



**Kiplagat v Keitany (Civil Appeal E017 of 2024)
[2026] KEHC 2387 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CIVIL APPEAL E017 OF 2024
E OMINDE, J
FEBRUARY 26, 2026**

BETWEEN

BRIAN KIMUTAI KIPLAGAT APPELLANT

AND

HOSEA KEITANY RESPONDENT

(Being an Appeal arising from the ruling and order of Hon. Gladys Adhiambo (SPM) delivered on 4th November 2024 in Iten Senior Principal Magistrates' Court Civil Case No. E039 of 2023)

JUDGMENT

1. Before the Lower Court, the Applicant herein (now the Respondent), filed an Application dated 22nd August 2024 seeking orders as follows;
 1. This application be certified as urgent and service be dispensed with in the first instance.
 2. There be a stay of sale of the defendant's movable property namely Motor Vehicle registration number KCA 042P Toyota Matatu pending hearing and determination of this application inter-partes.
 3. This honourable court be pleased to issue order compelling Hegeons Auctioneers to release of Motor Vehicle registration number KCA 042P Toyota matatu pending hearing and determination of this application.
 4. There be a stay of execution and or further execution against the judgment/decree herein and all consequential orders and/or proceedings arising there from pending the hearing and determination of this application inter-parties.
 5. This Honourable court be pleased to set aside the ex parte judgment obtained by the plaintiff in this suit and all the consequential orders and/or proceedings arising therefrom.



6. The defendant be granted leave to file the defence out of time.
 7. The suit does proceed on merit
 8. Costs of this application be borne by the plaintiff/Respondents
2. The Appellant deponed that on 14th August 2024, his motor vehicle registration number KCA 042P Toyota Matatu was attached by people who stated that they were auctioneers from Hegeons Auctioneers who showed him warrants of attachment, notification of sale and proclamation as the basis for the attachment. He urged that he was never served with Summons to enter appearance or a Notice of entry of judgment in the case.
 3. He deposed that the affidavit of service upon which ex-parte judgment was based was false and sought leave of the court to have the deponent cross-examined at the hearing of the application on the content of the said affidavit. He prayed that the warrants be lifted and the judgment and decree be stayed. He further stated that the application had been made in good faith, without delay and that no one would be prejudiced if it was allowed.
 4. The Respondent therein filed a Replying Affidavit dated 11th September 2024 and sworn by Geoffrey Kisilia Okara, counsel on record for the then plaintiff who averred that the application was not brought in good faith and further, that the applicant was properly served with the Summons to enter appearance and the pleadings in the matter, annexing and marking as GKO 1 (a), (b) and (c) copies of the Affidavit of Service, the WhatsApp Screenshot and the MPESA Message respectively.
 5. Further, that the Defendant/Applicant was served with a hearing notice before the matter proceeded for formal proof hearing on 9th August 2023, annexing and marking as GKO 2 (a), (b) & (c) copies of the Hearing Notice dated 24th May 2023, the Affidavit of Service and the WhatsApp Screenshot respectively. He further stated that a Notice of Entry of Judgment was issued, annexing and marking as GKO 3 a copy of the Notice of Entry of Judgment. He deponed that the application has been overtaken by events for reasons that the said motor vehicle had already been sold annexing and marking as GKO 4(a) & (b) copies of the advertisement and the Certificate of Sale respectively. He urged that the application lacked merit and prayed that it be dismissed.
 6. Upon considering the pleadings and submissions, vide the ruling delivered on 4th November 2024, the trial court allowed the application. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal vide the Memorandum of Appeal dated 8th November 2024 premised on the following grounds;
 1. The Learned Magistrate misdirected herself on both points of law and fact when she allowed the application without considering the facts on record and the law.
 2. The Learned Magistrate misdirected herself on both points of law and fact when she failed to consider the Appellant's Replying Affidavit (the annexures thereto) and the Appellant's written submission.
 3. The Learned Magistrate failed to hold that the Application had been overtaken by events and hence she could not grant the Orders sought.
 4. The Learned Magistrate failed to hold that the application was fatally defective as there was no draft defence.
 5. The Learned Magistrate failed to hold that there was presumption of service as the process server was never called for cross-examination.



