**Wamugunda v Ogombe (Civil Appeal E1325 of 2023)**
**[2025] KEHC 13130 (KLR) (Civ) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13130 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL APPEAL E1325 OF 2023**

**DKN MAGARE, J**

**SEPTEMBER 18, 2025**

**BETWEEN**

**DENNIS WAMUGUNDA ..... APPELLANT**

**AND**

**BEN OKEYE OGOMBE ..... RESPONDENT**

## JUDGMENT

1. This an appeal from the Ruling and Orders of Hon. P.W. Wasike (PM) delivered on 26.10.2023 in Nairobi MCCC No. 6829 of 2020. The court dismissed a Notice of Motion dated the 19.06.2023. The insurer instructed the firm of M/s Mugwe & Company Advocates to come on record instead of the company itself. The said firm filed pleadings.

2. They stated that they were not given a chance. They sought that they be given a chance to be heard. It was the appellant's considered position that they never gave the firm of Mugwe & Company Advocates a chance to come on record.

3. The Appellant averred that he was served with summons and took the same to his insurers. The application was responded to. The responded stated the obvious, that the defendant entered appearance and filed defence. They participated in the hearing and if there were no instructions, the said firm should bear punitive costs of Ksh 200,000/= for wasting the court's time.

4. The court had no difficulty finding the notice of motion unmeritorious and dismissing the same in limine with cots.

5. The appellant thereafter filed this appeal, and set out humongous grounds of appeal. Subsequently, submissions were filed by both parties. I shall subsume them in the analysis, as far as possible without rendering grammar tautological.

**Submissions**

6. The appellant filed submissions dated 19.12.2024. They relied on the case of Kenya Bus Service Ltd & another V Minister for Transport & 2 Others [2012] KEHC 2402 (KLR). However, the quotation was not from the said case. It was their case that Article 50 protects their right to be heard.

7. Reliance was placed on the rules of natural justice, and that the right to be heard cannot be taken away. Reliance was placed on the case of Republic vs Vice Chancellor Jomo Kenyatta University of Agriculture and Technology [2008] KEHC 2252 (KLR), where J.G. Nyamu, as he then was, held that:

   The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, the Court will readily grant an order of certiorari to quash any such decision arrived at in disregard of such principles. In the case of General Medical Council V Spackman [1943] 2 ALLER 337, Lord Wright at Page 345 stated:-

   > "If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared no decision."

8. The appellant further relied on the locus classicus case of James Kanyiita Nderitu & Another V Marios Philotas Ghikas & another [2016] Keca 470 (KLR), where the court of appeal [Makhandia, Ouko & M'inoti, JJ.A] posited as follows regarding the right to be heard:

   > The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:
   >
   > "[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."
   >
   > The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010, the High Court expressed itself thus:
   >
   > "If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

9. Sad as it sounds, all these authorities are irrelevant to the one issue at hand, that is, whether M/s Mugwe & Company Advocates had instructions to defend the Appellant.

10. In his submissions, the Appellant pointed out poignant issues that should have been noted to avoid such an embarrassing appeal.

11. The Respondents filed submissions dated 5.03.2025, where they relied on the case of Gathua Elizabeth v Cyrus Ombuna Machini & another [2021] KEHC 6772 (KLR), where S. Chitembwe J, held as follows:

> The relationship between an insurance company and its insured is well captured Under Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405, which provides that an insurance company which has issued a motor vehicle policy against 3rd party risks is under a mandatory legal duty to satisfy any judgment entered in favour of a 3rd party against the owner of the motor vehicle in question who is its insured. While Section 10 (2) of the same Act provides that the insurer will only be liable to satisfy the judgment entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings...
>
> It is therefore evident that the 1st Respondent was well aware of the interests of Britam Insurance from the onset of the case and the assertion that the insurer is a stranger to the proceedings is misconceived...
>
> ... The law requires that a statutory notice be served upon the insurance company in a claim for damages. Upon service of such a notice, the insurer's interest on the claim crystalises. If the policy is in force, the insurer will ultimately be called upon to satisfy any judgment granted against its insured. It would be a fallacy to expect the insurer to remain indolent and wait to be given a copy of a judgment by its insured without taking an active role in the dispute at the initial stage. .... The claimant cannot ask the insurer to keep off the case and simply wait to satisfy the decree or wait to be sued by way of a declaratory suit.
>
> It is common practice that upon being served with summons, the insured would take such summons to his/her insurer who would appoint an advocate to defend the claim. The insured is expected to explain to the insurer how the accident occurred. All the relevant information in relation to the accident would be in the knowledge of the insurer. The insured normally relies on the expertise of his insured to defend the claim and to ultimately settle any decreed amount. It is therefore my considered view that given the normal operation of insurance companies, any officer who is versed with an accident claim can swear an affidavit in relation to such a claim. Such an officer does not require the authority of the insured. (separate combined for neatness)

12. Reference was also made to the decision of Kassim Mbwana vs Wilson Kamande Magua [2005] eKLR - Civil Appeal 15 of 2003, where J.W. Mwera J held as follows:

> The issue of the insurance company and not the respondent having given instructions to M/S J. W. Kagwe Advocate was not raised or canvassed during the hearing of the subject notice of motion. That goes without argument that it was not the basis for the relief to set aside the consent judgment. Both sides were satisfied that the insurer had instructed M/S J. W. Kagwe & Co. Advocates to defend their insured (the respondent) and that firm had done just that. And where a lawyer appears to do anything for a party in any matter, it shall be taken that he has authority to do so. It is not for the court to go round that and ask of the nature, extent and validity of the instructions because as the learned trial magistrate quoted from David Ongiro Sare –vs- The Municipal Council Of Mombasa MBA HCCC 433/90; "Counsel would ordinarily have ostensible authority to compromise a suit as far as the opponent is concerned." That is the correct position.

13. The rest of the respondent's submissions were not relevant to the issues raised by the appellant.

**Analysis**

14. The memorandum of appeal is humongous and runs contrary to Order 42 Rule 1 of the Civil Procedure Rules, which provides are doth: -

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

    2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

15. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

16. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. 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."

18. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held by as follows;-

> " .. 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

19. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. This matter proceeded by way of affidavit evidence. This court thus has the same advantage as the lower court regarding affidavits. While addressing a scenario where the court below did not have advantage, Kiage JA stated as follows in the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR:

> " I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary.

21. The saddest part of this ruling is that the parties have, for the last three years, labored under the impression that there was an appeal pending. One of the parties, however, was fully aware that they were engaged in chicanery, duplicity, subterfuge, and skullduggery, if I may be forgiven for the tautology. The Appellant has led this Court through circumlocutory loops intended solely to obfuscate matters, yet there is, in truth, no issue in dispute. Indeed, no single arguable point has been raised in the appeal, let alone in the Notice of Motion.

22. The application actually raises an issue of training of lawyers in the field they practice in. The applicants rightly admit that the instructions were issued to the insurers Xplico who then instructed Ms. Muge & Company Advocates. What then was the issue for determination by the court? It is common knowledge that insurers take up defence of their insured. For that purpose, they are the agents of the appellant. How then did the appellants find the audacity to file the application making such admissions?

23. In this case the application was made out of sheer ignorance or probably filed by a non-advocate. The application just fell too far below the nadir and juts out like a sore thumb. The same must be save from its own ignominy.

24. It is admitted by the Appellant that they were duly served with summons to enter appearance. They did not themselves file a defence but instead referred the matter to their insurers. It is then the duty of the insurer, as a special agent and the party ultimately liable to satisfy any decree, to instruct advocates. The said advocates were duly instructed and entered appearance on record. If thereafter any issue arose in their relationship, the proper course was not to seek to expunge the documents filed, but rather to take over the matter and proceed with the defence.

25. Once an insurer assumes conduct of proceedings, it acts as the insured's agent, and any lapse or default in that arrangement does not invalidate the pleadings duly filed.

26. The firm of M/s Mugwe & Company Advocates were allowed to cease acting on 26.1.2023. The matter appears not to have been concluded. There was nothing wrong, if the appellant had decided to amend the defence to suit its case. It appears, and I am afraid that I am right, that the application was meant to buy time, nothing else.

27. The documents filed are properly on record, and the evidence from both parties confirms that the defence was duly filed. Accordingly, there is no live issue remaining for determination in that defence. The Appellant cannot claim to have been denied the right to be heard, for the record is clear that he was heard and is, in fact, continuing to be heard.

28. The allegation of denial of a hearing is therefore without merit and amounts to nothing more than an abuse of the court process. As the Court of Appeal emphasized in Onyango Oloo v Attorney General [1986–1989] EA 456, the right to be heard is satisfied when a party is afforded a fair opportunity to present their case. That opportunity was not only available to the Appellant herein but was exercised.

29. In the circumstances, the Appellant's complaint regarding the defence is wholly untenable and without merit. On a more fundamental note, the appeal was filed out of time. There appears to be no order granting leave to file out of time. The appeal ought to have been summarily rejected. Nevertheless, it lacks merit and is accordingly dismissed.

30. Considering the totality of the evidence and submissions by the parties, as juxtaposed with legal principles governing this matter, I am satisfied that the learned trial magistrate was justified in arriving at the decision she made. The findings and holdings of the learned trial magistrate were well founded and I find no basis to interfere with them.

31. The next question is as regards costs. Section 27 of the *Civil Procedure Act* provides as follows: -

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction

to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

32. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

33. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows:-

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
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> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

34. The best available order is to dismiss the appeal with costs. A sum of Ksh. 80,000/= will suffice.

**Determination**

35. The upshot of the foregoing is that I make the following orders:-

a. The appeal is dismissed for lack of merit with costs of Ksh. 80,000/= to the Respondent.

b. 30 days stay of execution on costs.

c. The lower court file be remitted for directions on hearing. Directions on 14.10.2025 before the trial court.

d. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

Represented by: -

Chesikaw & Kiprop Advocates for the Appellant

Kinaro & Associates Advocates for the Respondent

Court Assistant – Michael