



REPUBLIC OF KENYA



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Purkoret Holdings Limited v Njogu & 16 others & 2 others (Environment & Land Case 20 of 2017) [2023] KEELC 22333 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 20 OF 2017
CG MBOGO, J
DECEMBER 20, 2023**

BETWEEN

PURKORET HOLDINGS LIMITED PLAINTIFF

AND

BISHOP SAMWEL MURITHI NJOGU & 16 OTHERS 1ST DEFENDANT

WALTER OLE YENKO 2ND DEFENDANT

WILSON TUIKON 3RD DEFENDANT

RULING

1. Before this court for determination is a notice of motion application dated 4th October 2022, filed by the 3rd defendant/applicant on 6th October 2022. The application is expressed to be brought under Sections 1A & 3A and 6 of the *Civil Procedure Act*, Order 5 Rule 16, Order 10 Rule 11 and Order 51 Rule 1 of the *Civil Procedure Rules* and Article 159 (2) (d) of *the Constitution* of Kenya seeking the following orders: -
 1. Matter not certified urgent.
 2. That there be a stay of further proceedings, including but not limited to execution, in this matter pending the hearing and determination of this application.
 3. That the *ex-parte* judgment entered on 19th May 2022 against the 3rd defendant/ applicant herein, together with all consequential orders be set aside.
 4. Spent.
 5. That the 3rd defendant/applicant be granted leave to enter appearance and file a defence to the plaintiff's/respondent's claim.
 6. That the costs of this application be in the cause.



2. The application is supported by the affidavit of the 3rd defendant/applicant sworn on 30th September 2022. In his affidavit, the 3rd defendant/applicant deposed that plaintiff/respondent never took time to serve him with the summons and court documents to enter appearance, and he came to learn of the existence of the suit after his property being CisMara/Oleleshwa/17391 was invaded by individuals instructed by the plaintiff/respondent. Further, that the plaintiff/respondent demolished all the houses built on his property without prior notice and he incurred loss and damage during the sudden illegal demolitions.
3. The 3rd defendant/applicant further deposed that the plaintiff/respondent never took time to serve him with the judgment of this court delivered on 19th May 2022 and the decree in execution. He deposed that he only learnt of the demolition at the DCI offices, who informed him that the said decree had been served upon the OCS Narok Police Station. Further, that he was also not served with the orders issued by this court directed to Sename Africa Auctioneers on 14th July 2022 to proceed with the execution.
4. The 3rd defendant/applicant further deposed that upon perusal of this file in court, he learnt that the District Surveyor visited the suit properties and filed a report on 25th May 2012 in a bid to determine the boundary dispute which he was not served with any notice inviting him to attend to the same. He deposed that the judgment of the court did not direct the District Land Registrar to cancel the certificate of title issued to him and that the affidavit of service filed by the process server alleging service is completely misleading.
5. He further deposed that it is also fishy, that the plaintiff/ respondent claim to have served him yet by an affidavit of service sworn by a process server stated that he was deceased and it could not have been possible to have been served with a notice of entry of judgment in the year 2017 since he was deceased.
6. The 3rd defendant/ applicant deposed that the plaintiff/ respondent approached this court with unclean hands to regularly serve him and as a result, he has incurred losses of Kshs. 18,000,000/- and rental income of Kshs. 44,000/-. Further, that he has always resided in Londiani in Kericho county and he was only a resident of Narok where he was working prior to his retirement in the year 2007. Also, that the grant of the orders issued herein will not occasion any prejudice to the parties in this suit, but he will stand to suffer prejudice since he will be condemned unheard.
7. The application was opposed by the plaintiff/respondent through the replying affidavit of Maranka Ole Otune which was sworn on 9th November 2022. In his affidavit, the plaintiff/respondent deposed that there is no doubt whatsoever, that service of summons and pleadings was duly effected upon all defendants who acknowledged receipt. Further, that both the 1st and 2nd defendants entered appearance and filed their defence but the 3rd defendant/applicant ignored to enter appearance.
8. The plaintiff/respondent further deposed that even after failing to enter appearance, its process server continued to serve the 3rd defendant/ applicant with mention notices which he ignored. Further, that the 3rd defendant/applicant refused to abide by the judgment of this court, which necessitated the filing of the application dated 5th July 2022. Also, that execution has already taken place and to grant the orders sought would amount to a mere academic exercise.
9. The plaintiff/ respondent filed a further affidavit which was sworn by Benard Onduko on 24th May 2023. In his affidavit, the said Benard Onduko who is an accounts clerk with the plaintiff's/ respondent's firm of Advocates, deposed that they engaged the services of Gideon Habwe Kusina between the years 2011, 2012 and 2013 for purposes of serving documents related to this case and others cases. Further, that the process server proceeded to serve the documents and filed a return of



