



**Stecol Corporation Co Limited v Mulee (Civil Appeal E065 of 2022)
[2026] KEHC 1113 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1113 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E065 OF 2022
CW GITHUA, J
FEBRUARY 5, 2026**

BETWEEN

STECOL CORPORATION CO LIMITED APPELLANT

AND

MARTIN WAMBUGU MULEE RESPONDENT

JUDGMENT

1. The appellant, Stecol Corporation Company Limited filed the instant appeal challenging the ruling delivered by the lower court on 8th November 2021 dismissing its application dated 30th September 2021.
2. In the application, the appellant had sought review or setting aside of the Ex-parte judgement entered against it in favour of the respondent on 3rd February 2021 for failure to file its statement of defence within the time prescribed by the law.
3. In its memorandum of appeal dated 10th January 2022, the appellant advanced twelve grounds of appeal in which it principally faulted the learned trial magistrate for failing to give it an opportunity to defend the suit thus condemning it unheard.
4. The appellant also complained that the learned trial magistrate erred in law and fact by determining a work injury claim without jurisdiction and by failing to find that its draft defence raised triable issues entitling it to leave to defend the suit; that the learned trial magistrate's decision occasioned a miscarriage of justice.
5. The record shows that on 29th April 2024, the court directed that the appeal be prosecuted by way of written submissions. The court gave the parties over a months' time to exchange and file their written submissions. The appellant filed its written submissions dated 3rd June 2024 through its advocates on record Ms. Wambui Muiruri Associates Advocates but the respondent failed to file his submissions despite being given ample opportunity to do so.



6. I think it is important at this stage to give a brief background against which this appeal was filed. It is apparent from the record of appeal

that the appellant, for undisclosed reasons, failed to include in the record of appeal the plaint which instituted the suit against it in the lower court. I have however perused the original record of the trial court and noted the plaint dated 30th June 2020.
7. In the plaint, the respondent sued the appellant for damages as compensation for personal injuries sustained in a road traffic accident whose occurrence was blamed on the negligence of the appellant's driver or agent. The respondent alleged that on or about 23rd March 2019, he was walking along Kirimiri – Morram Road at Maji Kiboko area when the appellant's driver or agent recklessly drove motor vehicle Registration No.KBJ 182 R and knocked him down causing him serious injuries. The particulars of negligence attributed to the appellant's driver or agent were specified in paragraph 5 of the plaint.
8. The record shows that a summons to enter appearance addressed to the appellant was issued on 17th July 2020. It was served on the appellant as shown in the affidavit of service dated 14th December 2020. The appellant failed to file a memorandum of appearance or defence within the prescribed time and on 14th December 2020, the respondent requested for interlocutory judgement which was entered against the appellant on 3rd February 2021.
9. The record further shows that hearing of the suit proceeded by way of formal proof and thereafter, judgement was entered on 5th July 2021 against the appellant on liability at 100%. The respondent was awarded Kshs.350,000 in general damages and special damages in the sum of Kshs.10,330 together with costs of the suit and interest.
10. It is apparent from the record that the respondent commenced execution of the decree issued pursuant to entry of the aforesaid judgement. This is what triggered filing of the Notice of Motion dated 30th September 2021 whose outcome is the ruling subject of this appeal.
11. In the impugned ruling, the learned trial magistrate dismissed the application after making a finding of fact that the appellant had been properly served with the summons to enter appearance as shown in the affidavit of service dated 14th December 2020 and that it had failed to establish sufficient reason to justify review or setting aside of the default Judgement.
12. Having considered the grounds of appeal, the written submissions filed by the appellant, the impugned ruling and the entire record of the trial court, I find that the only issue arising for my determination in this appeal is whether the learned trial magistrate misdirected himself or erred when he dismissed the applicant's aforesaid application.
13. The law governing setting aside of *ex parte* judgements is set out in Order 10 Rule 11 of the Civil Procedure Rules. The provision gives the court unlimited discretion to vary or set aside a default judgement and any consequential decree or order upon such terms as are just.
14. Since the decision to set aside a default judgement is discretionary, this court being an appellate court is enjoined to apply the principles enunciated in the celebrated case of *Shah V Mbogo* [1967] EA 116 regarding the circumstances in which an appellate court can interfere with a decision based on a trial court's discretion. In the aforesaid case, the court expressed itself as follows;

“...I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or



because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so, arrived at a wrong decision”.

