



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Abdi & another v Abdi & another (Civil Case 406 of 2013)**  
**[2025] KEHC 2465 (KLR) (Commercial & Admiralty) (11 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2465 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND ADMIRALTY**

**CIVIL CASE 406 OF 2013**

**A MABEYA, J**

**MARCH 11, 2025**

**BETWEEN**

**ADEN IBRAHIM ABDI ..... 1<sup>ST</sup> PLAINTIFF**

**HASSAN ABDI GULED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**EZEKIEL ANGWENYI ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL ANGWENYI T/A UKAY CENTRE FOREX BUREAU .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. This suit was commenced by a Plaint dated 17<sup>th</sup> September, 2013. The same was served upon the defendants and on the strength of a detailed Affidavit of service of Michael Rotich sworn on 26<sup>th</sup> February, 2015, interlocutory judgement was entered against the defendants on 30<sup>th</sup> May, 2016. The matter proceeded to formal proof and judgment for US\$ 315,484.37 was entered against the defendants on 8<sup>th</sup> December, 2017.
2. By a Motion dated 14<sup>th</sup> December, 2018, the 1<sup>st</sup> defendant applied to set aside the said interlocutory and final judgment. By a ruling of 22<sup>nd</sup> May, 2020, Muigai J declined to set them aside and dismissed the said application.
3. In declining to set aside the judgment, the court relied fully on the averments of the process server and stated as follows:-

“The Process Server filed Affidavit of service on 5<sup>th</sup> August, 2015 and outlined process of service of Plaint and Summons...



The Process Server proceeded as instructed and was accompanied by 2<sup>nd</sup> Plaintiff. On arrival at 1<sup>st</sup> Defendant's wife place of work he enquired of her at the Reception and she came and ushered them to her office. He introduced himself and the purpose of the visit and she said her husband had informed her to receive the documents on her husband and his brother's behalf. He served her with the documents in the presence of the 2<sup>nd</sup> Plaintiff Hassan Abdi Guled and she declined to sign his copies as she had received the documents.

...

The 2<sup>nd</sup> Defendant's contest that Alice Angwenyi is not his wife is true as she is his sister in-law and she accepted service of his documents as was instructed by his husband, the 2<sup>nd</sup> Defendant's brother, 1<sup>st</sup> Defendant. Alice Angwenyi was their agent because 1<sup>st</sup> Defendant instructed the Process Server to serve her on their behalf."

4. In a subsequent ruling of 5<sup>th</sup> May, 2023, this Court found the 2<sup>nd</sup> defendant's application dated 29<sup>th</sup> September, 2021 to be res judicata since the issue of service of summons had been determined by Muigai J as aforesaid.
5. Against the foregoing background, on 23<sup>rd</sup> July, 2024, the 1<sup>st</sup> defendant took out a Motion on Notice of even date under, inter alia Order 45 Rule 12 (sic) of the Civil Procedure Rules and Section 1, 1A, 1B and 3A of the *Civil Procedure Act*. In that Motion, he sought the review and setting aside of the rulings of 13<sup>th</sup> July, 2021 (sic – 22<sup>nd</sup> May, 2020) and 5<sup>th</sup> May, 2023 the setting aside of the interlocutory and final judgment of 30<sup>th</sup> May, 2016 and 8<sup>th</sup> December, 2017 respectively. He also sought for the Process Server to be called for cross-examination and for the Registrar of Persons to supply certain particulars of one Alice Angwenyi and for leave to defend the suit.
6. The grounds for the Motion were set out in the body of the Motion and his Supporting affidavit of 23<sup>rd</sup> July, 2024. These were that the 1<sup>st</sup> defendant had now obtained or discovered new and important information that was not easily available at the time the said decisions were made. He denied ever having married Alice Angwenyi who was alleged to be his wife and who was served with the summons. That she was a total stranger to him.
7. That he was only married to one wife by the name Christine Moraa Monarisince 15<sup>th</sup> December, 1991 and he produced a Marriage Certificate to that effect. That he has since obtained new and important information from the office of the Registrar of Persons that there are over 25 persons with the name Alice Angwenyi and that it was important to identify who of these 25 was served with the summons. That the delay in obtaining the information was due to non-cooperation by the office of the Registrar of Persons.
8. That the interlocutory judgment was entered as a result of the Affidavit of service of Michael K. Rotichof 25<sup>th</sup> February, 2015 and that it was important to summon him for cross-examination on it. That in the premises, the interlocutory judgment entered on 30<sup>th</sup> May, 2016 was irregular and should be set aside.
9. The application was opposed vide a Replying Affidavit of Aden Ibrahim Abdi sworn on 18<sup>th</sup> November, 2024. He stated that the application was frivolous and an abuse of the court process. He denied the 1<sup>st</sup> defendant's allegations in toto.
10. He stated that the 1<sup>st</sup> defendant had made a similar application that was dismissed by Muigai J in the ruling dated 22<sup>nd</sup> May, 2020 and that this Court had ruled that the matter was res judicata in the ruling of 5<sup>th</sup> May, 2023. That no appeal had been preferred against the said rulings.



