



**Gede Enterprises Limited v Cheboi & another (Civil Appeal  
100 of 2023) [2025] KEHC 15634 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15634 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 100 OF 2023  
JRA WANANDA, J  
OCTOBER 31, 2025**

**BETWEEN**

**GEDE ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**CHARLES YATOR CHEBOI ..... 1<sup>ST</sup> RESPONDENT**

**WISKAM LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the Ruling dated 17/05/2023 delivered in Eldoret Chief Magistrate's  
Court Civil Case No. E773 of 2021 by Hon. D. Mikoyan – Chief Magistrate)*

**JUDGMENT**

1. This Appeal arises from the Ruling referred to above, delivered on 17/05/2023 in the said lower Court suit, in which suit the Appellant was the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Respondent was the Plaintiff, and the 2<sup>nd</sup> Respondent was the 2<sup>nd</sup> Defendant. By the Ruling, the lower Court declined to set aside the ex parte default Judgment entered against the Appellant on 24/11/2021, as well as the substantive ex parte Judgment entered subsequently on 17/08/2022 after a formal proof hearing.
2. The background of the matter is that the 1<sup>st</sup> Respondent, through Messrs Chebii & Co. Advocates, filed the suit on 14/09/2021. The claim was based on a sale agreement in which the 1<sup>st</sup> Respondent alleged to have purchased a motor vehicle from the Appellant at a purchase price of Kshs 3,500,000/-, payable in instalments, which the 1<sup>st</sup> Respondent paid in full, but that midway, the 2<sup>nd</sup> Respondent (auctioneer), acting as the Appellant's agent, and upon its instructions, unlawfully repossessed the motor vehicle. In the Plaint, the 1<sup>st</sup> Respondent thus prayed, basically, for restoration of the motor vehicle to his possession, or in the alternative, reimbursement of the full purchase price sum of Kshs 3,500,000/-. He also prayed for general damages.



3. The default Judgment was entered on 24/11/2021 by Hon. Kigen SRM, when no defence was filed despite the Appellant having earlier entered Appearance on 21/09/2021. The Appellant, through Messrs Muriu Mungai & Co. LLP, then filed an Application dated 12/08/2022, seeking setting aside of the default Judgment, which Application was however dismissed on 17/08/2022 for non-attendance. The matter then proceeded to formal proof on the same 17/08/2022, and a date for Judgment set. However, before the same could be delivered, the Appellant filed another Application seeking to arrest the Judgment but which did not deter the Court from delivering the same, which it did on 9/09/2022. All these proceedings were conducted before Hon. Kigen, SRM. After delivery of the Judgment, the Appellant filed a third Application, dated 20/09/2022 seeking setting aside thereof, which Application was, this time, heard by Hon. D. Mikoyan, CM, who dismissed it 17/05/2023. That Application and Ruling are now the subject of this Appeal.
4. The Application was supported by the Affidavit sworn by Kongere Billy, the Appellant's Counsel, who deponed that the Appellant's constitutional right to fair hearing guaranteed by Article 50 of *the Constitution* was grossly violated by the proceedings and the resultant Judgment because the Appellant sent its Statement of Defence to the Court on 23/03/2022 but the Court failed to process the same within time or at all thus resulting into the default Judgment being entered. He deponed further that the Appellant's Notice of Motion dated 23/08/2022 seeking to set aside the default judgment was dismissed for non-attendance on 17/08/2022 yet the Advocate had, keeping with the Chief Justice's directives, logged into the Court online link but the Court, without any notice, instead, proceeded with the hearing in open Court, and that the Appellant filed the Notice of Motion dated 23/08/2022 seeking to reinstate the dismissed application but the Court refused to even consider it.
5. In opposing the Application, the 1<sup>st</sup> Respondent filed Grounds of Opposition and also the Replying Affidavit sworn on 30/09/2022. He deponed that the suit was filed on 14/09/2021, the Appellant was served on 15/09/2021 as per the annexed copy of the Affidavit of Service, that no defence was filed and 3 months later on 12/11/2021, he requested for Judgment. He urged further that the suit was then fixed for formal proof on 17/08/2022, and that the case was determined in his favour as prayed in his Plaint. He deponed further that there was a pattern on the part of the Appellant to derail the suit as the Appellant filed its Memorandum of Appearance on 21/09/2022 but never filed a defence, which defence ought to have been filed by 30/09/2021, but was never filed till 23/03/2022, 6 months later, outside the prescribed period. He contended that the Appellant was all along aware of the default Judgment, and that the Appellant's Application to set aside the judgement was never prosecuted despite the Appellant having being granted the hearing date of 17/08/2022. He also deponed that said Bill Kongere Advocate swore to facts which are disputed yet as Counsel in the same matter, he was incompetent to do so, and that the Appellant did not give any reason why it did not prosecute its Applications despite the Court granting the opportunity, thus leading to dismissal for want of prosecution. He also urged that the defence did not raise any triable issues since the Appellant unlawfully repossessed the vehicle after the 1<sup>st</sup> Respondent had already paid the full purchase price of Kshs 3,500,000/-. It was his further contention that the Appellant approached the trial Court with unclean hands and was in contempt as it had not, by the time of filing the several Applications, complied with the trial Court's orders to release the motor vehicle.
6. As aforesaid, by the Ruling delivered on 17/05/2023, the trial Magistrate dismissed the Application. Aggrieved by the decision, the Appellant filed this Appeal on 15/06/2023. The Record of Appeal is quite bulky but simply because the Appellant, contrary to repeated caution by Appellate Courts, contains copies of authorities/case law relied on in the trial Court. It has been directed on many occasions that authorities/case law are generally, not primary appeal documents to be included in a



