



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gacheru v Rando (Civil Appeal E196 of 2025)  
[2026] KEHC 653 (KLR) (Civ) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 653 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E196 OF 2025**

**AC MRIMA, J**

**JANUARY 29, 2026**

**BETWEEN**

**PETER WAMBUGU GACHERU ..... APPELLANT**

**AND**

**MERCY ATIENO RANDO ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. Z. K. Kiboss in Milimani Chief Magistrates Court Commercial Case No. 6050 of 2019 delivered on 17th February 2025)*

**JUDGMENT**

**Background:**

1. Mercy Atieno Rando, the Respondent herein, instituted suit against Peter Wambugu Gacheru, the Appellant herein, in Nairobi [Milimani] Chief Magistrates Court Civil Case No. 6050 of 2019 (hereinafter referred to as 'the suit'). She sought compensation for damages occasioned to her motor vehicle, which she claimed, were caused by the negligence of the Appellant.
2. The Appellant did not enter appearance. Consequently, the Respondent obtained default judgment. In a bid to remedy the turn of events, the Appellant filed an application by way of Notice of Motion dated 18<sup>th</sup> July 2024 seeking to set aside the default Judgment. In its resultant Ruling, which is the subject of this appeal, the learned Magistrate did not find merit in the application. He dismissed it in its entirety.
3. The appeal was lodged and heard by way of written submissions, hence, this judgment.



## **The Appeal:**

4. Through a Memorandum of Appeal dated 20<sup>th</sup> February 2025, the Appellant sought to set aside the impugned ruling on the following grounds: -
  1. The Learned Trial Magistrate erred in law and facts in finding that the Appellant's Notice of Motion Application dated 18<sup>th</sup> July, 2024 lacked merit despite issuing a ruling date prematurely before the Appellant could file his supplementary affidavit and submissions providing evidence to the contrary.
  2. The Learned trial Magistrate erred in law and facts by failing to consider and determine the Appellant's subsequent Notice of Motion application dated 6<sup>th</sup> February, 2025 that was before her seeking to arrest the ruling and leave to file his supplementary affidavit and submissions thereby leaving one application undetermined and therefore arriving at a wrong decision and in so doing, prejudiced the Appellant.
  3. The Learned trial magistrate erred in law and facts by determining the entire suit at an interlocutory stage by stating in the Ruling dated 17<sup>th</sup> February, 2025, that the defence had no chance of success thus presuming the ownership of the subject motor vehicle without giving parties an opportunity to be heard.
  4. The Learned Trial Magistrate erred in law and facts by dismissing the Appellant's Notice of Motion Application dated 18<sup>th</sup> July, 2024 prematurely before he could adduce evidence to support the fact that he was never served with any pleadings prior to the proclamation notice dated 15<sup>th</sup> July, 2024 thus condemning him unheard.

## **The Submissions:**

5. In his written submissions dated 27<sup>th</sup> March 2025, the Appellant contended that the Court failed to accord him a fair hearing. It was his case that although he was granted time to file a supplementary affidavit, the Court failed to sit on the scheduled mention date of 31<sup>st</sup> January 2025 and the matter was subsequently mentioned on 3<sup>rd</sup> February 2025, in his absence and without notice, resulting in a ruling date being set prematurely.
6. Subsequently, it was his case that he filed an urgent application on 6<sup>th</sup> February 2025, seeking leave to file his supplementary affidavit before the delivery of the ruling, but the Learned Magistrate ignored the application and proceeded to deliver the impugned ruling thus violating his right to fair hearing, a tenet of natural justice. He drew support from the decision in the case of *Gerita Nasipwondi Bukunya & 2 Others v AG (2019) eKLR*, which relied on the Indian Supreme Court decision in *Sangram Singh v Election Tribunal Kotel*, to assert that persons should not be condemned unheard and decisions regarding their property should not be reached behind their backs. On the question regarding the missed mention date, the Appellant argued that blunders by Counsel should not be used to penalize him. Support to that end was drawn from various authorities among them the case of *Gakere v Njuguna (Environment and Land Appeal E005 of 2022) [2023] KEELC 22306*, and *Murai v Wainaina (No. 4) [1982] KLR 38*. In the former it was observed that failure to attend Court due to lack of notification is a mistake that should not result in a party failing to have their case determined on merit.
7. On the substantive merit of the defence, the Appellant argued that the Learned magistrate erred by determining the suit at an interlocutory stage and presuming ownership of the motor vehicle without a full trial. The Appellant contended that his defence raised triable issues. He drew support from the case of *Olympic Escort International Company Limited and 2 Others v Parminder Singh Sandhu &*



Another [2009] eKLR to advance the claim that a triable issue need only be bona fide, not necessarily one that must succeed.

