



REPUBLIC OF KENYA



**KENYA LAW**  
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**Possible Limited v County Government of Garissa (Civil Case  
E002 of 2021) [2025] KEHC 6285 (KLR) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6285 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL CASE E002 OF 2021  
JN ONYIEGO, J  
MAY 19, 2025**

**BETWEEN**

**POSSIBLE LIMITED ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF GARISSA ..... DEFENDANT**

**RULING**

1. The Plaintiff herein vide a plaint dated 08.02.2021 moved this court seeking judgement against the defendant for:
  - i. The sum of Kes. 72,340,820.63/-.
  - ii. Interest on [i] above from 18.05.2016 to the date of payment in full at the rate of 14%.
  - iii. Costs of this suit.
  - iv. Any other further relief that this Honourable Court deems fit to grant.
2. The suit is predicated on the fact that the defendant engaged the plaintiff for the services of rehabilitation of Garissa Urban Water supply vide tender number CGG/T/001/2014 – 2015. A notification of the award of contract was issued to the plaintiff to that effect vide a letter Reference No. CGG/WSS/T/VOL [001] dated 13.02.2015 and an agreement between the plaintiff and the defendant dated 27.02.2015 thereafter executed.
3. That the plaintiff's obligation was to execute the works as already mentioned for a consideration of Kes. 135, 185,390.13. It was a term of the contract that the defendant had the obligation to pay the said sum upon completion of the works by the plaintiff. The plaintiff thus performed his part of the contractual obligations within the agreed period. Consequently, on various dates being 23.06.2015, 06.05.2016 and 18.05.2016 the defendant paid the plaintiff an amount of Kes. 28,409,224.65, Kes. 2,754,827.60 and Kes. 31, 680,515.25 respectively. That the total amount so far paid is Kes. 62,844,569.50 only.



Thus it was averred that the defendant has breached its obligations by failing, refusing and otherwise neglecting to honour the balance of Kes. 72,340,820.63/.

4. Despite service of the plaint and summons to enter appearance upon the respondents, there was no defence nor appearance entered. Subsequently, interlocutory judgment was entered in default of appearance. Consequently, the bill was taxed and Judicial review to compel payment by way of mandamus filed.
5. It was after the respondents were served with the Judicial review application that they filed an application dated 21.01.2025 seeking for the following orders:
  - i. Spent.
  - ii. Pending the hearing and determination of this application, the Honourable Court be pleased to stay execution of the *ex parte* judgment entered on 14.07.2021 and the decree therein.
  - iii. The Honourable Court be pleased to set aside the entire proceedings and the *ex parte* judgment and the decree of the court thereof and any consequential orders.
  - iv. That leave be granted to the defendant to defend this suit and the same be heard and determined on merit.
  - v. That the costs of the application be provided for.
6. The application was based on the grounds set out on its face and further supported by the affidavit of Khadija Ahmed Mohamed, the County Attorney of the defendant. She deposed that the defendant only learnt of the instant suit and judgment entered in this matter when it was served with pleadings for HCJR/E005 of 2024 filed at the High Court in Garissa. That the defendant was never made aware of the suit as the court summons and the pleadings relating to the suit herein were never served upon it.
7. She further deposed that the plaintiff did not serve upon the respondent any mention or hearing notice in relation to this matter. That the *ex parte* judgment was entered and orders issued without the court having the full benefit of all the facts. That the defendant's defence raises triable issues which this court ought to hear before deciding the matter based on merits. It was averred that the defendant is likely to suffer great prejudice and substantial loss if the orders herein aren't granted. This court was therefore implored to allow the application as prayed.
8. In opposing the application, Mr. Abas Hajir, the director of the plaintiff filed a replying affidavit sworn on 04.03.2025 opposing the application. That at all times, the defendant was aware of the suit herein as it was served with the summons to enter appearance issued on 10.02.2021 together with the plaint dated 08.02.2021, plaintiff's list of witnesses, witness statements and the plaintiff's list and bundles of documents dated 08.02.2021. He deposed that on 11.02.2021, a court process server one James Mukuni attached at Garissa Law Courts at the time, served the office of the county secretary of the county government of Garissa who acknowledged receipt of the pleadings. That the pleadings were received by the secretary by stamping on the face of the summons to enter appearance using the office's official stamp.
9. That to that extent, there is proof of service upon the defendant in as much as no appearance was made. That the plaintiff filed an application dated 18.06.2021 seeking for leave for entry of judgment in default of appearance against the defendant. That the application was heard on 21.10.2021 by Hon. Lady Justice Aroni who was not with the manner of service prompting the court to order for another service. That a subsequent service was effected upon the defendant on 26.01.2022 by the plaintiff's counsel.



