



**Akumu v Ouma (Civil Appeal 22 of 2020) [2023] KEHC 18794 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18794 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL 22 OF 2020**

**KW KIARIE, J**

**JUNE 13, 2023**

**BETWEEN**

**SAMWEL ODHIAMBO AKUMU ..... APPELLANT**

**AND**

**CAREN ACHIENG OUMA ..... RESPONDENT**

*(Being an Appeal from the ruling and order in Oyugis Principal Magistrate's  
PMCC Case No. 41 of 2018 by Hon. Celesa Okore – Senior Resident Magistrate)*

**JUDGMENT**

1. The appellants herein, were aggrieved by the ruling of the trial court dated June 25, 2020. The appellants were, by an application dated January 25, 2020, seeking for setting aside default judgment which was entered on September 26, 2019. The court allowed the application but made an order for the deposit of the entire decretal sum awarded in the default judgment within 30 days failure of which the respondent be at liberty to execute.
2. The appellants were aggrieved and filed this appeal. They raised grounds of appeal as follows:
  - a. Having found and held that the appellants herein had laid out and/or established sufficient basis to warrant the settling aside of the default judgment and having thereby proceeded to and indeed set aside the default judgment, the learned Senior Resident Magistrate erred in fact and law in ordering and/or directing the appellants herein to deposit in court the entire Decretal Sum amounting to 815,760/- only, albeit without any lawful foundation or at all.
  - b. In ordering and/or directing that the appellants do deposit (sic) the entire decretal sum in court, the learned Senior Resident Magistrate misconceived and/or misapprehended the nature and extent of the discretion of the honorable court, while dealing with an application to set aside a default judgment and thus proceeded to and fettered the otherwise unfettered discretion.



- c. The learned Senior Resident magistrate misconceived and/or misapprehended the nature and extent of the discretion of the honorable court, while dealing with an application to set aside a default judgment and thus proceeded to and fettered the otherwise unfettered discretion.
  - d. In commanding and/or directing deposit of (sic) the decretal sum, the learned Senior Resident Magistrate, restricted, limited and/or otherwise ousted the appellants' right of access to justice and thus violated and/or otherwise infringed upon the provisions of Article 48 of the [constitution, 2010](#).
  - e. The learned Senior Resident Magistrate erred in law in proceeding to order and/or direct the depositing of the astronomical figure/sum (read Decretal Sum) in court, without assigning any lawful and/or plausible reasons for such an order and thereby contravening the provisions of Article 47 & 50(1) of the [constitution, 2010](#).
  - f. The learned Senior Magistrate erred in law in ordering and/or directing that in default of deposit of (sic) the decretal sum, execution to issue against the appellants, yet there was no judgment and/or decree, upon which such execution could issue and/or be granted, whatsoever. Consequently, limb of the order of the honorable court has been issued and/or made in vacuum.
  - g. The learned trial magistrate having correctly quoted a number of binding decisions pertaining to setting aside of default/ex parte judgments and having correctly observed the hackneyed principle that jurisdiction to set aside is unfettered, same proceeded to disregard and/or ignored the set principle and thereby fettered his discretion and/or jurisdiction and thus occasioned a miscarriage of justice.
  - h. The ruling and/or decision of the learned Senior Resident magistrate, is substantially conflicted and/or otherwise contradictory, insofar as the said ruling granted prayers (4) and (5), simultaneously, yet the said prayers were made in the alternative. Consequently, the ruling and order of the learned Senior Resident Magistrate, is omnibus and contrary and constitutes a miscarriage of justice.
  - i. The learned Trial magistrate erred in fact and in law in failing to fully appreciate, analyze and/or evaluate the totality of the submissions filed and/or lodged by the parties and in particular, the written submissions filed on behalf of the appellants, which in any event, were ignored and/or disregarded, without lawful basis and/or reasonable cause.
  - j. The decision and/or ruling of the learned trial magistrate, amounts to and/or constitutes punishment to the appellants in lieu of rendering justice. Consequently, the appellants have been subjected to condemnation and/or deprivation of the right to natural justice.
3. The appeal was opposed by the respondent through the firm of Achila T.O & Company Advocates. It was argued that the court exercised its discretion judiciously.
  4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
  5. When the learned trial magistrate set aside the default judgment, there was no basis for the subsequent order of depositing the decretal sum. When a judgment is set aside, it ceases to have any legal force for all purposes. The learned trial magistrate therefore erred in making the impugned order.



6. I therefore set aside the order that required the deposit of the decretal sum.

7. The appeal is allowed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 13<sup>TH</sup> DAY OF JUNE, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