8. The Appellant urged this Court to allow the appeal as prayed.

**The Respondent's case:**

9. Mercy Atieno Rando challenged the appeal through written submissions dated 2<sup>nd</sup> April 2025. She argued that dismissal of the Appellant's motion was justified due his consistent non-compliance with Court orders and lack of a meritorious defence. The Respondent submitted that the Appellant had been granted unconditional leave to file a supplementary affidavit and submissions as early as 30<sup>th</sup> September 2024, but failed to do so by January 2025. It was her case that the Appellant's Advocates failed to attend Court on multiple scheduled dates, including 18<sup>th</sup> November 2024 and 3<sup>rd</sup> February 2025, and neglected to check the case tracking system (CTS) for new dates as advised by Court staff.
10. In rebutting the claim of breach of natural justice, the Respondent contended that the Appellant was afforded ample opportunity to be heard but squandered it through inaction. As regards the defence of "mistake of Counsel" it was her case that it was not a valid ground for appeal and that professional negligence should not be visited upon the innocent party or the court. On the issue of the Appellant's unserved motion dated February 6<sup>th</sup> 2025, the Respondent argued that it was superfluous and an abuse of Court process because the leave sought therein had already been granted months prior. The Respondent asserted that filing such a motion violated the overriding objective. She called to her aid the decision in Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR, where the Court of Appeal established the "Oxygen Principle" (O<sup>2</sup> principle), stating that re-litigating points or abusing Court processes wastes resources and violates the duty to assist the Court in furthering the overriding objective.
11. Finally, the Respondent defended the Magistrate's finding that the Appellant's draft defence lacked merit. It was her case that it contained bare denials and spurious "Act of God" claims despite police records blaming the Appellant's vehicle for the accident.

**Analysis:**

12. Having intently appreciated the grounds of appeal, the parties' rival submissions and the decisions referred to therein, the following issues fall for determination:
  - i. The propriety of the ruling of 17<sup>th</sup> February 2025 in view of the Appellant's pending application to arrest the ruling.
  - ii. Whether the default judgment was regular.
  - iii. Whether the defence raises triable issue.
13. With the foregoing rendition, this Court will now deal with the issues.

**(a) The propriety of the ruling of 17<sup>th</sup> February 2025 in view of the Appellant's pending application to arrest the ruling:**

14. The Appellant contended that the ruling was delivered prematurely. The record shows that on 30<sup>th</sup> September 2024, the was granted leave to file a supplementary affidavit. By 3<sup>rd</sup> Appellant February 2025, over four months later, that had not been done. The Appellant's Counsel missed the mention on 3<sup>rd</sup> February 2025, where the ruling date was taken. While the Appellant was undoubtedly dilatory, he filed an application on 6<sup>th</sup> February 2025 seeking leave to file the supplementary affidavit before the



ruling was delivered on 17<sup>th</sup> February 2025. The trial Court proceeded to deliver the ruling without addressing the intervening application.

15. Article 50[1] of *the Constitution* guarantees the right to a fair hearing in the following manner;

50. Fair hearing.

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

16. While the Appellant's delay was significant, the trial Court's failure to address the application of 6<sup>th</sup> February 2025 constituted a breach of the Appellant's rights. However, such irregularity alone may not vitiate the ruling if the default judgment was regular and the defence lacked merit.

17. This issue, therefore, turns on a determination of the two subsequent issues.

**(b) Whether the default judgment was regular:**

18. The Court of Appeal in *James Kanyiti Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) discussed the place of regular judgments with particular respect to default judgments and observed thus;

.... 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.

19. In this matter, the trial Court found that the Appellant was served through his registered postal address after attempts at personal service failed. In addition to the Appellant not denying ownership of the postal address, being P.O. Box No. 61101-00200 Nairobi, there is the affidavit of service deposed to on 29<sup>th</sup> March 2022 on record with annexures (letter dated 25<sup>th</sup> January 2022) that substantiate the effort expended by the Respondent to serve the Appellant.

