYAMBURA MWANGI ..... 2ND RESPONDENT

SUING AS THE PERSONAL REPRESENTATIVES OF THE LATE NAHASHON MWANGI MACHARIA - DECEASED

(Being an Appeal from the Ruling and Order of Hon. S. Atambo (CM) delivered on 5th December 2023 in Thika CMCC No. 553 of 2020)

JUDGMENT

Brief facts

1. This appeal as consolidated arises from the ruling in Thika CMCC No. 553 of 2020 whereby the trial court dismissed the appellant's application for review and setting aside of the judgment entered on 20th June 2023 and interlocutory judgment dated 21st April 2021 as well as the 2nd respondent's application for leave to be granted to the firm of M/s L. W Ngugi & Co. Advocates to come on record instead of the firm of Kamanza & Partners Advocates and setting aside the interlocutory judgment dated 21st April 2021.

2. Dissatisfied with the court's decision, the 1st appellant lodged this appeal Civil Appeal No. E016 of 2024 relying on seven (7) grounds summarized as follows:-

a. The learned trial magistrate erred in law and in fact totally ignoring the 1st appellant's draft defence thus arriving at an erroneous conclusion of dismissing the application dated 19th July 2023.

b. The learned trial magistrate erred in law and in fact by failing to find that the 1st appellant was never served or notified of any summons to attend court thus arriving at an erroneous conclusion that the appellant's advocate failed to set aside interlocutory judgment.

c. The learned trial magistrate erred in law and in fact by failing to find that the appellant's draft defence raised triable issues which ought to have been canvassed vide a hearing.

3. The 2nd appellant in Civil Appeal No. E019 of 2024 cited 12 grounds summarized as follows:-

a. The learned magistrate erred in law and in fact in holding that the appellant's advocates on record, J.K. Ouko & Company Advocates, had not sought leave of the court to come on record and as such improperly on record, when such leave was sought in the 2nd appellant's application dated 18th July 2023 and was granted on 1st August 2023 when the matter came up for interparties hearing.

b. The learned magistrate erred in law and in fact when she misapprehended the procedure of coming on record post judgment by holding that such procedure was flawed when indeed the same was followed.

c. The learned magistrate erred in law and in fact by failing to appreciate that the delay in defending the suit was inadvertent and excusable as the said delay was attributable to the appellant's previous counsels on record who did not take reasonable steps to prosecute the appellant's case and such a mistake on the part of the advocate should not be visited on an innocent litigant.

d. The learned magistrate erred in law and in fact in failing to establish that the 1st defendant is a limited liability company and as such the respondent had flawed the procedure of service upon the company and in addition to having sued the wrong party.

e. The learned magistrate erred further in fact by ignoring the incontrovertible evidence that the 2nd appellant was never served in the manner set out in the Replying Affidavit.

4. Parties put in written submissions and the 2nd respondent chose to rely on the submissions by the appellant in Civil Appeal No. E016 of 2024.

The 1st Appellant's Submissions

5. The appellant relies on the cases of Chemwolo & Another vs Kubende (1984) LLR 219 (CAK) and Remco Ltd vs Mistry Jadva Parbat & Co. Ltd LRR 1099 (CCK) [2001] and submits that it was never served with any summons to enter appearance or the notice of entry of judgment. The 1st appellant states that it came to learn of the suit when it was served with the notice of entry of judgment and decree via email on 14th July 2023. He further states that the firm of Kamanza and Partners Advocates entered appearance and filed a defence on its behalf and on behalf of the 2nd appellant dated 23rd July 2022 without informing it of the instant suit. The matter proceeded for hearing without its knowledge resulting in the judgment dated 20th June 2023. The 1st appellant argues that it should not suffer due to the mistakes of an advocate.

6. The 1st appellant relies on the case of Gicharu vs Gachui (Environment and Land Appeal 5 of 2023) [2024] KEELC 812 (KLR) and submits that the learned magistrate failed to peruse the defence and

ascertain whether it raises triable issues. The appellant argues that its draft defence raises triable issues which ought to be considered by a court.

