



**Peter Kibe Ngugi (Next of Kin of CW) v New Nairobi Naivasha United Services Limited & another (Civil Appeal E034 of 2023) [2025] KEHC 13469 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E034 OF 2023  
HI ONG'UDI, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**PETER KIBE NGUGI (NEXT OF KIN OF CW) ..... APPELLANT**

**AND**

**NEW NAIROBI NAIVASHA UNITED SERVICES LIMITED .. 1<sup>ST</sup> RESPONDENT**

**NAHASHON MWANGI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. Yusuf Barasa Mukhula (Senior Resident Magistrate) in Naivasha CMCC No. 653 of 2019, delivered on 19th April 2023)*

**JUDGMENT**

1. This appeal arises from a Ruling and Orders entered in Naivasha CMCC No. 653 of 2019. In the said suit, the appellant (who was the plaintiff) sued the respondents (who were the defendants) for general and special damages and costs of the suit plus interest. This arose from injuries sustained by CW a minor who was involved in an accident which was allegedly caused due to the respondents' negligence.
2. On 14<sup>th</sup> April 2022 the trial court entered an *ex parte* judgment in favour of the appellant. Thereafter, in a ruling dated 19<sup>th</sup> April 2023 which was in respect of an application dated 13<sup>th</sup> March 2023 the said judgment was set aside.
3. Being aggrieved by the said Ruling the appellant lodged the appeal dated 27<sup>th</sup> October, 2022 on the following grounds:
  - i. That the learned trial magistrate erred in law and in fact by allowing the applications dated 21<sup>st</sup> March 2023 and 6<sup>th</sup> March 2023.
  - ii. That the learned trial magistrate erred in law and fact by finding that the judgment delivered on 14<sup>th</sup> April 2022 was *ex parte* judgment when indeed the same was not.



- iii. That the learned trial magistrate erred in law and fact by setting aside judgment delivered on 14<sup>th</sup> April 2022 on grounds that it was *ex parte* without any good reason.
  - iv. That the trial magistrate erred in law and fact in failing and/or ignoring to consider the appellant's reply and oral submissions-in response to the issues raised in the applications hence arriving at an erroneous decision in the circumstances.
  - v. That the trial magistrate erred in law and fact by failing to totally address his mind as regards the gravity of the issues raised by the appellant and the totality of the evidence in the court record hence arriving at an erroneous decision.
  - vi. That the trial magistrate erred in law and fact in failing to give directions with regards to the costs incurred by the auctioneers on account of the respondents.
  - vii. That the trial magistrate's decision albeit a discretionary one was plainly wrong in the circumstances.
4. The appellant urged the court to allow the appeal, set aside the ruling delivered on 19<sup>th</sup> April 2023 and substitute the same with a proper finding. They also prayed that the respondents be condemned to pay for costs of the appeal and that of the auctioneers.
  5. The Appeal was canvassed through written submissions.

#### **Appellant's submissions**

6. The appellants' submissions were filed by Gekong'a & Company advocates and are dated 13<sup>th</sup> December, 2024. Counsel gave a brief background of the case and identified two issues for determination.
7. The first issue is whether the summons to enter appearance were served upon the respondents. On this counsel submitted that the said summons together with the relevant documents were served upon the respondent. Further, that the return of service by the process server was filed in court as proof. Additionally, that the respondents instructed the firm of F.I Mburu to enter appearance on their behalf and protect their interests.
8. Reference on this was made to the decision in *Miruka v Abok & Another* [1990] KLR 541 where the court held as follows;
 

“Where service is disputed there is a qualified presumption in favour of the process server. The burden lies on the party questioning the service, to show that the return is incorrect..... An affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings.”

See also; *Karatina Garments Ltd v Nyanarua* [1976] KLR 94 and *Keroka Highway Service Station Ltd v Maurice Odongo Ogot* [2020] eKLR.
9. The second issue is whether the respondents have a triable defence. Counsel submitted that the intended defence did not raise any triable issues and that the respondents were the registered owners of the vehicle which caused the accident thereby causing severe injuries to the appellant. Reference on



this was made to the decision in Roy Mckenzie V Cartrack Kenya Limited & another [2014] eKLR, where the court held as follows

“In my view those issues do not show that the defendant’s defence raises any triable issues and because in considering an application such as the one before Court I am required to do justice to the parties, in my view the justice of this case would be met by the dismissal of the defendant’s application.”

See also; CFC Bank Limited v Charles K. Arap Tanui [2008] eKLR and Michael Juma Otieno v Martin Luther Omondi Ocholla [2015] eKLR.

10. On the third issue on whether the judgment entered herein is regular, counsel submitted in the affirmative and added that service of summons to enter appearance was properly effected upon the respondents herein and they were defended to finality. He placed reliance on several decisions including K-Rep v Segment case (supra) where the Judge quoted the case of Patel v East Africa Cargo Services Ltd [1974] EA 75 where it was held that before exercising such jurisdiction the court must ask and answer the question whether the impugned judgment was regular or irregular. He urged the court to allow the appeal.

### **1<sup>st</sup> respondent’s submissions**

11. These were filed by Njui Kariuki & Company advocates and are dated 14<sup>th</sup> January, 2025. Counsel gave a brief background of the case and identified five (5) issues for determination.
12. On the first issue on whether the 1<sup>st</sup> respondent was properly served, counsel cited Order 5 rule 3 of the Civil Procedure Rules, 2010 and several decisions including Rapando v Constantine Ouma & 6 Others [2004] eKLR. She submitted that no proper service was effected upon the 1<sup>st</sup> respondent and if the same would have been effected upon its officials or directors the matter would have been properly defended.
13. On the second issue as to whether the 1<sup>st</sup> respondent’s defence raises a triable issue, counsel submitted in the affirmative and urged the court to grant it an opportunity to produce evidence to prove that it was not the owner of the vehicle at the time of the accident. She placed reliance on the decision in Nimrod v Joseph Momanyi Civil Appeal No. 35 of 1998 where the court held as follows;

“On an application for setting aside judgement, a court should look at the nature of defence even if there is no sufficient cause for non-attendance and a litigant should not be deprived of an opportunity of pressing his defence”

See also; Tree Shade Motors Ltd v DT Dobie & Co. Ltd Civil Appeal No. 38 of 1998.
14. On the third issue on whether the 1<sup>st</sup> respondent were properly represented in court, counsel submitted that it was clear from the court record that the 1<sup>st</sup> respondent’s case was not at any time presented before court.
15. Lastly, on what was fair in the circumstances of this case, counsel submitted that in the event the 1<sup>st</sup> respondent is denied an opportunity to defend its case it would be condemned to pay damages for negligence yet it was not the owner or in control of the vehicle that caused the accident. She urged the court to uphold the finding of the trial magistrate and dismiss the appeal with costs.



## 2<sup>nd</sup> respondent's submissions

16. These were filed by the 2<sup>nd</sup> respondent on 29<sup>th</sup> April 2025 and are undated, he gave a brief background of the case and identified three (3) issues for determination.
17. The first issue is whether the appeal has met the threshold for setting aside the ruling. He submitted that the decision of the trial magistrate to set aside the Judgment in the present matter was based on the fact that the appellant did not satisfactorily dispel proper service of the summons. Further, that the appellant admitted that the counsel who represented the respondents before the trial court passed on during the trial process. He urged the court not to interfere with the discretion of the learned magistrate since the decision was based on substantive considerations and matters within the knowledge of the court during the trial process.
18. She placed reliance on the decision in *Nguruman Limited v Jane Bonde Nielsen and 2 others* [2014] eKLR where the court held as follows;

“It is appropriate to reiterate that before this Court can interfere with the exercise of a discretion of a judge, it must be shown that the judge either erred in principle in his approach or has left out of account factors he ought to have considered or has taken into account some factors that he should not have considered or that his decision was wholly wrong or that the decision was so aberrant that no reasonable judge, aware of his duty to act judicially could have reached it. These are the words of Sir Charles Newbold P. expressed in this often cited *Mbogo & Another v Shah* [1968] EA 98”
19. The second issue is whether the judgment was regular in the absence of service and proper representation. He submitted that it was on record and well within the knowledge of the trial Magistrate that he was not properly served or represented. He placed reliance on Order 5 rule 8 of Civil Procedure Rules and several decisions including *Sam Nyamweya and 3 Others v Kenya Premiere League Limited and 2 Others* [2015] eKLR where the court held as follows;

“This is the applicant’s case, and the burden of proof lay on him, first, to prove service by way of a watertight affidavit of service evidence which is lacking and, whose deficiency I find the allegation that the respondents should have sought to cross examine the process server an exercise in futility. See sections 107, 108 and 109 of the *Evidence Act* Cap 81 Laws of Kenya. Where service is denied, it was incumbent upon the plaintiff to procure an affidavit of the Mr. Kiama to corroborate the deposition of the process server. This was not done, and instead, the plaintiff shifts the burden of proof onto the Respondents to prove that service was not effected upon them by (calling for the cross examination of the process server).”
20. On who should be liable to pay costs of the appeal, he cited section 27 *Civil Procedure Act* and submitted that costs follow the event. In conclusion, he urged the court to dismiss the appeal with costs in his favour.

## Analysis and determination

21. I have carefully perused and considered the grounds of appeal, evidence on record, cited authorities and the law. I have identified one issue for determination which is whether the trial court erred in allowing the respondents’ application for setting aside the ex parte judgment dated 19<sup>th</sup> April 2023.
22. The appellant argued that the service of summons to enter appearance was properly effected upon the respondents herein and they were defended to finality. The 1<sup>st</sup> respondent on its part contends



that no proper service was effected upon it. It is the 2<sup>nd</sup> respondent's case that the decision by the trial Magistrate to set aside the Judgment in the present matter was based on the fact that the appellant did not satisfactorily dispel proper service of the summons.

23. The learned trial Magistrate in his ruling acknowledged that the matter had proceeded *ex parte* and that the proprietor of the Law firm which represented the respondents had passed on during the subsistence of the case. Thus, no proper handing over of the case to another advocate was done. He further noted that the defence by the respondents raised a triable deed and it would only be fair for them to be allowed to defend themselves.
24. The Court of Appeal in *Waweru v Maina* (Civil Appeal 59 of 2019) [2025] KECA 50 (KLR) (17 January 2025) (Judgment) cited the decision in *James Kanyita Nderitu v Maries Philotas Ghika & Another* [2016] eKLR, where the court held as follows;

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the 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 appearances 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....In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system....Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

25. The said court further stated as follows;

“When confronted with an application to set aside a default or *ex parte* judgment, therefore, the first task of a trial court is to determine if the default judgment is an irregular or regular one. If it is the former, the trial court must set aside the default judgment as a matter of right. If it is the latter, the trial court has unfettered discretion to determine if there is good cause and may set the default judgment aside if it so finds.”



26. I have perused the record of the trial court keenly. The record shows that judgment in the matter was entered on 14<sup>th</sup> April 2022. I note that the respondents entered appearance and filed their defence together with witness statements. The matter later on proceeded for hearing and both sides called witnesses. Thus, it is my considered view that the judgment by the trial court was proper in this case and the trial magistrate erred in setting it aside. In my view, the respondents being dissatisfied with the said judgment ought to have filed an appeal instead of filing an application for setting it aside when they clearly participated in the case till the tail end. The Judgment was not exparte as claimed.
27. For the above reasons, I find the Appeal to have merit and the same is allowed with costs to the appellant.
28. The Ruling delivered on 19<sup>th</sup> April, 2023 setting aside the Judgment delivered on 14<sup>th</sup> April, 2022 is set aside.
29. Orders accordingly.

**DELIVERED, VIRTUALLY DATED AND SIGNED THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