20. Order 5 Rule 12 of the Civil Procedure Rules allows for substituted service where a defendant cannot be found. The Appellant's argument that he was never served is discredited by the process server's return regarding the post office box, a valid mode of service, when personal service is not possible. The Appellant accepted ownership of the postal address and the fact that the letter serving the summons sent to the Appellant's address was not returned unclaimed was not disproved. The Appellant, therefore, provided no evidence to disprove this service other than a general denial.

21. Therefore, this Court affirms the learned Magistrate's finding that service was proper and the resulting default judgment was regular.

**(c) Whether the defence raises triable issue:**

22. Since the judgment was regular, setting it aside is a matter of judicial discretion. The Court must consider whether there is a reasonable excuse for the delay and, crucially, whether the defence raises a



triable issue. As to what constitutes a triable issue, Court of Appeal in the case of Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR rendered thus: -

..... a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication ... The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend.

23. In *Gupta v Continental Builders Ltd* (1978) KLR 83, the Court observed as follows;

“... 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.”

24. In *Tree Shade Motors Ltd v D.T. Dobie & Another* (1995-1998) 1 EA 324, the Court observed as follows: -

“... Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”

25. In this matter, the Court dismissed the Appellant's Draft Statement of Defence, annexed as Exhibit PWG-4, as containing mere general denials. This Court has examined the averments therein. Paragraph 4 explicitly pleads the defence of inevitable accident. The Appellant claimed that the vehicle skidded due to circumstances beyond the driver's control, which he termed an Act of God. In paragraph 6, the Respondent set out the circumstance that made the accident inevitable. He stated that he exercised diligence, drove at moderate speed and the vehicle was in good mechanical condition on the material date. The vehicle suddenly skidded and swerved out of control. The learned Magistrate held that the defence had no chance of success. It also presumed the ownership of the vehicle.

26. As was established in *Mrao Ltd v First American Bank*, a decision relied upon by the Appellant, a triable issue need only be bona fide and arguable; it does not need to be a winning defence at this stage. The Court observed;

“... A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court, a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or a rebuttal from the latter.”

27. This Court now finds that in assessing the probability of success and dismissing the specific plea of inevitable accident as a general denial, the subordinate Court determined the case summarily. A defence of inevitable accident in a traffic case is a triable issue of fact that requires the testing of evidence. At the end of the trial, it offers crucial insight in the assessment of the defendant's negligence. This Court's discretionary power to set aside judgment entered in default of appearance is an equitable remedy. Order 10 Rule 11 of the Civil Procedure Rules provides thus;

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.

28. In *Shah v Mbogo & Another* EA 116, the Court of Appeal for East Africa laid down the 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. Balancing the interests of justice, it is apparent that the main injury to the Respondent in allowing the appeal is the aspect of delay which can be compensated by way of costs. Comparatively, the injury to the Appellant is that of being condemned to pay damages and interests therein without a hearing on the cause of the accident. It is an absolute injury. The primary duty of this Court is to do substantive justice.

**Disposition:**

29. Flowing from the foregoing conclusions, this Court finds that the Appellant has a right to have its defence heard on merit. However, due to his conduct which caused the delay and necessitated this appeal, he must bear the costs.
30. In the end, the following final orders hereby issue: -
  - (a) The Appeal is allowed. The Ruling in Milimani Commercial Case No. 6050 of 2019 delivered on 17<sup>th</sup> February 2025 is hereby set aside.
  - (b) The Default Judgment entered on 2<sup>nd</sup> August 2022 and all consequential orders including the Warrants of Attachment and Proclamation dated 12<sup>th</sup> and 15<sup>th</sup> July 2024 are hereby set aside.
  - (c) Leave is granted to the Appellant to file and serve the Statement of Defence within fourteen (14) days from the date of this Judgment.
  - (d) As a condition for setting aside the judgment, the Appellant shall pay the Respondent throw-away costs assessed at Kshs. 30,000/= within 30 days hereof together with the Auctioneer costs failure to which the appeal shall stand dismissed with costs and execution shall proceed.
  - (e) The Appellant shall also bear the costs of this appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY, 2026.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr. Billo, Learned Counsel for the Appellant.

Mr. Ngugi, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

