



REPUBLIC OF KENYA



**Mwanza v Wanyonyi (Civil Appeal E058 of 2024)  
[2025] KEHC 15872 (KLR) (3 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15872 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL APPEAL E058 OF 2024  
WM MUSYOKA, J  
NOVEMBER 3, 2025**

**BETWEEN**

**VINCENT BARASA MWANZA ..... APPELLANT**

**AND**

**FREDRICK WAFULA WANYONYI ..... RESPONDENT**

*(Appeal from the ruling and orders, of Hon. EA Nyaloti, Chief  
Magistrate, of 30th April 2024, in Busia CMCCC No. E325 of 202)*

**JUDGMENT**

1. The suit, at the primary court, was by the respondent, against the appellant. It was a claim for Kshs. 228,384.00, with respect to dues on cane supplied.
2. I do not have the original trial court file, before me, and, therefore, I am only working with the record of appeal. The plaint was filed on 25<sup>th</sup> May 2023, but the registry stamp is not clear on when it was received at the court at Bungoma. The typed proceedings indicate that the file was placed before Hon. CM Maundu, Chief Magistrate, on 7<sup>th</sup> June 2023, for allocation, and it was allocated to Court No. 6. On 16<sup>th</sup> August 2023, a date was given, at the registry, for formal proof, on 4<sup>th</sup> October 2023.
3. The formal proof was conducted on 4<sup>th</sup> October 2023, when the respondent testified, and the matter was marked for mention on 19<sup>th</sup> October 2023. On 19<sup>th</sup> October 2023, the matter was fixed for judgement, on 15<sup>th</sup> November 2023. The typed proceedings are silent on whether a judgement was ever delivered. A copy of the judgement is not in the record of appeal. I, however, see a notice of entry of judgement, dated 1<sup>st</sup> December 2023, issued by the Advocates for the respondent, addressed to the appellant.
4. Orders were made, on 20<sup>th</sup> September 2023, at the High Court, for transfer of the matter to the Busia Chief Magistrate's Court. The order was extracted on 17<sup>th</sup> October 2023. That matter, at the Bungoma



court, Bungoma CMCCC No. E277 of 2023, was transferred to the Busia court, and became Busia CMCCC No. E325 of 2023. The appellant filed an application in Busia CMCCC No. E325 of 2023, dated 21<sup>st</sup> December 2023, for stay of execution, for the matter to start de novo, the setting aside of the judgement of 15<sup>th</sup> November 2023, and leave to defend.

5. In his affidavit in support of the application, the appellant deposed that he had been served with the court process in Bungoma CMCCC No. 277 of 2023, sometime in June 2023, or thereabouts. He consulted his Advocates, a day after he received service, and he was advised to obtain the pleadings from the court at Bungoma. He proceeded to Bungoma, and obtained the papers, which he shared with his Advocates. He was informed that his Advocates had filed an appearance, vide a memorandum, dated 14<sup>th</sup> July 2023.
6. After that his Advocates filed an application, at the High Court, for transfer of the matter from Bungoma to Busia. The said application was filed on 19<sup>th</sup> September 2023, and was allowed on 20<sup>th</sup> September 2023. A copy of the order was forwarded to the court administrator, at Bungoma, vide a letter, dated 1<sup>st</sup> December 2023. He averred that he was later served with a notice of entry of judgement, dated 11<sup>th</sup> December 2023, signalling that the matter had been heard and concluded. He averred that the effect of the order, in Busia HC Misc. Application No. E035 of 2023, which allowed the transfer application, was to stay the proceedings in Bungoma CMCCC No. E277 of 2023, as the matter was effectively transferred from the date the order was made. The effect of the order of 20<sup>th</sup> December 2023, was that execution was likely to ensue, and the appellant was seeking that the matter start de novo.
7. Attached to the application was a copy of a memorandum of appearance, dated 13<sup>th</sup> July 2023; a copy of the application for transfer, dated 22<sup>nd</sup> August 2023; a copy of the plaint in the suit at the trial court; a statement of accounts; an affidavit of service, sworn on 19<sup>th</sup> September 2023, with respect to the transfer application; the order for transfer, dated 20<sup>th</sup> September 2023; and the notice of entry of judgement, dated 1<sup>st</sup> December 2023.
8. I do not see a copy of a reply to that application, from the record of appeal before me. I cannot tell, as I do not have the original trial records, whether such a reply was ever filed.
9. A ruling was delivered, on 30<sup>th</sup> April 2024, dismissing the application, dated 20<sup>th</sup> December 2023.
10. It is the ruling of 30<sup>th</sup> April 2024, which triggered the instant appeal. The grounds are that the trial court did not make findings on the setting aside of the judgement of the trial court, and on the matter of leave to defend, and the matter starting de novo; denying the appellant an opportunity and right to be heard; stating that the court had considered submissions by the parties, when no submissions had been, in fact, filed; misapprehending the facts of the matter, and the application, dated 20<sup>th</sup> December 2023; dismissing the application in the absence of the parties; and awarding costs, yet no response had been filed.
11. Directions were taken, on 9<sup>th</sup> June 2025, for disposal of the appeal by written submissions. Both sides have complied.
12. The appellant submits that the trial court only considered the issue of stay of proceedings, but did not make findings on the other prayers. It is submitted that the application was essentially seeking the setting aside of the ex parte judgement, yet that prayer was not considered. It is also submitted that the court claimed to have had considered submissions by the parties, yet no submissions had been made. It is argued that Order 10 rule 11 of the Civil Procedure Rules gave the court discretion to set aside a decree or order on such terms as are just. Order 36 rule 10 is also cited, where discretion is granted



