



REPUBLIC OF KENYA



KENYA LAW
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**Onzere v Njeri (Civil Appeal 303 of 2023)
[2025] KEHC 12526 (KLR) (9 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 303 OF 2023
RC RUTTO, J
SEPTEMBER 9, 2025
(FORMERLY KIAMBU HCCA NO. 170 OF 2023)**

BETWEEN

AGGREY SIVA ONZERE APPELLANT

AND

BEATRICE WAITHIRA NJERI RESPONDENT

*(Being an Appeal from the Judgment of the Small Claims Court of
Kenya at Thika delivered by the Hon. Resident Magistrate O. J Muthoni,
on the 20th April, 2023 in Thika SCC COMM NO E019 OF 2023)*

JUDGMENT

1. This appeal arises from a ruling delivered in Thika SCC Comm No. E019 of 2023. In the said ruling, the trial court allowed the Respondent's application dated 22nd February 2023, thereby setting aside the interlocutory judgment entered on 23rd January 2023.
2. The gist of the appeal is that appellant through a statement of claim dated 3rd January 2023 filed suit against the respondent in Thika SCCC No. E019 of 2013, alleging breach of contract. According to the appellant, the parties had entered into a verbal agreement to jointly raise Kshs.214,000.00 for the purchase of land in Thika. The appellant contributed Kshs.107,000.00 which he handed over to the respondent. However, after receiving the money, the respondent allegedly stopped responding to the appellant's calls. As a result, he sought to recover Kshs.107,000.00 from the respondent.
3. On 23rd January 2023, the appellant informed that court that he had served the respondent with the pleadings and adduced a return of service as proof. Based on this, the court entered, judgment in default against the respondent in the sum of Kshs.107,000.00 together with costs and interests. A decree was extracted.



4. However, in an expected turn of events, on 22nd February 2023, the respondent filed a Notice of Motion dated 22nd February 2023 seeking to set aside the default judgment. It sought the following reliefs:
 1.Spent;
 2.Spent;
 3. That the Honourable Court be pleased to set aside the judgment entered on 23rd January 2023 and reopen the claim for a fresh hearing and determination on its merits.
 4. That the respondent to bear the costs of this application.
5. In response to the respondent’s application the appellant filed his notice of preliminary objection dated 28th February 2023 and a replying affidavit sworn on 28th February 2023. In her ruling delivered on 20th April 2023, the trial magistrate pronounced herself in the following terms and which entire ruling is produced as follows:

“This application was brought by a Notice of Motion dated 22nd February 2023 which sought to set aside the ex parte judgment which was entered on the 23rd of January 2023.

Grounds that the claimant did not duly serve statement of claim and notice of hearing to the respondent/applicant and therefore it should be set aside for want of service.

Both parties filed submissions.

Upon perusal of the file I find that the respondent was not properly served and hereby set aside the judgment.”
6. Aggrieved by the trial court’s decision the appellant filed a memorandum of appeal dated 31st May 2023 raising 14 grounds challenging the ruling.
7. Firstly, the Magistrate failed to address his Preliminary Objection, despite clear non-compliance with Order 9 of the Civil Procedure Rules. Additionally, the application lacked a draft defence, rendering it procedurally deficient and devoid of merit. The Magistrate is faulted for disregarding the affidavit of service, which clearly indicated that the Respondent had been served, and for relying on unsubstantiated denials by the Respondent without supporting factual evidence. The Appellant further argues that the Magistrate misapplied the law governing the setting aside of judgments and improperly invoked Article 159(2) of *the Constitution* to excuse procedural non-compliance. The ruling is described as biased, oppressive, and contrary to the weight of evidence, ultimately depriving the Appellant of the fruits of a valid judgment.
8. The Appellant prayed that the appeal be allowed with costs and that the ruling delivered on 20th April 2023 be set aside. Furthermore, the Appellant sought that the interlocutory judgment and decree entered on 23rd January 2023 be reinstated and upheld, also with costs.
9. The appeal was argued through written submissions.
10. The Appellant’s written submissions, dated 2nd July 2024, distilled the fourteen grounds of appeal into two key issues for determination: (i) whether the Notice of Motion application dated 22nd February 2023 was defective, and (ii) whether service of the claim dated 23rd January 2023 was properly effected.
11. On the first issue, the Appellant argued that the pleadings filed by the Respondent’s advocate were defective due to non-compliance with the mandatory provisions of Order 9 Rules 5 and 6 of the Civil



Procedure Rules. It was submitted that the application dated 22nd February 2023 was fundamentally flawed, as it was filed after judgment had already been entered on 23rd January 2023. The Appellant further contended that the Respondent failed to file a draft defence, which is essential for the court to assess whether any triable issues exist. In support of this position, the Appellant relied on the authority of *Patel v East Africa Cargo Handling Services Limited* [1974] eKLR.