service after which he was paid for the services. Benard Onduko further deposed that the firm stopped engaging the services of the process server in the year 2013 and it has never heard from him.

10. On 15th June 2023, the said Gideon Habwe Kusina appeared in court for cross examination. During examination in chief, Gideon Habwe Kusina, testified that he is an Auctioneer and his jurisdiction runs from Nairobi to Rift Valley and Western Provinces. With regard to the affidavit of service sworn on 4th November 2011, he testified that it was the first time that he was seeing this document, and that he is not conversant with the same. According to him, he only became aware of this matter when he was arrested. Further, that he has never at any time worked with the firm of Wamaasa Masese and Nyamwange and Company Advocates and that he has never been engaged at any time to effect service as a process server. He further testified that he has never acquired a practicing certificate as a process server, that he is not the deponent of the affidavit sworn on 4/11/2021 and that he did not at any time, receive payments from Wamaasa, Masese and Nyamwange and Company Advocates to effect service in Narok.
11. On cross examination, the process server testified that in the year 2011, he was a resident of Nairobi and Nakuru and that he started practicing in the year 2010 in the firm of Eshikoni Agencies Auctioneers. Further, that he did not have anything to show that he was a licensed Auctioneer in the year 2010 but that currently, he has a document to show that he is a licensed Auctioneer. According to him, he does not remember the date when he was admitted as an Auctioneer but presumes it could be in the year 2021. However, he did not have the documents to show when he became an Auctioneer, but he agreed to scan and file the documents confirming that he is an Auctioneer in court.
12. Gideon Habwe Kusina admitted that in the year 2011, he was not a licensed Auctioneer. He further admitted to know Benard Onduko as a friend, who used to work in the firm of Wamaasa and Company Advocates. On being shown the copy of the license of a process server, issued by the Registrar, High Court, he testified that it bears serial number 0889 and it indicated his names Gideon Habwe Kusina, and which certificate, is issued by the Registrar of the High Court of Kenya. With regard to the documents evidencing payment, Gideon Habwe Kusina testified that it would be a lie to say that Benard Onduko paid him Kshs. 6,000/ to effect service. He agreed that he met Benard Onduko at Section 58 in Nakuru, but that he did not tell him about this matter. He maintained, that he learnt of this matter when he was arrested and the affidavits of service by Mr Kairu showing that he was served, are not truthful. He admitted that he reported to the police that someone had impersonated him as a process server at Bondeni Police Station in Nakuru where he was given OB No. 21/27/2/2023.
13. It was his evidence that he reported the matter in February, 2023. when he was called by the 3rd defendant's/ applicant's Advocate, that he noticed that someone had impersonated him. That at the time, he did not know the 3rd defendant/ applicant, nor Mr. Kariuki until the latter called him. Also, that he would not be surprised how Mr. Kariuki got his phone number and that he did not know that this was initially, a 2011 matter. He admitted that he reported that someone was using his name when Benard Onduko called him and by the time he reported the matter, he had been called by the 3rd defendant's/applicant's Advocate. He testified that he has been following up in order to find out the person who has been using his name and in April, 2023, he reported to the OCS that it was the firm of Wamaasa, Masese and Nyamwange and Company Advocates, who have been using his name. According to him, he does not know if the police called out the said law firm and that he did not give out his specimen signature. That he just reported the matter to the police, and left the issue with them. Also, that he has not been paid to disown the affidavit of service.
14. On further cross examination, Gideon Habwe Kusina testified that for one to become an Auctioneer one has to practice under someone, under class B for 3 years or more and in his case, he began the process in the year 2010. He admitted that indeed, he was an Auctioneer at that time and he could be