15. It is trite that although the court has unfettered discretion to decide whether or not to set aside an *ex parte* judgement, that discretion being a judicial one, must be exercised in accordance with the law and established legal principles taking into account the evidence placed before the court.
16. As stated in the cases of *Patel V E.A. Cargo Handling Services Ltd* [1974] EA 75 and *Shah V Mbogo* (*supra*) and recently by the Court of Appeal in *Richard NCharpi Leiyagu V Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, exercise of the above discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error but is not meant to assist a person who deliberately sought to obstruct the course of justice.
17. That said, a distinction must be made between a default judgement that was regularly entered, that is, where the defendant was duly served with summons to enter appearance but for one reason or another failed to enter appearance or file a defence on time and an irregular default judgement where judgement was entered against a defendant who had not been served or properly served with summons to enter appearance. In the latter case, such a judgement is set aside *ex debito justitiae*, as a matter of right not as a matter of discretion. In such a case, the court automatically sets aside the default judgement in execution of its duty to uphold the integrity of the judicial process.
18. Where however a default judgement had been regularly entered, the court in the exercise of its discretion considers several factors which include; the reason for failure to file the memorandum of appearance or defence on time; the length of time that had elapsed since the default judgement was entered; whether the intended defence raised triable issues; the prejudice each party was likely to suffer if the application was allowed or dismissed and whether, taking into account the evidence in its totality, it was in the interest of justice to set aside the default judgement.
19. In this case, in the affidavit sworn in support of the application, the appellant denied the respondent’s assertion that it was properly served with the summons to enter appearance and chose not to enter appearance or file a defence. The deponent averred that the appellant became aware of the suit and existence of the default judgement when it was served with a proclamation by Betabase Auctioneers on 27th September 2021.
20. At paragraph 5 of the affidavit, the deponent however conceded that the summons was served at the appellant’s site at Kangundo road but not at its Makuyu Kirimiti site where its registered office was apparently located.
21. . It was further averred that the appellant had a good defence to the respondent’s claim as the injuries sustained by the respondent were suffered at his place of work not when walking on a road as a pedestrian as alleged in the plaint; that the accident had been reported to the Directorate of Occupation Safety and Health Services and the Director of Occupation, Health and Safety Services had already assessed compensation payable to the respondent whose payment was being processed at the time the appellant was served with a proclamation notice. The appellant annexed a draft defence to the supporting affidavit in which it denied liability as alleged and pleaded contributory negligence by the respondent.
22. In the relying affidavit dated 4th October 2021, the respondent denied the appellant’s claim that it was not properly served with summons to enter appearance and maintained that proper service was effected. The respondent also denied the appellant’s claim that he was knocked down by the appellant’s motor vehicle while at his place of work not on a road.



23. Having considered all the material placed before me, the brief ruling delivered by the learned trial magistrate and the applicable law, I find that although I cannot fault the trial courts finding that the appellant was properly served with summons to enter appearance as shown in the affidavit of service dated 14th December 2020 since this was admitted by the appellant in the supporting affidavit, I find that the learned trial magistrate misdirected himself on several fronts when determining the appellant's application.
24. To start with, the learned trial magistrate applied the wrong provisions of the law. He applied Order 12 Rule 7 of the Civil Procedure Rules which deals with setting aside of judgements entered as a consequence of non-attendance by parties on hearing dates or setting aside of orders dismissing a suit for non-attendance. The learned trial magistrate did not address his mind to the applicable law which is Order 10 Rule 11 of the Civil Procedure Rules which gave him unfettered discretion to grant the orders sought in the appellant's application.
25. Secondly, the learned trial magistrate did not consider any of the legal principles discussed earlier that guide courts in the exercise of their discretion in deciding whether or not to set aside default judgements. The learned trial magistrate did not therefore seek to establish from the evidence before him whether or not the appellant had a good reason for failing to file its defence on time; whether the draft defence raised triable issues and the prejudice each party was likely to suffer if the application was allowed or dismissed.
26. After my independent appraisal of the evidence placed before the trial court, I am satisfied that the appellant's supporting affidavit and draft defence raised triable issues which entitled the applicant to leave to defend the suit. The learned trial magistrate failed to consider the weighty claim made by the appellant that the injuries sustained by the respondent were work related and were not sustained as a result of a road traffic accident as pleaded by the respondent.
27. Considering that the respondent did not specifically deny having been the appellant's employee at the material time and considering also that the appellant had availed before the trial court evidence confirming that the Director of Occupational Health and Safety had already assessed compensation payable to the respondent, it is my finding that the appellant had demonstrated existence of triable issues which ought to have been ventilated in a trial.
28. For the foregoing reasons, I have come to the conclusion that the learned trial magistrate not only failed to apply applicable legal principles to the application that was before him but also failed to thoroughly interrogate the evidence before him and consequently failed to appreciate that the appellant had sufficiently established that it had a defence to the respondent's suit which raised triable issues entitling it to leave to defend the suit.
28. As I conclude, it is worth noting that although the learned trial magistrate alluded to delayed realization of fruits of the respondent's judgement, there was no claim by the respondent and there was no indication from the evidence on record that the appellants application had been filed not in the pursuit of justice but in bad faith with the aim of obstructing or delaying the course of justice.
29. For all the above reasons, I find merit in this appeal and it is hereby allowed. The learned trial magistrate's ruling dated 8th November 2021 is hereby set aside. It is substituted with an order allowing the application dated 30th September 2021 on terms that the default judgement entered on 3rd February 2021 is hereby set aside. The subsequent judgement delivered on 5th July 2021 is also set aside.

The Hon. Deputy Registrar is directed to remit the lower court file to the trial court within the next 14 days for directions or further orders with regard to hearing of the respondent's suit.



30. On costs, the best order that commends itself to me given the circumstances under which the appeal was filed is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 5TH DAY OF FEBRUARY 2026.

HON. C. W. GITHUA

JUDGE

In the presence of;

Ms. Mogaka holding brief for Mr. Nyantika for the respondent

No Appearance for the Appellant

Miss. Susan Waiganjo, Court Assistant

