Mogo Auto Limited v Kogo & another (Civil Appeal 244 of 2023)
[2025] KEHC 12541 (KLR) (15 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12541 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 244 OF 2023

RN NYAKUNDI, J

SEPTEMBER 15, 2025

BETWEEN

MOGO AUTO LIMITED ..... APPELLANT

AND

DOMINIC KIPNGETICH KOGO ..... 1ST RESPONDENT

RICHARD KIPYEGO ..... 2ND RESPONDENT

(Being an Appeal from the Ruling of Hon. O. Mogire (PM) Magistrate delivered on the 20th June 2023 in Eldoret CMCC No. E1146 of 2021)

JUDGMENT

1. The brief background of this Appeal is that the Appellant filed an application dated 30th August 2022 in the trial Court seeking orders that the exparte judgement be set aside. The trial court delivered its ruling on the 20th June 2023, finding that the Application lacked merit thus dismissing it.

2. That the Appellant being dissatisfied with the whole ruling, preferred this appeal vide a Memorandum of Appeal dated 4th August 2023 based on the following 3 grounds:

    a. That the Learned Magistrate erred in law and fact in considering and/or dismissing the 2nd respondent's application dated 30th August 2022 seeking to set aside and or vary the court's interlocutory judgement entered on 24th May 2022 against the 2nd defendant and stay of execution of the decree.

    b. That the Learned Magistrate erred in law and fact in dismissing the application thus condemning the appellant herein unheard on the grounds of procedural technicalities only and without giving due regard to the evidence adduced by the applicant.

c. That the Learned Magistrate erred in law and fact in failing to consider the rules of natural justice on fair hearing.

3. The Appellant sought that the appeal be allowed and an order do issue setting aside the whole of the subordinate court's decision and/or ruling made on the 20th June 2023 and that the appellant be awarded the costs of the appeal.

4. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

5. The Appellant filed its written submissions dated 21st July 2025 where the learned counsel on record Mr. Githaiga submitted on one issue for determination being; Whether the trial magistrate erred by failing to set aside its default judgement entered on 20th June 2023 against the appellant.

6. The Appellant submitted that the learned magistrate erred in law and fact in dismissing the appellant's application dated 30th August 2022 seeking to set aside the interlocutory judgement entered on 24th May 2022 against the appellant and stay of execution of the decree. He submitted that the nature of the suit at the trial court as captured at page 102-105 of the record of appeal is a road traffic injury claim relating to the subject motor vehicle, which the Appellant was neither the owner nor in any way in control of and that the appellant was only a registered owner for being a financier to protect its financial interests. He also submitted that the impugned ruling is unjust, disproportionate and irregular as it wrongly apportioned liability to the appellant and referenced to the case of Mogo Auto Limited Vs Kariuki & Another [2025] KEHC 7982 (KLR).

7. Counsel further submitted that at the trial court, the former advocate for the appellant delayed in entering appearance and filing a statement of defence, which mistake was not deliberate on the part of the appellant but on account of the said advocate and that the learned magistrate erred in visiting the mistake of counsel upon the client without considering that there was no reasonable cause of action in law to hold the appellant liable and that as per the asset financing agreement captured at page 65 of the record of appeal, the appellant is a mere financier of the purchase of the motorcycle registration number KMFR 027V. Counsel made reference to the case of Ouma Vs Ondieki [2024] KEHC 7093 (KLR).

8. The Learned Counsel furthermore submitted that judicial discretion includes evaluating the rights of all the parties and ensuring that no one suffers injustice due to mistake or error which can be compensated by damages and the trial magistrate erred in visiting the mistake of counsel of failing to attach a draft defense in the application upon the appellant and referred to the cases of Edney Adak Ismail Vs Equity Bank Limited HCCC No. 27 of 2012; FM Vs EKW [2019] eKLR. Counsel went further and submitted that the draft statement of defense captured at pages 57-79 of the record of appeal raises triable issues to be canvassed at a full hearing and that the impugned ruling condemns the appellant herein unheard whose right is non-derogable under *the Constitution* of Kenya. Reference was made to the case of Kahoro Vs Gachoki & 2 Others [2023] KEHC 3010 (KLR). Counsel also submitted that the learned magistrate wrongly exercised his discretion in dismissing the application to set aside the interlocutory judgement and made reference to the case of Pithon Waweru Vs Thuka Mugiria (1983) eKLR.

