



REPUBLIC OF KENYA



KENYA LAW
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**Rocky v Awuor (Civil Appeal E013 of 2024)
[2025] KEHC 15916 (KLR) (28 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E013 OF 2024
S MBUNGI, J
OCTOBER 28, 2025**

BETWEEN

RASHID ROCKY APPELLANT

AND

HENRY KWENA AWUOR RESPONDENT

*(being an appeal from the ruling of the Honourable Senior Principal
Magistrate Z.J. NYAKUNDI in Kakamega Chief Magistrate's
court civil suit no.168 of 2013 delivered on 22nd January 2024)*

RULING

1. The appellant being aggrieved and dissatisfied with the ruling of the Honourable Senior Principal Magistrate Z.J Nyakundi in Kakamega Chief Magistrate's court civil suit No.168 of 2013 delivered on 22nd January 2024, filed an appeal based on the following grounds;
 - a. That the learned Magistrate erred in law and in fact in faulting the appellant for non-attendance on the date of the hearing when an advocate had been duly appointed.
 - b. That the learned magistrate erred in fact and in law in failing to consider the Appellant's supporting affidavit and written submissions.
 - c. That the learned magistrate erred in fact and in law in failing to take judicial notice of the fact that the Appellant's advocate had passed on during the pendency of the suit.
 - d. That the learned magistrate erred in fact and in law to consider that no other advocate was reappointed by the insurance company.
 - e. That the learned magistrate erred in visiting the mistakes of the counsel on the appellant.



- f. That the learned Chairperson, deputy chairperson and members erred in law and in fact by occasioning a miscarriage of justice.
2. The appellant prays that the appeal be allowed and that the decision by the learned Magistrate delivered on 22nd January 2024 be set aside and or varied and the respondent be condemned to pay the cost of the appeal.

Appellant's submissions

3. The appellant's in his submission dated 4th July 2025 avers that his application at the lower court was based on the fact that his insurer had appointed M/s Kimanga&company Advocates who entered appearance and filed a defence in the matter and states that the advocate failed to diligently prosecute the suit hence his case was undefended and a judgment was entered against him and avers that he only became aware after his property was proclaimed.
4. He prayed that the court takes judicial notice that his advocate, Mr. Kimanga, who was appointed to act on his behalf, passed during the pendency of the suit and further that the insurance Invesco Assurance Co Ltd had gone under, and they did not instruct another advocate, and hence the mistake of the insurance should not be meted out to him.
5. He relied on the case of Patel vs. E.A Cargo Handling Services Ltd (1974) EA 75 and holds that the court under Order 12 Rule 7 of the Civil Procedure Code is mandated to set aside or vary interlocutory judgments when the terms are fit to meet the ends of justice according to the overriding objectives of the Civil Procedure Code.
6. He placed reliance on the case of Shah Mbogo & Another (1967) EA 116 and pray that the court does not visit the mistake of the advocate and the insurance company on him stating that he was never served in person after the death of his advocate and the court in not considering his submissions went against the rules of natural justice and prays that the court allows his appeal and set aside the ruling and orders of the trial magistrate to allow him a chance to prosecute his case.

Respondent's Submissions:-

7. The respondents submitted that the hearing notice served upon Kimanga Co. Advocates on 20.12.2021. Who deliberately failed to attend court.
8. I have considered the Application, supporting affidavit and the submissions .

Analysis and Determination

9. The main issue for determination by this court is whether the learned Magistrate erred in law and fact by dismissing the appellant's application to set aside the interlocutory judgment without regard to the death of instructed counsel and the appellant's supporting affidavit.
10. The appellant claimed that M/s Kimanga & Company Advocates had been on record for him during the trial. It is further not disputed that the principal advocate, Mr Kimanga, died during the subsistence of the suit and that the insurer, Invesco Assurance Co. Ltd, was placed under statutory management and failed to instruct a substitute counsel.
11. The learned Magistrate faulted the appellant for non-attendance on the hearing date and held that no sufficient cause had been shown. With respect, this approach overlooked the binding authority in Shah Mbogo & Another (1967) EA 116, where the Court of Appeal emphatically held that the negligence of counsel, however gross, ought not to deprive a litigant of the opportunity to be heard where the litigant



himself is blameless. The death of counsel and the insolvency of the instructing insurer constitute circumstances beyond the appellant's control. To penalise him for the same is to visit the sins of others upon him, a course expressly deprecated in *Shah v Mbogo*.

12. Order 12, Rule 7 of the Civil Procedure Rules confers a wide discretion on the court to set aside an ex parte judgment "on such terms as the court thinks fit". In *Patel v East African Cargo Handling Services Ltd* (supra), Sir Charles Newbold P observed (at p. 76):

"The discretion is intended to be exercised to prevent injustice... the court must be satisfied that there is a reasonable explanation for the default and that there is a triable issue."

13. There was no evidence tendered by the Respondent to show that Appellant was personally served with suit papers.
14. The appellant explanation, such as the death of counsel and the insolvency of the insurer are plausible. The Magistrate's failure to consider these materials amounted to a material misdirection. It is trite that courts are mandated by section 1A of the *Civil Procedure Act* to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes. To shut out the appellant in the circumstances would defeat rather than advance that objective.
15. I am satisfied that sufficient cause has been shown to warrant setting aside of the interlocutory judgment. The appeal therefore succeeds.

Conclusion

- (a) The appeal is allowed.
- (b) The ruling and orders of the Honourable Senior Principal Magistrate Z.J. Nyakundi delivered on 22nd January 2024 in Kakamega Chief Magistrate's Court Civil Suit No. 168 of 2013 are hereby set aside.
- (c) The interlocutory judgment entered on 15th November 2023 is set aside, defendant given a chance to prosecute his defence.
- (d) The Defendant/Appellant to file statement of defence within 14 days from today and serve.
- (e) The Appellant to pay the Respondent throw away costs of Ksh. 15,,000/= for he took a long time to file the Appeal.
- (g). Right of Appeal 30 days.
- (h). Mention 27.1.2025 before the Chief Magistrate for reallocation/further directions.
- (i) This file is closed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28th DAY OF OCTOBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Ms. Siwa holding brief for the Appellant, present.



Appellant, absent.

