



**Rose & 3 others v Njuguna (Suing as personal representative of the Estate of Mutero Njuguna – Deceased) (Civil Appeal E094 of 2023) [2026] KEHC 2834 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2834 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E094 OF 2023  
WA OKWANY, J  
FEBRUARY 5, 2026**

**BETWEEN**

**EGO ROSE ..... 1<sup>ST</sup> APPELLANT  
NATIONAL INDUSTRIAL CREDIT BANK LTD ..... 2<sup>ND</sup> APPELLANT  
BIG ROAD ENTERPRISES ..... 3<sup>RD</sup> APPELLANT  
JULIUS MUTUMA GIKUNDI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**EMILY WANGECHI MUTERO NJUGUNA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MUTERO NJUGUNA – DECEASED) ..... RESPONDENT**

*(Being an appeal from the ruling delivered on 4th October 2023 by Hon. Nathan Shiundu Lutta (CM) in Naivasha CMCC No. 113 of 2015)*

**JUDGMENT**

**Introduction**

1. The Respondent herein was the Plaintiff before the trial court where she sued the Appellants for negligence arising from a road traffic accident that occurred on 23<sup>rd</sup> April 2012 along Naivasha - Mai Mahiu Road involving motor vehicles KAJ 820F, KBK 300E, and ZD 3335 resulting her injuries and the death of her husband.
2. The Appellants did not enter appearance, alleging that they were never served with the Summons to Enter Appearance and Plaint. Default judgment was consequently entered on 6<sup>th</sup> December 2017 awarding the Respondent damages of Kshs 3,545,878.26 together with costs.



3. Upon learning of the judgment during execution attempts, the Appellants moved the trial court, on an application to set aside the default judgment, and on 28<sup>th</sup> September 2022 the said judgment was set aside but on condition that the Appellant files a defence and pays thrown away costs of Kshs. 50,000 within 30 days.
4. The Appellants filed their defence in time but delayed in paying the thrown-away costs due to an alleged inadvertence by counsel. A cheque was however later issued and delivered to the Respondent's advocates on 24<sup>th</sup> November 2022. The Respondent returned the cheque on 5<sup>th</sup> December 2022 on account of being paid out of time, leading to reversion of the default judgment.
5. A subsequent application dated 8<sup>th</sup> December 2022 filed before the trial court for extension of time within which to pay the thrown away costs was dismissed when the trial court held that the court was functus officio. The said dismissal precipitated the filing of the instant appeal.

### **The Appeal**

6. The Appellants listed the following grounds of appeal in the Memorandum of Appeal: -
  - a. That the learned trial magistrate erred in law in finding that the court was functus officio and that granting the orders sought by the Appellants vide application dated 08/12/2022 meant that the trial court would be sitting on appeal of its own ruling.
  - b. That the learned trial Magistrate erred in law and fact by omitting to consider the merits of the application went on a tangent and arrived at an erroneous conclusion.
  - c. That the learned trial magistrate erred in law and in fact in not appreciating that the Appellants had partially complied with the orders of 28/09/2022 by filing a defence within time which raised several triable issues and had demonstrated willingness and ability to comply with the orders of issued on 06/10/2022.
  - d. That the learned trial magistrate erred in law and in fact by failing to appreciate that the delay in paying throw away costs of Kshs 50,000/= was not inordinate and that should have entitled the Plaintiff to execute for the thrown away costs rather than restoring a judgment that was already set aside on merit.
  - e. That the learned trial Magistrate erred in law and in fact by failing to balance the rights of both parties in line with the overarching obligation to exercise discretion judiciously.
  - f. That the learned trial magistrate erred in law and in fact in not appreciating that the Appellants delay in payment of the throw away costs of Kshs 50,000/= was sufficiently explained and ignored the fact that the Respondent acquiesced to the delay by accepting the cheque only to return the same weeks later.
  - g. That the learned trial magistrate erred in law in failing to appreciate the need to administer substantive justice over procedural consideration which required the subject matter to be heard and determined on merit.
7. The Appellants seek the reversal of that ruling and the enlargement of time within which to pay throw-away costs of Kshs. 50,000, failure of which the judgment of 6<sup>th</sup> December 2017 be reverted.
8. The appeal was canvassed by way of written submissions which I have considered.



## Issues for Determination

9. I have carefully considered the record of appeal and the parties' rival submissions. I find that the following are the issues that fall for my determination: -
- a. Whether the application dated 8th December 2022 was res judicata.
  - b. Whether the trial court was functus officio.
  - c. Whether the Appellants demonstrated sufficient cause for enlargement of time.
  - d. Whether denying the extension violated the right to be heard or principles of substantive justice.

## Functus Officio and Res Judicata

10. The Appellants submitted that the trial court misapplied the doctrines of res judicata and functus officio as the said court retained jurisdiction to enforce, clarify, or extend time for compliance with its own conditional orders, even after issuing them. They relied on the following authorities: -
- (i) Telkom Kenya Ltd vs. John Ochanda [2014] eKLR where it was held that: -  
“Functus officio is an enduring principle... but it does not bar a court from addressing subsequent procedural issues that arise from its own orders.”
  - (ii) John Gilbert Ouma vs. Kenya Ferry Services Ltd [2021] eKLR where the court held that: -  
“...the doctrine of functus officio prevents merit-based re-engagement after final judgment, but does not bar the court from revisiting or giving effect to conditional interlocutory orders.”
11. The Respondent, on the other hand, argued that once the Appellants failed to comply with the trial court's orders within 30 days, the judgment of 6<sup>th</sup> December 2017 was automatically revived, finally determining the matter, thus barring the subsequent application. The Respondent placed reliance on the case of Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996 [1999] eKLR where it was held that: -  
“That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or Civil Procedure Act caters for.”
12. Reference was also made to the provisions of Section 7, Civil Procedure Act which stipulates that “... no court shall try any issue that has been directly and substantially decided in a former suit...”
13. A perusal of the ruling of 28<sup>th</sup> September 2022 reveals that it set explicit consequences on failure to pay the thrown away costs within 30 days to the effect that the default judgment “would revert.”



