



**Mochache v Ochwangi & another (Civil Appeal E178 of 2024)
[2025] KEHC 16123 (KLR) (5 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E178 OF 2024
JK NG'ARNG'AR, J
NOVEMBER 5, 2025**

BETWEEN

DERRICK ONYIEGO MOCHACHE APPELLANT

AND

STEPHEN MANUA OCHWANGI 1ST RESPONDENT

JOHN KIMUTAI LIMO 2ND RESPONDENT

*(Being an Appeal from the Judgment of Adjudicator Rono C.C.
at the Small Claims Court at Kisii, Suit Number E85 of 2024)*

JUDGMENT

1. The 1st Respondent (then Claimant) sued the 1st Respondent and the Appellant for Kshs 321,752/= as damages to motor vehicle registration number KCM 295B which arose out of a road traffic accident that occurred on 27th July 2021.
2. On 2nd July 2024, the trial court entered a Judgement in default of response against the 1st Respondent and the Appellant. The 2nd Respondent filed a Notice of Motion Application dated 2nd August 2024 where he sought to have the default Judgement set aside and be allowed to file his response and counterclaim.
3. In its Ruling dated 3rd October 2024, the trial court held: -
 - i. The ex-parte Judgement of this court of 2/7/2024 is hereby set aside on condition that the 2nd Respondent deposits the entire decretal sum in court within fourteen (14) days from the date hereof.
 - ii. That the Applicant shall file and serve the Response and Counterclaim within 7 days from the date of this Ruling.



- iii. In default of compliance with the order given in (ii) and (iii) hereinabove, the order vacating the ex-parte Judgement shall automatically lapse without further reference to the court and the Claimant shall be at liberty to execute.
- iv. The costs of the Application is granted to the Claimant.
4. Being aggrieved with the Ruling above, the Appellant filed his Memorandum of Appeal dated 4th October 2024 appealing against the conditions set in (i) and (iii). The Appellant stated that the trial court erred when it set aside the default Judgement and required him to deposit the full decretal amount in court.
5. The Appeal was canvassed by way of written submissions.

Appellant's submissions

6. Through his written submissions dated 4th June 2025, the Appellant submitted that it was basic legal logic that once an ex-parte default Judgement had been vacated, no Decree existed that would command payment. That the position contemplated when a default Judgement had been vacated was the payment of reasonable costs. He relied on Rule 11(4) of the Small Claims Courts Rules. The Appellant further submitted that the impugned Ruling by the trial court was inconsistent with fundamental legal principles.
7. It was the Appellant's submission that requiring him to deposit the entire decretal sum was tantamount to condemning him unheard. He relied on Kenya Power & Lighting Co. Ltd vs Abdulkakim Abdulla Mohamed & another (2017) eKLR, One Way Cleaning Services Limited vs Sirak Builders Limited (2019) eKLR et.al.
8. At the time of writing this Ruling, the Respondents had not filed their written submissions.
9. I have gone through and carefully considered the Record of Appeal and the Appellant's written submissions dated 4th June 2025. The singular issue for my determination was whether the Appeal had merit.
10. Rule 11 of the Small Claims Courts Rules provides: -
 - (1) Where a respondent fails to file a response to the claim within the time specified in these Rules or within such additional time as the Court may have allowed, the Court shall, on the written request of the claimant, enter default judgment and issue a decree in favour of the claimant.
 - (2) Where a State department or State organ fails to file its response to a claim under the Act, the Court shall enter default judgment in accordance with the *Government Proceedings Act* or any other written law.
 - (3) subrule (1) applies, with necessary modifications, to cases where the claimant fails to file a response to a counterclaim.
 - (4) The Court may set aside a default judgment or any consequential orders given under this rule on the written request of any party that is aggrieved by the decree or order if the Court is satisfied, on evidence given by the applicant, and on hearing the other parties to the proceeding, that—
 - (a) the default was inadvertent;
 - (b) the applicant has a valid defence with a probability of success; or



- (c) there are sufficient grounds to warrant setting aside the default judgment, decree or order.
- (5) Where the Court gives an order setting aside default judgment or other consequential orders, the Court may order payment of reasonable costs incurred by the corresponding parties in the proceedings. (Emphasis mine)
11. As stated earlier in this Ruling, the trial court set aside the default Judgment and ordered the Appellant to deposit the entire decretal sum in court, an order that is the subject of this Ruling. In *One Way Cleaning Services Limited v Sirak Builders Limited* [2019] KEHC 6093 (KLR), the court held: -
- “In exercising his discretion in setting aside the judgment and granting the appellant an opportunity to defend its case, the learned trial magistrate ought to have appreciated that the claim as it stands has yet to be proved and therefore there is no decree/judgment to be secured. Moreover, I am not convinced the learned magistrate’s reasoning that the appellant had sound financial standing offered a proper basis for ordering the deposit of the decretal amount as security. In so finding, I take guidance from *Kenya Power & Lighting Co Ltd v Abdulkakim Abdulla Mohamed & another* [2017] eKLR where the Court of Appeal had the following to say on the subject:
- “The court had and still has the power to fast track the hearing of the suit and to set the time within which to hear and dispose of it. There was not even a remote suggestion that the appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective.”
- Going by the above, I am persuaded that the learned trial magistrate misdirected himself in ordering the appellant to deposit the decretal amount as a condition for setting aside the ex parte judgment. As did the Court of Appeal in the abovementioned case, I deem it necessary to interfere with the trial magistrate’s rendition on this limb.”
12. Similarly, in *B.N Kotecha & Sons Limited v Naushad Trading Company Limited* [2022] KEHC 741 (KLR), the court held: -
- “Having found that the Appellant’s Defence raised a triable issue to warrant the setting aside of the default judgment, it was anomalous for the learned magistrate to again make mention of “decretal sum” and require that the same be deposited within a fixed period of time.....”
13. I am persuaded by the above decisions and find that the trial court misdirected itself when it required the Appellant to deposit the entire decretal sum in court. Once the default Judgment was set aside, it meant the matter was to start de novo. A decretal sum only exists when the trial has ended and a Judgment has been rendered and not before. With respect to the trial court, what it should have done was to condemn the Appellant to pay costs.
14. In the final analysis, the Ruling dated 3rd October 2024 is set aside. I hereby make the following orders: -



- i. The ex-parte Judgement of the trial court dated 2/7/2024 is hereby set aside on condition that the Appellant pays the 1st Respondent throw away costs of Kshs 30,000/= within seven (7) days of this Ruling.
- ii. That the Appellant shall file and serve the Response and Counterclaim within 7 days from the date of this Ruling.
- iii. In default of compliance with the order given in (i) and (ii) hereinabove, the order vacating the ex-parte Judgement shall automatically lapse without further reference to the court and the 1st Respondent (Claimant) shall be at liberty to execute.
- iv. Each party to bear their own costs.

JUDGEMENT DELIVERED VIRTUALLY, DATED AND SIGNED THIS 5TH DAY OF NOVEMBER, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of;

Siele (Court Assistant).

Maronga for the Appellant

Chengecha for the Respondent