- referred as such. Further, that the document shown to him is a piece of paper which shows that he was paid some money for some service but there was no invoice or a receipt that was shown to him.
15. On re-examination, Gideon Habwe Kusina testified that Mr.Kariuki, counsel for the 3rd defendant/ applicant called him and he only saw Mr. Kairu who had warrants of attachment that he was to collect from him. That the said warrants are not in respect to this matter. Further, that Mr. Kairu did not have the summons and that he did not know of a person known as Henry. He admitted that Counsel gave him the phone number of Ms Cheoloti so that he could call her. According to him, he did not receive any summons form this court before he was arrested.
16. The application was canvassed by way of written submissions. On 23rd September, 2023, the 3rd defendant/ applicant filed his written submissions dated 21st September 2023 and raised four issues for determination as follows: -
1. Whether proper service was effected by the plaintiff/respondent upon the 3rd defendant/applicant.
 2. Whether the court has the power in law to set aside an ex parte judgment.
 3. Was the judgment entered in favour of the respondents proper and regular in law.
 4. Whether the defendant is entitled to the prayers sought.
17. On the first issue, the 3rd defendant/ applicant submitted that under Section 20 of the [Civil Procedure Act](#), it is mandatory that any party who commences an action in court, ought to serve the defendant to grant him a fair opportunity to respond within the rules of natural justice. He further submitted that the purported process server stated during cross examination, that he has never been engaged as a process server at any point and that he was not the maker of the affidavit sworn on 4th November 2011, which can only be construed that proper service was never effected upon him. Further, that the plaintiff/respondent never served him with the summons and the plaint. The 3rd defendant/applicant relied on the case of [John Akasirwa v Alfred Inai Kimuso](#) (C.A No. 164 of 1999) (UR) and [Chris Munga N. Bichage & 2 Others v IEBC & 2 Others](#) [2017] eKLR.
18. The 3rd defendant/applicant further submitted that Order 5 Rule 15 of the [Civil Procedure Rules](#), requires a process server to file an affidavit of service, detailing the time and the manner in which summons was served and the person identifying the person served and witnessing the delivery or tender of summons. Reliance was placed in the case of [Shadrack Arap Baiywo v Bodi Bach](#) KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR. Further, it was submitted that it is quite obvious that the alleged process server repeatedly stated that he was not a licensed process server, and that a keen look at the court record, reveals that the process server was served severally with summons to attend court for cross-examination, but he declined to appear. Further, that Section 65 (1) of the [Evidence Act](#) stipulates that primary evidence is the best type of evidence and a party in any proceedings, should endeavor to rely on the same. The 3rd defendant/applicant relied on the case of [Caroline Lwangu v Benson Wafula Ndote](#) [2021] eKLR.
19. He further submitted that the plaintiff/respondent never made attempts to trace the 3rd defendant/ applicant but merely instructed the process server to put in affidavits of service that were non-compliant with the rules of procedure. To buttress on this submission, the 3rd defendant/applicant relied on the cases of [Credit Corporation Limited v Mathew Joseph Ogutu & another](#) [1994] eKLR, [Gandhi Brothers v HK Njage T/A HK Enterprises Nairobi](#) (Milimani) HCCC No. 1330 of 2001 and [Law Society of Kenya v Martin Day & 3 Others](#) [2015] eKLR.