Record of Appeal, but unfortunately, Advocates continue breaching this directive. Be that as it may, the 3 grounds of Appeal preferred are as follows:

- i. The learned Magistrate erred in law in failing to appreciate and apply correct principles for setting aside of default judgments.
  - ii. The learned Magistrate erred in law and in principle in refusing to set aside the default judgment entered on 9/09/2022.
  - iii. The learned Magistrate on the whole exercised his discretion injudiciously leading to a result that is manifestly wrong and unjust.
7. The Appeal was then canvassed by way of written Submissions. The Appellant's Submissions is dated 24/03/2025, while the 1<sup>st</sup> Respondent's is dated 9/06/2025.

### **Appellant's Submissions**

8. Counsel for the Appellant, in lengthy Submissions, restated the principles applicable in determining Applications for setting aside a default judgment. He cited several authorities and faulted the Chief Magistrate for failing to apply the said principles. He submitted that one of the twin reasons given by the learned Magistrate for refusing the application is that the defence was sent for filing way out of time and no reason was given for that delay, and that the second reason was that the Appellant's conduct was that of a party not keen to pursue its applications. He urged that both observations are a misdirection, starting with the supposed lack of an explanation for the delay in filing the defence. He urged that in his Affidavit, he explained that he concentrated in defending the interlocutory application and only remembered of the defence after the Ruling on that interlocutory application was delivered. Counsel contended that the learned Magistrate should have considered that explanation. In regard to the finding that the Appellant filed Applications but failed to prosecute them, he submitted that only one application filed and not prosecuted. He reiterated that he explained that, based in Mombasa, he logged in to virtual Court but the hearing was conducted in open Court without notice. He pointed out that the learned Magistrate was referred to two authorities, namely, *Frankline Muriira M'Nkanata v Adjudication Officer, Ruiiri/Rwarera Adjudication Section & 2 others; Annah Mwari Mutuma & 3 others (Interested Parties) [2021] eKLR*, and *Key Freight Kenya Limited v Mohammed Abdi [2022] eKLR*, both which accepted that explanation as reasonable. Counsel wondered how the Appellant could be castigated for being indolent when it filed an application to reinstate the dismissed Application, just 8 days thereafter. He further submitted that the learned Magistrate was required to consider the nature of the action, that here was a party being condemned to pay Kshs 3,500,000/, and damages of Kshs 10,000/- per day for an undisclosed period, and that even if the learned Magistrate was not convinced that there was any explanation for the delay in filing the defence, the defence had been filed and served before the formal proof hearing of 17/08/2022, and the learned Magistrate was bound to consider whether it raised triable issues.
9. He also contended that the learned Magistrate was bound to consider whether, despite the delay, the 1<sup>st</sup> Respondent could be compensated by costs. He submitted that the 1<sup>st</sup> Respondent never stated that he would suffer any prejudice that could not be compensated, and had, in fact, proposed that if the judgment were to be set aside, then it should be on condition that the decretal amount is deposited in Court. Counsel also submitted that the learned Magistrate was required to consider that the right to a hearing is sacrosanct and should only be curtailed as a last resort. He cited the case of *Pithon Waweru Maina v Thika Mugiria [1983] KECA 117 (KLR)*, and contended further that if the Magistrate had considered that principle, then he would have found that the error in filing a defence out of time, in the circumstances, was not one that called for the exceptional punishment of locking out a party from



