



REPUBLIC OF KENYA



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**Karanja v Chesang (Small Claims Appeal E002 of 2025)
[2025] KEHC 17290 (KLR) (25 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SMALL CLAIMS APPEAL E002 OF 2025
RN NYAKUNDI, J
NOVEMBER 25, 2025**

BETWEEN

DANIEL KARANJA APPELLANT

AND

MARGARET CHESANG RESPONDENT

*(Being an Appeal from the Ruling and orders of Hon. Rodgers Otieno
(Adjudicator/RM) delivered on 9/5/2025 in Eldoret SCCOMC NO. E769 OF 2024)*

JUDGMENT

1. The background of this appeal is that the Appellant who was the Respondent at the Trial Court filed an application dated 14th March 2025 seeking the following orders: that the Honourable Court be pleased to stay execution of the judgement and decree herein pending the hearing and determination of the application, that the default judgement entered against the Respondent on 16 8 2025 be set aside, that the Respondent be granted leave to file Response to the statement of claim in terms of the draft defense and the costs of the application be provided for. The application was made on the grounds that the applicant was never served with the pleadings and summons to attend court and that he had a defense which raised triable issues and should be heard. The Respondent herein who was the Claimant at the trial Court opposed the application and stated that the applicant was duly served with court process but opted not to participate, that the applicant had not come to court with clean hands and urged the court to dismiss the application.
2. The Trial Court vide its ruling dated 9th May 2025 stated as follows: -
 - “5. This Court finds that the evidence on record proved that the applicant was duly served with court process. There was no evidence that the certificates of service on record were not genuine. He did not deny that the telephone number indicated to have been used to call him belonged to him.



6. The judgement herein was therefore regular. The judgement was entered on 16th August 2024. The right to be heard cannot be the only reason to set aside a regular judgement in a case where a party was served but failed to comply with the strict timelines provided by statute. The application lack merit and is hereby dismissed with costs to the Claimant.”
3. The Appellant being dissatisfied with the aforesaid ruling appealed to this Honourable Court by way of a Memorandum of Appeal dated 22nd May 2025 based on the following grounds: -
 - a. That the Learned Trial Magistrate erred in law in the exercise of his discretion in declining to set aside ex parte judgement entered against the Appellant herein on 16 8 2024.
 - b. The Learned Trial Magistrate erred in law in finding and holding that the Appellant was properly served with statement of claim and summons to enter appearance.
 - c. That the Learned Trial Magistrate erred in law in failing to grant the appellant herein leave to defend the claim in the face of a formidable defense presented by the Appellant against the claim.
4. The Appellant prayed that this appeal be allowed with costs and;
 - a. The Trial Court’s ruling dated 9 5 2025 be set aside.
 - b. The Honourable Court be pleased to allow the appellant’s application dated 14 3 2025, set aside the ex parte default judgment entered against the appellant herein and grant the appellant leave to defend the claim against him before the trial Court.
5. The Appeal was canvassed by way of written submissions.

Appellant’s Written Submissions

6. The Appellant filed its written submissions dated 10th July 2025 in which the learned Counsel for the Appellant Mr. Kapere submitted on 3 issues for determination as follows:
 - a. Whether the Appellant was properly served with the Statement of Claim.
 - b. Whether the trial Court properly exercised its discretion in dismissing the Appellant’s Application dated 14 3 2025.
7. The learned counsel for the Appellant, Mr. Kapere submitted that the central issue in the appeal is that the appellant was never properly served with the Statement of Claim and the trial court therefore misapprehended both the facts and the law. Counsel argued that there were two separate certificates of service on record: one by Eliud Kipkemboi Tanui dated 29 7 2024 which was the basis of the ex parte judgment and another by Daniel Shiraho dated 5 3 2025 which the appellant did not dispute. He noted that the appellant only became aware of the matter upon service of the notice to show cause by Shiraho, who was the only process server to call the appellant through his phone. He opined that the trial court therefore erred in relying on the statement that the appellant “did not deny the phone number used belonged to him,” because this fact related only to Shiraho’s service and not Tanui’s disputed affidavit.
8. The Learned Counsel emphasized that Tanui’s affidavit of service was defective and unreliable. It showed that the process server did not know the appellant and depended on an unnamed Mpesa agent to identify him, without explaining how the agent knew the appellant. He further submitted that the affidavit did not indicate whether the person allegedly served identified himself as the appellant nor did it name or describe the recipient of the documents. This omission made it impossible to determine



whether the actual appellant was served. Citing Kenya Union of Commercial Food and Allied Workers Vs Kenya Credit Traders Ltd (Cause E033 of 2022) [2023] KEELRC 2403 (KLR), counsel argued that failure to name the recipient or record their refusal to sign rendered the service defective. He stressed that the appellant had requested the cross-examination of the process server, and the failure to produce the process server should have been interpreted in the appellant's favour.

