



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimotho v Muriuki (Civil Appeal E1148 of 2024)  
[2025] KEHC 13315 (KLR) (Civ) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13315 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1148 OF 2024**

**TW OUYA, J**

**SEPTEMBER 24, 2025**

**BETWEEN**

**JAMES KINYUA KIMOTHO ..... APPELLANT**

**AND**

**ELIJAH MURAGE MURIUKI ..... RESPONDENT**

*(Being an appeal from the Ruling of the Magistrate’s Court at Nairobi, Milimani Small Claims Court (Hon. Justice Asiago) delivered on 24th of September, 2024 in Nairobi SCCC/E5603 OF 2023, and the Judgment delivered in Court on the 26th of April 2024 by Hon. D.S. Aswani)*

**JUDGMENT**

1. The Record of Appeal before the Court dated 4<sup>th</sup> October, 2024 was filed alongside an undated Memorandum of Appeal whereby, the Appeal is seeking Judgment for the following Orders as against the Respondent:
  - a. That the whole Judgment and hearing of the Magistrates Court in Nairobi SCCC No. E5603 OF 2023 be set aside.
  - b. That the suit in SCCC No. E5603 OF 2023 be dismissed with costs.
  - c. That the Respondent bear the Costs of this Appeal.”
2. The subject appeal challenges the default Judgment entered by the trial Court (Hon. Aswani-RM) on 26<sup>th</sup> April 2024 in Nairobi SCCC No. E5603 OF 2023 allowing the Respondent’s (then Claimant) claim against the appellant in the amount of Kshs. 1,000,000/- (one million) plus costs and interests at Court rates from the date of filing. The trial Court marked the Claimant’s claim against the 2<sup>nd</sup> Respondent in the suit as withdrawn.



3. The appeal before the Court also challenges the holding of the trial Court (Hon. Asiago-RM/ Adjudicator) delivered on 24<sup>th</sup> September 2024, dismissing the Appellant’s application dated 30<sup>th</sup> July 2024 wherein he sought to set aside the default Judgment dated 26<sup>th</sup> April 2024.
4. The appeal is premised on the following five (5) grounds:
  1. That the trial Court erred in law and fact in failing to appreciate that the Claimant unequivocally admitted that the contract was frustrated.
  2. That the trial Court erred in law and fact by failing to rely on legal principles to grant stay to and allow filing of defence, instead based their ruling on a ratified agreement between the parties, yet the Respondent never entered into any consent judgment.
  3. That the trial Court erred in law and fact by failing to consider the validity of the defence when practicing discretion on whether to grant a stay.
  4. That the trial Court erred in law and fact in deciding the case on extraneous matters but not on the evidence on record.
  5. That the trial Court erred in law and fact in failing to appreciate that the Claimant’s evidence was contrary to his pleadings and far below the required standard of proof.”
5. The current appeal was filed together with an even-dated Notice of Motion anchored under Order 42 Rule 6 of the Civil Procedure Rules as read together with Section 3A of the *Civil Procedure Act*, wherein the Appellant/Applicant sought the following reliefs from this Court:
  - (1) .....Spent.
  - (2) That this Honourable Court do set aside ex-parte hearing and the Judgment and Decree made by the trial Court on 26<sup>th</sup> Day of April 2024 pending the hearing and determination of the Applicant’s intended appeal.
  - (3) That this Application be served on the Respondent.  
That this application be heard inter-partes on such date and time as this Honourable Court may direct.
  - (4). That the costs of this Application be provided for.”
6. The subject application is premised on the grounds set out on its face and in the Supporting Affidavit sworn by the Appellant/Applicant on 4<sup>th</sup> October, 2024.
7. The current appeal was admitted pursuant to the provisions of Section 79B of the *Civil Procedure Act* with directions that both the appeal and the application be dispensed by way of written submissions.
8. The Appellant/Applicant filed written submissions dated 14<sup>th</sup> November 2024 through his Counsel and identified the following three (3) issues for resolution by the Court namely:
  - (i) Whether the frustration of the contract was admitted and considered
  - (ii) Whether there were inconsistencies in evidence.
  - (iii) Whether the Court relied on extraneous issues outside the scope of Evidence.”
9. It was submitted that in the suit before the trial Court, the Respondent (then Claimant) tacitly acknowledged frustration of the contract executed with the Appellant/Applicant. Furthermore, that frustration of a contract denotes an unforeseen and uncontrollable event which impacts the parties’