9. In conclusion, the learned counsel prayed that this Honourable Court allows the appeal; issue an order setting aside the whole of the subordinate court's ruling made on 20th June 2023, issue an order for retrial of the suit at the subordinate court and award the appellant costs of the appeal.

Respondent's Written Submissions

10. The Respondent filed its written submissions dated 22nd July 2025 in which the learned counsel on record Mr. Omusundi submitted on one issue for determination being whether the trial court erred in law and fact by failing to set aside the default judgement.

11. The learned counsel submitted that the trial magistrate in a well-reasoned ruling exercised discretion judiciously and correctly having found that service had been effected and that the appellant had failed to annex a draft defense to demonstrate the merit of the intended defense. He also submitted that the Notice of Motion subject to the present appeal is dated 30th August 2022 and that in the said application, the debt allocation senior supervisor denied ever being served with any pleadings whatsoever; that contrary to this, the record is clear as evidenced by the typed proceedings in page 1-22 of the Appellant's bundle, that the Appellant fully participated in the said application. He went further to state that the record clearly shows evidence of proper service and thus the ruling was sound and just.

12. Counsel also submitted that the principle guiding the setting aside of default judgement require that the party must demonstrate a plausible explanation of non-appearance and also to annex a draft defense showing a triable issue or a plausible defense on merit. He further submitted that presently the appellant failed to annex a draft defense and as such, the trial court was left without any material to assess whether the appellant had a bonafide defense worth ventilating at trial and made reference to the case of Ouma Vs Ondieki (Civil Appeal No E076 of 2023) [2024] KEHC in which the court observed that it is trite law that the court must look at the draft defense to see whether it raises triable issues in deciding setting aside of a regular judgement.

13. In conclusion, counsel submitted that the learned trial magistrate exercised discretion and applied the correct legal principles; that the appellant was served but failed to take an action timeously and no draft defense was tendered to justify the setting aside of the judgement. Accordingly, the counsel prayed that the Appeal be dismissed with costs to the Respondent.

Analysis and Determination

14. The key responsibility of an appellate court, especially when dealing with a first appeal, is to undertake a comprehensive and independent re-assessment of the evidence presented before the trial court and to arrive at its own conclusions. While it is not bound by the factual findings of the trial magistrate and may reach different conclusions where the trial court misapprehended the evidence or failed to consider relevant circumstances and probabilities, the appellate court must nonetheless remain mindful that the trial court had the distinct advantage of directly observing the witnesses' demeanor and hearing their testimony firsthand. In the case of Mbogo and Another v Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

15. The said duty of the appellate Court was explained in the case of Selle & Another v. Associated Motor Board Company Ltd. [1968] EA 123, where the Court stated as follows:

> "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. I have read and considered the appeal, the submissions in support and rival submissions. There is only one issue for determination: -

Whether the trial magistrate erred by failing to set aside its default judgement entered on 20th June 2023 against the appellant.

17. The first yardstick on this issue before this court is to delve into relevant constitutional provisions. *The Constitution* enshrines the values and principles that bind courts when administering justice. Specifically, Article 10 provides as follows;

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them -

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include -

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

18. The implication of Article 10 is that it requires that the national values and principles (including rule of law, human dignity, equity, social justice and democratic governance) inform the interpretation and application of *the Constitution* and of any law.

19. Article 27 obliges that every person be equal before the law and have equal protection and benefit of the law. The implication of this is that courts must ensure procedural fairness that does not discriminate or disproportionately burden a party. Article 48 of *the Constitution* guarantees access to justice for all and provides that any fee required shall be reasonable and shall not impede access to justice.

