Muriungi v Nkuene (Civil Appeal E1261 of 2024)
[2025] KEHC 16909 (KLR) (Civ) (19 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16909 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1261 OF 2024

AC MRIMA, J

NOVEMBER 19, 2025

BETWEEN

PETER MURIUNGI ..... APPELLANT

AND

AGNES NKUENE ..... RESPONDENT

(Being an appeal from the Ruling and Orders of Hon. E. K. Too in Milimani Chief Magistrates Court Civil Case No. E.12688 of 2021 delivered on 17th October 2024)

JUDGMENT

Background:

1. Agnes Nkuene, the Respondent herein, instituted MilimaniChief Magistrates Court Civil Case No. E.12688 of 2021 (hereinafter referred to as 'the suit') against Peter Muriungi, the Appellant herein. She sought compensation for damages occasioned to her motor vehicle for what she claimed was caused by the Respondent's negligence, including the failure to exercise control of his vehicle, to swerve, to brake and driving at excessive speed.

2. The Appellant did not enter appearance. Consequently, the Respondent sought and obtained default judgment and thereafter execution ensued. Aggrieved, the Appellant lodged an application by way of a Notice of Motion dated 16th September 2024, seeking to set aside the judgment. The application was opposed and in a resultant ruling, [hereinafter referred to as 'the impugned ruling'], the application was dismissed thereby resulting to the instant appeal.

The Appeal:

3. Through a Memorandum of Appeal dated 30th October 2024, the Appellant sought to set aside the impugned ruling and that he be allowed to defend the suit on the following grounds of appeal: -

    1. That the Learned Magistrate erred in law and in fact by dismissing the Appellants application dated 16th September 2024 that sought to set aside the ex-parte Judgement entered in default of appearance.

    2. That the learned magistrate erred in fact and in law by disregarding all evidence alluded to on the reasons for failure to enter appearance.

    3. That the learned magistrate erred in law and in fact in finding that the draft defence filled by the appellant did not raise any triable issues.

    4. That the learned magistrate erred in law and in fact in failing to rectify an inadvertent mistake or error that could have been corrected by payment of costs.

    5. That the learned magistrate erred in law and in fact by dismissing the application on the ground that litigation must come to an end without considering that whereas the suit was instituted in 2021, the plaintiff did not actively pursue the matter until late 2023 and 2024.

    6. That the Learned Magistrate erred in law and fact by applying the wrong principles or by not taking relevant matters/evidence into consideration, thereby arriving at a ruling that occasioned a miscarriage of justice.

The submissions

4. The Appellant urged his case further through written submissions dated 26th June 2025. He argued that the Learned Magistrate failed to properly consider the reasons for the delay in filing the application to set aside the judgment. It was his case that the delay in lodging the application was not inordinate: that the application was filed on 16th September 2024, less than three months after the default judgment was entered on 19th June 2024. He posited that there were plausible reasons for the delay since he was unaware of the judgment given that the Judiciary E-filing portal did not reflect it. Crucially, he indicated that his insurer was actively engaged in good-faith, out-of-Court settlement negotiations with the Respondent's Advocates during that time.

5. He further claimed that the trial Court erred since it focused excessively on the suit which was filed in 2021 while ignoring a long period of inactivity by the Respondent who only actively pursued the matter in late 2023 and 2024. He submitted that litigation must have a just end, not merely a speedy one. On the issue of his defence, he submitted that the failure by the trial Court to consider the Draft Defence occasioned him injustice since it raised triable issues. He asserted that the Learned Magistrate committed a fundamental error of law by completely failing to evaluate the merits of the annexed draft defence. The Appellant drew support from the decision in Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another [1998] KECA 40 (KLR) to buttress the position that a Court's discretion is properly exercised only after it examines the draft defence to determine if it raises a valid or reasonable defence.

6. In further pursuit of the claim that the draft defence raised triable, specific, substantial issues, not just bare denials, it was his case that the award by the trial Court was inflated more so given that the salvage value of the motor vehicle which amounted to Kshs. 290,000/= was not deducted from the amount claimed. He submitted that vicarious liability was inapplicable since his driver was not negligent. It was

further his defence that there was an aspect of contributory negligence as the Respondent substantially was to blame for the accident. On the foregoing, he submitted that even one triable issue is sufficient to warrant setting aside of the judgment and allowing the case to proceed to trial on its merits.