ability to perform the contract. Guidance was placed on Halsbury's Laws of England Vol.9(1), 4<sup>th</sup> Edition at paragraph 897 for a definition of frustration of contracts.

10. The Appellant/Applicant subscribed to the position that the contract executed with the Respondent was frustrated following the outbreak of the COVID-19 pandemic. Reliance was sought in the holding of the Court in *Taylor V Caldwell* (1863) 3B & S 826 and *Davis Contractors Ltd V Fareham UDC* to buttress the argument that frustration of contracts refers to unforeseen circumstances that alter the core obligations of the contracting parties so substantially that they cannot be fulfilled as contracted. Further reliance was placed in the reasoning of the Court in *Daniel Otieno Migore V South Nyanza Sugar Co. Ltd* [2018].
11. It was further submitted that, at the trial Court, the Respondent confirmed receipt of Ksh. 650,000/- from the Appellant/Applicant pursuant to the governing contract, therefore, the trial Court erred in awarding the Respondent Ksh. 1,000,000/- as claimed. Relying on the decision of the Court in *Kenya Ports Authority V Kushon (Kenya) limited* (2000) 2EA 212, it was argued that the trial Court based the impugned decision on extraneous factors, particularly a ratified agreement which the Respondent had not pleaded, resulting in a faulty decision. Further reliance was placed in the holding of the Court in *Electoral and Boundaries Commission & Another Vs Stephen Mutinda Mule & 3 Others* (2014) eKLR.
12. The Respondent filed written submissions dated 30<sup>th</sup> April 2025 through his Counsel on record and identified the following two issues for resolution by the Court:
  - I. Whether the Judgement in 5603 of 2023 should be set aside.
  - II. Who bears the costs.
13. It was submitted that the Judgment which the Applicant is seeking to set aside is a regular as distinguished from an irregular, judgment as the Applicant acknowledged the suit against himself but failed to defend the same, as admitted in paragraphs 6 and 7 of the Applicant's Replying Affidavit. Guidance was placed in the reasoning of the Court in the cases of: *Joshua Muthuli Muli* (Industrial Cause no. 1224 of 2012) [2014] eKLR; *James Kanyita Nderitu V Maries Philotas Ghika & Another* [2016] eKLR; and, *Yooshin Engineering Corporation V Aia Architects Limited* (Civil appeal E074 of 2022) [2023] KECA 872 (KLR) (7 JULY 2023) (Judgment)
14. The Respondent further submitted that by mounting the subject appeal, the Appellant/Applicant is engaged in forum-shopping as he admitted liability and sought the Respondent concurrence to a repayment which the Appellant/Applicant proposed via emails dated 26<sup>th</sup> June 2024 and 7<sup>th</sup> August 2024.
15. That the instant Appeal was mounted following inordinate delay as the impugned decision was delivered on 26<sup>th</sup> April 2024 while the appeal was lodged on 4<sup>th</sup> October 2024. Furthermore, while accepting that mistakes by an Advocate ought not to be visited upon the client, the Appellant/Applicant's duty to follow up on his case cannot be waived by reliance on his Advocate. The Respondent further pointed out that the Appellant/Applicant's application seeking to set aside the decision dated 26<sup>th</sup> April 2024 was dismissed the trial Court due to lack of merit.
16. On the issue of costs, guidance was placed on the provisions of Section 27 of the [\*Civil Procedure Act\*](#) to underpin the contention that the Respondent is entitled to the costs of the appeal.
17. Upon careful consideration of the grounds of Appeal raised by the Applicant, parties' rival submissions in respect of the appeal and the entirety of the record of the proceedings before the trial Court, this Court has isolated the following issues for determination:



- I. Whether the Appeal is merited
  - II. Who shall bear the costs of the appeal.
18. In the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR), the Court distinguished between regular and irregular Judgments as follows:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.”

