

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEALS DIVISION

CIVIL APPEAL NO. E253 OF 2024

BETWEEN

DANIEL MURIKWA

NGIGI.....APPELLANT

VERSUS

NICHOLAS BENEDICT MUNGAI

(Suing as the Administrator of the Estate of

PAUL KARIUKI MUNGAI -

DECEASED).....RESPONDENT

***(Being an appeal from the ruling delivered on 28th July
2023 by Hon. G.M. Gitonga (PM) in Nairobi CMCC No.
3989 of 2014)***

JUDGMENT

Background

1. This dispute originates from a claim arising out of a fatal road traffic accident.
2. The Respondent herein was the Plaintiff before the trial court where he sued the Defendant/Appellant, as the administrator of the estate of the deceased, **Paul Kariuki**

Mungai, for damages arising out of a road traffic accident in which the deceased sustained fatal injuries.

3. The Appellant acknowledges that he was served with Summons to Enter Appearance and Plaint in 2014 but maintains that he forwarded the pleadings to his insurer, **Xplico Insurance Company Limited**, who in turn appointed the law firm of **K. Moseti & Co. Advocates** to represent him in the case.
4. According to the Appellant, the said advocates did not take instructions from him but filed a defence consisting only of general denials. He contends that the advocates did not prepare witness statements or inform him of the hearing date and failed to attend the hearing thus leading to an ex parte hearing that culminated in judgment being entered against him.
5. The Appellant states that he only became aware of the judgment when auctioneers descended on his property in 2022 in a bid to execute the decree.

Application to Set Aside Judgment

6. Following the attempted execution, the Appellant filed an application dated 21st October 2022 seeking, inter alia, the setting aside of the judgment and leave to file an amended defence.
7. The Respondent opposed the application through a replying affidavit sworn by **Mandela K. Chege Advocate** who argued that the Appellant had been duly served with

the pleadings, was guilty of inordinate delay and had been indolent in following up the case.

8. After considering the application, affidavits and submissions, the trial court dismissed the said application dated 21st October 2022.
9. The Appellant was aggrieved by the refusal of the trial court to exercise its discretion in his favour and lodged the present appeal challenging the trial court's exercise of judicial discretion.

The Appeal

10. The Appellant filed a Memorandum of Appeal raising several grounds as follows:
 - a) The learned magistrate erred in law in failing to exercise judicial discretion to set aside the judgment.***
 - b) The magistrate failed to appreciate the unique circumstances under which the judgment was entered.***
 - c) The magistrate misdirected himself in concluding that the Appellant had not been condemned unheard.***
 - d) The magistrate failed to consider the Appellant's submissions and authorities.***
 - e) The magistrate applied the wrong principles of law.***

11. The appeal was canvassed by way of written submissions which I have considered. The Respondent did not participate in the appeal.
12. This Court is sitting as a first appellate court and is therefore duty-bound to reconsider the evidence tendered before the trial court with a view to arriving at its own independent findings. (See ***Selle & Another vs. Associated Motor Boat Co. Ltd* [1968] EA 123**).
13. Having considered the record and submissions, I find that the main issue for determination is whether the appeal is merited.
14. The appeal turns on the right to a fair hearing as guaranteed under **Article 50(1) of the Constitution**, which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of law.
15. Article 48 of the Constitution further guarantees access to justice. Courts are therefore obligated to interpret procedural rules in a manner that advances substantive justice.
16. The law on setting aside ex parte judgments is well settled. It is trite that the power to set aside ex parte judgments is discretionary. Discretion must however be exercised judicially and only in the most deserving cases. In ***Smith vs. Middleton* [1972] SC 30**, the Court stated that discretionary power should be exercised judicially and not arbitrarily.

17. In ***Shah vs. Mbogo* [1967] EA 116**, the Court held that: -

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake.”

