



**Luchivya v Mwenesi & another (Civil Appeal E004 of 2025)
[2026] KEHC 4854 (KLR) (15 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 4854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E004 OF 2025**

**AC BETT, J
APRIL 15, 2026**

BETWEEN

GILES LAMECK LUCHIVYA APPELLANT

AND

ANNE MMBOGA MWENESI 1ST RESPONDENT

WATU NOMINEES COMPANY LTD 2ND RESPONDENT

*(Being an appeal against the Judgment/decree of Honourable Sylvia Wayodi,
(Adjudicator) in Kakamega SCCC. No. E135 of 2023 delivered on 24/07/2023)*

JUDGMENT

Background

1. By an amended statement of claim dated 30th May 2023, the 1st Respondent sought general and special damages for pain and suffering and future medical expenses arising from injuries sustained in a road traffic accident involving tuktuk registration number KTWC 374G registered in the name of the 2nd Respondent.
2. The 1st Respondent's claim was that on 3rd May 2023, she was a lawful passenger on motor vehicle registration No. KWTC 374G along Kisumu-Kakamega Highway when the 2nd Respondent's driver so negligently drove, controlled and/or otherwise managed the same and approached the round-about without due care and attention causing it to veer off its lawful lane and onto the lawful lane of motor vehicle registration number KCP 049S thus causing an accident whereby she was injured.
3. By an application dated 19th June 2023, the 2nd Respondent sought leave to issue a Third Party Notice to the Appellant on the grounds that he was the actual owner of motor vehicle registration number KMTWC 374G and should be joined to the suit for the fair determination of the question of liability. At the same time, the 2nd Respondent filed a response to the amended statement of claim in which



it denied being the owner of the subject motor vehicle and shifted the entire blame for the accident to the Appellant whom they averred, was its owner. The 2nd Respondent averred that it was merely a financier of the subject motor vehicle and had no control over the usage or management thereof, nor was it being used for its joint benefits.

4. On 20th June 2023, the 2nd Respondent was granted leave to issue the Third Party Notice to the Appellant as prayed and upon being served, the Appellant entered appearance and on 28th June 2023, Mr. Mulama attended court on his behalf when he was granted leave to amend the memorandum of appearance and the matter stood over to 10th July 2023. On 10th July 2023, there was no appearance for the Appellant but Counsel for the 2nd Respondent sought directions that the matter do proceed by way of Section 30 of the *Small Claims Court Act* and prayed for a Mention date to confirm the filing of written submissions. On 17th July 2023, the parties' Advocates attended court. Mr. Mulama sought and was granted leave to withdraw from acting for the Appellant. Interlocutory judgement was entered against the Appellant. Judgement was delivered on 24th July 2023 as the other parties had filed their written submissions.
5. The Appellant filed an application dated 30th August 2023 seeking the setting of the judgement made on 24th July 2023 and to be granted leave to defend the claim. However, the said application was dismissed on 4th December 2023 and a subsequent attempt to have it reviewed vide an application filed on 8th December 2023 disallowed.
6. Undeterred, the Appellant sought and was granted to file appeal against the Judgement of the Adjudicator and filed Memorandum of appeal in which he set down the following grounds of appeal:-
 - a. The Honourable trial Adjudicator failed in law and in fact in entering judgement for the claimant as against the Appellant.
 - b. The Honourable trial Adjudicator's evaluation of the evidence placed before her in terms of service of pleadings is wanting and has resulted in the Appellant being condemned unheard.
 - c. The Honourable trial Adjudicator grossly erred in awarding the 1st Respondent a sum of Kshs. 222,280/= being general damages and special damages as well as costs of the suit and interest for soft tissue injuries that have completely healed with no permanent disability.
 - d. The Honourable trial Adjudicator exhibited actual bias against the Appellant.
 - e. The Honourable trial Adjudicator's decision has caused the Appellant a gross miscarriage of justice.
7. The Appeal was canvassed through written submissions which I have duly considered.

Appellant's Submissions

8. The Appellant submits that the appeal is based on the principle grounds that the trial Adjudicator's evaluation of the evidence placed before her in terms of service of pleadings was wanting and resulted in the Appellant being condemned unheard. He relies on the case of *Kimani Kigano & Company Advocates v. Jimba Credit Corporation Limited (1991) KLR* and argues that based on the said case, the court has unlimited discretionary power to set aside ex parte orders provided it is properly exercised. He also submits that the court is obliged to look at the defence that the Defendant may be having to the claim and that if a party establishes that he has a reasonable defence which appears on the face of the pleadings to contain considerable merit, the court ought to be inclined towards setting aside.



9. The Appellant also contends that he was never properly served and no matter how well reasoned a decision is, if it is based on a nullity from the beginning, it cannot suffice. He submits that the court is under duty to inquire into the reasons for failure to attend court and at the defence to ascertain whether it raises triable issues. He submits that he did not intend to obstruct or delay the court of justice. He argues that the trial Adjudicator did not grant him an opportunity to ventilate his claim that he had not been served with the pleadings.
10. The Appellant also submits that the trial Adjudicator grossly erred in awarding the 1st Respondent the sum of Kshs. 222,850/= being general and special damages as well as costs for soft tissue injuries when the injuries had completely healed with no permanent disability. It is the Appellant's further submission that the trial Adjudicator exhibited actual bias against him which occasioned gross miscarriage of justice.