19. In its decision dated 24<sup>th</sup> September 2024 dismissing the Appellant/Applicant’s application dated 30<sup>th</sup> July 2024 seeking to set aside the Judgment of the trial Court dated 26<sup>th</sup> April 2024, the trial Court opined as hereunder:

“It is not contested that the Applicant acknowledges existence of the debt and that on 26/6/2024 he made a proposal to clear the outstanding amount of Ksh.266,667/- per year. He cannot now appear in Court to have the Judgment he has verified to be set aside. I consequently find the application dated 30<sup>th</sup> July 2024 an abuse of the process of the Court which I dismiss and costs are awarded to the Claimant/Respondent.”

20. In his Witness Statement dated 30<sup>th</sup> August 2024 filed before the trial Court, the Appellant/Applicant admitted to executing a contract dated 4<sup>th</sup> April 2019 for the purchase and importation of a motor vehicle from Japan, on behalf of the Respondent, for the mutually-agreed, entire purchase price of 13,000 US Dollars (equivalent to Ksh.1.3 million as at 2019). The Appellant/Applicant further deposed that out of the 13,000 US Dollars received from the Respondent, he refunded Kshs.650,000/- because he could no longer fulfill his contractual obligations due to the COVID 19 pandemic which stalled export/import operations worldwide.
21. Further, the Appellant/Applicant proposed through an email bearing the subject line “proposal for repayment of Kes.1,000,000 to Elijah Murage” sent to the Respondent’s Advocates on 26<sup>th</sup> June 2024, on page 65 of the record, proposed to deliver Ksh. 200,000/- to the Respondent before the lapse of year 2024 and the remainder in 3 equal instalments of Kes. 266,667/- annually, in order to offset the entire amount owed to the Respondent being Kes. 1,000,000.

The Court holds and finds that, the Appellant/Applicant having acknowledged the existence of the debt owed to the Respondent and proposed repayment plan to settle the same, he is estopped from deflecting the aforesaid debt either to his Japanese vehicle suppliers, who he blames for non-delivery of the vehicle in question, or, the COVID 19 pandemic.



22. The Appellant/Applicant did not offer a satisfactory explanation in the eyes of the Court, for the failure to import a motor vehicle into Kenya for the Respondent as covenanted, several years following the containment of the COVID 19 pandemic in 2021.

This Court subscribes to the view that it is disingenuous for the Appellant/Applicant to refund only part of the funds deposited with him for the purchase of a motor vehicle by the Respondent while retaining part thereof and, to justify such conduct on the occurrence of the COVID 19 pandemic whose restrictions were removed at the end of 2021 in Kenya and many other countries.

23. In the upshot, the Court is not minded to disturb the trial Court's findings as set out in the Judgment dated 26<sup>th</sup> April 2024 and the Ruling issued on 24<sup>th</sup> September 2024 as both decisions evince a sound appreciation of the applicable law.

24. Accordingly, the Court holds and finds that the subject appeal and even-dated Notice of Motion are unmerited. Accordingly, both are dismissed with costs to the Respondent. Being the successful party at the trial Court, the Respondent is awarded the costs at the trial Court pursuant to the provisions of Section 27 of the *Civil Procedure Act*.

25. Thirty (30) days stay of execution to apply.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 24<sup>th</sup> SEPTEMBER, 2025.**

**HON. T. W. OUYA**

**JUDGE**

