

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. E023 OF 2024

(CORAM: HON. CHARLES M. KARIUKI – J)

(Being an Appeal arising from the Ruling of Hon.G.Sagero- Principal Magistrate at NAROK, in

NAROK CMCC NO.46 OF 2018 dated and delivered on 23rd August,2024)

GEOFREY CHEGE MBURU.....1ST APPELLANT

PETER KAMAU GITHINJI.....2ND APPELLANT

-VERSUS –

TITUS KITAVI TILU.....RESPONDENT

JUDGMENT

16/02/2026

INTRODUCTION

- 1) This appeal arises from the ruling of Hon. G. Sagero, Principal Magistrate, delivered on 23rd August 2024 in Narok CMCC No. 46 of 2018. In that ruling, the learned trial magistrate allowed the Appellants’ application dated 16th February 2024 seeking to set aside an ex parte judgment entered on 4th February 2019. The setting aside, however, was conditional upon payment of thrown away costs of Kshs. 100,000/= to the Respondent within fourteen (14) days, failing which orders would lapse.
- 2) The Appellants do not challenge the setting aside itself, but are aggrieved by the condition imposing the thrown-away costs. Consequently, this appeal is confined to the legality, propriety, and quantum of the thrown-away costs imposed.

MEMORANDUM OF APPEAL

3) The Appellants' memorandum raises six grounds of appeal. They contend that the award of Kshs. 100,000/= was manifestly excessive, punitive, and imposed without justification.

The grounds may be summarised as follows:

- i. **That the trial magistrate erred in law and fact in awarding Kshs. 100,000/= which was excessive and unjustified.**
- ii. **That the learned magistrate wrongly exercised his discretion, resulting in injustice.**
- iii. **That the award was punitive in nature.**
- iv. **That the award curtailed the Appellants' right to a hearing.**
- v. **That the assessment was based on no evidence and was unconscionably high.**
- vi. **That the award offended Section 1B(d) of the Civil Procedure Act, Cap. 21 Laws of Kenya.**

4) The Appellants pray that this Court either set aside the award or reduce it to a reasonable sum.

SUBMISSIONS BY THE APPELLANTS:

5) Counsel for the Appellants submitted that, as a first appeal, this Court is obliged to re-evaluate the record and exercise its independent judgment, citing **Selle & Another v Associated Motor Boat Co. Ltd & Others [1966] EA 1** and **Mbogo & Another v Shah [1968] EA 93**.

6) It was argued that the award of Kshs. 100,000/= was unjustified because the trial court did not explain the basis for the figure. Reliance was placed on **Sheila Wambui Muturi v**

Peter Macharia Muiru [2021] eKLR, where a similar award was faulted for lack of explanation.

- 7) The Appellants further contended that the award was punitive, contrary to Section 27 of the Civil Procedure Act, and contrary to the principle in **Premchand Raichand Ltd v Quarry Services of East Africa Ltd [1972] EA 162**, which underscores that costs should not be oppressive.
- 8) Additionally, they relied on **County Government of Tana River & Another v Hussein Fumo Hiribae [2018] eKLR**, which emphasises that costs must be proportionate and not impair access to justice. It was also argued that the award infringed Articles 48 and 50 of the Constitution of Kenya, 2010, citing **Joseph Njoroge Kimondo & Another v JWM (Minor) [2017] eKLR**.
- 9) The Appellants proposed that the thrown-away costs be reduced to Kshs. 30,000/= in line with awards in **Ojwang' v Mutinda & Another [2025] KENS 10887** and **Kreative Concrete Products Ltd v AEE Power S.A Ltd [2024] KEHC 8934**.

