Njogu v Nduna (Suing as the Personal Representative of the Estate of the Late Ezron Musyoki David) (Civil Appeal E052 of 2025) [2025] KEHC 18992 (KLR) (22 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18992 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E052 OF 2025

TM MATHEKA, J

DECEMBER 22, 2025

BETWEEN

SIMON NYAGA NJOGU ..... APPLICANT

AND

JOSEPHINE NDUNI NDUNA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE EZRON MUSYOKI DAVID) ..... RESPONDENT

RULING

1. The application before me is dated 25th July 2025.The applicant seeks inter alia a stay of execution in Makueni civil suit number E 140 of 2024 pending the hearing and determination of the appeal.

2. The application is supported by the affidavit sworn by the applicant. He depones that he is unable to attach the ruling against which he is appealing because by the time of filing the application it had not been uploaded.

3. The issue however is that he was the defendant in the named suit and an interlocutory judgment was entered against him on the 17th of September 2025 after he had filed his defence. He depones that the judgment was entered four days after he had filed his defense; that the respondents advocates filed a reply to the defence on the 17th of September 2024 which means that they had received his statement of defence before the interlocutory judgment was entered.

4. That as soon as judgment was entered the respondent quickly obtained decree and warrants and attached his motor vehicle registration number KDE 097E. He filed an application seeking to set aside the interlocutory judgment and obtain a stay of execution and sale of his motor vehicle on the 17th of April 2024 his application was dismissed on the on the 27th of July 2025, and he instructed his advocates to file this appeal. He said his vehicle was attached on the 28th of March 2025 and the auctioneers had advertised to sell it but did not do so because of the temporary order of stay of sale that was in force at that time. He annexed the Memorandum of appearance dated 22nd of August 2024 He also annexed

the statement of defense dated 5th September 2024 and a receipt dated 13th September 2024 for the payment of the defence ; reply to the defendant's statement of defence dated 17 September 2024; the request for decree dated 18th September 2024 following the entry of interlocutory judgment against him on the 17th of September 2024 ;the decree issued on the 19th February 2025, and the advertisement for sale of the motor vehicle in the People Daily dated the 28th of March 2025.

5. The application is opposed through the replying affidavit of the respondent Josephine Nduni Nduna.

6. She depones that on the 30th July 2024 she instructed her Advocates to file a claim against the applicant following a road accident that occurred on the 5th of January 2024 that led to the death of her son as outlined in the plaint dated 24th July 2024 which she attaches. She depones further that the advocates for the applicant came on record by filing a memorandum of appearance on the 22nd of August 2024 which was beyond the 15 days the prescribed time in the summons and as outlined under order 5 rule (1) of the civil procedure rules; that they proceeded to purport to file a statement of defence on the 13th of September 2024 craftily dated 5th of September 2024, 23 days since the date they had filed their memorandum of appearance contrary to the provisions of Order 7rule 1 which requires that a defence be filed and served within 14 days after entering appearance. Further that the applicant failed to file and serve their defence within the prescribed timelines and on the strength of the provisions of order 10 rule 3 her advocates applied for the default judgment on 13th September 2024. And the same was entered by the trial court on the 17th September 2024. She attaches a copy of the said request for the default judgment dated 13 September 2024; that the matter was set down for formal hearing on the 16th of October 2024 which was indicated in the judiciary online portal and text messages sent to the registered numbers; That the applicant not being a keen litigant did not notice this and the respondent appeared physically in court on the 16th of October 2024 and formal proof hearing was conducted. That the applicant chose not to appear and her advocate was directed to file written submissions ;the matter was given a mention date for the 7th of November 2024 to confirm the filing and when the matter came on the 7th of November 2024 her advocate appeared on her behalf and another advocate who introduced herself as Susan Margaret Otieno appeared for the firm of Olubayi Mashimba advocates LLP. That the advocate made a verbal application to set aside the default judgment but the same was vehemently opposed by her advocate; The trial court made a ruling and directed the applicants advocate to move the court formally properly and appropriately; The matter was my consent of both parties set for judgment on the 6th of February 2025; The judgment was delivered on the 12th of February 2025 and a notice of entry of judgment was served on the applicant , and without any confirmation of receipt of the said notice her advocates made an application for the decree. A demand was made for payment of the decretal sum with an indication that in default execution would proceed. That there was no communication from the applicant's advocates and a warrant for the attachment and sale was made on the 6th of March 2025. That pyramid auctioneers were legally properly and lawfully instructed to execute the sale by auction of the applicants motor vehicle KDE 058E;That upon service of the decree and notice of entry of judgment that is when the advocates for the applicant filed the application dated 19th Feb 2025 seeking to set aside the judgment that was obtained legally and lawfully without bothering to offer to pay throw away costs on the allegation that they were not aware of the proceedings culminating to the award of the judgment and subsequent decree and warrants.