20. Article 50 guarantees the right to a fair hearing in civil and criminal proceedings, a cornerstone of the Bill of Rights. Specifically, this Article provides as follows; (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The implication of this is that courts must therefore interpret and apply rules of procedure with due regard to the right to be heard.

21. The principles applicable to applications on setting aside exparte or interlocutory judgements are well outlined in Order 43, Rule 1(g) of the Civil Procedure Rules. To be precise, the specific provisions are:

1. Appeals from Orders [Order 43, rule 1]

(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act-

(g) Order 10, rule 11 (setting aside judgment in default of appearance);

22. The settled principles applicable to applications to set aside ex parte or interlocutory judgments are (a) the exercise is discretionary and must be exercised judicially, (b) the applicant must give a plausible explanation for the default, and (c) the applicant must ordinarily annex a draft defence (or other material) demonstrating that there is a triable issue or a bona fide defence worth ventilating. In the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75, 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 any rule of procedure."

23. The record before this Court shows:

(a) the Notice of Motion dated 30th August 2022 seeking to set aside the interlocutory judgment;

b) typed proceedings of the interlocutory hearing (pp.1–22) that indicate participation in the proceedings and

(c) what the Appellant says is a draft statement of defence contained at pages 57–79 of the record of appeal. The Appellant's written submissions emphasize that the Appellant was merely financier of the motorcycle KMFR 027V (and not the owner or driver) and that liability was wrongly apportioned to the Appellant. Counsel for the Appellant contends the delay was caused by the former advocate's mistake and that the draft defence raises triable issues. The Respondent's written submissions emphasize that service was effected, the Appellant participated in the application, and that no draft defence was properly before the trial court to demonstrate a triable issue.

24. I take cognizant note that procedural rules exist to facilitate the just, timely and efficient resolution of disputes but they must be applied so as not to defeat the constitutional right to a fair hearing and to access to justice. Article 50 and Article 48 of *the Constitution* as read together demand that courts should where appropriate resolve disputes on their merits rather than on hyper-technical technicalities. The respondent placed emphasis on service and on the trial magistrate's finding that no draft defence had been annexed to the application. That finding is critical because where a draft defence is absent or does not disclose triable issues, a court will ordinarily refuse relief. But the record before this Court includes the draft statement of defence said to be at pages 57–79. If that draft is before the Court and raises triable issues on its face, then the trial court ought to have considered its contents before dismissing the application. The law is clear that the draft defence is material to the exercise of the discretion.

25. The Courts have reiterated that the court should look at any draft defence attached to an application to see whether it raises triable issues meriting the setting aside of a judgment. The underlying approach is to balance the need to protect the finality and integrity of judgments against the constitutional

imperative that litigants should not be condemned unheard where there is a reasonable explanation and a bona fide defence. In the case of Ouma v Ondieki (Civil Appeal 076 of 2023) [2024] KEHC 7093 (KLR) (3 June 2024) (Judgment), the Court held that: -

> "On whether the draft defence raises triable issues, the same indicates that the applicant denies, occurrence of the accident, ownership of the vehicle, damages and in the alternative is claims that the accident was caused by the negligence of the unknown motor cycle on which the respondent was ridding (whose Particulars have been specified). It was also pleaded that the suit is ambiguous. It is trite law that the court must look at the draft defence to see whether it raises triable issues in deciding setting aside of a regular judgment. I have seen the draft defence which was annexed to the application for setting aside and I find that the same raises triable issues of liability and quantum. The appellant has a right to be heard and it is fair and just that he be given a chance to be heard in this matter."