6. The Learned Magistrate misapprehended and misunderstood the extent and severity of her Orders thereby resulting in the Honourable Court misdirecting itself and occasioning a miscarriage of justice.
7. The parties were directed to file submissions on the appeal.

Appellants' Submissions

8. Learned counsel for the Appellant submitted that the trial Magistrate misdirected herself on both points of law and fact when she allowed the Respondent's application. He urged that the Appellant demonstrated that the Respondent had been properly served with pleadings in the Subordinate Court as already demonstrated in the pleadings herein. Further, that the Respondent was equally served with a Hearing Notice and he ignored the Summons to Enter Appearance as well as the Hearing Notice.
9. That when the Respondent filed his Application dated 22nd August 2024, he did not pray to have the process server take the witness box for cross-examination. The service was thus uncontested and there must be a presumption that proper service of the pleadings and the Hearing Notice was done. He cited the case of Shadrack Arap Baiywo vs Bodi Bach Ksm CA Civil Appeal No. 122 of 1986 [1987] eKLR, and the case of Kingsway Tyres and Automarts Ltd v Rafiki Enterprises Ltd NRB CA Civil Appeal No. 220 of 1995 [1996] eKLR on presumption of service.
10. Counsel urged that the Respondent also sought to set aside default judgment but did not annex a draft defence as the law requires. In this regard, he placed reliance on the decision of the Court of Appeal in the case of Nature Pharmacy Ltd & Another vs Gichuhi (Civil Appeal 245 of 2016) [2022] KECA 827 (KLR).
11. Counsel submitted that the Appellant also demonstrated that the suit Motor Vehicle was sold by public auction which was properly conducted as there was neither a stay of execution nor had the default judgment been set aside. Further, that the Learned Trial Magistrates' order for the Auctioneers to release a Motor Vehicle that has already been sold to a 3rd party was not only impracticable but also amounts to issuing orders against a person that is not a party to the suit.
12. The Trial Magistrate ought to have found that the Respondent's application had been overtaken by events. He cited the case of Murunga v Barasa (Civil Appeal E069 of 2022) [2024] KEHC 676 (KLR) (31 January 2024) (Ruling) and Nyariki vs Mogusii Farmers Group Company Limited & Another; Hezron Getuma Onsongo Trading as Hegeons Auctioneers (Proposed Interested Party) (Civil Case 2 of 2019) [2023] KEHC 23116 (KLR) (Civ) (2 March 2023) (Ruling) in this regard and urged that the appeal has merit and should be allowed with costs.
13. The Respondents did not file any submissions. The court also notes that the Respondents did not participate at all in this matter even at the Application stage.

Analysis & Determination

14. The issue that arises for determination is;

Whether the trial court erred in setting aside the ex parte judgment

15. Setting aside of Judgement is governed by Order 10 Rule 11 of the Civil Procedure Rules which provides as follows;

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.



16. In *Mureithi Charles & another v Jacob Atina Nyagesuka (2022) KEHC 1805 (KLR)* the court held that;
- ‘That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.’
17. In the instant case, I have carefully considered the submissions made by Counsel for the Appellant as well as the case law cited and relied upon. I am well satisfied that the decisions of the courts in the cited cases are very relevant and applicable to the circumstances pertaining to the impugned decision of the lower court and the court shall therefore rely on them fully. The court also notes that there has been no rebuttal at all by the Respondent to the facts of the case as herein summarized and further that there are also no rival submissions on the issues of law that comprise the grounds of appeal.
18. The above being the case, I am satisfied that the Appellant’s Appeal has merit and the same is allowed in its entirety. Consequently, therefore, the Learned Trial Magistrate’s Ruling delivered on 4th November 2024 and every and all consequential orders is now hereby set aside. The Respondent is to bear the costs of the Appeal.

READ DATED AND SIGNED AT ELDORET ON 26TH FEBRUARY 2026

E. OMINDE

JUDGE