the seat of justice. He accepted that the Appellant erred in failing to file its defence within time, but urged that Courts have kept on reminding that errors will continue to be made for as long as we remain human, and thus, unless an error is contumelious, the Court ought to do its best to see that the suit is heard on its merits.

10. He cited the case of Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87(KLR). Regarding the 1<sup>st</sup> Respondent's invitation that in setting aside the judgment, a condition should be imposed that the decretal sum be deposited, Counsel termed the proposal as unfair. He cited the case of Kenya Power & Lighting Co. Ltd v Abdulhakim Abdulla Mohamed & another [2017] KECA 527 (KLR), which, he submitted, guided that the Court should not fetter its discretion by imposing unlawful conditions.

### **1<sup>st</sup> Respondent's Submissions**

11. Counsel for the 1<sup>st</sup> Respondent, on his part, appreciated that the Court's power to set aside a judgement is unfettered, and that the only condition is that the Court must be satisfied that there is sufficient cause for doing so. He pointed out that there was representation for the Appellant all through, even on the date of formal proof as the Application for setting aside had been fixed for hearing on that same date but its Counsel failed to appear, upon which the Application was dismissed for wants of prosecution, and the formal proof proceeded. According to him, the Appellant did not give any account of why it was not in Court on 12/08/2022. He appreciated that in certain instances, the Court may set aside judgement in favour of an Applicant where a mistake on the part of Counsel has occurred so as not to penalize an innocent party, but contended that nevertheless, the Court must be cautious while on such inquiry to avert abuse of the process.
12. He cited Nairobi Civil Case No. 1079 of 1980 Sammy Maina versus Stephen Muriuki, and urged that the Appellant does not give any impression of having attempted to provide reasons for not attending Court, and that the Appellant has assumed a blissful pose that presumes that what is in its Supporting Affidavit rhymes with the Court record and automatically exonerates them from blame, which is not the case. In his view, there was deliberate delay calculated to obstruct the onward march of the suit to its finalization. Counsel submitted that the cardinal rule in setting aside proceedings is that the Court should never be seen to aid a party who has demonstrably attempted to delay or obstruct the course of justice. He cited the case of Richard Nchapai Leiyangu v. IEBC & 2 Others, and also the case of Philip Chemwolo & Another v Augustine Kubende, (1982-88) KAR.