7. In a different line of argument, the Appellant submitted that the failure to set aside the default judgment violated his right to a fair hearing guaranteed under Article 50(1) of *the Constitution*. He relied on the case of Martin Maurice Odhiambo v Kipsigis Traders Co-operative Society Ltd & Another (2010) eKLR where it was establishing that the right to be heard is paramount and should not be defeated by procedural technicalities or manageable delays, especially when any inconvenience to the other party can be compensated with costs. The Appellant then faulted the trial Magistrate for failure to consider that not setting aside the default judgment would cause him irreparable injustice that could not be adequately compensated by an award of costs.

8. The Appellant also submitted that the learned trial Magistrate failed to address the issue of throw-away costs. He claimed that the Respondent had suggested Kshs. 50,000/-, while he had proposed a range of Kshs. 10,000/- to 30,000/-. He asserted that by not considering the imposition of reasonable costs as a condition (a discretion granted by Section 27 of the *Civil Procedure Act*), the Court failed to facilitate a just resolution.

9. In conclusion, the Appellant concluded that the Learned Magistrate exercised discretion based on wrong principles, ignored a triable defence, and denied him a fair hearing. He prayed that the appeal be allowed accordingly.

The Respondent's case:

10. Agnes Nkuene, challenged the appeal through written submissions dated 1st July 2025. At the heart of the argument was the legal principle that litigation must eventually be concluded. She outlined the timeline of the suit had taken and submitted that Summons to Enter Appearance were served on the Appellant via WhatsApp on March 26, 2024, in accordance with Order 5 Rule 22C of the Civil Procedure Rules. However, the Appellant failed to enter an appearance or file a defence within the required 15-day period. She then requested for and was granted a default judgment, which was entered on June 5, 2024.

11. It was her case that the Appellant filed an application to set aside the ex-parte judgment on 16th September 2024 a period nearly six months after service and three months after the judgment was entered. She characterized the application as an "afterthought" intended to "frustrate the Respondent". In arguing that the trial Magistrate's decision was correct and the appeal is unmerited, she asserted that service of summons was proper and there is an Affidavit of Service, sworn on 26th March 2024, which provides a proper account of how service was effected via WhatsApp in consonance with Order 5 Rule 22C of the Civil Procedure (Amendment) Rules, 2020. It was her case that the Affidavit of Service was never challenged by the Appellant in the trial Court and the Appellant's failure to respond was a deliberate choice.

12. The Respondent drew support from the case of Francis Munyoki Kilonzo & Another v. Vincent Mutua Mutiso, to firm the position that a Court of equity should not assist a person in extricating themselves from circumstances they themselves have created.

13. In challenging the claim that the draft defence raised triable issues, it was her case that they only were mere denials and assumptions and does not raise any bona fide triable issues. She drew support from the case of Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio (2015) eKLR where the Court of Appeal defined triable issue as matter that requires further interrogation by the Court during a full trial. She contended that the Appellant's defence did not meet the threshold of a

defence on the merits. She claimed that the facts of the accident were confirmed by a Police Abstract, which the Appellant has not disproven and setting the judgment aside would, only just postpone the inevitable. It was also her case that she would suffer greater prejudice if the appeal is allowed since she lawfully obtained judgment after complying with all procedural requirements.

14. She asserted that disturbing her judgment would cause grave injustice by denying her the fruits of her Judgment. Conversely, she stated that the Appellant's predicament was entirely self-inflicted. In conclusion, she contended that the appeal is not merited since the judgment was regularly obtained following proper service. She reiterated that the trial Magistrate exercised his discretion properly and judiciously and this Court should not interfere with that discretion. She prayed that the appeal be dismissed with costs.

Analysis:

15. Having carefully considered the grounds of appeal as set out in the Memorandum of Appeal, the comprehensive written submissions by both parties and the decisions therein, this Court finds that the following issues crystallize for determination: -

    i. A general discussion on the legal principles governing the setting aside an ex-parte judgment entered in default of appearance.

    ii. Whether the learned trial magistrate exercised his discretion judiciously.

    iii. Whether the Appellant's Draft Statement of Defence discloses bona fide triable issues.