20. On the second issue, the 3rd defendant/applicant submitted that as a matter of principle, this court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex-parte* judgment. Further, that the draft defence raises triable issues and is worth taking a trial. Further, he submitted that if any delay were to be noted based on the explanation of improper service advanced, the same can be compensated by costs. Reliance was placed in the case of *James Wanyoike & 2 Others v CMC Motors Group Limited & 4 Others* [2015] eKLR and *Tree Shade Motors Limited v DT Dobie & another* [1995-1998] 1EA 324.
21. On the third and fourth issues, the 3rd defendant/ applicant submitted that he was not properly served and therefore, the judgment was not a regular judgment and it ought to be set aside as he was denied an opportunity to be heard. He relied on the case of *James Kanyiita Nderitu & another v Marios Philotas Gbikas & another* [2016] eKLR.
22. The plaintiff/respondent filed its written submissions dated 23rd November, 2023 and raised two issues for determination as listed below: -
 - a. Whether the defendant/applicant has satisfied the conditions for setting aside of the *ex-parte* judgment delivered herein in favour of the plaintiff.
 - b. Who should bear the costs of the application.
23. On the first issue, the plaintiff/respondent submitted that the court file shows several instances where the 3rd defendant/applicant was served. With regard to the impugned affidavit sworn on 4th November 2011, it was submitted that the 1st and 2nd defendants entered appearance on the basis of service by Gideon Habwe Kusina. Further, that the said Gideon admitted, during cross examination, to have known the accountant-Benard Onduko whom they met a week before the matter came up for cross examination and there was no other affidavit to discount these depositions. The plaintiff/respondent further submitted that through its advocates, they tried engaging the process server to come to court and testify but he became evasive and ordinarily, the plaintiff/respondent's Advocates were the ones likely to call him but, in this case, the person who looked for the process server is the 3rd defendant/ applicant. Further, that when Gideon Habwe Kusina was asked what he was doing in the year 2021, he stated that he was an Auctioneer but he did not have the documents to prove.
24. With regard to the affidavit of service sworn by Arasa Kinara on 16th April 2012, the plaintiff/respondent submitted that the affidavit indicates that the 3rd defendant was served through his caretaker by the name of James who is the same person who was served with the summons to enter appearance by Gideon Habwe Kusina. Further, that the 3rd defendant/ applicant has not disputed the contents of the 2nd affidavit of Mr. Arasa leaving a logical conclusion that the 3rd defendant/ applicant was served or had knowledge of this matter.
25. With regard to the affidavit sworn by Samuel Gekanana on 10th June 2022, the plaintiff/ respondent submitted that this affidavit of service has not been challenged for the reasons that the defendant/ applicant had knowledge of the suit herein and was served with the summons and pleadings. Further, the plaintiff/ respondent submitted that the 3rd defendant/ applicant had knowledge of the suit herein and proceedings, and if he was truthful, at least he knew that the property that gave rise to land parcel Cis-Mara/Oleleshwa/17391 being land parcel Cis-Mara/Oleleshwa/4015, had a dispute. Also, that it is inconceivable and disgenious of the 3rd defendant/applicant to allege that he did not know the existence of the suit when in fact, there was a court order directing the Land Surveyor to visit the disputed property. The plaintiff/respondent relied on the case of *Samuel Gathu Kamau v Peter Kaniu Gathungu* [2006] eKLR, *Shah v Mbogo* {1969} EA and *Central Bank of Kenya v Uhuru Highway Development Limited & 3 Others*, Civil Appeal No. 75 of 1998.



26. On whether the defence raises triable issues, the plaintiff/ respondent submitted that the if at all the 3rd defendant/ applicant purchased the property Cis-Mara/Oleleshwa/17391 as alleged, knowing very well that there was a dispute over the same as contained in the report by the District Surveyor dated 15th May 2012, then the 3rd defendant/applicant actions is in total violation of the legal principles of lis pendens. Further, it was submitted that the 3rd defendant/applicant draft statement of defence tries to raise the issues of boundary which is not the case, and as such, the defence does not raise triable issues.
27. I have considered the application, replies thereof, the evidence tendered, the written submissions as well as the authorities cited by plaintiff/respondent and the 3rd defendant/applicant and the issue for determination is whether the 3rd defendant/applicant is entitled to the orders of setting aside the judgment delivered by this court on 19th May, 2022.
28. In determining whether or not to exercise its discretion to set aside judgment, the court has to consider the reasons that may have occasioned default in appearance and such reasons and/or explanations as the 3rd defendant/applicant may adduce.
29. In *Shah v Mbogo & another* [1967] E.A, it was held that:
- “The court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused.”
30. The contention by the 3rd defendant/applicant is that he was never served with summons to enter appearance, the plaint, verifying affidavit and supporting documents. One of the prayers in his application, was that the process server to be cross-examined on the correctness of the averments contained in the affidavit of service sworn on 4th November, 2011. During the cross examination, Gideon Habwe Kusina informed the court that he has never been at any one time a process server and that he has never been engaged by the firm of Advocates for the plaintiff/respondent.
31. According to him, he first came across the affidavit of service in court and that all along, he has been an Auctioneer and never at any time a process server.
32. Order 10 Rule (2) of the *Civil Procedure Rules* provide for Affidavit of Service upon non-appearance as follows: -
- “Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court.”
33. The Court of Appeal in CA No. 6 of 2015 *James Kanyita Nderitu v Maries Philotas Ghika & another* [2016] eKLR held as follows:
- “We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend



the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see *Mbogo & another v Shah (supra)*; *Patel v EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004]1 KLR 173).

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh v Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

34. In order to determine whether the 3rd defendant/applicant was served or not and whether judgment was properly entered or otherwise, this court will have to carefully peruse the proceedings and the record in this matter to verify both issues. It will be noted that this matter was first filed in Nakuru *vide* HCCC No. 308 of 2011 under a certificate of urgency. The certificate of urgency was filed alongside an application of even date as well as the plaint dated 18th October, 2011. This matter was placed before Ouko J, (as he then was) on 24th October 2011. The court certified the matter as urgent, granted orders of injunction *ex parte* and issued a date for *inter partes* hearing on 14th November, 2011.
35. On 14th November 2011, the matter came up before Wendoh J, who directed that the respondents, be served afresh. In giving directions, the court noted that the applicant (herein the plaintiff/respondent) had not given reasons why they had not served, as the defendants were not present. Thereafter, the court slated the matter for hearing on 7th December 2011. From the proceedings, it appears that the matter was not heard, or nothing took place on the 7th December 2011. Instead, the record shows that the matter was mentioned before the Deputy Registrar on 9th January 2012 and the case was fixed for hearing on 27th March, 2012.
36. On 27th March, 2012, Mr. Wamaasa, learned counsel for the plaintiff/respondent informed the court that the defendants were served, but were not in court. Gideon Habwe Kusina denied the contents of the affidavit of service said to be sworn on 4th November 2011 effecting service on the 3rd defendant/



applicant. This affidavit said to be served upon the 3rd defendant/ applicant and the 2nd defendant was scheduled for hearing on 14th November 2011 as can be seen in paragraph 2.

37. Paragraph 3 of the impugned affidavit reads as follows: -

“That on 27th October 2011, I traveled from Nakuru to Narok town then proceeded to the 3rd defendant resident near Mwamba total are behind the full gospel church building 3 metres from the main Narok-Kisii road where I met Mr. James the caretaker of Mr. Wilson’s plot of whom after introducing myself and also explaining the purpose of my visit, he called Mr. Wilson through his mobile phone number xxxx that Mr. Wilson instructed him to receive the documents on his behalf as he was out for business in Kericho. I effected service upon him at around 4.00 pm whereby he acknowledged receipt of the same but declined to sign on the reverse side of the original I herewith return duly served.”(with emphasis).

38. This affidavit of service was filed in court on 11th November, 2011 and noting the absence of the defendants on the 14th November, 2011, the court directed that they be served afresh. Interestingly, Gideon Habwe Kusina did not deny the affidavit of service sworn on 23rd March 2012 and filed in court on 27th March, 2012. However, he still maintained during cross examination that he has never been a process server. My attention was however, drawn to the affidavit of service sworn on 5th December 2011 by Gideon Habwe Kusina. This affidavit of service was to effect service of the application dated 18th October 2011, filed under a certificate of urgency together with the summons and plaint which was scheduled for hearing on 7th December, 2011. The said affidavit of service indicates the effect of service to have taken place on 29th November, 2011.

