



Nyange v Asusa Transporters Limited (Employment and Labour Relations Appeal E271 of 2025) [2026] KEELRC 338 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEELRC 338 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E271 OF 2025**

K OCHARO, J

FEBRUARY 5, 2026

BETWEEN

SYLVESTER MZAE NYANGE APPELLANT

AND

ASUSA TRANSPORTERS LIMITED RESPONDENT

(Being an Appeal from the ruling of Hon. J.B. Kalo (Chief Magistrate) delivered on 4th December 2024 in Mombasa CMELRC No. E007 of 2022)

JUDGMENT

Background

1. This appeal arises from proceedings in Mombasa CMELRC No. E007 of 2022, in which Sylvester Maze Nyange sued Asusa Transporters Limited. Judgment in the main cause was delivered on 10th June 2024.
2. Following the delivery of judgment, the Respondent filed a Memorandum of Appeal dated 25th June 2024 in this court, thereby appealing the judgment of the trial court.
3. Subsequently, the Respondent filed a Notice of Motion dated 5th August 2024 before the same trial court, seeking, inter alia, to set aside the judgment delivered on 10th June 2024 and to reopen the Respondent's case.
4. The Claimant opposed the application and raised a jurisdictional objection, contending that the trial court had become functus officio upon the filing of the appeal.
5. In a ruling delivered on 4th December 2024, the trial court determined the application mentioned above and allowed it. That ruling is the subject of the present appeal.



The Respondent's Application before the Trial Court.

6. The Respondent approached the trial court with a Notice of Motion dated 5th August 2024, supported by an affidavit sworn by its Advocate, seeking orders to set aside the Court's judgment and a consequential order to reopen the case to enable it to present its defence. It was alleged that the proceedings on 25th September 2023 were held in the absence of both the Respondent and its Advocate.
7. It contended that the failure to attend court on that date was not deliberate, but arose from misdiarisation of the matter, and that neither the Respondent nor its advocate was aware that the matter was due for hearing on that day.
8. Subsequently, the learned trial Magistrate delivered a judgment that was without consideration of the defence, as the case was closed without having a chance to present a witness. The Respondent maintained that they were condemned, and therefore unheard, in violation of their constitutional rights under Articles 48 and 50 of *the Constitution* of Kenya, 2010.
9. The Respondent argued that a mistake made by counsel should not be visited on a litigant. They contended that the justice of the matter demanded the setting aside of the judgment of June 10th, 2024, to enable it the opportunity to present its defence.
10. The Respondent asserted that the application was brought timeously upon discovering that judgment had been delivered, and urged the court to reopen its case to avoid a miscarriage of justice.

The Appellant's Response before the Trial Court.

11. The Appellant opposed the application through his Replying Affidavit, sworn on 23rd August 2024. The Appellant stated that the Respondent had already lodged an appeal on 25th June 2024 against the judgment delivered on 10th June 2024.
12. The Appellant contended that once the Respondent elected to file an appeal, it was barred in law from seeking a review of the same judgment, and that the trial court was thereby divested of jurisdiction.
13. He maintained that under Section 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules, and Section 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024, a party cannot pursue both remedies of appeal and review concurrently.
14. The Appellant further asserted that the Respondent's application dated 5th August 2024 was filed after the appeal and therefore amounted to an abuse of the court process.
15. It was the Appellant's case that the Respondent had been indolent throughout the trial, had failed to attend court on several occasions, and had consciously allowed the matter to proceed to judgment.
16. The Appellant argued that the application for review was a deliberate attempt to delay enjoyment of the fruits of judgment and to engage in forum shopping.

The Ruling by the Lower Court delivered on 4th December, 2024

17. After considering the parties' respective positions for and against the Respondent's application, the trial court allowed the application, aside its judgment, and awarded the Appellant thrown away costs of KShs. 15,000.