to set aside any judgement given against a party who did not attend at the hearing, and for grant of leave to defend.

13. The respondent argues around 4 issues: whether the judgement of 15<sup>th</sup> November 2023 should be set aside; whether the appellant is entitled to leave to defend and for the suit to be heard de novo; whether the requirements for stay were met; and on the matter of costs.
14. On the first issue, it is argued that the entry of judgement was regular, and based on *Shah v Mbogo* [1967] EA 116 (Harris, J) and *Sheikh t/a Hasa Hauliers v Highway Carriers Limited* [1988] eKLR [1988] KECA 139 (KLR) (Gachuhi, Apaloo & Masime), the court would not assist a party who deliberately sought to evade or otherwise obstruct the course of justice. It is submitted that the discretion under Order 10 rule 11, to set aside a judgement, is exercised judiciously, and not capriciously, and it should be considered whether a defence exists, with triable issues; whether prejudice would be suffered; and whether there is an explanation for the failure to act on time.
15. On whether a defence exists, with triable issues, *Tree Shade Motor Limited v DT Dobie & another* [1995-1998] EA 324 [1998] KECA 40 (KLR) (Kwach, Tunoi & Bosire, JJA), is cited, for the argument that before setting aside a regular judgement, the court should consider if a defence, with triable issues, exists. It is submitted that there was no demonstration, at the trial court, that such a defence existed, for no draft defence was annexed to the application.
16. On whether stay of execution should be granted, Order 42 rule 6 is cited, for the argument that an application for stay would be considered where the application is made without delay, substantial loss would otherwise occur, and security for costs is given. It is submitted that there was delay in the bringing of the application, and probability of substantial loss was not demonstrated, and no security for costs was offered. *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1982-1988] 1 KAR 1018 [1986] eKLR [1986] KECA 94 (KLR) (Hancox JA, Platt & Gachuhi Ag JJA) and *Thugge v Kenya Commercial Bank Limited* [1990] eKLR [1990] KEHC 63 (KLR) (Akiwumi, J) are cited. Good faith is emphasised. *Port Reitz Maternity v James Karanga Kabia CA No. 63 of 1997* and *Mbugi & another v Matundio* [2022] KEELC 1393 (KLR) (Kimani, J) are cited.
17. The principal issue, for me to determine, is whether the appellant should have been granted the orders that he sought in his application, dated 20<sup>th</sup> December 2023.
18. This is an instance where the appellant was served with court process, in June 2023, to wit the summons to enter appearance. He, apparently, did not enter appearance, nor file a defence, which, naturally follows entry of appearance, or should go hand-in-hand with it. Instead of appearing and defending the suit, he decided to move the High Court, in August 2023, to have the suit transferred from Bungoma to Busia. The order, for the transfer, was granted on 20<sup>th</sup> September 2023. A formal or extracted copy of the order was then forwarded to the court at Bungoma, vide a letter written on 1<sup>st</sup> December 2023. In the meantime, the proceedings, in Bungoma, progressed, as is usual, after service of a summons to enter appearance. By the time the order of 20<sup>th</sup> September 2023, for the transfer, was being forwarded to the court at Bungoma, by the letter dated 1<sup>st</sup> December 2023, judgement had already been entered.
19. This is a case of proper service of court process, for the appellant does not contest or dispute that he was served with summons to enter appearance. He, in fact, conceded that service, which he avers happened in the course of June 2023. The summons to enter appearance gives timelines, within which action is to be taken, and it indicates the action to be taken. The appellant, allegedly consulted his Advocates, just a day after he received service, and one would suppose that he was advised on the sequence of events that should have followed the service. He did not enter appearance, within the timelines indicated in the



