



**Mbugua & another v Wanjiru & another (Suing as the Legal Representatives
of the Estate of the Late Alfred Kimwele Kyambati) (Civil Appeal
E133 of 2023) [2025] KEHC 14551 (KLR) (Civ) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14551 (KLR)

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

CIVIL

CIVIL APPEAL E133 OF 2023

JM NANG'EA, J

OCTOBER 9, 2025

BETWEEN

KIMANI JOSEPH MBUGUA 1ST APPELLANT

PETER KARAGU 2ND APPELLANT

AND

ESTHER WANGECI WANJIRU 1ST RESPONDENT

CECILIA WANJIKU WANJIRU 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
ALFRED KIMWELE KYAMBATI**

*(Being an Appeal from the Ruling and/or Order of Honourable Rawlings
Liluma, Senior Resident Magistrate, Delivered on 30th January, 2023)*

JUDGMENT

1. This Appeal is against the lower court's Ruling of 30th January 2023 in the above stated case in which the Appellants' Application dated 4th October 2022 for various reliefs including setting aside of ex-parte proceedings taken on 12th February 2020 together with a consequential judgement was dismissed.
2. The Grounds of Appeal as per Memorandum of Appeal dated 27th February 2023 are set out hereunder;
 1. That the Trial Magistrate erred in law and in fact in failing to substantively consider the legal requirements on proper service of summons to enter appearance upon a Defendant which would then resolve with finality all subsequent proceedings after the alleged service. (sic)



2. That the Trial Magistrate erred in law and in fact in failing to find that the Respondents had not filed any affidavit of service to substantiate their allegations that they properly served upon the Appellants summons to enter appearance.
 3. That the Trial Magistrate erred in law and in fact in failing to find no service of summons to enter appearance had been served upon the Appellants as is required by law.
 4. That the Trial Magistrate erred in law and in fact in erroneously finding that the Appellants' prayer for cross-examination of the alleged process server of summons to enter appearance had been overtaken by events.
 5. That the Trial Magistrate erred in law and in fact in failing to substantively consider the distinction between advocates acting on instructions of an insurer without a party's knowledge of the suit and advocates properly instructed by a party to a suit.
 6. That the Trial Magistrate erred in law and in fact by misconceiving the prayers sought by the Appellants in their application subject of the ruling to erroneously find that the Appellants had not sought any order against any proceedings undertaken prior to 12th February, 2020.
 7. That the Trial Magistrate erred in law and in fact in failing to taken note of and be guided by the relevant statutory provisions cited in the Appellants' application subject of the ruling.
 8. That the Trial Magistrate erred in law and in fact in failing to sufficiently consider the Appellants' affidavits and written submissions on the application the subject of the ruling.
 9. That the Trial Magistrate erred in law and in fact in failing to be guided by the doctrine of stare decisis, precedents and principles of law in analyzing all the issues before him for consideration. (sic)
3. The Appellants, the Defendants in the suit, pray that the Appeal be allowed; the impugned Ruling reversed and the Application dated 4th October 2023 allowed.
 4. In the Application dated 4th October 2022 lodged in the trial court, the Appellants craved these reliefs;-
 1. That this Honourable Court be pleased to certify this Application as urgent, service of the same be dispensed with and heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to order stay of any intended, pending, ongoing or further execution process of the decree in Nairobi CMCC no. 6466 of 2018 pending hearing and determination of this application.
 3. That in the alternative this Honourable Court be pleased to order stay of any further proceedings pending hearing and determination of the instant application.
 4. That this Honourable Court be pleased to order attendance to Court of the serving officer who allegedly served summons to enter appearance upon Defendants for purposes of examination on oath.
 5. That this Honourable Court be pleased to set aside the ex parte hearing of 12th February, 2020 together with all other consequential proceedings leading to the judgement and decree, and order for fresh hearing of the suit.
 6. That the costs of this application be granted to the Applicant.



5. The Application was filed in the suit arising from a road traffic accident allegedly caused by the Appellants' negligent driving and/or control of motor vehicle registration number KAS 486C allegedly owned by them. The Respondents, the Plaintiffs in the suit, averred that Alfred Kimwele Kyambati (deceased) on behalf of whose Estate they instituted the suit was knocked down by the vehicle while he was a pedestrian along Eastern Bypass Road, Nairobi, thereby occasioning him fatal injuries. The Respondent claimed general and special damages as well as the costs of the suit and interest on behalf of the Estate of the deceased.
6. The Appellants did enter appearance but failed to file defence to the action, resulting in the impugned ex-parte Judgement entered in favour of the Respondents on 9/9/2020.
7. The Appellants then brought the Application dated 4th October 2022 to challenge the ex- parte proceedings and Judgement contending they are not served. In dismissing the Application, the learned trial magistrate found that the Appellants had been served with mention and hearing notices as evidenced by stamping of the notices by their advocates. The Appellants' advocates had even requested for time to file submissions in the suit during a mention of 6/3/2020 and were obliged, according to the learned trial magistrate, it was further noted in the contested Ruling that the Appellants were also served with notices and the Judgement date and entry of the Judgement itself. The Appellants were faulted for failure to seek cross-examination of the Process Server despite earlier indicating intention to, if they insisted that they were not served with the court documents.
8. The trial magistrate further observed that the Appellants only complained about the ex-parte proceedings of 12th February 2020 but did not distance themselves from the Memorandum of Appeal and earlier defence filed on their behalf despite disowning the court documents.
9. For foregoing reasons inter alia the court exercised its discretion in favour of the Respondents and threw out the Appellants' Application with costs.
10. This being a first appeal I am required to reconsider the material placed before the lower court, evaluate it and draw my own conclusions on both matters of fact and law{ (see *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123 }. The Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."
11. I shall consider the Grounds of Appeal together against the parties' written submissions on the Appeal which I have perused.
12. The Appellants contend that the default judgement was irregular for the reason that they were not served or properly served with the suit documents and so it is implied that the default judgement ought to be set aside ex debito justitiae. Indeed this is the law as held in many cases including the judicial determination in *Mwala v Kenya Bureau of Standards* EA LR (2001) 1 EA 148 and *Nakuru HCCC No. 82 of 2002 (Kabutha v Mucheru)* which took the position that where Summons to Enter



Appearance was not properly served or at all such an application should be granted as a matter of course.

13. The issues arising for determination, therefore, are:
 - (a) Whether the impugned ex-parte Judgement is a regular one.
 - (b) If the ex-parte judgement is regular, whether the Application before the lower court seeking to set aside ought to have been allowed.
 - (c) The orders commending themselves to the court.
14. The court has unlimited discretion to set aside or vary an ex-parte Judgement. The discretion is exercised judiciously and not capriciously, the intention of the court being to do justice regard being had to the facts and circumstances of a particular case before the court (see the judicial decision in International Air Transport Association & Another v Roskar Travel Limited & 3 Others (Civil Case E457 of 2020) {2022} KEHC 200(KLR) (Commercial & Tax (17th March 2022 (Ruling)). This manner of exercise of the court's discretionary power is also stressed in the famous case of Shah v Mbogo.
15. If service of the suit documents was disputed an Application could have been made to cross-examine the Process Server to clear any doubts (see Order 5 Rule 16 of the Civil Procedure Rules 2010 and the Court of Appeal decision in Kisumu CACA NO. 15 of 2010 (Amayi Okumu Kasiaka & 2 Others v Moses Okware Opari among many other legal authorities). This right was not exercised despite the Appellants initially intimating intention to do so.
16. In Patel v East Africa Cargo Limited (1974) EA 75 it was stated that the defendant must give a plausible reason for failure to enter appearance and/or file defence within the required time.
17. The impugned judgement is thus regular and issue (a) is accordingly determined in the affirmative. The learned trial magistrate rightly disbelieved the Appellants who questioned documents filed on the behalf by their Insurer's lawyers but at the same time condoning them to be on record. As also noted by the trial court, the Appellants failed to pursue cross-examination of the court Process Server if they doubted his evidence as to service of the relevant suit documents. This court therefore entirely agrees with the trial court and finds that the Application dated 4th October 2022 was rightly dismissed.
18. The upshot is that the Appeal is dismissed with costs to the Respondents.

J. M. NANG'EA, JUDGE.

JUDGEMENT DELIVERED VIRTUALLY AT NAKURU THIS 9TH DAY OCTOBER, 2025.

In the presence of:-

Appellants' Advocate, Mr. Mwangela for Mr. Khisa

The Respondents' Advocate, Ms Mudaye

The Court Assistant (Jeniffer)

J. M. NANG'EA, JUDGE.

