



REPUBLIC OF KENYA



**KENYA LAW**  
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**Koros v Miriuki & another (Civil Appeal E229 of 2023)  
[2025] KEHC 5498 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5498 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E229 OF 2023  
PN GICHOHI, J  
APRIL 30, 2025**

**BETWEEN**

**FREDRICK KIMUTAI KOROS ..... APPELLANT**

**AND**

**PAUL MIRIUKI ..... 1<sup>ST</sup> RESPONDENT**

**DARSON TRADING LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of the Hon. D.M Macharia (Adjudicator) delivered on 18th August, 2023 in the Small Claims Court at Nakuru SCC Civil Case No. E003 of 2023)*

**JUDGMENT**

1. The background of this Appeal is that the 1<sup>st</sup> Respondent herein (Claimant in the lower court) commenced Nakuru SCC Civil Case No. E003 of 2023) by a Statement of Claim dated 10<sup>th</sup> January, 2023 and filed in court on 12<sup>th</sup> January, 2023 where he claimed:-
  - a. Compensation.
  - b. Special damages of Kshs 122,550.
  - c. Costs of the claim.
  - d. Interest at Court rates and any other remedy the court may deem fit to grant.
2. In its defence, the 2<sup>nd</sup> Respondent informed the trial court that it sold the subject motor vehicle to the Appellant herein and thus was not liable for any damages caused by the said vehicle.
3. None of the other parties participated in this matter which was disposed of by way of documents only without calling witnesses and in line with Section 30 of the Small Claims Court Act. After analysing



the pleadings and the evidence adduced therein, the trial Court was satisfied with the 2<sup>nd</sup> Respondent's arguments and dismissed the case against it with cost.

4. On 9<sup>th</sup> May, 2023, the court entered judgement in favour of the 1<sup>st</sup> Respondent herein against the Appellant as follows: -
  - a. Liability 100%
  - b. Special damages of Kshs. 122,550.
  - c. Costs of the Claim.
5. According to the Appellant, he became aware of the proceedings when Silverline Auctioneers proclaimed his motor vehicle registration number KCT 116V.
6. Faced with execution proceedings, the Appellant moved the Small Claims Court by his application dated 4<sup>th</sup> July, 2023, under certificate of urgency and pursuant to Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law, seeking for the following orders:-
  1. That this application be certified urgent and service thereof be dispensed with in the first instance.
  2. That pending the inter-partes hearing and final determination of this application there be a stay of execution for judgment/decree dated 9th May, 2023.
  3. That the ex parte proceedings and judgment/decree herein be set aside and the defendant be granted leave to file their Statement of Defence and accompanying documents out of time.
  4. That the matter be admitted to full inter-parties hearing to its final and judicious determination on merit.
  5. That this honorable court do hereby lift the warrants of attachments and sale dated 29th May, 2023.
  6. That this Honourable court do order the unconditional release of Motor Vehicle Registration Number KCT 116V.
  7. That the annexed draft defence be deemed as duly filed.
  8. That the costs of this application be in the cause.
7. The basis for that application was that he was not served with the pleadings in the trial Court and only became aware of the proceedings when his vehicle was attached.
8. He maintained that no evidence of service was tendered before the court to warrant the interlocutory judgement. Further, he stated that he had a formidable defence that raised serious triable issues and thus, he should be granted an opportunity to defend the suit.
9. The Respondent opposed that application through his Replying Affidavit which he swore on 18<sup>th</sup> July 2023 maintaining that the Appellant's allegation that he was not aware of the case was untrue.
10. After considering the application, the trial court delivered its Ruling on 18<sup>th</sup> August, 2023, whereby it dismissed the application for reasons that the suit motor vehicle had been sold and thus the application for stay of execution had been overtaken by events. The court further denied him a chance to be heard on the basis that the draft defence annexed to the application contained a mere denial.