16. A consideration of the above issue now follows.

    (a) The Principles governing the setting aside of default judgments:

17. The jurisdiction of the Court to set aside a judgment entered in default of appearance is a discretionary power of an equitable nature. The statutory foundation for this jurisdiction is found in Order 10, Rule 11 of the Civil Procedure Rules, 2010, which provides as follows: -

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

18. The language of the rule, particularly the use of the words 'may' and 'upon such terms as are just,' signify that the Court's discretion is wide and unfettered. The primary role of the Court, as was observed in the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75, is to do justice to the parties. The proviso is that discretion must not be exercised capriciously, vaguely or arbitrarily. It must be exercised on the basis of reason and justice, and in accordance with established legal principles.

19. The jurisprudence from our Courts has, over the years, crystallized the principles that guide a Court in the exercise of this discretion. The Court of Appeal for East Africa in the locus classicus case of Shah v Mbogo & Another EA 116, laid down the foundational test. The Court held that the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

20. In discharging the foregoing duty, the key principles that a Court considers are whether the judgment was regularly or irregularly obtained. Subsequently, an Applicant must show a meritorious defence. In this instance, the Court does not need to be fully convinced the defence will succeed, only that it raises triable issues worthy of a hearing. This is often considered the most important factor.

21. Thirdly, the Court considers the period of delay and reasons advanced by the Applicant for failing to enter appearance or file a defence in time. The Court will assess whether the explanation is plausible and demonstrates that the default was not deliberate.

22. Finally, the Court must weigh the potential prejudice to the Respondent if the judgment is set aside against the prejudice to the Applicant if it is not. A key consideration is whether any prejudice suffered by the Respondent can be adequately compensated by an award of costs.

23. With the foregoing legal basis, this Court will now re-assess the learned trial Magistrate's decision.

(b) Whether the learned trial Magistrate exercised his discretion judiciously:

24. In this case, there is no contest that a default judgment was entered. There is on record the Affidavit of Service of Vincent Mungau deposed to on 26th March 2024 on the service of the Plaint and the Summons to enter appearance. Since the service was not challenged, this Court will deal with the Appellant's explanation for the delay.

25. The Appellant's explanation was twofold: one, was that there was a technical issue with the e-filing portal and, two which is more substantively; that there were ongoing settlement negotiations being conducted by his insurer. While a party's Advocate has a duty to remain vigilant and monitor Court proceedings, the reality of litigation practice, particularly in insurance-backed claims, is that parties often place significant reliance on parallel negotiation tracks. To dismiss this explanation out of hand as being insufficient, without considering its context, may be unduly harsh. It does not, on the face of it, point to a litigant who is deliberately attempting to obstruct justice. Rather, it suggests a litigant who, perhaps mistakenly, believed that the formal Court process was in abeyance pending the outcome of the negotiations. In this Court's view that such oversight is an excusable mistake or error that the discretion under Order 10, Rule 11 is designed to remedy.

26. Therefore, the circumstances of the case permit this Court to invoke the overriding objective of the *Civil Procedure Act*, often referred to as the Oxygen Principle. This Court's inherent power under Section 3A of the *Civil Procedure Act* serves as a reservoir of jurisdiction to be invoked to prevent the abuse of the Court process and to ensure that the ends of justice are met. This power exists to ensure that a strict adherence to procedural rules does not lead to a manifest injustice.

27. In the circumstances of this case, by focusing narrowly on the fact of the delay of three months without giving sufficient weight to the plausible explanation offered, and by prioritizing finality over a determination on the merits, respectfully, the learned trial Magistrate appears to have exercised his discretion on wrong principles, failing to give effect to the overriding objective of the Act. As such, this Court finds that the Learned Magistrate erred and that aspect alone, calls for this Court to interfere with the finding.

(c) Whether the Appellant's Draft Statement of Defence discloses bona fide triable issues:

28. Before the eyes of this Court, this is one the most decisive issue in an application to set aside a regular default judgment. The law is settled that the Court must examine the draft defence to satisfy itself that it is not a sham and that it raises at least one bona fide triable issue. In Gupta v Continental Builders Ltd (1978) KLR 83 the Court spoke the foregoing requirement in the following manner: -

> .... The duty of the Court is not to ascertain the truth of the facts stated in the defence and the replying affidavit but merely to consider whether the facts as pleaded, if proved, would constitute a defence.

29. The Appellant's Draft Statement of Defence, as submitted, raised three distinct lines of defence: contributory negligence, vicarious liability, and the quantum of damages. The Respondent dismissed these as mere denials and assumptions. This Court must, therefore, analyze whether such characterization is accurate. A claim of contributory negligence essentially proposes apportionment of liability. It is fact that can only be determined by evidence at trial. A plea of contributory negligence is an affirmative defence requiring evidence to be adduced and tested in cross-examination. It is not a mere denial. It meets the threshold of a triable issue.