11. That the issue of the marriage of the 1<sup>st</sup> defendant to Alice Angwenyi was determined when Muigai J held that the said ALICE was the agent of the defendants. That the matters alleged by the 1<sup>st</sup> defendant are not sufficient to warrant the setting aside of the interlocutory judgment of 30<sup>th</sup> May, 2016. It was urged that the application be dismissed.
12. I have considered the rival contestations and the record. This is an application for review of the orders made on 22<sup>nd</sup> May, 2020 and 5<sup>th</sup> May, 2023 and consequently set aside the interlocutory and final judgments of 30<sup>th</sup> May, 2016 and 8<sup>th</sup> December, 2017, respectively.
13. There is a point of law raised by the Plaintiffs which if determined in their favour it is capable of disposing the matter. It was contended that the matter was res judicata as it had been determined by the rulings of 22<sup>nd</sup> May, 2020 and 5<sup>th</sup> May, 2023.
14. Under Section 7 of the Civil Procedure Act, no Court is to try a matter which has been determined by a Court with competent jurisdiction between the same parties. It is true that in the ruling of 22<sup>nd</sup> May, 2020 the Court found that the said Alice Angwenyi was an agent of the defendants. However, looking at the Court's ruling, it depended on the averments by the Process Server that the said Alice Angwenyi, was a wife of the 1<sup>st</sup> defendant.
15. While the said decisions of 22<sup>nd</sup> May, 2020 and 5<sup>th</sup> May, 2021 were based on an application to set aside the interlocutory judgment, the present application is for review of those decisions. There has been no application for review of those decisions. Accordingly, the matter of review is not res judicata.
16. Review applications are entertained under Order 45 Rules 1 & 2 of the Civil Procedure Rules. An order, decree, ruling or judgment will be subject to review if there is an error apparent on the record, or there is discovery of new and important evidence that was not available at the time the order or decree was made or passed, or for any sufficient cause or reason.
17. The present application has been made on the basis that there is discovery of new and important information or evidence that was not available at the time the rulings sought to be reviewed were made. The evidence is that there are 25 persons by the name of Alice Angwenyi in the records kept by the Registrar of Persons.
18. It is true that at all times the 1<sup>st</sup> defendant has been denying that the said Alice Angwenyi was his wife. He has now produced a real Certificate of Marriage that shows that he was married in a monogamous marriage to one Christine Moraa Monari. That he has been so married since 15<sup>th</sup> December, 1991.
19. I think it is apt here to reproduce what the Process Server told the Court which resulted in the impugned rulings and then interlocutory judgments complained of.
  - “6. That upon arrival at the Company, I met a lady at the reception and upon inquiring where about the defendant (sic) she told (sic) that they attended a funeral and they will be back in a week's time and that I should call them.
  7. That at the moment the 2<sup>nd</sup> plaintiff gave me their mobile numbers for the both defendants and I made a phone call to both of them through their numbers respectively being 0722-702795 and 0735-557778.
  8. That I spoke to both the defendants herein and the purpose of my call to them.
  9. That the 1<sup>st</sup> defendant asked me to go and serve his wife on their behalf since they were not around and they will get the Summons and the Complaint from her when they are back and that they gave me the directions where to find his wife,