14. I however find that the issue of extension of time within which to comply with the said conditions had not been previously decided by the trial court and that the earlier ruling did not bar future enlargement applications. In John Gilbert Ouma case (supra), the Court of Appeal clarified that: -
- “...functus officio does not bar a court from considering post-ruling applications where parties seek time to comply with conditional orders.”
15. I note that the application of 8<sup>th</sup> December 2022 was not seeking to relitigate the setting aside but rather, it sought enlargement of time, a distinct issue that had not been heard and determined. It is my finding that the res judicata doctrine did not apply to the said application.
16. I further find that the conditional nature of the 28<sup>th</sup> September 2022 ruling left the court with residual jurisdiction to supervise compliance, clarify timelines, and, where appropriate, enlarge time. I find guidance in the decision in Telkom Kenya Ltd vs. John Ochanda (2014) eKLR where it was held: -
- “...a court may address issues relating to enforcement or supervision of conditional orders even after delivering the ruling.”
17. Similarly, in Kenya Power vs. Onyango (2023) eKLR it was held: -
- “...the court was not functus officio when dealing with an application to enlarge time for payment of throw-away costs.”
18. Guided by the decisions in the above cited cases, I find that the court retained jurisdiction to hear and determine the application for extension of time for compliance and that the functus officio principle was misapplied.

### **Mistake by Counsel**

19. Turning to the issue of partial compliance and mistake by counsel, the Appellants submitted that their defence was filed in time and that the delay in paying the throw-away costs was due to inadvertence and internal insurance requisition processes. They relied on the decision in Belinda Murai & Others vs. Amos Wainaina [1978] KLR where it was held that: -
- “ A mistake is a mistake...The door of justice is not closed because of a mistake by counsel.”
20. Reference was also made to the case of Phillip Chemwolo & Another vs. Augustine Kubede [1982–88] KLR 103 where the court held that: -
- “Blunders will continue to be made... it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merit.”
21. Citing Article 50 of *the Constitution* and Order 50 Rule 6, the Appellants submitted that courts have power to enlarge time even after expiry and that litigation should be determined on merit. They cited the case of Kenya Power & Lighting Co. Ltd vs. Onyango [2023] KEHC 21246 where it was held that: -
- “...it was in the interests of justice to re-open the file and enlarge time for payment of throw-away costs; the court could not be said to be functus officio.”
22. The Appellants submitted that they had demonstrated sufficient cause for enlargement of time as they had not only filed the defence within time but also forwarded the cheque for thrown away costs



shortly later, albeit after the lapse of the time granted by the court. The Appellants attributed the delay in the dispatching of the cheque to inadvertence and insurer requisition delays. They noted that the Respondent initially received the cheque but opted to return it.

23. It was the Appellants' case that the delay was not inordinate and that no prejudice was shown as the thrown away costs could still be recovered. Reference was made to Belinda Murai case (supra) for the argument that the court should do whatever is necessary to rectify the error if the interests of justice so dictate.
24. The Respondent, on her part, argued that she had the right to enjoy the fruits of her judgment having waited for the determination of the case since 2012. She urged the court not to allow her to be subjected to endless litigation. She relied on the decision in Machira T/A Machira & Co. Advocates vs. East African Standard [2002] KLR where it was held that: -

“ A successful party is entitled to the fruits of his judgment at any stage... Unless exceptional circumstances exist.”
25. The Respondent further argued that the Appellants were given a fair opportunity to defend the case and cannot now seek the court's indulgence after ignoring explicit timelines. She cited Njoroge & Another vs. Malweyi & Another (Civil Appeal E243 of 2024) where failure to pay throw-away costs led to reinstatement of judgment and dismissal of extension request.
26. Courts in Kenya have consistently taken the position that mistakes by counsel should not be visited on their clients. This is the position that was taken in Phillip Chemwolo & Another vs. Augustine Kubede case (supra).
27. In the present case, it was not disputed that the Appellants had partially complied with the court orders having filed a defence and supporting documents within time. I note that the delay in remitting the cheque was minimal, explained, and that the cheque was delivered before the Respondent's advocate rejected it weeks later. I find that the delay or error in remitting the cheque should not override substantive justice, especially where the Respondent could be compensated through costs. I am guided by the provisions of Article 159 of *the Constitution* which does not favour decisions based purely on technicalities and Article 50 of *the Constitution* on the right to a fair hearing.
28. While it is clear that the Respondent has a genuine interest in finalising this long standing case, I am of the view that procedural justice cannot eclipse substantive justice where prejudice is minimal. My take is that denying extension shut the door to a hearing on merits contrary to constitutional standards.

## **Disposition**

29. Having regard to the findings that I have made in this judgment, I find that the appeal is merited and I therefore allow it in the following terms: -
  - a. The appeal succeeds.
  - b. The finding of the trial court that the application dated 8<sup>th</sup> December 2022 was res judicata and that the court was functus officio is hereby set aside.
  - c. Time for payment of Kshs. 50,000 throw-away costs is hereby enlarged.
  - d. The Appellants shall pay the said amount within 14 days from the date of this judgment.
  - e. The defence on record shall stand as duly filed.
  - f. The matter is remitted to the trial court for hearing on merits.



g. The costs of this appeal shall abide the outcome of the lower court case.

**DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**HON. W. A. OKWANY**

**JUDGE**

05/02/2026

For Appellant No Parties

For Respondent No Parties

Court Assistant Karani