30. Similarly, the question of vicarious liability of the driver's negligence is the primary factual dispute upon which the entire claim rests. Denying negligence is the foundation of the defence and requires a full trial for determination. It is the very issue the Court is called upon to adjudicate. It is indeed a triable issue. Finally, on quantum of damages, the Appellant asserted that the claimed amount is inflated as the salvage value of Kshs. 290,000/= was not deducted. This is a specific, quantifiable and arguable defence on the quantum of special damages. It is not a bare denial but a direct and substantial challenge to the calculation of the decretal sum. If successful, it would significantly alter the outcome. It unequivocally meets the threshold.

31. In the case of Mugunga v C.S.I (2014) eKLR the Court stated as follows: -

... A triable issue is not necessarily one that will succeed but one that is arguable and requires the trial court to hear evidence on record and evaluate the same before concluding the same.

32. From the analysis and authorities cited above, it is clear that the Appellant raised several substantial and bona fide triable issues. The plea regarding the non-deduction of the salvage value of Kshs. 290,000/= is particularly potent. It is a specific, arithmetical challenge to the quantum of special damages claimed. This is not a vague or general denial; it is a concrete issue of fact and law that goes to the heart of the assessment of damages. The Respondent's reliance on a Police Abstract is misplaced at this interlocutory stage; a Police Abstract is prima facie report of an accident, but not conclusive evidence of liability and is subject to challenge during a trial.

33. This Court, therefore, finds that to drive the Appellant from the judgment seat permanently would be a draconian step that is disproportionate to the nature of his default. Indeed, the Court's power to impose conditions, particularly an award of costs, becomes a vital tool for balancing the competing interests of the parties. Section 27 of the *Civil Procedure Act* grants the Court full discretion over costs. The concept of throw-away costs is a judicial innovation designed to mitigate the prejudice suffered by a diligent party when an indolent party is granted an indulgence by the Court. By ordering the defaulting party to pay the costs occasioned by their application and the setting aside of the judgment, the Court compensates the non-defaulting party for the delay and inconvenience, thereby ensuring they are not unfairly prejudiced. This allows the Court to uphold the Respondent's right to be compensated for the consequences of the delay, while simultaneously vindicating the Appellant's constitutional right to defend the suit on its merits.

34. In the end, this Court finds that the draft defence raised several triable issues worth re-looking at a trial.

Disposition:

35. In light of the foregoing analysis, this Court finds, with utmost respect, that the learned trial Magistrate, despite the fact that the delay was not inordinate, placed undue emphasis on the principle of finality in litigation and the expeditious disposal of cases at the expense of the overriding objective of the *Civil Procedure Act*, which is to ensure the just determination of disputes. This Court further finds that the draft defence, particularly on the issues of contributory negligence and the specific challenge to the

quantum of damages regarding the non-deduction of the vehicle's salvage value, raised substantial and arguable points that warrant a full trial on the merits.

36. Consequently, the appeal is meritorious and ought to be allowed. The following final orders hereby issue: -

(a) The Appeal be and is hereby allowed.

(b) The Ruling and attendant Orders delivered on 17th October 2024 in the Milimani Chief Magistrates Court Civil Case No. E.12688 of 2021 be and are hereby set aside and quashed in their entirety.

(c) The ex-parte judgment entered against the Appellant in default of appearance in the aforesaid suit, together with all consequential orders and/or decrees, be and is hereby set aside and quashed accordingly.

(d) The Appellant's Draft Statement of Defence, which was annexed to the Notice of Motion dated 16th September 2024, shall be deemed as duly filed and served.

(e) As a condition for the setting aside of the Exparte judgment, the Appellant shall pay to the Respondent throw-away costs, which are hereby assessed at Kshs. 30,000/- [Read: Kenya Shillings Thirty Thousand Only] within fourteen (14) days from the date of this judgment and in default the appeal shall stand dismissed with costs, the order setting aside the default judgment automatically discharged and the judgment of the trial Court reinstated for forthwith execution.

(f) The costs of this appeal, also assessed at Kshs. 30,000/- [Read: Kenya Shillings Thirty Thousand Only], shall be borne by the Appellant.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Odera, Learned Counsel for the Appellant.

Mr. Ouma, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.