18. In ***Pithon Waweru Maina vs. Thuku Mugiria* [1983] eKLR**, the Court stated that the court’s discretion to set aside an ex parte judgment is intended to avoid injustice.

19. In ***Tree Shade Motor Ltd vs. D.T. Dobie & Co. Ltd* [1995] eKLR**, the Court of Appeal held that even one triable issue is sufficient to entitle a defendant to unconditional leave to defend.

20. The Appellant attributed the delay in filing the appeal and the failure to attend court to the mistake of his advocates, then on record. Courts have consistently held that a litigant should not automatically suffer for the mistakes of counsel. This is the position that was taken in ***Belinda Murai & Others vs. Amos Wainaina* [1979] eKLR**, where Madan JA observed: -

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip.”

21. In ***Philip Chemwolo & Another vs. Augustine Kubende* [1982-88] KAR 103**, the Court held:

“Blunders will continue to be made... but it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on the merits.”

22. The Appellant contended that he was condemned unheard as a result of his advocates’ mistakes. The trial court held that the Appellant had admitted service.

23. I however find that service alone does not end the inquiry as the critical issue is whether the Appellant had a fair opportunity to participate in the proceedings.

24. The Appellant explained that he entrusted the defence of the suit to his insurer who in turn appointed advocates who never informed him of the hearing.

25. In ***Captain Philip Ongom vs. Catherine Nyero Owota SCCA 14/2001***, the Court stated that a litigant ought not to bear the consequences of the advocate’s default unless the litigant is privy to the default. This principle has been adopted in Kenyan jurisprudence.

26. In the present case, the trial court held that the Appellant delayed for eight (8) years. I however note that judgment was delivered in August 2021 and the application filed in October 2022. I therefore find that the relevant period of delay is approximately one year.

27. The Appellant explained that he only discovered that judgment had been delivered in the matter when execution commenced. In ***Ivita vs. Kyumbu [1984] KLR***

441, the Court stated that the test is whether the delay is prolonged and inexcusable.

28. In the present case, I find that the delay has been reasonably explained.

29. On whether the Appellant has a triable defence, I note that the draft defence raises several questions including; whether the deceased was an authorized passenger, whether he boarded the vehicle unlawfully and the circumstances of the accident. In **CMC Holdings Ltd vs. Nzioki [2004] eKLR**, the Court held that a triable issue is one which raises a prima facie defence. My finding is that the defence filed in the present case clearly raises triable issues.

30. On whether the court exercised its discretion judicially, I find that the trial court did not sufficiently consider the advocate's conduct, the constitutional right to a fair hearing and the existence of a defence.

31. The objective of the court is to ensure that justice is done. In this regard, courts must lean towards hearing matters on their merits rather than shutting out litigants.

32. In the present case, justice demands that the Appellant be granted an opportunity to defend the suit.

33. I therefore find that the discretion to set aside *ex parte* judgment was not properly exercised.

34. Having regard to the findings and observations that I have made in this judgment, I find that the Appellant has demonstrated sufficient cause to warrant the granting of the orders sought in this appeal and that the delay was

explained. I note that the Appellant has a triable defence and further, that the trial court misdirected itself in exercising discretion.

35. Consequently, I find that the instant appeal is merited and I therefore allow it in the following terms: -

a) The ruling delivered on 28th July 2023 is set aside.

b) The judgment delivered on 27 August 2021 is set aside.

c) The Appellant is granted leave to file an amended defence within 14 days from the date of this judgment.

d) The suit shall be heard afresh before a different magistrate.

e) The Respondent is awarded throw-away costs of KShs. 20,000.

f) Costs of the appeal shall abide the outcome of the trial.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL, 2026.

HON. W. A. OKWANY

JUDGE

16/04/2026

FOR APPELLANT Mrs Kuria

FOR THE RESPONDENT No appearance

COURT ASSISTANT Abdirizak

File closed

Lower Court file be sent back to the Lower court

ORIGINAL