26. The trial court is also entitled to consider the explanation for the default. The Appellant's explanation that delay was caused by a former advocate who failed properly to enter appearance or to file timeously the defence is of a kind often accepted by courts as plausible, particularly where;

a. The explanation is not shown to be a sham and

b. The applicant promptly seeks relief once the default is discovered. Courts have consistently held that the mistake of counsel will not automatically be visited upon the client where doing so would produce injustice and where a defence raising triable issues exists. In the case of Edney Adaka Ismail v Equity Bank Limited [2014] KEHC 5932 (KLR), the Court held as follows: -

> 11. The question then, that arises is whether the Plaintiff has offered sufficient reason to persuade this Court to exercise its discretion in his favour and reinstate the application. It is true that where the justice of the Case mandates, mistakes of Advocates even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. In the Case of Lucy Bosire -vs- Kehancha Div. Land dispute Tribunal & 2 Others (supra) Odunga J held as follows:
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> "It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74."

However, it is not in every Case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J expressed himself as follows: -

> "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 a 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. (emphasis added)

27. Looking at the record as a whole and applying the constitutional norms (Articles 10, 48, 50 and 27 of *the Constitution*) which require the courts to give effect to fairness, access to justice and equality, an important aspect of fairness in civil proceedings (as it is in criminal and administration and administrative proceeding) is their adherence to Article 50 of *the Constitution* whose maxim is audi alteram partem meaning Court orders, Rulings and Judgments should not be made without affording the other side a reasonable opportunity to state his, her or their case. It is particularly important for any Court or Tribunal constituted under Article 50(1) of *the Constitution* to capture all that the law provides, whether procedural or substantive, and to conform to the command of the supreme law, which came into effect in 2010 and from which all other laws derive their legitimacy, force, and validity. During the drafting of *the Constitution*, many articles were inserted and ultimately approved by the Kenyan people through a referendum. One such provision is Article 2(5) and (6) of *the Constitution*, which incorporates international law as part of the sources of law to be applied in the adjudication of cases. In this respect, take for example the African Commission on Human and Peoples' Rights has held that:

> " the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all".

28. Similarly, the European Court of Human Rights has explained the principle of equality of arms as "one of the features of the wider concept of a fair trial" as understood by Article 6(1) of the European Convention, which implies that:

> " Each party must by afforded a reasonable opportunity to present his case under conditions that do not place him a disadvantage vis-à-vis his opponent", in the context, "importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice".

29. It is my strong belief that justice must be done in matters that are brought to the courts and tribunals duly constituted by *the Constitution* or Statute law. There must be no fear or favor toward any litigating party seeking a remedy to vindicate his or her rights, whether initiated by way of a plaint, claim, originating summons, petition or any other format recognized by law. In this regard, the rules of court must always be factored in as instruments of justice ensuring impartiality and predictability in the conduct of both the parties and the court itself in resolving disputes that arise in controversy. It is through justice that litigants pursue litigation with the aim of setting themselves in order and attaining a dignified life once their human rights are vindicated before a court of law. That is why justice is regarded as a moral value by members of our society and by the human community as a whole, for where injustice prevails, there can be no peace only acrimony, cries, emotional distress, violence, and instability as people experience and complain of injustice. There is no shortcut to justice. The rules must be purposively interpreted so that the concept of justice may thrive.

30. As I interact with the law under the powers conferred upon me by Article 50(1) of *the Constitution* and other enabling statutes, I must acknowledge that the canon of law may not always align with

what is morally right. However, the drafters of the law being the Legislature ordinarily believe in the justness of the laws it enacts. Consequently, when courts and tribunals interpret and apply those laws fairly, correctly and justly, the climate of justice prevails. I believe this is the cry of the Appellant in the present application; that issuing a final award of damages in favor of the Respondent without his input amounts to a form of injustice. Hence the maxim that for justice to be done in any case, every party to a dispute must be afforded a fair hearing, as guaranteed by Article 50 of *the Constitution*, which imports the doctrine of pari materia. It is therefore trite that every party to a dispute should have the right to participate fully at every stage of the trial, and before any decision is rendered by a judicial officer, in accordance with Article 10 of *the Constitution*.

31. I find that the trial Magistrate placed undue emphasis on procedural technicalities. In so doing the learned Magistrate misdirected himself in law in the exercise of his discretion. The discretion to set aside an interlocutory judgment is not a code to be applied in a mechanical fashion. It must be exercised to prevent injustice where there is a plausible explanation for default and a bona fide defence raising triable issues.