9. On the second issue, counsel submitted that the trial court improperly exercised its discretion in dismissing the appellant's application dated 14 3 2025. He submitted that although the trial magistrate noted that the right to be heard could justify setting aside an ex parte judgment, the court failed to apply the correct legal principles, the appellant had presented a draft defence raising a clear triable issue and that he denied owing the respondent any money and denied having entered into any contract with the respondent. Counsel relied on the Court of Appeal case of Job Kilach Vs Nation Media Group Ltd & Others (2015) eKLR and Hashi Empex Ltd Vs Wangethi Mwangi (2009) eKLR which affirm that even one triable issue entitles a party to defend a suit. The learned counsel furthermore submitted that by disregarding this, the trial magistrate wrongly exercised discretion and effectively condemned the appellant to pay a debt he does not owe, without being heard contrary to natural justice.
10. Counsel concluded that the trial court's reference to the 60-day timeline in section 34 of the *akn ke act 2016 2 Small Claims Court Act* was not a lawful reason to deny the appellant procedural and substantive justice. He urged the Court to find that the appeal is merited and to allow it as prayed.

Respondent's Written Submissions

11. I take note that at the time of writing this judgment, the Respondent in this Appeal had not yet filed her written submissions. A look at the Case Tracking System (CTS) also indicates that the Respondent had not yet filed the submissions. Nevertheless, I will proceed with the appeal on its merits.

Decision

12. This appeal is based on the grievance of a Judge's or Magistrate's exercise of discretion which must be exercised judiciously and not arbitrarily underpinned according to established legal principles and not to whimsically or capriciously. According to the Appellant the learned trial Magistrate failed to interrogate the question of service by the Process Server in compliance with the Civil Procedure Rules which can apply to the Small Claims Court by dint of the doctrine *pari materia*. On matters of this nature it is trite that an appellate court will only interfere with that exercise of discretion under specific circumstances as laid down in the following case law:

In the case of Mbogo & Another versus Shah (1968) EA 93: This is leading case establishing the principles under which an appellate court may interfere with a trial judge's exercise of discretion. Interference is justified if the trial judge either: Misdirected themselves on a matter and arrived at a wrong decision. Made a manifestly wrong decision, resulting in an injustice.

Similarly, in Hamed v Kenya Orient Insurance Company Limited [2013] eKLR: This case affirmed the principle that judicial discretion is a judicial power and not a judge's personal will. It held that discretion must be exercised on fixed legal principles, based on evidence, and not on private opinion, sentiment, or whim. The Court further in Feroz Begum Qureshi and Another v Maganbhai Patel and Others [1964] EA 633: This case clarified that the terms "sufficient cause" and "good cause" for an exercise of discretion are interchangeable. An applicant must satisfy the court that they have a good cause for requesting orders that rely on the court's discretion. In addition the court in Republic v Kenya Orient Insurance Company Limited [2023] eKLR: In the High Court, Justice Odunga reiterated that judicial discretion must be exercised on fixed principles and not on private opinions, sentiments, or



sympathy. The burden of providing the necessary material for such orders lies with the applicant. These settled principles were also revisited by the Apex Court in *Kenya Electricity Transmission Co. Ltd v Law Society of Kenya & Another* [2016] KLR, the Supreme Court stated that as the “ultimate custodian of constitutional integrity,” it may interfere with another court’s discretion if it is satisfied that the lower court misapplied the law, or that its orders conflict with *akn ke act 2010 constitution the Constitution* and cause grave injustice.

13. The general guiding principles in exercise of judicial discretion are contextualized as herein under: Discretion is not arbitrary: A judge’s discretion must be exercised judiciously, not capriciously, and in accordance with reason and justice. Contextual exercise: The exercise of discretion must be based on the specific circumstances of each case. Serving justice: The court’s primary goal in exercising discretion is to do real and substantial justice to the parties. Not a tool for negligence: Courts will not use their discretion to aid litigants who have slept on their rights or exhibited a lack of diligence. Adherence to law and precedent: While a judge has discretion, it must be exercised within the constraints of existing laws and precedents. Decisions that violate legal principles may be reversed by higher courts.

14. The question to be answered in this case is whether the learned Magistrate was right in pronouncing himself on the 9th May 2025 as follows:

“This court finds that the evidence on record proved that the applicant was duly served with court process. There was no evidence that the certificate of service on record were not genuine. He did not deny that the telephone number indicated to have been used to call him belonged to him. The judgment herein was therefore regular. The judgment was entered on 16th August 2024. The right to be heard cannot be the only reason to set aside a regular judgment in a case where a party was served but failed to comply with the strict timelines provided by Statute. The application lack merit and is hereby dismissed with costs to the Claimant.”