### **Determination**

13. The issue for determination herein is "whether the trial Court erred in declining to set aside the default Judgment and the subsequent ex parte Judgment entered against the Appellant."
14. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court, and draw its own conclusion (see for instance, the case of Kenya Ports Authority v Kuston (Kenya) Ltd [2009] 2 EA 212.
15. In civil litigation, matters to do with the consequences of a Defendant failing to appear or attend Court, or failing to file a defence, are governed by Order 10 of the Civil Procedure Rules. The provisions permit the entry of Judgment upon a liquidated demand, and sets out guidelines on the process of entry of interlocutory judgments. Order 10 Rule 11 then empowers the Court, in the exercise of its discretion, to set aside or vary such ex parte Judgments.



16. In an Appeal challenging exercise of discretion, the limits within which an Appellate Court can interfere were reiterated by the Supreme Court in the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, as follows:

“..... we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court’s exercise of discretion.”

17. It is trite law that a Defendant, once served with Summons, is expected to act promptly and expeditiously in entering appearance, and subsequently filing defence or answer to the claim. The time limit provided under Order 6 Rule 1 is 14 days for entering appearance, and, under Order 7 Rule 1, another 14 days to file the defence. In the event a Defendant fails to meet the set timelines and a default judgment is entered, then he will be under a legal duty, should he wish to seek setting aside of the Judgment, to sufficiently explain the reasons why he delayed to act.
18. The Court of Appeal, in the case of *Gicharu Kimani & Associates Advocates –v- Samwel Kazungu Kambi* [2020] eKLR, in restating the difference between a default Judgment regularly entered and one, which has been obtained irregularly, and the different effects flowing therefrom, held as follows:

“Considering the circumstances of this motion, the facts regarding the merits or demerits of it one must take into account in exercise of discretion that it’s within the ambit of the guiding principles laid down in the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another Civil Appeal No 6 of 2015 eKLR (Msa)*, the Court of Appeal stated 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 the case. 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 to set aside the default Judgment, among other. (See *Mbogo & Another v Shah* (supra), *Patel v EA Cargo Handling Services Ltd* {1975} EA 75, *Chemwolo & Another v Kubende* {1986/KLR 492 and *CMC Holdings v Nzioki* {2004/1 KLR 173})’.

19. In this case, there is no dispute that both the default Judgment, and the substantive ex parte Judgment entered subsequently, were regular. I say so because the Appellant admits that it was served with Summons, and even entered appearance, but failed to file a Defence in time. The Judgment entered



herein was therefore a regular one. Even where the Judgment is regular, the Court still retains the power to set it aside if justice of the case demands, for instance, where the Defendant demonstrates that it has a good defence, and where prejudice caused may be compensated by an award of costs. This is what the Court of Appeal affirmed in the case of *Tree Shade Motors Limited v D T Dobie and Company (K) Ltd and Another* [1998] eKLR).

20. In this case, the argument advanced by the Appellant’s Counsel is that after entering Appearance on 21/09/2021, he forwarded the Statement of Defence to Court on 23/03/2022, but the Court failed to “process” the same within time, thus resulting into entry of the default judgment on 24/11/2021. Regarding dismissal of the Application seeking to set aside the default Judgment for non-attendance on 17/08/2022, the Appellant’s Counsel claimed that he logged into the Court online link but the Court, without any notice, instead proceeded with the hearing in open Court.

21. The Chief Magistrate, in respect to these claims, in his Ruling dated 17/05/2023 dismissing the Application seeking setting aside of the default Judgment and substantive Judgments, found as follows:

“The court record of 24.11.2021 demonstrates that a request for judgment in default of defence was sought and granted. On undisclosed date in March, 2022, Applicant’s Counsel sent the said Defence for filing, well outside the requisite time. And there is no explanation for the inordinate delay in filing the same out of time.

In any event, there is no e-filing facility at Chief Magistrate’s Court, Eldoret. Court would only receive hard copy pleadings together with confirmation of payment of fees in the respective files.