32. Judicial discretion is akin to a delicate balancing act, a solemn trust reposed in the courts to ensure justice is not only done but manifestly seen to be done. This discretion is not absolute, nor is it an open cheque to be wielded arbitrarily. The Court of Appeal in Mbogo v Shah [1968] EA 93 cautioned against judicial overreach, stating that appellate intervention is warranted where a trial court has misdirected itself or considered extraneous factors. In this case, the Trial Court disregarded established legal precedent and misapplied its discretion, an error this Court cannot overlook.

33. Further, in Hajar Services Limited v Peter Nyangi Mwita [2020] eKLR, the Court reiterated that discretion must be exercised judicially, not whimsically. It was held that: -

> 'This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.'

34. Procedural rules are the machinery by which courts achieve justice; they must never be used as instruments to deprive parties of constitutional rights. In the circumstances of this case the Appellant has shown a plausible explanation for the failure to appear or to file in time and the draft defence raises triable issues which merit a full, inter partes hearing. The subordinate court therefore misdirected itself in refusing to set aside the interlocutory judgment. With this I am guided by the case of Raila Odinga Vs IEBC & 4 Others Petition No 5 of 2013 where the Supreme Court pronounced itself as follows: -

> " The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of

the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best outcome."

35. From the perusal of the records and the entire proceedings some of the issues at stake which impacts the fidelity of the trial had everything to do with legal Counsel for the Appellant, entering appearance and thereafter failed to file defence and other necessary pleadings in answer to the claim or plaint. Generally speaking, the Applicant should not be made to suffer for the omission and blunders of his legal Counsel. The principle in this country is that sins of lawyers, advocates, solicitors should not be visited on his/her client unless there are compelling and substantial circumstances that there was negligence on the part of the Counsel which is all a matter of litigation as between client and his legal Counsel. The rule is that the error or acts of omission of legal Counsel retained by a litigating party should not be visited on his client. The litigant is guided by the Court's desire to administer substantive justice. Legal counsel, retained to appear before any court, are equally bound under Article 50(2)(g) and (h) of *the Constitution* to exercise diligence and to treat the Court with respect, honesty, and mutual courtesy. Where an advocate, lawyer, or solicitor duly instructed by a client and having entered appearance in the proceedings forms the view that he or she can no longer discharge professional duties in accordance with the oath of office, such counsel may properly seek leave of the Court to cease acting in the matter. That, however, does not appear to be the case in the present application filed by the Applicant. There would have been no prejudice to the Court in notifying the Applicant that his counsel had been indolent in filing the necessary pleadings in response to the Respondent's plaint.

36. For these reasons, I am satisfied that the Appellant has discharged the threshold required to justify the setting aside of the ruling by the trial court and to obtain an opportunity to be heard on the merits. Accordingly, this appeal is allowed to the following extent: that;

    a. The ruling of the subordinate court dated 20th June 2023 dismissing the application dated 30th August 2022 be and is hereby reviewed and set aside being in violation of Article 10, 47, 48 & 50 of *the Constitution*.

    b. The final decree of the impugned judgement dated 24th May 2022 be and is hereby reviewed and set aside to pave way for reopening of the trial

    c. The draft defense be deemed as duly served and the same be served upon the Respondents.

    d. The Respondents to file a reply to the defence within 14 days from the date of this judgement.

    e. The Trial Magistrate to reopen the Plaintiff's case and the Respondents' witnesses be recalled for cross examination by the Appellant/Defendant and the subordinate court shall recall any witnesses whose evidence was taken in the interlocutory proceedings and permit the Appellant to cross-examine them on issues properly before the trial court.

    f. The Respondents shall serve with immediate effect all witness statements, documentary evidence and such other probative material presented to Court during the formal proof.

    g. The costs shall abide the outcome of the trial within a trial on the cause of action.

    h. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET VIA EMAIL AND CTS THIS 15TH DAY OF SEPTEMBER 2025

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R. NYAKUNDI

JUDGE