10. He averred that the suit came up for hearing on 17.02.2022 which application was allowed and the said ruling has not been appealed against or set aside. It was further averred that on 23.08.2023, a notice of entry of judgment and draft decree were served upon the defendant via its official email address info@garissa.go.ke. That the plaintiff thereafter filed a bill of costs dated 19.07.2022 and on 27.07.2022, served the same upon the defendant through the office of its county secretary together with a notice of taxation dated 20.09.2022.
11. It was deponed that the defendant partially paid the plaintiff's claim which only meant that the plaintiff completed the contractual works pursuant to the averments at paragraphs 5 of the draft defence. Additionally, it was urged that partial payment of the plaintiff's claim constitutes an admission of liability and therefore, the defendant cannot be heard distancing itself from that position. Additionally, that the present application has been made in bad faith without disclosing to this court that the Judicial Review Application in Garissa HCJR No. E005 of 2024 had been given directions by this court which matter the defendant attended and was slammed with costs for non-compliance. This court was urged to dismiss the application herein for the same was merely filed with the sole intention of delaying and/or denying the plaintiff its right to enjoy the fruits of its judgment.
12. The defendant through Khadija Ahmed Mohamed further swore on 12.03.2025 an affidavit deposing that they have no records of the pleadings claimed to have been served upon the defendant and as such, buttressing the defendant's claim that it would not have been in any position to defend the suit. It was urged that a perusal of the annexed affidavits of services shows non-compliance with Order 5 of Civil Procedure Rules which clearly provides on how services ought to be effected.
13. That the defendants wished to have Mr. Erick Kinaro, Mr. James Mukumi and Mr. Stanley Wachira cross examined in reference to their claim that they served the defendant herein. It was urged that the defendant's draft defence raises triable issues and as such, this court should allow the prayers sought. Additionally, an application dated 12.03.2025, a notice of intention to cross exam was also filed urging the call for Mr. Erick Kinaro, Mr. James Mukumi and Mr. Stanley Wachira to be cross examined by the defendant.
14. I have considered the application by the defendant/applicant and the response by the respondent/plaintiff and further affidavit by the applicant/defendant. The only issue for determination is whether the orders sought herein ought to be allowed.
15. Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules grant Court discretion to set aside interlocutory judgement in default of appearance and also an ex-parte judgement.
16. Order 10 Rule 11 of the Civil Procedure Rules empowers the Court to set aside or vary a default judgement and any consequential decree or order entered under Order 10 Rules 6 & 10 of Civil Procedure Rules in default of appearance or in failure to file Defence, upon such terms as the court may deem necessary. The said Order provides; "where a judgement has been entered under this Order, the court may set it aside or vary such judgement and any consequential decree or order".
17. From the application, the counsel for the defendant/applicant submitted at length that the defendant was not served with summons to enter appearance and all other pleadings related to this case and only came to learn of this matter when it was served with pleadings for HCJR/E005 of 2024 filed at the High Court at Garissa.



18. The principles for setting aside an interlocutory or ex-parte judgement were espoused in the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 as follows;

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

19. It follows therefore, that there exists a distinction between a default judgment, that is regularly entered and one that is irregularly entered. The difference between these two was set out by the Court of Appeal in the case of *James Kanyita Nderitu v Marios Philotas Ghikas* [2016] eKLR, where it was held as follows:

“In a regular default judgement, the defendant will have been duly served with summons to enter appearance 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others.”

20. On the other hand, in respect of an irregular judgement, the considerations are different. The Court went further to state as follows;

“In an irregular default 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 justiae, 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.”

21. This court has thoroughly perused the record herein and notes as follows; that the said pleadings [plaint dated 08.02.2021, summons to enter appearance dated 10.02.2021, a letter of authority, verifying affidavit sworn on 08.02.2021 and annexures drawn by the firm of Kinaro and Associates] according to James Mukuni via an affidavit sworn on 16.02.2021 were served upon the defendant.

22. The plaintiff filed under certificate of urgency an application dated 18.06.2021 that leave be granted for entry of judgment in default of appearance against the defendant for the reason that despite being



