

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO. E159 OF 2023

KAN TRAVELLERS 1ST APPELLANT

JOSEPH NYIGE KANGETHE 2ND APPELLANT

VERSUS

JACOB NYANGA NGUTO RESPONDENT

Coram: Before Justice R. Nyakundi
M/s Morgan Omusundi Law Offices Advocates
M/s Kairu & Mccourt & Co. Advocates

JUDGMENT

- 1.** The Respondent sued the Appellants at the trial court stating that on or about the 10th October, 2022 whilst the Respondent was a passenger aboard motor vehicle registration No. KAJ 278M along Eldoret-Nakuru road when the Appellant, his agent, driver, manager and/or employees so negligently drove, controlled or otherwise managed the motor vehicle registration No. KCT 561N that the same lost controlled and veered off its lane into the Claimant’s lawful lane and hit motor vehicle registration No. KAJ 278M causing an accident whereupon the Respondent suffered severe injuries, pain, loss and damages.
- 2.** During the pendency of the suit, the appellants filed an application seeking to have default judgment set aside for reasons that the appellants were not aware of the existence of any suit and or judgment and as such they never entered appearance nor filed a response to the

Claimant's/Respondent's Statement of Claim. The trial court considered the application together with the Response by the Respondent and vide its Ruling dated 7th August, 2023, it allowed the Appellants to file a response within five days and directed the Appellants/Respondents to pay throw away costs of Kshs. 20,000/=.

3. The Court on 17th August, 2023 reverted the ex-parte judgment as a result of failure to make payment of the throw away costs. The appellants contend that the same was done without counsels being given a chance to advance reasons why the same happened
4. Dissatisfied with the said ruling, the appellants lodged the instant appeal raising the following grounds:
 - a. The learned magistrate/adjudicator erred in law and misdirected herself on both points of law and fact when she ordered that the appellants pay an excessive/unreasonable amount of Kshs. 20,000/= as throw away costs, despite having set aside the ex-parte judgment.
 - b. The learned magistrate/adjudicator erred in law and misdirected herself on both points of law and fact when she completely disregarded submissions by the appellants herein on the issue of reasonable throw away costs.
 - c. The learned magistrate/adjudicator erred and misdirected herself on both points of law and fact when she ordered the appellants herein to make payment within 5 days of delivery of the Ruling a timeframe which was inordinately short and unreasonable, therefore occasioning a miscarriage of justice.
 - d. The learned magistrate/adjudicator erred and misdirected herself on both points of law and fact when she ordered the Appellants herein to make payment within 5 days of delivery of the Ruling a

timeframe which was inordinately short and unreasonable, therefore occasioning a miscarriage of justice.

- e. The learned magistrate erred in law and misdirected herself on both points of law and fact when she failed to set aside the ex-parte judgment with reasonable conditions based in law.
 - f. The learned magistrate erred in imposing conditions for setting aside an ex-parte judgment, that had no basis in law.
- 5.** The Appellants as a result sought for the following orders:
- a. That this appeal be allowed.
 - b. That part of the Ruling of Hon. T. Mbugua; Adjudicator RM delivered on 7th August, 2023 in Eldoret SPMCC No. E136 of 2023 Jacob Ng’ang’a Nguyo vs Kan Travellers & Joseph Ngige Kang’ether, requiring the appellants herein to make payment of Kshs. 20,000/= within 5 days of delivery of the Ruling as condition for setting aside the ex-parte judgment be set aside.
- 6.** In the alternative, the appellants sought that this court should substitute the requirement to pay the sum of Kshs. 20,000/= with an order for payment of reasonable throw away costs.
- 7.** The appeal was canvassed by way of written submissions but as at the time of drafting this judgment, the Respondent did not have his submissions on record, which largely renders the appeal undefended but I shall nonetheless consider the appeal on merit.

Appellants’ written submissions

- 8.** Learned Counsel Mr. Amihanda started giving a brief background of the appeal and reminded this court of its duty as an appellate court. Counsel cited the decision in **Selle & Another vs. Associated Motor Boat Co. Limited & Others (1968) EA 123** and submitted that this being a first appeal, the court is duty bound to re-evaluate, re-assess

and re-consider the evidence adduced and come up with its own conclusions bearing in mind that the appellate court did not have the opportunity to hear the witness testify in the first instance before the subordinate.