11. Dissatisfied with that Ruling, the Appellant moved this Court vide a Memorandum of Appeal dated 22<sup>nd</sup> August, 2023 and based on the grounds that: -
  1. The trial Adjudicator erred in law by finding that the draft responses filed by the Appellant contained mere denials.
  2. The trial Adjudicator erred in law and misdirected himself by finding that the suit Motor Vehicle had been sold without proof of the same
  3. The trial Adjudicator erred in law in not taking into consideration the submissions tendered on behalf of the Applicant (Appellant herein) and ignoring the issues raised on behalf of the Applicant.
  4. The trial Adjudicator erred in law by ignoring and/or neglecting to give a finding on the issues raised by the Appellant on improper service.
  5. The trial Adjudicator erred in law by considering a screenshot of Mpesa as sufficient proof of physical and WhatsApp service.
  6. The trial Adjudicator erred in law by failing to read or analyse the Appellant's Supplementary Affidavit and Submissions thereby reaching a wrong conclusion.
  7. The trial Adjudicator erred in law by failing to consider the fact that the First Respondent was Vicariously liable for the actions of the auctioneer.
  8. The learned Adjudicator's decision was unjust, against the weight of the evidence, was based on wrong principles of law and occasioned miscarriage of justice.
12. He therefore prayed for Orders that:-
  1. This Court allows the appeal by reversing and setting aside the ruling entered on the 18<sup>th</sup> August, 2023 in NAKURU SCCC No. E003 of 2023.
  2. The Respondents be condemned to pay costs of this Appeal.
13. When the appeal came up for directions on 13<sup>th</sup> March, 2024, the parties recorded a consent inter alia, to dispose the Appeal by written submissions. However, only the Appellant's and the 1<sup>st</sup> Respondent's submissions are on record.

### **Appellant's Submissions**

14. The Appellant began by submitting whether there was proper service. He argued that Rule 7 of the Small Claims Court Rules, 2019 provides for service of statement of Claim, while Rule 35 provide for the mode of service. Rule 36 on the other hand provides for proof of service.
15. He submitted that in this case, the process server alleged to have effected services of the pleadings physically and also through WhatsApp, however no evidence was exhibit before the court to confirm such service.
16. In regard to service via WhatsApp, he argued that this mode of service was introduced by Amendment of the Civil Procedure Rules under Order 5 Rules 22 (B) & (C) and that service is confirmed upon the sender receiving a delivery receipt.
17. Accordingly, he submitted that being no copy of the delivery receipt attached, service of pleadings was not effected on the Appellant and therefore, the judgment should have been set aside. To support



this argument, he relied on the case of *Mulatya & Another v Kyalo & Another* (Suing as the legal representatives of the Estate of Wycliff John Syengo (Deceased)) (Civil Appeal E024 'B' of 2021 [2022] KEHC 15393 (KLR) where R. K. Limo J held :-

“This court finds that the question of service was not properly addressed yet the same goes into the fundamental issue of the right to be heard. Courts should always guard that right zealously because it is an inalienable right under article 25(2) of the Constitution of Kenya and is connected to right to access justice under article 48 of the Constitution of Kenya. That right cannot be treated in a casual way and that is the basis upon which I have found that the process server should have been summoned to clarify the issue of service the ascertain that the appellants were properly served pursuant to the provisions of order 5 rule 16 of Civil Procedure Rule.”

18. He also relied on the case of *James Kanyiita Nderitu & another v Marios Philota Ghikas & another* [2016] eKLR, where the Court of Appeal cited with approval, the decision in *Frigonken Ltd v. Value Pak Food Ltd*, HCCC No. 424 of 2010, in which the High Court expressed itself thus:-

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae*. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

19. On whether the attached draft defence raised any triable issue, it was submitted that the trial court dismissed the defence on allegation that it was a mere denial yet the said defence intimated that the 1<sup>st</sup> Respondent had been paid Kshs. 20,000/= in full satisfaction of alleged damage.
20. He submitted that in any case, the success of the defence is not an issue to be considered but rather triable issues as was stated by the court in *Bouchard International (Services) Ltd vs M'mwereria* [1987] KLR 193.
21. As to whether execution was proper, the Appellant submitted that he was not served with any notification for sale or proclamation notice. Furthermore, that no entry of Judgement was served on him in violation of Order 22 Rule 6 of the Civil Procedure Rules.
22. He submitted that even if the proclamation, attachment and auction notice was proper, the Auctioneers Act under sections 21 and 23 requires the Auctioneer to afford the owners of the goods an opportunity to redeem his goods before auction sale is conducted but this was not done.
23. Further, he submitted that there was no evidence of sale and that even though the 1<sup>st</sup> Respondent annexed a certificate of sale from the Auctioneer addressed to Registrar of Motor Vehicles, it had no indication that the transfer had been done. On that basis, the Appellant urged this court to allow the Appeal as prayed.

### **1<sup>st</sup> Respondent's Submissions**

24. He submitted on three issues that is:-whether the trial court was justified in dismissing the application, whether the Appeal is meritorious and who should bear costs of the Appeal.
25. On the first issue, he reiterated the finding by the trial court that the application had been overtaken by events as the subject motor vehicle had been sold to a third party. He argued that the Appellant is the one that delayed in filling the application, having been aware of the execution proceedings as early as 12<sup>th</sup> June, 2023 but chose to delay till 4<sup>th</sup> July, 2023 without giving reason for the delay.