SUBMISSIONS BY THE RESPONDENT:

- 10) The Respondent opposed the appeal, submitting that the award of Kshs. 100,000/= was modest and justified, given the delay occasioned by the Appellants. He argued that substantial expenses had been incurred, including filing fees, service costs, and court attendances, as he had prosecuted the matter to conclusion following the default judgment.
- 11) The Respondent submitted that the trial court exercised its discretion under Order 10 Rule 11 of the Civil Procedure Rules correctly, relying on **Devram Dhanji v Kanji Hirji Shah [1965] EA 123**, which emphasises that costs should reflect work done.
- 12) It was further submitted that appellate interference is only warranted where discretion has been exercised injudiciously, citing **Mbogo & Another v Shah [1968] EA 93**. The

Respondent argued that the Appellants had benefited from the ruling and cannot now challenge the condition after having accepted it.

ISSUES FOR DETERMINATION:

13) From the record and the submissions, the issues for determination are:

- i. **Whether this Court can interfere with the trial court's exercise of discretion on thrown-away costs.**
- ii. **Whether the award of Kshs. 100,000/= was excessive, punitive, or based on wrong principles.**
- iii. **Whether the award infringed the Appellants' constitutional right to access justice and a fair hearing.**

ANALYSIS AND DETERMINATION:

I. Interference with Discretion

14) It is settled that an appellate court will not interfere with a trial court's discretion unless the discretion was exercised on wrong principles or the decision is plainly wrong, resulting in injustice. This principle was established in **Mbogo & Another v Shah [1968] EA 93** and reaffirmed in **Pindoria Construction Ltd v Ironmongers Sanitaryware [2012] eKLR**.

15) Therefore, this Court's role is not to substitute its own discretion merely because it might have awarded a different sum, but to assess whether the discretion was exercised judicially.

II. Whether the Award was Excessive or Punitive

- 16) Order 10 Rule 11 of the Civil Procedure Rules permits the court to set aside a default judgment “upon such terms as are just.” Thrown-away costs are compensatory in nature, meant to indemnify a party for costs rendered nugatory by the setting aside.
- 17) The trial court found that the Respondent had proceeded to proof and obtained a decree. However, no basis was provided for the figure of Kshs. 100,000/=. In **Sheila Wambui Muturi v Peter Macharia Muiru [2021] eKLR**, the High Court faulted a similar unexplained award.
- 18) Costs must be reasonable and proportionate. As noted in **Premchand Raichand Ltd v Quarry Services of East Africa Ltd [1972] EA 162**, costs should not be punitive. No itemised breakdown or taxation was placed before the trial court. Consequently, the assessment of Kshs. 100,000/= lacked a discernible foundation and was therefore injudicious.

III. Constitutional Right to Access Justice

- 19) Articles 48 and 50 of the Constitution of Kenya, 2010 guarantee access to justice and the right to a fair hearing. Conditional setting aside is permissible, but conditions must not be oppressive. In **County Government of Tana River & Another v Hussein Fumo Hiribae [2018] eKLR**, the court emphasised the principle of proportionality.
- 20) A disproportionate condition may indirectly impede a litigant’s right to be heard. Courts must discourage indolence but avoid imposing conditions that effectively bar access to justice.

CONCLUSION:

- 21) This Court finds that:

a) **The trial court had jurisdiction and discretion to impose thrown-away costs.**

b) The assessment of Kshs. 100,000/= was made without demonstrated justification.

c) The award was therefore excessive and warrants interference.

22) Taking into account the delay, the stage reached in the proceedings, and the need for proportionality, thrown away costs of **Kshs. 30,000/=** would adequately compensate the Respondent while safeguarding the Appellants' right to a hearing.

ORDERS: -

23) Accordingly:

- i. The appeal partially succeeds.**
- ii. The order awarding Kshs. 100,000/= as thrown away costs is set aside.**
- iii. The award is substituted with Kshs. 30,000/= payable within fourteen (14) days from today.**
- iv. In default of payment within the stipulated period, the order setting aside the ex parte judgment shall lapse.**
- v. Each party shall bear its own costs of the appeal.**

24) It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS

APPLICATION, THIS 16TH DAY OF FEBRUARY 2026

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CHARLES KARIUKI

JUDGE