9. Learned Counsel couched the following issues for determination:

- a. *Whether the order of Kshs. 20,000/= as throw away costs in 5 days was reasonable and thus the court exercised its discretion judiciously.*
- b. *Whether the order reverting ex-parte judgment on the failure to pay throw away costs was just and fair in view of the circumstance.*
- c. *Whether the order reverting ex-parte judgment on the failure to pay throw away costs was just and fair in view of the circumstances.*

10. Learned Counsel started by submitting that the honorable court in exercising its discretion on whether or not to grant an application to set aside the ex-parte judgment, warrants therein and the matter begins de-novo ought to consider the special circumstances as well as the unique fundamental principles/requirements as provided for under Order 10 Rule 11 of the Civil Procedure Rules 2010.

11. Mr. Amihanda argued that whereas the court exercised its discretion and issued an order that the applicants pay Kshs. 20,000/=, the timeframe was so stringent that the appellants could not reasonable comply. Counsel further submitted that counsels were not supplied with a copy of the Ruling and this warranted the commissioning of the letter dated 9th August, 2025 seeking that the court avails a copy of the Ruling to the applicants' counsels to enable them raise their clients to make payments or comply.

- 12.** It is also submitted for the appellants that the trial court reverted to ex-parte judgment on the back of the failure to make payment of the throw away costs without even giving the appellants a chance to explain why throw away costs were yet to be made and/or court orders complied with.
- 13.** In sum, the appellants through counsel submitted that the court did not exercise its discretion judiciously and the appellants' prayer therefore before the court is that the appeal be allowed and the draconian orders especially reverting ex-parte judgment be set aside and the appellants be granted a chance to take part in the determination of the suit as is envisaged under Art. 50 of the Constitution of Kenya, 2010.

Analysis and determination

- 14.** The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the Appellants. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in ***Selle v Associated Motor Boat Co. [1968] EA 123*** in the following terms:

"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High 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.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. The law is settled that an appellate court will not lightly interfere with factual determinations made by a trial court. Such intervention is justified only where the impugned finding is demonstrated to be without basis, or where the trial court can be shown to have proceeded on erroneous principles. See ***Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-1988] I KAR 278.***

16. It is in ***Safaricom Limited vs. Josenga Company Limited & 4 others [2021] eKLR***, in which the court held that:

"..... the right to fair hearing is a principle of Natural Justice and the same cannot be limited and or derogated as per the provisions of Article 25 of the Constitution of Kenya 2010. The Constitution, at Article 50(1), provides for fair hearing with regard to any dispute that has to be resolved in accordance with the law. It states as follows:

"50. (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."

17. Article 159(2)(d) of the Constitution of Kenya, 2010 provides that justice shall not be delayed and shall not be frustrated by undue regard to procedural technicalities. This is reinforced by the overriding objective enshrined in Section 1A and 1B of the Civil Procedure Act which mandates courts to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

18. However, it is equally important to highlight the findings in the case of **Raila Odinga v IEBC & others (2013) eKLR**, where the Supreme Court observed that:

“Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

19. Having set out the applicable legal principles, I now turn to consider the specific grounds of appeal raised by the Appellants. While the Appellants raised several grounds, the substantive issues for determination can be distilled as follows:

- a. Whether the quantum of Kshs. 20,000/= as throw away costs was excessive;*
- b. Whether the 5-day timeline for payment was reasonable;*
- c. Whether the trial court erred in reverting to ex-parte judgment without affording the Appellants an opportunity to be heard.*

20. Starting with the first issue, the Appellants challenged the amount of Kshs. 20,000/= as excessive and unreasonable throw away costs. I have carefully considered this ground and find it lacking in merit. The award of throw away costs is a matter within the discretion of the trial court and an appellate court will not lightly interfere with such exercise

of discretion unless it is shown that the discretion was exercised arbitrarily, capriciously or upon wrong principles.