wife to the 1<sup>st</sup> defendant by the name Alice Angwenyi who work as a dentist at Better Living Hospital situated at Seventh Day Church compound opposite Integrity Centre along Milimani Road.

10. That on the same day together with the 2<sup>nd</sup> Plaintiff herein Hassan Abdi Guled. We proceeded to the work place of the 1<sup>st</sup> Defendant's wife Alice Angwenyi and on arrival we met a receptionist and upon inquiring about Alice Angwenyi and she ushered us to her office.
  11. That at her office, I introduced myself to her and the purpose of my visit to her office.
  12. That Alice Angwenyi told me that she had been informed by her husband about the Summons and the Plaints that she has the authority from him to receive the documents on his behalf and that of his brother to her husband too.
  13. That.....she accepted service but declined to sign on my copies stating that she had received them already.”
20. From the foregoing, it is clear that this was a one day hurried service on a person who was not any of the defendants. The person's name is Alice Angwenyi. Clearly, the Process Server does not state who gave him the name of this person. He only states that this was the wife of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has denied knowing her and has produced a Marriage Certificate to show that his wife is one Christine Moraa Monari.
21. In *Filomona Afwandi Yalwala v Indimuli & Another* [1989] eKLR, the Court of Appeal held:-
- “The Return of Service under Order 5 Rule 6(1) of the Rules enjoins Court Process Server to make service on defendants or respondents. That is the primary task. It is not to expect too much of Court Process Servers to try and try again to serve the defendant before embarking on the other means of service...
- A quick, single hurried visit to the defendant's home in his absence would not reasonably justify a conclusion that he cannot be found.
- Order V Rule 9 provides that whenever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service.”
22. In the present case, the Process Server has never been summoned to explain his affidavit of service. It is the one which was relied on to enter interlocutory judgment and later formal proof and final judgment. It led the Court to believe that one Alice Angwenyi was the wife of the 1<sup>st</sup> defendant and therefore an agent for the defendants.
23. It has now turned out with the production of a monogamous Marriage Certificate produced by the 1<sup>st</sup> defendant that he is married to one Christine Moraa Monari. He has denied knowledge of the said Alice Angwenyi. He has also alleged that from the Registrar of Persons, there are a total of 25 Alice Angwenyi's. Who amongst them was served? Who amongst them allegedly confirmed to be a wife of the 1<sup>st</sup> defendant to have accepted the Summons on behalf of the defendants? This cannot be known without the Process Server attending Court and shedding light on it.
24. In my view, the way to go is to first summon the Process Server for cross-examination and get the information sought by the 1<sup>st</sup> defendant from the Registrar of Persons. Upon his cross-examination vis a vis the information from the Registrar of Persons, the Court will then be in a position to conclude



whether with the new information, it would be proper to review the two rulings and set aside the interlocutory judgment and consequent proceedings.

25. Accordingly, I allow the application in terms of prayer Nos. 2, 3 and 4 of the Motion. However, due to Data Protection, all that the Registrar of Persons has to produce in Prayer No. 4 is information as to the actual number of persons in his record that bear the name 'Alice Angwenyi' only without releasing any further details and particulars. The order to be complied with within 30 days of the date hereof.
26. After the cross-examination, the Court will then make suitable directions and orders regarding prayer No. 5, 6, 7 and 9 of the Motion dated July 23, 2024.

It is so ordered.

**SIGNED AT KISUMU ON THIS 26TH DAY OF FEBRUARY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2025.**

**F. GIKONYO**

**JUDGE**