The second ground was that the Applicant’s motion dated August 12, 2022 was dismissed on August 17<sup>th</sup>, 2022 dismissed for non-attendance. Proceedings of 17.8.2022 disclose that the Applicant had not even served notice of motion dated August 12<sup>th</sup>, 2022 for inter partes, hence the orders made by LTM Hon. Kigen (as she then was) and the matter proceeded to formal proof. Indeed, the conduct of the Applicant is wanting, at best the Applicant’s indolence in the proceedings throughout is one symptomatic of a litigant who has failed to pursue their right to ventilate a defence or applications, if any.”

22. The Chief Magistrate thus cast serious doubts on the Appellant’s Counsel’s allegation that he had sent the defence for filing via the Judiciary e-filing. I say so because the Chief Magistrate pointed out that as at the period alleged, there was even no e-filing facility at the Magistrate’s Court at Eldoret. The other important observation made by the Chief Magistrate regarding the non-attendance by Counsel on 17/08/2022, was that the proceedings of that date before Hon. Kigen, SRM, revealed that the Appellant had not even served the Application seeking setting aside, and that this was one more reason why the Application was dismissed. According to the Chief Magistrate therefore, these are some of the matters that informed his finding that the conduct of the Applicant showed indolence, as the Appellant consistently failed to act promptly, first, by failing to file a defence, and secondly, by failing to attend Court on 17/08/2022.

23. The above are, in my view, pertinent matters that I would have expected the Appellant to have addressed and given proper explanations on. Unfortunately, the Appellant, in its wisdom, chose to steer clear of, and completely ignored. Not a word has been said about those findings.

24. Further, regarding Counsel’s allegation that he sent the defence for e-filing on 23/03/2022 after entering Appearance on 21/09/2021, even if true, it is not lost on me that this was a whole 6 months later, a clear inordinate delay which required sufficient explanation. Regarding Counsel’s claim that he was present virtually on 17/08/2022 when his Application was dismissed for non-attendance,



Dr. Chebii, Counsel for the Respondent refuted that allegation. Dr. Chebii also refuted the further allegation that Hon. Kigen converted, without notice, the formal proof hearing on the same date into an open Court hearing. Those claims therefore remain unproven as the same are not supported by the record before me. I therefore have no way of verifying their veracity.

25. There is also the Ruling by E. Ogola J rendered in this very Appeal on 17/05/2022, in which, in dismissing the Appellant's Application for stay pending Appeal, he castigated and reprimanded the Appellant over its conduct in the following words:

“37. Given that stay of execution is discretionary, the conduct of the Appellant is not lost on the Court. The Appellant failed to release the vehicle as per the order of the Court when the stay lapsed, without any justification as to the failure to obey the Court orders. It is trite law that he who comes to equity must come with clean hands and in the premises the applicant has not.”

26. According to Dr. Chebii, the Appellant is yet to comply with the orders referred to above by E. Ogola J, which contention has not been not contested.

27. While therefore the draft defence presented by the Appellant cannot be termed completely frivolous, although it is also not a strong one, considering the totality of the matter as a whole, I am not satisfied that that the Appellant has demonstrated that the Chief Magistrate acted arbitrary or capriciously, or ignored relevant facts, or disregarded the applicable principles. While I would have probably reached a different conclusion had I been the trial Court hearing the Application seeking to set aside, and would probably have granted the Appellant leave to defend the suit, as was held in the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission* (supra), above, the fact that I could have arrived at such different conclusion is not a reason to interfere with the Chief Magistrate's exercise of his discretion.

### **Final Orders**

28. The upshot of my findings above is that this Appeal fails, and is accordingly dismissed. As costs follow the event, the 1<sup>st</sup> Respondent is awarded costs.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 31<sup>ST</sup> DAY OF OCTOBER 2025**

.....

**WANANDA JOHN R. ANURO**

**JUDGE**

Delivered in the presence of:

Mr. Cheruiyot h/b for Kongere for the Appellant

N/A for the Respondent

Court Assistant: Brian Kimathi