The Appeal

18. Dissatisfied with the ruling of the lower court the Appellant filed the instant appeal, setting forth the following grounds;
- a. That the Learned trial Magistrate erred in Law and in fact by failing to consider that all necessary steps were taken to secure the attendance of the Respondent who deliberately failed to prosecute their case when it came up for hearing on 25/09/2023.
 - b. That the Learned trial Magistrate erred in Law and in fact in failing to consider that the Respondent is guilty of laches evident by the inexcusable delay in presenting their application dated 05/08/2024 considering that Judgement was delivered on 10/06/2024, that no application was filed by the Respondent to arrest the said judgment before its delivery and that an appeal had already been preferred by the Respondent. In ELRCA NO. E134 of 2024 (Mombasa) Sylvester Mzae Nyange vs Asusa Transporters Limited.
 - c. That the learned Magistrate erred in law and in fact in failing to appreciate that the Respondent had preferred an appeal against the trial Court's decision entered on 10/06/2024 through a memorandum of appeal dated 25/06/2024 and filed on 25/06/2025 at 16:51:50 hours when before it filed an application dated 05/08/2024 seeking to re-open the case on 05/08/2024.
 - d. That the learned Magistrate erred in law and in fact in re-opening the Respondent's case after Judgement had been delivered in CMEC NO. E007 of 2022 Sylvester Mzae Nyange vs Asusa Transporters Limited on 10/06/2024 and an appeal preferred by the Respondent against the said judgment in ELRCA NO. E134 of 2024 (Mombasa) Sylvester Mzae Nyange vs Asusa Transporters Limited.
 - e. That the learned Magistrate erred in law and in fact in failing to appreciate the fact that in law, a litigant cannot seek for the remedy of a review after having sought to file an appeal.
 - f. That the learned Magistrate erred in law and in fact in failing to appreciate and take judicial notice of the fact that a ruling of the Respondent's appeal was delivered on 09/10/2024 in the Applicant's/Appellant's favour in ELRCA NO. E134 of 2024 (Mombasa) Sylvester Mzae Nyange vs Asusa Transporters Limited hence the trial Court had no residual jurisdiction to re-open the Respondent's case.
 - g. That the learned Magistrate erred in law and in fact in failing to appreciate that both the Appellant and the Respondent were accorded a fair hearing both parties were aware of the proceedings in CMEC/E007/2022 Sylvester Mzae Nyange vs Asusa Transporters Limited before Judgement was delivered.
 - h. That the learned Magistrate erred in law and in fact in failing to consider and hear the Appellant's application dated 04/09/2024 or consider the ruling in ELRCA No. E134 of 2024 (Mombasa) Sylvester Mzae Nyange vs Asusa Transporters Limited delivered on 09/10/2024 before delivering a ruling of the Respondent's application dated 05/08/2024 on 04/12/2024 contra the ruling of ELRCA No. E134 of 2024 (Mombasa) Sylvester Mzae Nyange vs Asusa Transporters Limited delivered on 09/10/2024 by Hon. Lady Justice M Mbaru.



Analysis and determination

19. In the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123, the court therein rendered itself as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

20. Shall consider the instant appeal through the forestated lens.

21. I have carefully reviewed the application before the learned trial Magistrate, the Respondent’s response affidavit, the trial Court’s ruling, and the record of appeal. Two main issues arise for determination: whether the trial magistrate had jurisdiction to entertain an application to set aside a judgment that had already been appealed, and whether the decision to set aside the judgment was meritorious.

22. Undoubtedly, the trial Magistrate entered judgment for the Appellant in the suit mentioned above on 10th June 2024. Subsequently, the Respondent filed an appeal, namely, appeal ERLCA NO. E134 of 2024[Mombasa]. Despite having filed the appeal through a Memorandum of Appeal dated 25th June 2024, the Respondent, after two months, filed an application dated 5th August 2024 seeking to set aside the judgment appealed from.

23. Counsel for the Appellant submitted that, in the circumstances, the trial Court lacked jurisdiction to entertain the setting aside application and grant the orders she did. Further, Rule 74 of the Employment and Labour Relations Court [Procedure Rules], section 80 of the *Civil Procedure Act*, and Order 45 of the Civil Procedure Rules prohibit the filing of an application for review of a judgment while an appeal against the judgment is pending. The two processes cannot run simultaneously. To support this submission, Counsel placed reliance on the case of *Gerald Kithu Muchanje vs Catherine Muthoni Ngare & another* [2020] eKLR.

24. The Respondent’s Counsel, on the other hand, argues that the Appellant’s submissions are misanchored. The application from which the impugned ruling flowed was not an application for review under Section 80 of the *Civil Procedure Act*. It was anchored in a completely different provision of the law, Order 12 Rule 7 of the Civil Procedure Rules, 2010.

25. It was further argued on behalf of the Respondent that under the provision, a court has discretion to set aside or vary a judgment. The discretionary power is intended to be exercised to protect the right to be heard and to avoid injustice arising from inadvertence, error or excusable non-attendance.

26. True, the Respondent’s application dated 5th August 2024 was brought under Order 12 Rule 7 and Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and as such, that application contemplated under the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. However, the question remains whether a Magistrate, whose judgment or order has been appealed against, can entertain an application for setting aside filed subsequent to the filing of the appeal?

27. In my view, the answer to this question should be in the negative. Where a valid appeal is filed against a judgment or order of a trial court, to a Superior court, that court becomes *functus officio* in respect of the judgment appealed against. Jurisdiction over setting it aside, varying it or reviewing it shifts to



the court to which the appeal is preferred. Setting aside proceedings and the appeal process cannot run in parallel.

28. However, it is important to point out that the Magistrate may still act in ancillary or residual matters, such as correcting clerical or typographical errors under the slip rule, and dealing with execution or stay of execution, where the law permits.
29. Allowing the Magistrate to set aside a judgment that is already under appeal would risk conflicting decisions, undermining the authority of the appellate court, and unnecessary confusion and wastage of time in litigation. Further, it would impede expeditious disposal of matters, as commanded by Article 159 of *the Constitution* of Kenya, 2010.
30. As the learned trial Magistrate did not have jurisdiction, in the circumstances, to entertain the setting aside application, the ruling and consequential orders were a nullity. The appeal herein is allowed. The order setting aside her judgment is hereby set aside. The judgment that was set aside shall revert.
31. The Respondent shall bear the costs of this appeal.

READ SIGNED AND DELIVERED THIS 5TH DAY OF FEBRUARY 2026.

OCHARO KEBIRA

JUDGE