26. On whether execution was proper, he submitted that the trial court found that the Appellant had admitted being aware of his car being proclaimed.
27. It was submitted that upon obtaining judgement, the 1<sup>st</sup> Respondent instructed Silverline Auctioneers who proclaimed the Appellant's vehicle, issued notification for sale, advertised the sale via standard newspaper and the sale was scheduled for 23<sup>rd</sup> June, 2023. Therefore, that execution was done in accordance with the law.
28. On evidence of sale of the subject motor vehicle, the Respondent submitted that the trial court was satisfied with the advertisement carried out in the standard newspaper that showed the date of the Auction as 23<sup>rd</sup> June, 2023.
29. On service of pleadings, he maintained that they produced a copy of Mpesa message and WhatsApp screenshot proving service of the pleadings on the Appellant.
30. On whether the Appellant is entitled to the reliefs sought, the Respondent cited the case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the court held as follows:-

“It is firmly settled that on appeal, this Court will not normally interfere with the exercise of discretion by a judge of the court below. These principles have been repeatedly stated but nonetheless bear repeating. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 the court explained that; “The Court of Appeal may only interfere with the exercise of the court’s judicial discretion if satisfied; the Judge misdirected himself on law; or That he misapprehended the facts; or That he took into account or considerations of which he should not have taken account; or That he failed to take into account of considerations of which he should have taken account; or That his decision, albeit discretionary one, was plainly wrong”

31. Accordingly, he submitted that the reliefs sought herein are not merited. Moreover, that the defence attached does not raise any triable issues and therefore, the Appeal should be dismissed.

### **Analysis and Determination**

32. This being an Appeal from the small claims Court, section 38 of the Small Claims Court Act provides that Appeal from the Small Claims Court to the High Court should be on issue of law and not facts.
33. On the other hand, this Court’s duty is well cut out as an Appellate court as was held in the case of *Selle & Another Vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123 thus: -

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

34. Black’s Law Dictionary defines a matter of fact and a matter of law as follows: -

“Matter of fact as, a matter involving a judicial inquiry into the truth of alleged facts and Matter of law, as a matter involving a judicial inquiry into the applicable law.”



35. While addressing the question of whether the Memorandum of Appeal raised factual issues, the Court of Appeal in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR, recognized that when faced with a situation where a memorandum of appeal raises factual issues, an appellate Court is at liberty to strike out the offending ground (s) while retaining those that are compliant.
36. From the foregoing, the issue for determination are:-
1. Whether the pleadings were properly served on the Appellant.
  2. Whether the default judgement entered against the Appellant was regular.
  3. Whether the trial court was justified in dismissing the Appellant's application.
  4. Who should bear costs of the Appeal.
37. On service, the Appellant maintained that he was not served with the pleadings of the trial court to enable him defend himself. In its ruling, the trial court stated by his certificate of service dated 16/2/2023 and 24/2/2023, the process server indicated that the Appellant was served though evidence of that service was not exhibited. The court nonetheless relied on the said certificate of service when entering the interlocutory judgment on 1<sup>st</sup> March, 2023 and default judgment on 9<sup>th</sup> May, 2023.
38. In the Small Claims Court, the mode of service of pleadings is provided for under Rule 35 of the Small Claims Rules thus:-
- (1) Service of any document under these Rules shall be made by delivering a copy thereof personally to the party upon whom it is to be served and, where there are more than one party to be served, on each of them.
  - (2) Wherever it is practicable, service shall be made on each party in person unless they have an agent authorized to accept service, in which case service on the agent personally shall be sufficient.
  - (3) The person served under this rule is required to endorse an acknowledgment of service on the original document:  
  
Provided that, if the Court is satisfied that the party or such agent or other person has refused so to endorse, the Court may declare the document to have been duly served, and a Certificate of Service shall be sufficient proof of service.
  - (4) Where it is not practicable to effect personal service of a document on a party in accordance with this, rule, service may be effected by mail addressed to the party's last known postal address, and a certificate of posting in that regard shall be attached to the Certificate of Service.
39. Proof of service is provided for under Rule 36 of the same rules as follows:-
- “Service of a document may be proved by filing in court any or all of the following—
- (a) in the case of personal service, a copy of the document duly endorsed in acknowledgment of service;
  - (b) in the case of service by mail, a copy of the document that was mailed, accompanied by a certificate of posting; or
  - (c) in the case of service on an agent of the party to be served, a copy of the document duly endorsed in acknowledgment of service.”