7. The application was heard inter partes on the 21st of February 2025 where parties were directed to seek an out of court settlement. That it was evident that the applicant was not interested in a settlement but only on the release of the motor vehicle.

8. She depones that this application is only meant to delay her enjoyment of the fruits of her judgment and that the applicant should pay the decretal sum That the applicant's application and the alleged

intended appeal are frivolous, vexatious and a waste of judicial time because from all corners of the law they it has no legs . She urges the court to dismiss the appeal the application.

9. The applicant filed a supplementary affidavit in which he attached the ruling against which he is appealing research so this will be appealing to the Parties filed written submissions.

10. The Applicant set out three issues for determination: a) Whether the application has been brought without undue delay; b) Whether the Applicant will suffer substantial loss unless the order of stay is granted; c) Whether the Applicant is willing to provide security for the due performance of the decree.

11. It is submitted that the iinterlocutory judgment against the Applicant was delivered on 12/02/2025. The Applicant's application to set aside the interlocutory judgment was dismissed on 17th July 2025 and the present application for stay was filed on 25th July 2025, 8 days of dismissall. The applicant relied on James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, where an application for staywas filed within 12 days.

12. It is further submitted that the order for stay is to preserve the subject matter in dispute so that the the right of appeal is not rendered nugatory. James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, for this proposition.

13. On substantial loss it is submitted that the decretal amount of Kshs. 5,202,561.84 is a large sum and there is no certainty that if paid the to the respondent it would be recoverable should the appeal succeed. It is further argued that the Respondent has not demonstrated capacity to refund, that during the trial she testified that she was a a peasant farmer and going by National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR (paragraph 18), where it was held that once an applicant expresses reasonable fear that the respondent will not be able to refund, the evidential burden shifts to the respondent to demonstrate means to pay, the respondent had not done rendering the applicants fear to be genuine.

14. On deposit of security, it is submitted that the applicant is is willing to provide security for the due performance of a decree vide the Applicant's motor vehicle, Registration No. KDE 097E, which is already attached in execution of the decree, that it provides reasonable and sufficient security that balances the interests of both parties. It is submitted that retaining the motor vehicle will preserve the subject matter of the appeal and prevent the appeal from being rendered nugatory. Reliance is made on Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR, for the proposition that the requirement for security should not be applied oppressively.

15. For the Respondent the issues for determination are also three: - a. Whether the applicant has demonstrated that he will suffer substantial loss? b. Whether the Applicant should pay security? c. Whether the Applicant has made out a case for stay of execution?

16. On substantial loss it is argued that that Applicant has not placed before the court any cogentnevidence of the nature of the substantial loss he stands to suffer if the stay is not granted. The respondent relies on the Court of Appeal decision in Equity Bank Ltd vs. Taiga Adams Company Ltd [2006] eKLR).

17. It is also submitted that the judgment/debt is a monetary decree for Kshs.5,202,561.84 and no ground has been set forth by the applicant why the Respondent should be denied the opportunity to enjoy her judgment.

18. It is submitted that applicant must prove that the respondent would be unable to repay the money should it be paid to her and the appeal succeeds. The respondent cites the principle of restitution and relies on National Industrial Credit Bank vs. Aquinas Francis Wasike & Another [2006] eKLR).

It is submitted that the accident is not disputed or that the applicant's insurance is bound to pay compensation.

19. On Security it is submitted that the purpose of security is to protect the Respondent who has a valid judgment in her favour.It is argued that the applicant has not made or offered to abide by any security the Court may impose. That it is improper for the applicant to seek equitable remedies without clean hands. That this failure to make a reasonable offer of security is fatal to the Application . See G N Muema vs. Miriam W Kagiri & Another [2010] eKLR).