7. Relying on the cases of Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2EA 212; Richard Nchapai Leiyangu vs IEBC & 2 Others (no citation given) and Patel vs EA Cargo Handling Service (1974) EA 75 and submits that it was never given an opportunity to be heard in the lower court.

The Respondent's Submissions.

8. The respondent submits that Civil Appeal No. E019 of 2024 must fail as it was not prosecuted despite the grounds it raised being materially different with those raised in Civil Appeal No. E016 of 2024.

9. The respondent submits that the appellant and 2nd respondent were represented by Mr. Musembi of M/s Kamanza & Partners Advocates who attended court even after default judgment was entered and he was denied audience until he moved the court appropriately. Thus, the appellants were well aware and ought to have followed up with their advocates on record why they had not filed a defence. Even if the court were to believe that the appellants had not been previously served with the pleadings and summons, at the point they were served with the request for judgment in default was the time they ought to have entered appearance and not when served with judgment and decree through the same email addresses they claim they had never seen.

10. The respondent further submits that the contradicting accounts by the appellants that they had appointed the firm of M/s Kamanza & Partners Advocates while the auctioneer claiming that he had never instructed the said advocates, but there being on record his Replying Affidavit with the very documents produced in the application filed by his second appointed advocates demonstrates that he was lying on oath.

11. The respondent submits that the appellants were not denied a chance to be heard, they were given the opportunity to be heard but failed to utilize it. They further failed to demonstrate why they failed to utilize it and instead decided to pursue lies with the hope they would get a second bite at the cherry. The trial court denied them the chance and there is no plausible reason advanced on appeal to warrant interference of the exercise of discretion by the trial court. to support their contentions, the 1st respondents rely on the case of Nesco Services Limited vs C.M Construction (EA) Limited [2021] eKLR.

Issue for determination

12. The main issue for determination is whether the appeal has merit.

The Law

13. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> "…..this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind
>
> that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

14. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> An appeal to this court from a trial by the High 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

15. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

16. Under Order 10 Rule 11 of the Civil Procedure Rules the court can set aside or vary such judgment and any consequential decree or order upon such terms as are just. It provides as follows:-

> 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.

17. Notably, the above provision shows that a court has the discretion to set aside a default judgment. This principle was enunciated in the case of Patel vs EA Cargo Handling Services Ltd (1974) EA 75, where the court held that:-

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow ay rule of procedure."

18. Similarly in Shah vs Mbogo & Another [1967] EA it was held 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 of justice, the motion should therefore be refused.

19. Thus the principle that emerges from the above cited cases is that the discretion of the court to set aside or vary ex parte judgment entered in default of appearance or defence is a free one. Further, it is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

20. The Court of Appeal in the case of Thorn PLC vs MacDonald [1999] CPLR 660 stipulated the following guiding principles to consider when setting aside an ex parte judgment;-

    a. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

    b. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

    c. The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

    d. Prejudice (or the absence of it) to the claimant also has to be taken into account.

21. The respondents herein had instituted the suit in the lower court vide an application dated 14th October 2020 under certificate of urgency seeking for orders of an injunction to be issued against the appellant and 2nd respondent who are in custody of motor vehicle registration number KCM 073K from selling, transferring or otherwise disposing off the said vehicle pending the hearing and determination of the suit. It was the 1st respondents case that motor vehicle registration number KCM 073K belonging to the deceased was valued at an excess amount of Kshs. 1.5million had been illegally seized by the appellants and was due for sale by public auction over an alleged debt of Kshs. 100,000/-. The respondents filed a plaint together with the application and sought for judgment to be entered against the appellant and 2nd respondent for a permanent injunction restraining them from selling, transferring or otherwise disposing off the suit motor vehicle belonging to the estate of the deceased. In opposition to the application, the appellant and 2nd respondent filed a replying affidavit on 25th January 2020 through the firm of M/s Kamanza & Partners Advocates after entering appearance.

22. Vide letter dated 6th April 2022, the 1st respondents' requested for interlocutory judgment to be entered against the appellants and for the suit to proceed by way of formal proof. Interlocutory judgment was entered on 21st April 2022. The firm of Kamanza & Partners Advocates received the request for interlocutory judgment dated 6th April 2022 as shown by their stamp. The said firm filed a Statement of Defence on 25th July 2022 however the said advocates did not file an application to set aside the interlocutory judgment. The suit proceeded by way of formal proof and regular judgment was entered in favour of the respondents as against the appellants on 20th June 2024 and decree issued on 14th July 2023.