15. What the learned Magistrate did from this decision is to determine the rights of the parties conclusively based on a default judgment. He took the view that the defendant appellant was duly served with the court process. From the readings of the affidavits and material evidence alluded to by the appellant there is sufficient cause on the nature of the affidavit of service relied upon by the Learned Magistrate to dismiss the right to present and challenge the evidence of the entire claim. Every time a matter is dealt with *ex parte* it means one party is not heard and it is by means other than review that a matter dealt with *ex parte* can be reversed.

16. It is important to further emphasize the role accorded to Article 48 on access to justice and Article 50 on the right to a fair hearing by the framers of our Constitution. These rights may not be limited in terms of law and general application nor justifiable in an open and democratic society based on national values and principles of governance under Article 10 of the same Constitution. The purpose of fair trial rights under Article 50 indeed are impactful on the application of Article 27 on equality before the law and freedom from nondiscrimination. The question whether the appellant did in fact suffer the impairment of not being heard by the trial court so as to challenge the evidence on record is a matter which cannot be answered on the efficacy of the Process Server. The trial Court had a duty to give effect to substantive equality in interpreting the provisions of the *akn ke act 1924 3 Civil Procedure Act* and the Small Claims Court on service of the suit papers upon a respondent or a defendant to the claim. The importance of the National values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination etc. in our new Constitution cannot be over emphasized as binding to the decision makers more specifically on matters



of adjudication of disputes by the constitutional organs provided for under Article 50 (1) of *akn ke act 2010 constitution the Constitution*. The constitutional emphasis that everyone is equal before the law and has the right to equal protection and benefit of the law was not properly interpreted and construed by the learned Magistrate when he denied the appellant to state his case in an inter parties forum. The learned Magistrate is clothed with unfettered discretion to recall the default judgment and on the right to a recourse and fair trial rights under Article 50 of *akn ke act 2010 constitution the Constitution* reopen the proceedings with a condition on costs to be awarded to the respondent in the primary trial. The doctrine of equality of arms implicit in Articles 10, 27, 47, 48 and 50 of *akn ke act 2010 constitution the Constitution* should be central in the administration of justice and no party should be allowed to have an unfair advantage over the other. The right to a fair trial on the face of it seem to hinge or tilt more to the criminal process but that is not the letter and spirit of the article in question. The right to a fair consists of a number of component rights including but not limited to the speedy hearing, legal representation, challenging evidence in adversarial system, pretrial disclosures, adequate notice on the claim filed by a litigant or plaintiff and the same to be answered in equal measure. The principle of equality and right to a fair trial are central and becomes the core in our administration of justice and no judicial discretion can be exercised to derogate or limit the fair trial rights. They lie at the heart of our fair administration of justice and they are even embedded in various international human rights documents justiciable under Article 2(5) & (6) of *akn ke act 2010 constitution the Constitution*. The right to a fair trial is absolute subject only to limitations necessary for a legitimate purpose in a democratic society that does not compromise the fairness of the trial. In the present case, the limitation adopted by the learned trial Magistrate underpinned on a defective or challenged process of court service was not justifiable and to that extent the fair trial rights of the appellant were infringed, hence compromising the fairness of the trial.

17. In my considered view, there could have been no prejudice or injustice on the part of the disputants before the Small Claims Court to comply with an order of reopening the case, obtain the attendance of witnesses, carry out the examination of witnesses based on the claim and the defence which could have been filed by the instant appellant. The best that the learned Magistrate could have done is to permit certain costs to be paid as a sanction for the party who was for one reason or another was found to have been in breach of the applicable rule of procedure.
18. It should be borne in mind that the courts in Kenya should protect constitutional procedural and substantive rights far more rigidly than rules of procedure in the Civil Procedure Rules or any such Statute enacted by Parliament to regulate the order of the trial. It is for those reasons I find that if indeed there was a violation of the procedural rule on service by the appellant there was no prejudice which resulted on the part of the respondent for the proceedings not to be reopened and a statement of defence be filed to avoid a judgment on technical grounds in which the merit threshold was not met.
19. Therefore, as a consequence of the above, the impugned ruling by the learned trial Magistrate denying the appellant to argue and agitate his defence be and is hereby set aside. In this regard, the appellant shall exercise his constitutional rights under Article 27, 47, 48 and 50 and in furtherance of set of rights catered for in *akn ke act 2010 constitution the Constitution* be heard by another Court not the one constituted by learned Magistrate Hon. R. Otieno. This review of the order by the learned trial Magistrate paves way for recall of the witnesses who testified against the appellant to have the evidence shared and a retrial be scheduled, commencing in earnest and concluded within a reasonable time and not later than 45 days from today's ruling. The costs of this appeal shall abide the outcome of the primary suit before the Small Claims Court.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25TH DAY OF NOVEMBER, 2025

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R. NYAKUNDI
JUDGE