20. Finally, it is submitted that the balance of convenience favours the respondent as to grant a stay would be to deprive the Respondent of the fruits of her judgment for an indeterminate period, which would be a great injustice. That the overriding objective is to do justice to both parties. In this case, justice demands that the successful litigant at the trial court should not be prevented from enjoying the result of her litigation without a very good reason, which the Applicant has failed to provide. The court is referred to Supreme Court decision of Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others [2014] eKLR)

The court is urged to dismiss the application but should it be persuaded otherwise (which is strongly opposed), the same be granted on the strict condition that: i. The entire decretal sum plus costs and interest be deposited in a joint interest-earning account in the names of the Advocates for both parties within seven (7) days. ii. The Applicant provides an additional bank guarantee for the entire sum, to secure the Respondent's costs of the appeal.

I have carefully considered the application, the submission rival submissions. The issue is whether the application has merit as provided for under Order 42 rule 6 of the CPR.

This appeal is against the ruling dismissing the applicants; application to set aside the interlocutory judgment. The applicant is seeking to have this court hear and determine an appeal against the ruling of the learned trial magistrate refusing to set aside the interlocutory judgment. This is not an appeal against the judgment of the court, but against the court's decision to proceed ex parte on the ground that there was no defence filed. The applicant herein sought to have that interlocutory judgment set aside in order for the matter to be heard on merit. The trial court determined that the applicant was aware of the matter and refused to allow the matter to proceed on merit.

So here we are looking at the procedure and whether it was complied with.

21. It is not in dispute that an interlocutory Judgment was issued. The issue is whether the applicant has complied with Order 42 rule 6 of the Civil Procedure Rules.

22. The application was filed soon after the application to set aside in the subordinate court was refused.

23. The judgment that resulted from the interlocutory judgment is for a large sum of over Ksh 5million, a sum if paid there is no certainty that the respondent can repay the same. On this the onus is on the respondent to demonstrate the means as that is information that would be in her exclusive possession.

24. In addition, the applicant has offered security- of the motor vehicle that is already attached to remain on attachment , and in that way to maintain the status .

25. However, the issue is the application refusing to set aside the interlocutory Judgment. In James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR) the Court

of appeal discussed the interlocutory judgment and how and when it is to be set aside. The Court stated:

> We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).
>
> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456).

26. I found illumination in the above case on the status of this matter as to the regularity or otherwise of the inter locutory judgment.

27. In this case there was a memorandum of appearance, even if filed late it was there before the application for judgment, there was a defence filed on 13th and a reply by the plaintiff on 17th the same date the plaintiff sought for the judgment.

28. However, the record shows that the defendant was not served with the notice of the hearing of the formal proof, there was no affidavit of service filed.

29. In addition, the trial court mentioned of the memorandum of appearance and the defence but declined the applicant's application on the ground that the applicant was aware of the judgment and had attempted an out of court settlement.

30. It is not clear to me from the record why the respondent had filed an application for reinstatement of the judgment and the attachment orders. What is clear is that at the time the matter was being heard ex

parte there was on record a memorandum of appearance and a judgment and a reply to the defence by the party who applied for interlocutory judgment. Despite that the trial court ought to have addressed the effect of those pleadings. The judgment states that the applicant was served with summons to enter appearance and file defence but did not do so, yet that is not the position.

So, what orders should issue?

31. The appeal herein is on an interlocutory application. It is my view that the application is merited on the foregoing circumstances.

32. This court could grant the orders sought and proceed to hear the appeal. However, it is my considered view that that would not serve the interests of justice and would only cause unnecessary delay in the hearing and final determination of the matter on merit.

33. Hence it is my view that justice will be served by the following orders:

The interlocutory judgment entered on the 12th February 2025 and the consequential orders be and are hereby set aside.

The Makueni MCCC E140 of 2024 be heard on merit The matter is remitted to the Chief Magistrate for hearing and determination. The matter be assigned a mention date before the Chief Magistrate at the earliest date available.

The applicant to pay throw away costs of Ksh 30 000 before the hearing date .

Orders accordingly.

DATED SIGNED AND DELIVERED VIA CTS THIS 22ND DECEMBER 2025

MUMBUA T MATHEKA

JUDGE

CA Chrispol