23. I have further perused the court record and noted that although the 2nd respondent alleges that they were never served with any summons or plaint, the record shows that the firm of Kamanza & Partners Advocates entered appearance for both defendants but it failed to participate in the suit in that it failed to file a defence on time. It is noted that defence was filed late after interlocutory judgment had been entered. The firm on record for the defendants failed to apply to set aside the said judgment. Furthermore, the appellants had filed an application dated 18th July 2023 where both of them admitted that they had instructed the firm of Kamanza & partners Advocates to defend them in the suit. The defendants further stated that the said firm only entered appearance but failed to defend them in the suit. Thus, it is improper for the 2nd appellant to allege that they were never served with any summons or pleadings to enable them enter appearance while the court record shows the contrary. It is noted further that the said firm was served with the request for interlocutory judgment, which they received and when they filed their statement of defence, the said advocates had not applied to set aside the interlocutory judgment. As such, the said interlocutory and regular judgments were regular and cannot

be challenged. I opine that the court did not err in exercising its discretion and in noting that the appellants were delaying the course of justice in the matter.

24. It is trite law that a regular judgment will not be set aside unless the court is satisfied that there is a defence which raises triable issues. In Kenya Trade Combine Ltd vs M. Shah (Civil Appeal No. 193 of 1999) (unreported) the court held:-

> In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence must succeed.

25. The court in the case of Equatorial Commercial Bank Limited vs Jodam Engineering Works limited & 2 Others (2014) eKLR had occasion to determine what amounts to a triable issue. In its decision Kasango J. stated as follows:-

> A Statement of Defence is said to raise a reasonable defence if that defence raises a prima facie triable issue.

26. Similarly in the case of Olympic Escort International Co. Ltd & 2 Others vs Parminder Singh Sandhu & Another (2009) eKLR, the Court of Appeal held that for an issue to be triable, it has to be bona fide. The court 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.

27. From the above decisions, it is clear that where there are no triable issues disclosed, the court cannot sustain a defence on record. The record shows that the trial court considered the defendants' statement of defence while delivering its judgment but found that the respondents proved their case against the defendants on the balance of probabilities. The appellant is economical with the truth when he states that the trial court did not consider that the defence which he says raised triable issues. It was noted on the record that the court took notice that the appellants filed their statements of defence but had not applied to set aside the interlocutory judgment which ought to have been their first step. The interlocutory judgment was on record before appearance was entered. It is therefore my considered view that the trial court considered the defendants defence in hearing the application to set aside but found it not plausible. The court then proceeded to find that the 1st respondents proved their case on a balance of probabilities.

28. The 2nd respondent, argues that the trial court erred in holding that the firm of J.K Ouko & Company Advocates had not sought leave to come on record when such leave was sought in the application dated 18th July 2023 and was granted on 1st August 2023 when the matter came up for inter parties hearing. From the record, judgment was delivered on 23rd June 2023. Order 9 Rule 9 of the Civil Procedure Rules provides:-

> When there is a change of advocates, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be affected without an order of the court-
>
> a. Upon an application with notice to all the parties; or
>
> b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

29. On perusal of the court record, no consent was filed by the said firm of advocates and neither did the trial court grant any such orders on 1st August 2023 as alleged by the 2nd respondent. The correct procedure was for the incoming advocates to seek leave of the court to come on record and then file and serve the same on the previous advocates, the firm of M/s Kamanza & Partners Advocates who were on record for both appellants, which the firm of J.K. Ouko & Company Advocates failed to do. As such, I find no fault in the finding of the lower court to the effect that the said advocates were improperly on record. It is further observed that the said firm of advocates have not regularised their position even on appeal in pursuance with Order 9 Rule 9 of the Civil Procedure Rules.

30. In my considered view, this consolidated appeal lacks merit and is hereby dismissed with costs to the 1st respondents.

31. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE