



REPUBLIC OF KENYA



KENYA LAW
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**Dongo v Rorio (Civil Appeal 80 of 2024)
[2025] KEHC 15196 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 80 OF 2024
S MBUNGI, J
OCTOBER 22, 2025**

BETWEEN

GRACE ADHIAMBO DONGO APPELLANT

AND

WALTER RORIO RESPONDENT

*(An appeal from the ruling of the Chief Magistrate's court in Kakamega
CMCC No. 406 of 2015 delivered before Hon. J.K. Ngarngar on 2nd April 2024)*

JUDGMENT

1. The appellant had filed a claim at the lower court seeking damages for an accident that was allegedly caused by the defendant. It was her case that she was a lawful pedestrian when the defendant, his agent or driver negligently knocked her down, causing her serious injuries.
2. The trial court, after hearing the witness testimony, found in favour of the appellant and awarded general damages of Kshs. 6,000,000/= and special damages of Kshs. 693,840/=. The defendant, being dissatisfied with the decision and the decree, filed for a review of the judgment, claiming that he was never served and was never granted a chance to be heard and further that the said advocate who prosecuted the suit was not his advocate and he represented the insurance company.
3. He avers that he was unaware that there was a case against him until he was served with the decree that was to be executed against him.
4. The trial magistrate, upon analysing the review application in their ruling dated 2nd April 2024, set aside the orders issued by the court on 2/8/2022 and struck out the suit against the defendant.
5. Being dissatisfied with the ruling of the lower court by Hon. Ng'arng' ar 2nd April 2024, the appellant appealed the ruling based on the following grounds;



- a. That the learned trial magistrate erred in fact and law by striking out the Appellant's suit against the Respondent
 - b. That the learned trial magistrate erred in fact and in law by striking out the Appellant's suit even though the judgment had already been delivered.
 - c. That the learned trial magistrate erred in fact and law by failing to consider the grounds of opposition raised by the Appellant in his replying affidavit sworn on 5th December 2023.
 - d. That the learned trial magistrate erred in fact and in law by failing to consider the appellant's submissions and authorities, hence arriving at an erroneous decision.
 - e. The trial magistrate misapprehended the applicable law in determining the respondent's notice of motion dated 15th May 2023, hence arriving at a wholly erroneous decision.
 - f. That the learned trial magistrate erred in fact and in law by reviewing the Honourable court's judgment when the defendant had not satisfied the criteria for the grant of such an order.
 - g. The trial magistrate's ruling delivered on the 2nd April 2024 is so manifestly unjust, unfair, and unreasonable that it amounts to a miscarriage of justice.
 - h. That the trial magistrate erred in law and in fact in granting the Respondent orders not sought in his application.
 - i. That the learned trial magistrate erred in law and in fact in over-relying on the Respondent's evidence and submissions.
 - j. That the learned trial magistrate's ruling was wholly not supported in law by evidence tendered in court by the parties.
6. The appellant prays that the appeal be allowed and that the ruling of the trial court dated 24th April 2024, striking out the Appellant's suit, be set aside and be substituted with an order dismissing the respondent's notice of motion dated 15th May 2023.
 7. The application was canvassed by way of a written submission.

Appellant's Submission

8. The appellant filed their submissions dated 6th August 2025, where they opposed the decision by the trial court who upon the review the judgment issued on 2nd August 2022 struck out their case despite there being a valid order and decree.
9. In their application, they raised three issues for determination. On the first issue of whether the failure to personally serve the respondent rendered the suit fatally defective despite the Respondent's full participation through counsel appointed by his insurer, they quote Order 5 Rule 8 (i) on the issue of service.
10. They submitted that there was an agency relationship between the respondent and the insurer who in this case represented the respondent in the suit and as such, their appointed advocates E.K. Owinyi & company Advocates entered appearance and represented the respondent in the proceedings who never objected to being represented by the insurer appointed advocates and as such, they hold that the respondent should not feign ignorance or lack of participation since it should be assumed that the counsel was instructed by the respondent's insurer. They quoted the decision by Hon. Justice Tunoi in *Karanja vs. Phoenix of EA Assurance Co. Ltd* and held that the insurer's act of appointing a counsel



with a view to represent the insured before the court and without the objection from the respondent created a legally binding consequence.

11. They aver that the respondent had accepted legal representation throughout the proceedings and cannot now turn and object to the service, as his failure to raise any protest and his full enjoyment of the insurer's legal defence amounted to his waiving any question of service at a later stage.
12. They reflected on section 120 of the *Evidence Act* Cap 80 on the principle of estoppel, stating that the respondent is estopped from denying that he was not properly served when all along he was being represented by the insurer's counsel.
13. The applicant quoted the case of Yooshin Engineering Corporation vs. Aia Architects Limited (Civil Appeal E 074 of 2022(2023) KECA 872 (KLR) on the issue of non-service of summons where the party had participated in the proceedings and hold that the respondent to raise the claim of non-service after the judgment was delivered was an afterthought and an attempt to defeat justice as they should have raised the concern at the earliest stage when he was being represented by the insurer counsel throughout the trial hence he subjected himself to the jurisdiction of the court through his advocates and actively participated in the trial.
14. The Respondent submitted further that trial court erred in striking out her suit based on alleged non-service despite it being undisputed by the respondent during the trial when he was being represented by the insurer's advocates until the completion of the case.
15. She prays that the ruling by the learned magistrate striking out the suit should be set aside and be substituted with an order dismissing the Respondent's notice of motion dated 15th May 2023.
16. On whether the trial court erred in allowing the review application the court was referred to order 45 of the civil Procedure Rules and section 80 of the *civil procedure Act*.
17. The appellant avers that the respondent, in his notice of motion application dated 13th May 2023, seeking review, failed to demonstrate the discovery of any new or important evidence that was not within their knowledge, nor did he point out any mistake or error apparent on the face of the record.
18. She averred that the claim that the respondent was not served was neither new nor sufficient as the matter had already been conducted by the insurer's advocate and such the application was not subject to a review and as such it was subject to an appeal not a review and pray that the court finds that the application by the respondent failed to meet the legal threshold under order 45 civil procedure rules.

Respondent's submission.

19. In his submission dated 2nd October 2025, the respondent raised one issue for determination, being why the trial court in its ruling dated 2/8/2024 struck out the appellant's suit.
20. He maintained that the suit was properly struck out for the appellant served the Plaintiff and summons to enter appearance upon the insurance company, but not upon the defendant as required by order 5 rule 8 of the Civil procedure rules, and as a result, he did not participate in the proceedings and thus was condemned unheard contrary to Article 50 of *the constitution* on the right to fair hearing.
21. He faulted the appellant's submission that the absence of service to the respondent was a mere technicality, given that this there was an issue of ownership of a suit motor vehicle and the validity of the search.



Analysis And Determination

22. I have carefully examined the trial court record, the grounds of appeal, and the submissions of both parties and find the following issues arise for determination:
- a) Whether the trial magistrate erred in striking out the Appellant’s suit for non-service of summons on the Respondent, despite the Respondent’s participation through counsel appointed by his insurer.
 - b) Whether the trial magistrate erred in granting the Respondent’s application for review under Order 45 of the Civil Procedure Rules.
 - c) Whether the trial magistrate’s ruling was manifestly unjust or unsupported by evidence and law.
23. The Respondent contends that he was not personally served with a summons to enter an appearance, as required under Order 5 Rule 8(1) of the Civil Procedure Rules 2010, which requires service on the defendant in person or through an authorized agent. The trial magistrate held that service was effected on the Respondent’s insurer, not the Respondent himself, violating his right to a fair hearing under Article 50 of *the Constitution* of Kenya 2010.
24. It is to be noted that personal service of summons is a fundamental procedural requirement which is intended to give notice to the defendant of the claim against them and to allow them to be heard under Article 50 of *the constitution*. The failure to serve the defendant personally goes to the root of *the constitution* and renders subsequent proceedings a nullity.
25. In Shadrack Arap Baiywo v. Bodi Bach [1987] eKLR, the Court of Appeal emphasized that personal service is not a mere technicality but a mandatory requirement of natural justice. The court held that: “The mode of service of summons is a matter of substance going to the jurisdiction of the court. Unless the defendant has been duly served, the court cannot assume jurisdiction over him.”
26. Similarly, in James Kanyita Nderitu & another v. Marios Philotas Ghikas & another [2016] eKLR, the Court of Appeal stated:
- “A judgment entered against a defendant who has not been served with a summons to enter appearance is irregular. Such a defendant is entitled ex debito justitiae to have it set aside as a matter of right.”
27. The rationale is rooted in Article 50(1) of *the Constitution* of Kenya, 2010, which guarantees every person the right to a fair hearing. Personal service ensures that the defendant is aware of the proceedings and is allowed to defend himself/herself.
28. The Appellant further argues that the Respondent’s participation through counsel appointed by his insurer, E.K. Owinyi & Company Advocates, constituted a waiver of the requirement for personal service.
29. The appellant assertion that the Respondent’s failure to object to representation during the trial estops him from raising the issue after the judgment cannot stand.
29. In Ecobank Kenya Ltd v. Samuel Otieno [2013] eKLR, the court clarified that participation in proceedings through counsel does not automatically waive the requirement for proper service unless the defendant explicitly submits to the court’s jurisdiction or acknowledges service. The court stated, “The defendant’s appearance through counsel, especially when appointed by a third party such as



- an insurer, does not cure a jurisdictional defect arising from improper service unless the defendant expressly authorises such representation.”
29. In the present case, there is no evidence that the Respondent personally instructed the insurer’s counsel or consented to the insurance counsel representation. The insurer’s unilateral appointment of counsel does not impute agency for service without proof of the Respondent’s knowledge or approval.
30. In *Hassan v. Kilonzo & Another* [2009] eKLR, the court held that a defendant’s silence or passive participation does not constitute a waiver of service irregularities, particularly where the defendant was unaware of the proceedings. The trial magistrate correctly prioritised the procedural requirement of personal service over the Appellant’s claim of waiver.
31. The law distinguishes representation by insurer from personal service upon a defendant. The relationship between an insured and insurer is contractual and does not, without clear authority, confer automatic power upon the insurer to accept court process on behalf of the insured.
32. The Court of Appeal in *Co-operative Merchant Bank Ltd v. George Fredrick Wekesa* [1997] eKLR held that:
- “Where there is no evidence that the defendant was served with summons to enter appearance, any judgment entered in default is irregular and must be set aside as of right.”
33. Similarly, in *Kenindia Assurance Co. Ltd v. Otiende* [1989] eKLR, the court observed that even where an insurer may have an interest in defending a claim, the insured must still be personally served unless they have expressly authorised the insurer to accept service. The court held:
- “An insurer’s right to defend a suit does not negate the requirement of personal service upon the insured. The insured is the proper defendant and must be made aware of the proceedings.”
34. The record shows no affidavit of service demonstrating that the respondent was personally served with summons to enter an appearance. Service upon the insurer or its counsel cannot be deemed proper service under Order 5. There is also no evidence that the insurer was an appointed agent of the respondent for the purpose of accepting service as required by law.
35. The learned magistrate, therefore, correctly found that the failure to personally serve the respondent rendered the entire proceedings void ab initio, and any judgment founded upon such defective service was irregular and liable to be set aside ex debito justitiae.
36. The court in *Alpha Fine Foods Ltd v. Horeca Kenya Ltd & 4 others* [2021] KEHC 4068 (KLR) summarised the principles governing review applications, stating that a review is permissible where:
- a. There is the discovery of new and important evidence not within the knowledge of the applicant;
 - b. There is an error apparent on the face of the record; or
 - c. Does any other sufficient reason exist?
37. The trial court in its analysis noted that the respondent’s claim that he had never been served or participated in the proceedings constituted “a sufficient reason” under Order 45.
38. This court equally notes that this was new information that fundamentally affected the validity of the judgment. It is my finding that the trial court was therefore right to exercise its review powers to prevent



perpetuation of an injustice. The court allowed a review where improper service was established, holding that such a defect is an error apparent on the record. The trial magistrate's decision to grant the review and strike out the suit was therefore within the legal parameters of Order 45 of Civil Procedure Rules.

39. In conclusion, this court finds that the absence of evidence of personal service on the Respondent rendered the proceedings in CMCC No. 406 of 2015 a nullity, and the Respondent's participation through insurer-appointed counsel does not constitute a waiver of service, as there is no evidence of his explicit consent or submission to the court's jurisdiction.
40. The trial court wrongly assumed jurisdiction over the Respondent without ascertaining whether he was properly served with a plaint and summons to enter appearance.
41. This court finds that the trial magistrate correctly exercised his discretion under Order 45 to review and set aside the judgment to prevent a miscarriage of justice.
42. I find that the appeal lacks merit and is dismissed with costs to the Respondent.
43. Orders
 - a) The appeal is dismissed.
 - b) The ruling of the Chief Magistrate's Court delivered on 2nd April 2024 in CMCC No. 406 of 2015 is upheld.
 - c) The Appellant shall bear the costs of this appeal
 - d) This file is closed.
 - e) Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 22nd DAY OF OCTOBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Parties absent plus the Advocates though aware of the ruling date.

The Court Assistant to publish the Judgment in the CTS forthwith.