Respondent's Submissions

11. The 1st Respondent submits that the trial court did not err in evaluating the evidence on service of pleadings and that the Appellant was given the opportunity to be heard but was indolent and has no one to blame but himself for the default judgement which she maintains was regular.
12. She asserts that the award of the trial court was reasonable, proportionate, and in alignment with Kenyan jurisprudence on quantum. She relies on the cases of *Magenge v. Masai & another* [2025] KEHC 9669 (KLR), *Riitho & Another v. Nguluta* [2025] KEHC 14664 (KLR), and *Francis Ochieng & Another v. Alice Kajimba* [2015] eKLR.
13. On the claim that the trial court was biased, she submits that the same was baseless and an affront to judicial integrity.
14. On its part, the 2nd Respondent submits that proper service of the Third Party Notice was effected and the Third Party subsequently appeared through his Counsel Mr. Mulama who later sought to be expunged from the record. It argues that the entry of the interlocutory judgement was regular within the meaning of Order 10 Rules 6 and 10 of the Civil Procedure Rules and the learned Adjudicator cannot be faulted for exercising her discretion as she did. It relies on *James Kanyiita Nderitu & Another v. Manos Philotas Ghikas & Another* [2016] eKLR and *Remco Ltd v. Mistry Jadva Parbat & Co. Ltd & others* [2002] EA 233.

Analysis and Determination

15. The principles that govern hearings in the Small Claims Court is the principle of simplicity, informal procedure and speedy dispensation of justice as are anchored in Section 3 of the *Small Claims Court Act*. Pursuant to said Section 38 (1), an appeal to the High Court can only be on matters of law and not of fact and once the High Court renders its judgement on the appeal, the decision is final. In making its decision, it is the duty of the appellate court to ensure that the trial court followed the principles of natural justice as envisaged by Section 17 of the Act which provides:-

“Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice.”

16. The record in the lower court is not quite clear as the notes appear too brief to be a true reflection of what transpired. What is apparent is that on 21st June 2023, Counsel for the 2nd Respondent sought time to serve the Appellant, then the Third Party.



17. On 28th June 2023, Mr. Mulama attended court and stated that he was appearing for the Third Party. He sought and was granted leave to amend the memorandum of appearance. The matter was adjourned to 10th July 2023 when directions were taken in the absence of Counsel for the Third Party. The parties were directed to file written submissions and the matter stood over to 17th July 2023 to confirm the filing of submissions. On the scheduled date, the court record indicates that Mr. Mulama for the Third Party addressed the court as follows:-

“I clarified issue representation I wish to withdraw from this matter.”

18. The record shows that the firm that was indicated as representing the Third Party was expunged from the record. The court then entered an interlocutory judgement and subsequently delivered a judgement dated 24th July 2024 in which the Third Party/Appellant was found wholly liable for the accident and the 1st Respondent awarded special and general damages together with costs and interest.

19. The Appellant argues there was no proof of service of pleadings. Prima facie, the record, shows that Counsel appeared in court and presented themselves as acting on his behalf. However, the submissions by Mr. Mulama that he had clarified the issue or representation followed by a request to withdraw seems to suggest that the said firm may have not received proper instructions to enable them proceed. This is confirmed by an affidavit sworn by Abok Advocate on 7th December 2022 in which he states that his firm had been instructed by Occidental Insurance Company Ltd to defend the policy holder Watu Nominees Ltd and not by the Appellant.

20. I have perused the original record and cannot see any affidavit of service confirming when and how the Appellant was served with the Third Party Notice. Without evidence of service and in light of the averment by the Mr. Abok whose associate had attended court and represented themselves as the acting for the Appellant, I can only conclude that the Appellant was not properly served.

21. I must hasten to add that even if the Third Party/Appellant had been properly served and already appeared through an advocate as contemplated in Section 20 (1) of the *Small Claims Court Act*, the Adjudicator was obliged pursuant to Section 27 (3) to adjourn the matter to allow the Third Party/Appellant, who was not present in person, to appoint a new Advocate or file his documents in his defence.

22. Even though the *Small Claims Court Act* does not have a specific provision for the procedure of withdrawal of an advocate from acting for a party, this court is guided by Order 9 Rule 13 of the Civil Procedure Rules which provides that:-

“(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:

Provided that, unless and until the advocate has—

- (a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and



- (b) procured the order to be entered in the appropriate court; and
- (c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.”

23. When the firm of Abok and Abok Advocates were allowed to withdraw from acting for the Third Party, the learned Adjudicator ought to have not entered interlocutory judgement immediately as this had the effect of totally excluding the Appellant from the proceedings. The entry of judgement was irregular and the Appellant was condemned unheard. In evaluation of the pleadings before her, the learned Adjudicator erred in not considering the fact that the Appellant was entitled to proper service to enable him participate in the proceedings. Section 27 (4) of the *Small Claims Court Act* expressly stipulates that:-

“An order shall not be made against a respondent under this section unless the Court is satisfied that a copy of the written claim and the notice of hearing have been served on the respondent under section 25 of this Act.”

24. Whereas Section 30 of the *Small Claims Court Act* allows an Adjudicator to determine matters summarily by use of documents only, the court should not act arbitrarily and in violation of the “audi alteram partem” principle.

25. Having carefully reviewed the grounds of appeal, the appeal is hereby allowed. The entire judgement and decree of the learned Adjudicator is set aside and the matter returned back to the Small Claims Court for hearing on its merits. Each party shall bear the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF APRIL 2026.

A. C. BETT

JUDGE

In the presence of:

No appearance for Mr. Mondia for Appellant

Mr. Mbetera for Respondent

Court Assistant: Polycap

