Wanyokie v Muthengi (Civil Appeal E042 of 2025)
[2026] KEHC 684 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KEHC 684 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E042 OF 2025

BM MUSYOKI, J

JANUARY 30, 2026

BETWEEN

JOHN MUNGAI WANYOKIE .... APPELLANT

AND

JOHN MUTHENGI .... RESPONDENT

(Being an appeal from ruling and orders in the Small Claims Court at Ruiru (Hon. J.K. Tawai Adjudicator/SRM) dated 27th January 2025 in claim number E433 of 2024)

JUDGMENT

1. This appeal arose from ruling of the trial court dated 27th January 2025 which dismissed the appellant's application dated 3rd December 2024. The said application was seeking that exparte judgment entered against the appellant be set aside and he be granted leave to defend the claim among other prayers related to the execution of the decree.

2. In an affidavit sworn on 3rd December 2024 in support of the application, the appellant alleged to have learned of existence of the claim when auctioneers sent him a proclamation notice. He claimed that failure to enter appearance and respond to the claim was caused by the respondent by failing to serve him with the claim documents. He also deponed that the proclamation notice was irregular because the proclaimed vehicle did not belong to him and that the auctioneers never physically visited his house to carry out the proclamation. He also claimed that he had a good defence to the claim which raised triable issues.

3. In reply to the application, the respondent filed grounds of opposition and replying affidavit dated 13th December 2024 and 18th December 2024 respectively. In the same, the respondent averred that the appellant had been properly served with summons and claim documents but deliberately ignored the same. Other than that, the appellant was served with notice of entry of judgement together with the

decree but went silent until the auctioneers showed up and therefore there were no sufficient grounds for setting aside the judgment.

4. The trial court in dismissing the application held that, the appellant was served with summons and claim documents and that his draft defence which was not dated consisted of mere denials. This ruling prompted this appeal which raises the following three grounds;

   1. The learned trial Magistrate erred in law and fact in dismissing the appellant's application dated 3rd December 2024 without considering all the applicable legal principles for setting aside judgment entered in default of appearance.

   2. The learned trial Magistrates erred in law and in fact by failing to consider that the appellant's draft defence/response to claim filed in the lower court raised triable issues which ought to be canvassed during the hearing of the main suit.

   3. The learned trial Magistrate erred in law and in fact in ignoring the appellant's written submissions both on the issues of the attachment of goods and appellant's defence/response to claim which raises triable issues.

5. The appeal was canvassed by way of written submissions. I have read the appellant's submissions dated 17th July 2025 and those of the respondent dated 9th September 2025. The appellant argues that although he was served through WhatsApp platform, his phone had malfunctioned and later stolen which prevented him from accessing the documents. Therefore, failure to enter appearance was not deliberate and he should not be condemned unheard because of that. He has also argued that he has a good defence as he has pleaded negligence on the part of motor cycle registration number KMCK XXXX and the respondent. He also submitted that the respondent will not be prejudiced if the application was allowed as he will still have an opportunity to present his case during the trial.

6. The respondent maintains in his submissions that, the judgment was regular as the appellant had been properly served and three are no sufficient grounds to allow the appeal. He adds that the appellant deliberately avoided the court process and as such, by virtue of maxim of equity that posits that equity aids the vigilant, the appellant is not entitled to the orders sought. It is also submitted that the draft defence which was undated did not contain particulars and consisted of mere denials. The respondent has urged this court to refrain from considering the issue of service and whether defence has triable issues because those are matters of facts which are not appealable to this court by virtue of Section 38(1) of the Small Claims Courts Act.

7. Based on the submission as reproduced above, it is my position that the issues for determination in this appeal are; whether the appellant was served with summons, whether the appellant had a good defence and whether the judgement should be set aside.

8. The respondent has submitted that the issue of service and strength of the defence are matters of facts and not appealable to this court. I hold the position that limitation of the appealable matters to those of law does not mean that the court cannot revisit the evidence produced before the court or in other words should look the other way when confronted with an appeal where matters of facts are contested. In my view, an appellate court is entitled to go through the evidence as a whole including that touching on matters of facts to enable it ascertain whether the same is relevant to the case and how it impacted the mind of the trial court in reaching the decision it did.

9. In my opinion, the only bar to the appellate court in the above circumstances is that it should not substitute the trial court's findings on matters of facts with its own simply because it would have reached a different decision. The appellate court would be within its mandate if the decision of the trial

court is too perverse as it relates to available evidence that a reasonable court of law or tribunal properly applying its mind would not have reached such a decision or where the decision is plainly wrong or it is not based on any evidence at all. The Court of Appeal held in National Bank of Kenya Limited v Otieno Ragot & Company Advocates [2020] KECA 828 (KLR) that;

> 'The parameters on interference of the discretion of the trial court or even 1st appellate case are well defined. If the discretion was exercised judiciously, this Court cannot interfere simply on the ground that if it were sitting as the court of first instance, it might have given different weight to that given by that court to the various factors in the case.'