- summons to enter appearance, which is 14 days. Entering appearance would have bought him more time, 14 days to be precise, to file a defence. None of that was done within the timelines.
20. The material, in the record of appeal, is unclear on whether judgement was entered for non-appearance, or for default of defence, but I see that, on 16<sup>th</sup> August 2023, the matter was fixed for formal proof, suggesting that interim or interlocutory judgement had been entered. Despite being served in June 2023, the appellant did not participate in the proceedings of 4<sup>th</sup> October 2023, when the matter came up for hearing, and it would appear that a final judgment was entered on 15<sup>th</sup> November 2023.
  21. Where a judgement is entered regularly, that is where there was proper service, the court would always be reluctant to set it aside, except where a good explanation or good reasons are given for failure to enter appearance or file defence. The party in default is expected to offer some explanation, for its default. The exercise of discretion, to set aside the default judgement, would be triggered by the reasonableness or plausibility of the explanation. Where no explanation is offered, no discretion will be exercised.
  22. In this instance, the appellant did not explain, to the trial court, why he defaulted, in entering appearance and filing a defence, to enable the trial court exercise discretion, to set aside the default judgement and final judgement, and to allow the appellant to file defence, and to consider whether the matter could start de novo. He gave no reasons at all, why he did not enter appearance nor file defence, within the given timelines, after he was properly served with process in June 2023. He did not unlock exercise of discretion in his favour, and, therefore, he should not have expected discretion to be exercised in his favour.
  23. What the appellant is lurching on is the order made by the High Court, on 20<sup>th</sup> September 2023, for transfer of the matter from Bungoma to Busia. That order was made on an application, dated 22<sup>nd</sup> August 2023. In the first place, that application should not have preceded entry of appearance and filing of defence. He should have entered appearance and filed defence first, at Bungoma, before asking the High Court for the transfer of the matter to Busia. It would appear that he was seeking transfer of a matter where he was not even on record. Secondly, by the time he was filing for transfer, by his application, dated 22<sup>nd</sup> August 2023, interlocutory judgement had already been entered, for the matter had, by that time, been fixed, on 18<sup>th</sup> August 2023, for formal proof, on 4<sup>th</sup> October 2023.
  24. Thirdly, I have seen the argument, that the order, of 20<sup>th</sup> September 2023, stayed the proceedings at the trial court, pending transfer. Yet, by the time the order, of 20<sup>th</sup> September 2023, was being made, interlocutory judgement had already been entered, and a date fixed for hearing, being 4<sup>th</sup> October 2023. The order of 20<sup>th</sup> September 2023, preceded the formal proof of 4<sup>th</sup> October 2023, and the final judgement of 15<sup>th</sup> November 2023. However, the order of 20<sup>th</sup> September 2023 was not communicated to the trial court, by either 4<sup>th</sup> October 2023 or 15<sup>th</sup> November 2023, to stay the formal proof or the final judgement, hence the trial court was unaware of the existence of that order, as at those crucial dates. The order of 20<sup>th</sup> September 2023, was not extracted until 17<sup>th</sup> October 2023, by which date the formal proof of 4<sup>th</sup> October 2023 had already happened. A court order only becomes effective upon its being served, or otherwise brought to the notice of the other party, or that of whoever else is expected to act on it.
  25. The order, of 20<sup>th</sup> September 2023, was not served on the trial court, at all, at any stage. Instead, the Advocates wrote a letter to the trial court. The letter, of 1<sup>st</sup> December 2023, which forwarded the formal order to Bungoma, was being written after the final judgement had already been delivered, on 15<sup>th</sup> November 2023, hence, there was nothing that could legitimately stop the trial court, from proceeding in the manner it did, on 16<sup>th</sup> August 2023, 4<sup>th</sup> October 2023 and 15<sup>th</sup> November 2023. The trial court cannot be faulted, in any way, for the way it handled the matter, on those dates. It did not deny the



appellant an opportunity to be heard, nor limit his right to be heard. The opportunity was available, but the appellant chose, for unknown or undisclosed reasons, not to take up the chance. He cannot now turnaround to blame anyone. He was a victim of his own folly.

26. The trial court, faced with that background, had no option, but to dismiss the application, dated 20<sup>th</sup> December 2023, on 30<sup>th</sup> April 2024, as the said application had no merit. Of course, the trial court could have done better. It based its decision on only 2 prayers, despite the application having multiple prayers. It only addressed stay of proceedings and stay of execution, yet there were prayers on the setting aside of the judgement, leave to defend and the matter of the case starting de novo. Those other prayers were, in fact, primary, and the prayers considered by the trial court were secondary. The trial court should have dealt with the primary prayers first, and it was upon coming to whatever position it came to, that it could proceed to consider the secondary prayers. The trial court literally put the cart before the horse. Anyhow. It did not matter in the end. The trial court came to the right conclusion, that the application, dated 20<sup>th</sup> December 2023, was lacking in merit, and it was rightly dismissed.
27. I find no merit in the appeal herein, in the circumstances, and I, accordingly, dismiss it. The respondent shall have the costs of the appeal. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 3<sup>RD</sup> DAY OF NOVEMBER 2025.**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Were, instructed by Fwaya Masakhwe Were & Company, Advocates for the appellant.

Ms. Masengeli, instructed by JO Makali & Company, Advocates for the respondent.