- 21.** Looking at the record, in the present case, the Respondent had incurred costs in obtaining default judgment and subsequently opposing the application to set aside the same. The sum of Kshs. 20,000/= as throw away costs cannot, in my considered view, be said to be so excessive as to warrant interference by this court. I therefore find no basis to interfere with the trial court's discretion on the quantum of throw away costs.
- 22.** The critical issue in this appeal concerns not the quantum but the timeline within which payment was to be made. The trial court ordered payment of the throw away costs within 5 days of delivery of the ruling.
- 23.** The Court of Appeal in **Mbogo v Shah [1968] EA 93** cautioned against judicial overreach, stating that appellate intervention is warranted where a trial court has misdirected itself or considered extraneous factors.
- 24.** Let me start by pointing out from the record that counsel for the Appellants wrote to the court on 9th August, 2023 seeking to be supplied with a copy of the ruling to enable them advise their clients on compliance. This letter demonstrates that counsel had not been immediately furnished with the ruling and were actively seeking to comply with the court's orders. The 5-day timeline must be computed from when the ruling was actually delivered or made available to the parties.
- 25.** Second, even assuming the 5 days commenced from the date of the ruling (7th August, 2023), such a timeline is inordinately short and unrealistic. It does not take into account practical realities such as the time needed for counsel to obtain and peruse the ruling, advise their

clients, and for the clients to mobilize the requisite funds for payment. While courts must ensure timely compliance with their orders, such orders must be realistic and achievable. A timeline that is impossible or extremely difficult to comply with defeats the very purpose of setting aside an ex-parte judgment, which is to allow a party to be heard on the merits. In this case, the stringent 5-day timeline effectively rendered the order setting aside the ex-parte judgment nugatory.

- 26.** Finally, the right to be heard is sacrosanct. Before visiting an adverse consequence upon a party for non-compliance with a court order, elementary fairness demands that the party be given an opportunity to show cause why such consequence should not follow. The trial court ought to have issued a show cause notice or at least heard the parties before taking the drastic step of reverting to ex-parte judgment.
- 27.** It is important to note that there is no evidence on record suggesting that the Appellants were deliberately defiant or were engaging in dilatory tactics. On the contrary, the letter dated 9th August, 2023 demonstrates a willingness to comply once furnished with the ruling. In the absence of any demonstrated mala fides, the interests of justice militate in favour of allowing the Appellants to be heard on the merits of the case.
- 28.** In the present case, in my fair assessment, the Appellants' failure to comply within the 5-day timeline was not born of a deliberate conduct but rather of practical difficulties in accessing the ruling and mobilizing funds within an unreasonably short period. To permanently deny them the right to defend the suit on account of such failure would be to elevate form over substance and to frustrate the constitutional imperative of access to justice.
- 29.** In light of the foregoing analysis, I find that while the trial court was within its rights to impose conditions for setting aside the ex-parte

judgment, and while the quantum of Kshs. 20,000/= as throw away costs was reasonable, the 5-day timeline was unrealistic and the subsequent reversion to ex-parte judgment without hearing the Appellants violated principles of natural justice and constitutional guarantees of fair hearing.

30. The appeal therefore succeeds in part. The interests of justice require that the Appellants be afforded a realistic opportunity to comply with the conditions and to defend the suit on its merits. In the final result, I make the following orders:

- a. The appeal is allowed in part.*
- b. The order dated 17th August, 2023 reverting to ex-parte judgment is hereby set aside.*
- c. The quantum of throw away costs of Kshs. 20,000/= is affirmed as reasonable and is hereby upheld.*
- d. The Appellants shall pay the said throw away costs of Kshs. 20,000/= to the Respondent within thirty (30) days from the date of this judgment.*
- e. Upon proof of payment of the throw away costs, the Appellants shall file their Defence to the suit within seven (7) days thereafter.*
- f. The matter shall thereafter proceed to hearing on merit before the trial court.*
- g. The Appellants shall bear the costs of this appeal.*

31. It is so ordered.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 5TH DAY OF
FEBRUARY, 2026.**

.....
R. NYAKUNDI
JUDGE