10. And while considering the confines of jurisdiction where the law requires the court to deal with matters of law only, the Court of Appeal held in Kenya Breweries Ltd v Godfrey Odoyo [2010] KECA 498 (KLR) that;

> 'In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.'

11. It is notable that the appellant did not deny that the line through which the summons were served belonged to him. He actually admitted in his submissions that the summons were sent to his line which malfunctioned and was later stolen. I have gone through the affidavit in support of the notice of motion and I have not seen anything pointing to the malfunctioning or lose of the phone. The allegations are captured in the appellant's submissions before this court and the trial court and in my view amount to the counsel giving evidence from the bar and therefore hearsay.

12. The appellant has not denied that he was served with notice of entry of judgement and the decree as deponed by the respondent. it is clear that after service, the appellant sat on the same until the auctioneers proclaimed his assets. It is my opinion that, the antecedents of a litigant who approaches a court of law for an equitable remedy are relevant factors of consideration. The appellant appears to me to be a person who is not truthful in his averments and approached court with unclean hands. A party who seeks discretionary orders of the court must be candid, open and honest irrespective of the circumstances. Otherwise, where he presents himself as evasive, he makes himself underserving of court's mercy. The discretion given to the courts to set aside default judgements is meant to assist parties who fail to appear due to a mistake or/and inadvertent omission or genuine oversight but not to help those who seek to delay or frustrate the course of justice.

13. Having said the above, I do not see anything in the court's ruling as compared to the evidence adduced before her which would justify this court in disturbing her factual finding that the appellant was properly served.

14. I now need to consider whether the draft response to the claim exhibited by the appellant consisted of triable issues. The respondent has argued that this is a matter of fact but in my considered opinion, it may consist of both matters of law and facts. The respondent has submitted that the appellant did not plead negligence. To me, the manner in which pleadings are couched or drawn is a matter of law as much as the contents therein are facts. It is therefore within my jurisdiction to consider this issue.

15. The Honourable Adjudicator held that the draft defence was not dated and consisted of mere denials. The respondent has in support of this holding submitted that the response did not plead any particulars or present factful narratives which would rebut his case. First it is not a requirement that a draft defence

be dated or signed. The purpose of a draft defence is to show the court the trajectory the defendant or respondent would be taking in defending the case and his grounds of attacking the claimant's case. In fact, I have held the position that triable issues can even be discerned or identified in the affidavit is support of the application for setting aside judgment without necessarily exhibiting a draft defence.

16. The claim in the trial court was for compensation for personal injuries sustained by the respondent in an accident involving motor cycle registration number KMCK XXXX on which the respondent was riding as a pillion passenger and the appellant's motor vehicle registration number KDA 319L. In the draft response, the appellant pleaded that the rider of the motor cycle and the respondent substantially contributed to the occurrence of the accident. The draft which appears on pages 52 to 55 of the record of appeal distinctively pleaded particulars of negligence against both the rider and the respondent. It is therefore not true that the appellant did not plead particulars. In my view these are triable issues which requires proof from the parties in one way or the other.

17. Denying a party the right to defend themselves should be the last resort and should be applied in the extreme circumstances. Whereas the appellant was guilty of laches, that alone should not deny him his right not to be condemned unheard. The delay and conveniences caused to the respondent can be compensated by award of costs. A right to be heard is fundamental and should be granted in deserving cases. I am persuaded by holding in Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah [2014] KECA 143 (KLR), that;

> 'The object of clothing the court with discretion to set aside judgment obtained ex parte has been pronounced in many decisions....
>
> The overall effect of those judicial pronouncements is that where a defendant raises a reasonable defence to the plaintiff's claim and the defendant has not been privy to obstruction of justice, the court should exercise its discretion in favour of the defendant.'

18. In view of the above, I hold that the appellant deserved a chance to defend himself despite his conduct but not without a price. The claimant could not be faulted for seeking to execute the judgment and I have not seen anything that would make the proclamation irregular. Since setting aside the judgment would effectively set aside the warrants of attachment and by extension the proclamation, the respondent is entitled to be compensated for the costs and the inconveniences.

19. In conclusion, I allow this appeal in the following terms;

    a. Ruling of the trial court dated 27th January 2025 is hereby set aside and substituted for an order allowing the appellant's application dated 3rd December 2024 on condition that the appellant pays the respondent throw away costs of Kshs 10,000.00.

    b. The appellant shall also pay the auctioneer's costs to be agreed or taxed.

    c. In the event the costs stated in (a) above shall not be paid within fourteen (14) days from the date hereof, the order allowing the application shall stand vacated and this appeal shall be deemed to have been dismissed.

    d. The appellant shall also meet the respondent's cost of this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

Judgment delivered in presence of Mr. Nyoike for the appellant and Mr. Chege for the respondent.