40. Apparently, the trial court relied on Rule 35, Sub-rule 3 and adopted the certificate of service as proof of service in entering judgement against the Appellant.
41. A perusal of the two certificates of service sworn on 16/2/2023 and 24/2/2023 by Peterson Ogera Moturi, a licensed process server, indicate that he received the Mention Notice on the two occasion and served on the Appellant and the 2<sup>nd</sup> Respondent herein. There is however no mention of the pleadings being served.
42. Further, a perusal in regard to service on the 2<sup>nd</sup> Respondent reveals that it was duly served via WhatsApp and evidence of the WhatsApp screenshots conversation annexed to the affidavit thus evidencing service.
43. However, no evidence was tendered in support of service against the Appellant herein, save for proof of his contact number which was not the issue in these proceedings. A copy of mention notices in both occasions were annexed as proof of service, yet, pleadings that were allegedly served were not annexed to the certificate of service.
44. If physical service is anything to fall back to, then copies of the pleadings served were to be attached as evidence of service with or without endorsement of the person served. Without evidence of such service the trial court erred in finding that service was effected on the Appellant.
45. Section 43 of the Small Claims Court Act empowers the court to set aside its orders by providing as follows:-

“ The Court may on the application of any party to the proceedings set aside any of its orders and make such further orders as it thinks just.”
46. Further, the jurisdiction to set aside default judgement is wide and unfettered but the appellate court will not interfere with the decision of the trial court unless it is satisfied that the court misdirected itself in some matter and consequently, arrived at a wrong decision, or that the court had been wrong in the exercise of its discretion- See Mbogo v Shah [1968] EA 93.
47. Further, the Court of Appeal in the case of Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) had this to say on setting aside of a judgment / decree:-

“What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.”
48. Similarly, since the Appellant herein was not served with the pleadings in the trial court case, the default judgment was irregular and ought to have been set aside and the Appellant allowed to defend the Claim. However, in its ruling the trial court held that the annexed “draft response contains mere denials and nothing more.”



49. In effect, the trial court was saying that the draft statement of defence did not raise any triable issue. As to what constitutes a triable issue, the Court of Appeal in *Kenya Trade Combine Ltd V Shah*, Civil Appeal No. 193 of 1999[2021] eKLR stated:-

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

50. In this case, the draft defence shows that the Appellant denied liability and blamed the accident on the negligence of the 1<sup>st</sup> Respondent and proceeded to give the particulars of negligence.

51. He also pleaded that he paid the 1<sup>st</sup> Respondent herein (Claimant) a sum of Kshs. 20,000/= which was to facilitate repairs caused by the said accident and that the 1<sup>st</sup> Respondent received it without any protest hence the matter was settled only for him to exaggerate damages in his Claim. These cannot be wholly termed as mere denials.

52. It is trite that where a defence raises even one triable issue, the defendant should be given a chance to be heard even while bearing in mind the timelines set for hearing and determination of a matter before a Small Claims Court.

53. On the prayer for stay of execution, the Appellant urged the trial Court to stay execution, lift warrants of attachment and order for unconditional release of the subject motor vehicle. That Application was made on 4<sup>th</sup> July, 2023 and according to record the sale through auction was carried out on 23<sup>rd</sup> June, 2023.

54. Evidence of that sale is seen in the Replying Affidavit of the 1<sup>st</sup> Respondent sworn on 18<sup>th</sup> July, 2023 and it indicate that the motor vehicle was sold to a third party one Ian Gichuki Ndegwa of National Identify Card Number 36938700 and who is not a party to this matter. It is thus evident that execution has been completed by the time the Appellant was making the Application for stay. Accordingly, the trial court properly held that prayer for stay of execution was overtaken by events.

55. On whether the trial court ignored the submission of the Appellant, the trial court indicated in its ruling that the application was canvassed by written submissions. Though there is no specific mention that it had considered the submissions, the content of that ruling shows that the trial court did capture the issues raised by the parties therein in arriving at its decision.

56. In any event, Submissions are suggestions that are neither persuasive nor binding on a court. The court makes a decision based on its own interpretation of the evidence and law, even if it contradicts the submissions made by either party. Indeed, the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR stated:

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

57. In the conclusion, the Appeal partly succeeds in that the trial Court decision rendered on 18<sup>th</sup> August, 2023 is set aside and substituted with the following Orders:-

1. The default judgement and decree entered on 9<sup>th</sup> May, 2023 be and is hereby set aside.
2. The Appellant is granted leave to defend the claim, which defence shall be filed within 15 days.



3. The lower court file be and is hereby returned to the Trial Court to comply.
4. The Appellant is granted costs of this Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

Ms Ondande for Appellant

Mrs Musavakwa h/b for Miss Wachika Maina for 1<sup>st</sup> Respondent

Ms Cherop for Osoro for the 2<sup>nd</sup> Respondent

Ruto, Court Assistant

