



REPUBLIC OF KENYA



KENYA LAW
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**Gichuru v Kilinga (Civil Appeal 20 of 2023)
[2025] KEHC 14229 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 20 OF 2023
RPV WENDOH, J
OCTOBER 9, 2025**

BETWEEN

STEPHEN NJARAMBA GICHURU APPELLANT

AND

JOAB AMBAKA KILINGA RESPONDENT

JUDGMENT

1. This appeal was filed by Stephen Njaramba Gichuru challenging the Ruling of the trial court in Kitale CMCC.267/2014 dated 24/4/2023.
2. In the application dated 28/11/2022, the appellant sought the following orders;
 1. Spent
 2. that there be Stay of execution of the decree dated 16/10/2019 and stay of the proceedings in respect of the case pending the hearing and determination of the application;
 3. that the Judgment dated 12/10/2017 and decree dated 16/10/2019 passed against the applicant and all consequential orders be set aside pending the hearing and determination of the application;
 4. that the applicant be granted leave to file his defence out of time since he has been wrongly sued and therefore has an arguable defence.
3. The application was supported by the Affidavit sworn by the appellant dated 28/11/2022 and a Supplementary Affidavit dated 7/2/2023. The application was opposed by the Respondent who filed a replying affidavit dated 23/1/2023.
4. A brief background of this case is that the plaintiff/Respondent Joab Ambaka Kalinga was involved in a road traffic accident on 18/12/2013 while travelling as a passenger in motor vehicle KAW 537P



- Toyota Hiace. The Respondent sustained multiple grievous injuries. By a plaint dated 5/9/2014, and filed in court on 22/10/2014, the Respondent prayed for general and special damages for the injuries he sustained.
5. A defence dated 8/12/2014 was filed on 13/12/2014 and later, the matter proceeded to hearing. Judgment was delivered on 16/10/2017. The firm of Kimani Advocate filed the application dated 28/11/2022 seeking to set aside the said Judgment. The trial court heard the application and dismissed it for lack of merit. The appellant is aggrieved by the said ruling and it is the subject of this appeal.
 6. The grounds of the appeal are as follows: -
 1. That the trial court ignored important material facts to the effect that the appellant was not the owner of motor vehicle KAW 537P Toyota, at the time of the accident on 18/12/2013 in which the Respondent was injured;
 2. That the court erred in apportioning liability against the appellant inspite of the fact that the appellant was not the owner of the subject motor vehicle at the time of the accident;
 3. That the court erred in failing to appreciate that the defendant's defence raised triable issues;
 4. That the court erred in dismissing the subject application and was therefore condemned unheard.
 5. That the court erred in failing to appreciate that the applicant had only become aware of the existence of the suit in the month of November 2023.
 7. The appellant prays that the ruling delivered on 24/11/2023 be set aside, the default judgment entered against the appellant and all consequential orders be set aside and the whole suit be heard afresh and lastly, the appellant be allowed to file his statement of defence.

The appellants submissions.

8. It is the appellant's submission that the appellant was condemned unheard because he had sold the subject motor vehicle to third parties and he was not served with summons to enter appearance to enable him file his defence since the firm of J.M. Kimani & Company Advocates was appointed by Invesco Assurance Company Limited who had insured the suit motor vehicle; that the firm of J.M. Kimani never informed the appellant of the hearing date and neither did the said firm record the appellant's witness statement to enable him come to court to ventilate his issues; that the appellant was also not served with the ten (10) days' notice of entry of judgment and notice to show cause; that he only became aware of the suit on 11/11/2022 through a friend.
9. The appellant relied on the case of David Kiptanui Yego and 134 others -V- Benjamin Rono & 3 others (2021) eKLR, in which the
10. case of Mohammed & Another -V- Shoka (1990) KLR 463 was cited where the court set out the four (4) tenets to be considered in setting aside an interlocutory Judgment to include: -
 1. Whether the Judgment was regular;
 2. Whether there is a defence raises triable issues;
 3. Whether there is a reasonable explanation for the delay;
 4. Whether there will be any prejudice



11. On the first limb, Counsel submitted that the Judgment was irregular since the appellant was never served with summons to enter appearance and was never made aware of the proceedings by the firm of J. M. Kimani Advocate or the Respondent. He relied on the decision of Mwala -V- Kenya Bureau of Standards EALR (2001) IEA 145 where the court said that where there was no service of summons, the Judgment was irregular and must be set aside.
21. On the second limb, Counsel urged that the draft defence raises triable issues and the case should be heard. He relied on the decision of Hayu Kamau Mukigi -V- Francis Kibaru Karanja (2013) eKLR.
13. As to the issue of delay and prejudice, Counsel submitted that the application was filed without inordinate delay because the appellant learnt of the suit on 11/11/2022 and he filed this application on 28/11/2022; that if the Judgment is not set aside the appellant will suffer great prejudice in that he will have been condemned unheard.
14. Counsel also relied on Orders 10 Rule 11 of the Civil Procedure Rules on setting aside of judgment, where judgment was entered for non-appearance and in default of defence.
15. He also relied on Articles 50 (1) of *the Constitution* and 25(c) on right to be heard at a fair hearing. He also invoked Article 159(2) (d) of *the Constitution* and Section 1A & 1B *Civil Procedure Act* which enjoin the court to administer justice without undue regard to technicalities in a just efficient and expeditious manner.

Respondent's Submissions.

16. It is the Respondent's submission that the Judgment is regular, that the firm of J.M. Kimani filed a Memorandum of Appearance and defence and there is no logic in the argument that that summons to enter appearance was not served. Counsel relied on the case of Uncle Sam's Githurai Ltd & Another -V- Samuel Mureithi Muriuki & 3 others, where the court held that where a defendant files an appearance and defence to a claim without being served with summons to enter appearance, they cannot insist that they should be served with summons; that the appellant having filed a defence, he cannot turn round to claim that he was not served with summons.
17. Whether there is a defence on merit, it was submitted that there is no defence on merit because the matter was already litigated and the appellant had an opportunity to ventilate his case as he was represented by Counsel, that the appellants assertion that he had sold the motor vehicle in question is irrelevant and is a backdoor attempt to reopen the case.
18. As to whether any prejudice will be suffered, it was urged that it is the Respondent who would suffer hardship and injustice if the judgment were set aside because this case was filed on 22/10/2024, judgment delivered on 16/10/2017 and that the appeal flies in the face of the Constitutional principles in Article 159(2) (b) that justice should not be delayed. The court was invited to dismiss the appeal.

Determination: -

19. This being a first appeal, this court has the duty to re examine the entire lower court record afresh, analyse the evidence and come up with its own independent conclusions but bear in mind that this court did not have the benefit of seeing and hearing the witnesses testify. This court is guided by the decision of Selle & Another -V- Associated Motor Boat Co., Ltd & others (1968) EA 123 where the court said

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by



the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 EACA 210).”

20. Courts are guided by Article 159(2) (d) of *the Constitution* and sections 1A and 1B of the *Civil Procedure Act* in administering justice. The courts are enjoined to administer justice without undue regard to technicalities and the just, efficient and expeditious disposal of cases.
21. Order 10 of the Civil Procedure Rules addresses the issue of consequences of non-appearance, default of defence and failure to serve a party. Under Rule 11, where Judgment has been entered under Order 10 Civil Procedure Rules, the court may set aside or vary such judgment and any consequential orders on such terms as are just. Order 12 Civil Procedure Rules provides for hearing
22. and consequences of non-attendance. Under Rule 7, where judgment has been entered under the said order, or a suit dismissed, the court, on application, may set aside or vary the judgment or Order on such terms as are just. Setting aside of judgment is an exercise of the court's discretion.
23. The factors that the court should consider in an application for setting aside judgment are: -
 1. Whether there is a regular judgment;
 2. Whether there is a defence on merit;
 3. Whether there is a reasonable explanation for the delay;
 4. Whether there will be any prejudice.
24. What is a regular judgment was addressed in the case of Mwala -V- Kenya Bureau of Standards (Supra)

To all I should add my own views that a distinction is to be drawn between a regular and irregular *exparte* judgment where the judgment sought to be set aside is a regular one then all the above consideration as to the exercise of discretion should be born in mind in deciding the matter. Where on the other hand the judgment sought to be set aside is an irregular one for instance one obtained either where there is no proper service or any service at all of the summons to enter appearance or when there is a memorandum of appearance but was inadvertently over looked the same ought to be set aside not as a matter of discretion but *ex debit justitiae* for a Court should never countenance an irregular judgment on its record.

Whereas the appellant denies that summons were served on the appellant, the Respondent is of a different view. The Proceedings in the lower court clearly show that the defendants, who include the appellant, were represented by J.M. Kimani & Co Advocates who entered a Memorandum of appearance, dated 2/12/2014 which was followed by a defence dated 8/12/2014. It did not stop there, because the case proceeded to hearing with the Respondent calling three (3) witnesses. The appellant's Counsel cross examined the witnesses. When it reached the defence case, the case was adjourned two (2) times and on the third (3rd) occasion when the appellant's Counsel and defendants did not show up, the defence case was closed and later a judgment was delivered in the case. Before entering appearance and



defence for the appellant, the Counsel must have done so in response to summons to enter appearance. Even if he had not been served, he had notice of the case and that is why he filed the appearance and defence. In Uncle Sam's Githurai Ltd (Supra) J. Mativo stated as follows in respect of service of summons "..... the purpose of summons to enter appearance is to bring to the notice of the Defendant of the fact of the institution and to require them to respond to the plaintiff's claim. Where therefore the Defendants on their own motion file appearances and defence to the claim, it becomes superfluous to still insist that summons should be served upon them....."

25. Counsel for the appellant must have proceeded with instructions from the appellant. I find that the judgment was a regular one and the appellant cannot deny having had notice of the case.

Whether the defence has merit: -

26. The appellant's draft defence is that he was not the owner of the suit motor vehicle at the time of the accident because he had sold it on 9/12/2011. However, the accident, the subject of this appeal occurred on 18/12/2013 two (2) years after the alleged sale. The appellant had exhibited a police abstract and a sale agreement. A police abstract is not the document that proves ownership of a vehicle. The Respondent had procured a copy of the records of the
27. motor vehicle, the subject of the accident, from the Registrar of motor vehicles. The records disclosed that the appellant was still the owner of the vehicle. How could a vehicle sold on 9/12/2011?
28. be still registered in the appellants name on 18/12/2013, two years later? It is the responsibility of the seller to ensure that the transfer of the vehicle into the buyer's names is done. In the circumstances, it is my view that the draft defence did not raise any triable issues.

Whether there is a reasonable explanation for the delay and if prejudice will be suffered: -

29. The appellant claims to have learnt of the suit on 11/11/2022 through a friend and that he moved with speed to file the application to set aside Judgment by 28/11/2022. Having found that the appellant had notice of the suit and ably defended it through Counsel, the application to set aside judgment for the reasons given is brought late in the day. The suit was filed in court on 22/10/2014, and the trial court rendered its judgment on 16/10/2017. The application to set aside judgment was filed in 2022, about five (5) years after entry of Judgment on 16/10/2017. This matter has been in court for eleven (11) years. Further delay in determination of the suit is prejudicial to the Respondent who suffered serious injuries in the accident giving rise to the suit. Litigation must come to an end. Further delay flies in the face of the objectives of Article 159 (2) (d) of *the Constitution* to have justice administered, justly, efficiently and expeditiously and without undue regard to technicalities.
30. The Respondent has a regular judgment which was lawfully obtained. To my mind, there is no justification to interfere or deny the Respondent the enjoyment the fruits of that judgment. Consequently, the appeal is unmerited and is hereby dismissed with costs to the Respondent

DATED, DELIVERED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 9TH DAY OF OCTOBER, 2025.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Mr. Kimani for the Appellant.



N/A for the Respondent.

Juma/Hellen Court Assistants.

