



**Mathews v Masika (Civil Case E180 of 2022) [2022] KEHC 12194 (KLR)
(Commercial and Tax) (22 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E180 OF 2022
DAS MAJANJA, J
AUGUST 22, 2022**

BETWEEN

CALLISTA MOWO MATHEWS PLAINTIFF

AND

KENNETH MUEMA MASIKA DEFENDANT

RULING

1. In the application dated July 22, 2022 made, *inter alia*, under Order 10 rule 11 of the [Civil Procedure Rules](#) (“the Rules”), the defendant seeks to set aside the judgment in default of appearance and defence entered against him on June 30, 2022 and all consequential orders. The application is supported by the plaintiff’s deposition sworn on July 22, 2022 and opposed by the defendant through the deposition of his advocate, George Brian Akello, sworn on August 1, 2022. The parties’ advocates made brief oral submissions in support of the respective positions.
2. The defendant’s case is that he was not served with the Plaint and summons to enter appearance and only realised that judgment had been entered against him when he was served with the decree on July 20, 2022. He states that when he consulted his advocate and was informed to confirm whether he had been served, he searched his personal Gmail address, official email address and spam folder and noted that apart from the decree that was served on him on July 20, 2022, he was not served with any other court process.
3. The defendant further depones that prior to filing suit, the plaintiff’s advocate had reached out to him and his advocates to resolve the matter and the plaintiff’s advocate and his advocate had exchanged correspondence through email. Despite exchange of emails, the plaintiff states that no process was served upon his advocates. further, the plaintiff denies that he was served in person. The defendant avers that he has a good defence to the .



4. Mr Akello depones that he effected service of process on May 27, 2022 to the defendant's personal Gmail address and obtained a delivery receipt whereupon he filed an affidavit of service sworn on June 15, 2022. He further states that he had previously attempted service through the defendant's official email address; k@lloydmasika.co.ke . Thereafter on July 20, 2022, he notified the defendant that default judgment had been entered against him through his official and personal Gmail address. He therefore contends that court process was duly served and the judgment is regular.

5. Order 10 Rule 11 of the Rules empowers the court to set aside judgment in default of appearance or defence on such terms as are just. The unfettered jurisdiction of the court had been asserted in several decisions among them *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 where the court held that:

There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.

6. This discretion is intended to be exercised to avoid injustice or hardship and not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. In exercising this discretion, the court is entitled to look at the entire circumstances of the case, the conduct of the parties, whether the defendant has a defence to the claim and any prejudice that may be occasioned to the plaintiff. I would add that where there is no service or the judgment is irregular, the court does not have discretion to set aside the judgment, it must set aside the judgment as a matter of right (see [James Kanyita Nderitu and another v Marios Philotas Gbikas & another](#) MSA CA Civil Appeal No. 6 of 2015 [2016] eKLR). In *Mwala v Kenya Bureau of Standards EALR* [2001] 1 EA 148 the court explained this positions as follows:

[A] distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.

7. This case concerns service of summons through electronic means which is now provided for under Order 5 Rule 22B of the Rules as follows;

1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
3. Summons shall be deemed to have been served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.



4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.
8. From the aforesaid provision, the plaintiff is entitled to serve summons upon the defendant at his last confirmed and used E-mail address. Contrary to the defendant's suggestion, electronic service is not an alternative or substituted mode of service hence the plaintiff need not to make any attempt to serve the defendant personally. In his supporting depositions, the defendant does not disclose his email address or deny that the address set out in the affidavit of service is his. He does however admit that he received the decree through his personal Gmail address. Without any rebuttal or contrary evidence, I am entitled to conclude that the email addresses used by the plaintiff belong to the defendant particularly given that the defendant admits that the parties had been in correspondence as shown by the various emails in the plaintiff's bundle of documents.
9. The plaintiff has shown that it sent the court process to the defendant's Gmail address and that he received a delivery receipt confirming that the email had been received. Under Order 5 Rule 22B of the Rules, summons is deemed to be served when the sender receives a delivery receipt. This delivery receipt is not contested. From the totality of the material before the court, I find and hold that the defendant was served with summons to enter appearance and that the judgment entered was regular.
10. Even where the judgment is regular, the court is still entitled to set aside default judgment if the defence raises any triable issue. In *Tree Shade Motors Limited v D T Dobie Company Limited* NRB CA Civil Appeal No 38 of 1998 [1998] eKLR, the Court of Appeal stated that, "Even if the service was valid, judgment will be set aside if [the] Defence raised triable issues".
11. Turning to the claim, the plaintiff's case as set out in the Complaint dated May 25, 2022 is that she engaged the defendant to sell her property; LR No. 12715/252 – Athi River on her behalf and invest the proceeds to enable her purchase apartments. The Defendant subsequently sold the property in 2011 for KES. 40,000,000.00 but only disclosed to her that he had sold it for KES. 25,000,000.00. By a letter dated September 10, 2015, the defendant admitted that he was holding KES. 35,034,465.00 as at August 31, 2015 and on September 27, 2017 the amount had grown to KES. 37,262,000.00. The Plaintiff therefore prays for judgment for the KES. 37,262,000 with interest and KES. 15,000,000.00 being the undisclosed portion of the purchase price.
12. In his draft defence, the defendant does not deny that he was engaged by the plaintiff to sell the suit property. He however states that at the time, the suit property was the subject of disputes which he resolved on his own initiative. He states that the sum claimed is exaggerated and should be subjected to an audit. He also states that it was agreed that he would be paid KES. 25,000,000.00 on account of agency and brokerage fees. As regards the acknowledgement of debt, he states that the same were resolved and the money remitted to the plaintiff.
13. I have considered that the Complaint vis-a-vis the draft defence. I am aware that the court is not required to conduct a mini trial but only needs to be satisfied that there is a reasonable defence. The defendant admits his relationship with the plaintiff. What is in issue is whether and to what extent he is indebted to the plaintiff. The acknowledgement of debt was in 2014 as shown by subsequent emails acknowledging indebtedness and it appears that the matter has not been settled for a period of 8 years. I have looked at the defence alongside the documents produced by the Plaintiff and I am of the view that the proper cause in this matter would be to grant a conditional order as there is an admission of indebtedness and the judgment is regular.
14. For the reasons I have set out above, I allow the application dated July 22, 2022 on the following terms:
 - a. The default judgment herein be and is hereby set aside on the terms set out hereunder.



- b. The defendant shall file and serve its defence to the claim within 7 days.
- c. The defendant shall deposit the sum of KES. 10,000,000.00 in a joint interest earning account in the names of the advocates on record failing which in court within thirty (30) days from the date hereof.
- d. The defendant shall pay costs of the application assessed at KES. 30,000.00 within 7 days.
- e. In default of any of the conditions set out above, the default judgment shall stand reinstated and the plaintiff shall be at liberty to proceed with execution.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Akello instructed by Akello Karuga and Company Advocates for the Plaintiff.

Mr Gichamba instructed by Gichamba and Company Advocates for the Defendant.