39. Paragraph 3 of this particular affidavit sworn on 5th December 2011 reads as follows: -

“That on the same day, I travelled from Nakuru to Narok town then proceeded to the 3rd defendant resident near Mwamba Total area behind the Full Gospel Church Building 3 metres from the main Narok-Kisii road where I met Mr. James Seki the caretaker of Mr. Wilson Tuikon’s plot of whom after introducing myself and also explaining the purpose of my visit, he called him through his mobile phone number xxxx that Mr. Wilson Tuikon came at the plot where I was waiting. After introducing myself and explaining the purpose of my visit, I effected service him at around 11.00 am whereby he acknowledged receipt of the same but declined to sign on the reverse side of the original I herewith return duly served.” (with emphasis)

40. On 6th July, 2022, Samuel Gekanana, a process server filed an affidavit of service which was sworn on 10th June, 2022. The purpose of this affidavit was to effect service of the notice of entry of judgment dated 17th February 2022 and the decree dated 19th May 2022 upon the 3rd defendant/ applicant. In this affidavit, the process server deponed as follows in paragraph 3: -

“That on 8th June 2022, I travelled from Nakuru town to Narok to effect service upon the 3rd defendant where upon arrival, I proceeded to Oleleshwa where the suit property number CisMara/Oleleshwa/267 is located and called the 3rd defendant on his mobile number xxxx whereby he came to the suit parcel of land aforesated and I effected service upon him at 11.20 am which service he accepted, however he declined to acknowledge receipt of the same on the principal Notice of Entry of Judgment and decree I herewith return duly served.”(with emphasis)



41. It appears, that the 3rd defendant/applicant now became aware of these proceedings when he was served with the notice of entry of judgment and decree served upon him on 8th June 2022. The question then is, how was it possible that he denied service of the summons and plaint contained in the affidavit of Gideon Habwe Kusina dated 5th December, 2011, yet admits service by Samuel Gekanana, yet on both affidavits, he was reached through his mobile number xxxx.
42. The 3rd defendant/applicant has not denied his contact details being mobile phone number xxxx. How was it that his mobile phone number was contained in an affidavit sworn on 5th December 2011? It defeats logic as to how, Gideon Habwe Kusina could have had the 3rd defendant's/applicant's details yet he first saw him in court during cross examination. There was also inconsistency in the testimony of Gideon Habwe Kusina who, testified that he was never served with summons to appear in court, but knew of this matter when he was arrested. His testimony contradicts the submissions by the 3rd defendant/ applicant who admitted that Gideon Habwe Kusina was served severally with summons, but declined to appear in court. Also, the said Gideon Habwe Kusina did not inform this court of his work between the years 2011 to 2021 save to state that he was an Auctioneer practicing as such. The only document he provided detailing that he is an Auctioneer can only be traced to as early as the year 2022. In sum, I find that Gideon Habwe Kusina lied under oath as he indeed effected service of summons and plaint upon the 3rd defendant/ applicant. Also, the 3rd defendant/applicant was aware of the existence of this suit owing to proper service but opted not to defend the suit..
43. On whether the judgment entered was regular, I need not say more. Again, from the proceedings and the record, the plaintiff/respondent vide a letter dated 15th November, 2013 filed a request for judgment against the 2nd defendant and 3rd defendant/ applicant pursuant to Order 10 Rule 6 of the Civil Procedure Rules. The same was filed on 16th December 2013. The plaintiff/respondent thereafter wrote a letter to the Deputy Registrar, requesting for a mention before the court to fix a date for hearing. The said letter was received in court on 28th January, 2014. Again, the plaintiff/ respondent through its advocates wrote another letter dated 5th November 2014 which was received in court on 17th December 2014. Vide the orders of the court issued on 18th October 2016, Munyao J directed that the matter to proceed for formal proof against the 3rd defendant/applicant.
44. This court, in its judgment delivered on 19th May, 2022 was satisfied that the 3rd defendant/applicant was served with summons to enter appearance but chose not to defend the case. Having found that the judgment entered was regular, I see no need why I should comment on whether the draft defence annexed to the application raises triable issues.
45. The upshot of the foregoing is that the notice of application dated 4th October 2022 lacks merit and it is hereby dismissed with costs to the plaintiff/respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 20TH DAY OF DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE

20/12/2023