12. On the second issue, the Appellant maintained that service of the claim was duly effected upon the Respondent. He alleged that the Respondent resorted to intimidation tactics, including threats involving the police, which he argued demonstrated her awareness of the proceedings. Citing *Mbogo v Shah* [1968] eKLR, the Appellant submitted that the Respondent willfully failed to defend the suit. He further asserted that the Respondent's lack of seriousness was evident in her failure to file a draft defence alongside the application dated 22nd February 2023.
13. In conclusion, the Appellant submitted that the Respondent's application was an afterthought, intended solely to frustrate the execution process and subject the Appellant to unnecessary expense.
14. The Respondent relied on written submissions dated 11th July 2024, in which four issues were identified for determination: (i) whether the advocate was improperly on record; (ii) whether the court had the power to set aside the judgment; (iii) what objectives guide the court in dispensing justice; and (iv) whether the court can deny a litigant access to justice under the circumstances.
15. On the first issue, the Respondent submitted that the advocate was properly on record and had not contravened any provisions of Order 9 of the Civil Procedure Rules. It was argued that since the advocate had not participated in the initial proceedings, the requirements of Order 9 were inapplicable in the present context. The Respondent cited *Eseuri Ole Katulele v Shankwa Nkai Lemomo* [2018] eKLR and *Kazungu Ngari Yaa v Mistry V Naran Mulji & Co* [2014] eKLR, arguing that an application for leave to come on record was not necessary, as the advocate had not previously participated in the proceedings.
16. On the second issue, the Respondent submitted that Section 41(1)(c) and Section 43 of the *Small Claims Court Act* empower the court to set aside a default judgment where it appears to have been obtained fraudulently. Additionally, Regulation 11(4) of the Small Claims Court Rules was cited as granting the court discretion to set aside default judgments in the interest of justice.
17. Regarding the third issue, the Respondent invited the court to be guided by Article 159 of *the Constitution*, as well as Sections 1A, 1B, and 3 of the *Civil Procedure Act*, which emphasize the need to administer justice without undue regard to procedural technicalities. It was submitted that the court should prioritize substantive justice and that, in applications of this nature, it is not required to assess the merits of a draft defence. In support of this position, the Respondent relied on the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Limited versus Augustine Kubede* (1982-1988) KAR.
18. As to whether he was properly on record, reliance was placed on the case of *Eseuri Ole Katulele v Shankwa Nkai Lemomo* (2018) eKLR and *Kazungu Ngari Yaa v Mistry V Naran Mulji & Co* (2014)eKLR to urge that they were not required to file an application to come on record since they previously did not participate in the proceedings.
19. In conclusion, the Respondent urged the court to find that the appeal lacks merit and to dismiss it with costs.



Analysis and Determination

20. This Court has carefully considered the grounds of appeal, the record of appeal, and the parties submissions. As an appellate court exercising jurisdiction under the *Small Claims Court Act*, its mandate is governed by Section 38 of the *Small Claims Court Act*. This provision expressly limits the jurisdiction of the High Court in appeals arising from the Small Claims Court to matters of law only.
21. The scope of what constitutes a “point of law” has been well defined see the case of Peter Gichuki King’ara v IEBC & 2 Others, Nyeri Civil Appeal No. 31 of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA).
22. Upon reviewing the Memorandum of Appeal and the grounds therein, it is evident that the Appellant raises both factual and legal issues. The grounds of appeal allege errors in law and fact, and the submissions are similarly framed to support both dimensions. However, in line with the authority cited above and the statutory limitation under Section 38 of the *Small Claims Court Act*, this Court will refrain from addressing factual disputes and will confine its analysis strictly to matters of law.
23. To begin with, this Court notes that the trial court, in its ruling, failed to analyze or address the parties’ submissions concerning both the Application dated 22nd February 2023 and the Preliminary Objection dated 28th February 2023. Notably, the ruling makes no reference to the Preliminary Objection, suggesting that the trial court did not consider the substantive issues raised therein.
24. It is important to underscore that the impugned ruling is exceedingly brief, making it difficult to discern the rationale behind the trial court’s decision or the legal basis upon which it exercised its discretion in favor of the Respondent. A foundational principle of common law is that judicial officers must provide clear and reasoned decisions. This principle was eloquently articulated by Thomas J in *Bell-Booth v Bell-Booth* [1998] 2 NZLR 2, where he stated:

“Reasons for judgment are a fundamental attribute of the common law. The affinity of law and reason has been widely affirmed and Judge’s reasoning—his or her reasons for the decision—is a demonstration of that close assimilation. Arbitrariness or the appearance of arbitrariness is refuted and genuine cause for lasting grievances is averted. Litigants are assured that their case has been understood and carefully considered. If dissatisfied with the outcome, they are able to assess the wisdom and worth of exercising their rights of appeal. At the same time public confidence in the legal system and the legitimacy and dynamic of the common law is enhanced. The legal system can be seen by (sic) working and, although possibly at times imperfectly, striving to achieve justice according to law.”
25. In view of the trial court’s omission to engage with the Preliminary Objection, and bearing in mind this Court’s appellate jurisdiction is confined to matters of law, it is necessary to consider the legal issue raised therein. Specifically, the question is whether the Application dated 22nd February 2023 contravened the provisions of Order 9 Rules 5 and 9 of the Civil Procedure Rules.
26. It is undisputed that the Appellant filed a Notice of Preliminary Objection alongside a Replying Affidavit in response to the said Application. These documents were properly placed before the trial court and formed part of the record.
27. The Appellant argues that the Respondent’s advocates—Messrs. Jaden Jonathan & Mwambi Advocates—did not file or serve a Notice of Appointment as required under Order 9 Rule 6 of the Civil Procedure Rules. Moreover, the Appellant contends that no application seeking leave to come on record was filed in accordance with Order 9 Rule 9, given that judgment had already been entered. As a



result, the Appellant asserts that the documents filed by the Respondent's advocates were procedurally defective and ought to be struck out.

28. The Respondent, in response, contends that her advocates were not previously on record in the matter. As such, she argues that the provisions of Order 9 of the Civil Procedure Rules do not apply to her situation.
29. Upon a careful reading of Order 9 Rule 5 of the Civil Procedure Rules and considering the circumstances of this case, this Court finds that there was no requirement for the Respondent's advocates to file a formal application to seek leave to come on record after judgment. The Respondent had neither previously acted in person nor been represented by another advocate. Therefore, Rule 5 which governs changes in legal representation does not apply to the filing of the Application dated 22nd February 2023.
30. The requirement to file a Notice of Appointment arises under Order 9 Rule 7 of the Civil Procedure Rules, which applies where a party who has previously acted in person subsequently appoints an advocate. The Rule provides:

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”
31. In the present case, the Respondent had neither previously acted in person nor engaged an advocate. Accordingly, there was no requirement for her advocate to file a Notice of Change of Advocate or seek leave of the court to come on record. It would be illogical for the Respondent's advocate to give notice of intention to come on record or seek leave where no prior representation existed.
32. With respect to Order 9 Rule 9, this provision applies only where judgment has already been entered and a party who was previously represented seeks to change counsel or act in person. In such instances, leave of the court must be obtained either by way of a formal application served on all parties or through a consent signed by both the outgoing and incoming counsel or the party intending to act in person. In the present case, the Respondent had no prior representation, either personally or through counsel and therefore, Rule 9 is inapplicable.
33. However, Order 9 Rule 1 of the Civil Procedure Rules provides that any application, appearance, or act in court must be made either by the party in person, a recognized agent, or an advocate duly appointed to act on the party's behalf. The Rule states:

“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.”
34. In this case, there is no Notice of Appointment filed by the firm of Jaden Jonathan & Mwambi Advocates. Their failure to file such a notice is a direct contravention of Order 9 Rule 1, as there is no evidence that they were duly appointed by the Respondent to act on her behalf. The legal consequences of failing to file a Notice of Appointment were addressed in *Joshua Nyamache T. Omasire v Charles Kinanga Maena* [2008] eKLR, where an application was struck out with costs for being filed by a stranger who had no capacity to do so.



35. The only way an advocate can demonstrate authority to act on behalf of a party is by filing a Notice of Appointment. Therefore, the failure by Jaden Jonathan & Mwambi Advocates to file and serve such a notice meant they had no legal standing to file the Notice of Motion dated 22nd February 2023. They remained a stranger to the proceedings.
36. In light of the foregoing, this Court is satisfied that the learned trial Magistrate erred in law by failing to provide reasons for the impugned ruling and by disregarding the Appellant's Preliminary Objection dated 28th February 2023. For the reasons set out in this judgment, the appeal is allowed the judgment of the trial court dated 23rd January 2023 is reinstated. The appellant shall further have costs of this appeal.
37. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