- served the pleadings, it had failed to enter appearance or file a defence. And this court on 25.06.2021 upon considering the application ordered that the same was not urgent and that the application be served upon the defendant and a hearing date be fixed at the registry.
23. On 22.07.2021, one Stanley Wachira, a licensed process server filed an affidavit of service sworn on 22.07.2021 deposing that on 15.07.2021 at around 4.46 p.m. he received a copy of an Order dated 25.06.2021, a certificate of urgency under a notice of motion, supporting affidavit and annexures all from the counsel of the plaintiff which he served upon the defendant's offices at Garissa Office. That the secretary therein accepted the documents and further, signed and stamped each document. Having perused the record, I find that indeed the said documents were served upon the defendant and further stamped using the Office of the County Secretary, County Government of Garissa stamp.
  24. On 06.08.2021, Mr. Stanley Wachira filed an affidavit of service detailing that on 05.07.2021 at around 10.46 a.m., he received a copy of a Hearing Notice dated 02.08.2021 from the firm of Kinaro Advocates to serve upon the defendant. That the same was served upon the secretary, one Elizabeth at the defendant's offices who signed and then stamped a copy of the served documents. Having perused the record, indeed, the stamp of the Office of the County Secretary, County Government of Garissa is stamped on a copy of the said Hearing Notice encompassing the other documents served.
  25. On 19.11.2021, Mr. Stanley Wachira filed an affidavit of service sworn on 19.11.2021 deposing that on 19.11.2021, he received a copy of a Hearing Notice, an application dated 18.09.2021, a plaint and summons to enter appearance from the plaintiff advocate and he re - served the same upon Elizabeth, the secretary at the defendant's offices at Garissa who consequently received the documents and then signed and stamped his copy.
  26. On 15.02.2022, counsel for the plaintiff swore on 15.02.2022, an affidavit of service reiterating that on 26.01.2022 at around 3.30 p.m., he proceeded to the office of the County Secretary, Garissa County, a place well known to him with a copy of a Hearing Notice dated 21.12.2021, an application dated 18.06.2021 with annexures of summons to enter appearance dated 10.02.2021, plaint dated 08.02.2021, an affidavit of service sworn on 11.02.2021 by Jame Mukuni to effect upon the defendant. That he tendered the said documents to one Tabitha Were, who introduced herself as the secretary to the office of the County Secretary, Garissa County. That he introduced himself to and explained the nature of his visit to the said secretary but Tabitha declined to receive the pleadings claiming that she was tired of receiving the very documents which had been served severally upon the office.
  27. On 17.02.2022, Lady Justice Aroni upon considering the plaintiff's application dated 18.06.2021 together with the affidavit of service as sworn by the plaintiff's/respondent advocate, ordered that leave be granted for entry of judgement in default of appearance and defence against the defendant/respondent together with the costs of the application. This was after the court was convinced that proper service had been effected after rejecting the first one. This court's finding is still in force hence binding.
  28. Mr. Stanley Wachira further swore an affidavit on 30.03.2022 deposing that on 29.03.2022, he received a copies of Notice of Taxation from the court's registry having been sent by the firm of Kinaro & Associates Advocates with instructions that the same be served upon the defendants. That on 12.37 p.m. on the same day, he proceeded to the defendant's office where he found the secretary, introduced himself and then served upon her the said documents.
  29. Further, Mr. Stanley Wachira swore an affidavit on 25.10.2022 averring that on 19.10.2022, he received copies of a Notice of Taxation dated 18.10.2022 and fixed for Hearing on 25.10.2022 from the court's civil registry and served the same on the same day upon the defendant's offices where he found a



secretary by the name of Ruth Wangui who received, signed and then stamped his copy. I have perused the document and I note that the foregoing is true.

30. The ruling on taxation was delivered on 26.05.2023 on the plaintiff's party to party bill of costs dated 24.02.2022.
31. A decree was consequently issued on 23.08.2022 decreeing the judgment entered for the plaintiff against the defendant for the sum of Kes. 73,340,820.63 being the principal amount plus costs and interests of the principal amount at the rate of 14% p.a. Additionally, an amended Certificate of Order against the defendant was issued on 02.07.2024. That the plaintiff then commenced judicial review proceedings against the defendant.
32. Having perused the above, it is this court's view that a summon being crucial, no party should be condemned unheard. Thus a person can only know about a claim against him/her by being served with the court documents. The foregoing has been reiterated through article 48 and 50 of *the constitution*. Also see the case of Stephen Ndichu v Montys Wines and Spirits [2005] eKLR, where the court held that; to deny a party the right to be heard should be the last resort of a Court.
33. However, a decision on whether to set aside or not to set aside, an ex-parte judgement is discretionary, and is intended to be exercised judiciously so as to avoid injustice or hardships, resulting from accidents, inadvertence or excusable mistake or error. However, it is not supposed to aid a party who is deliberately seeking to obstruct justice. See the case of Shah v Mbogo & Another [1967] EA 116 where the Court held;

“ this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
34. As already mentioned, it is clear that the defendant was served with the summons to enter appearance and pleadings of the court. The same is supported by the affidavits of service as deposed by the court process servers and counsel for the plaintiff. From the documents returned to court after service, thereon were appended the signatures of the recipients on behalf of the defendant/applicant. Nobody has challenged the authenticity of the signatures of those who acknowledged receipt of service nor the stamp affixed on the served pleadings.
35. The above notwithstanding, the defendant/applicant in its current application dated 21.01.2025 confirmed that the plaintiff's claim indeed fell under the pending bill category which is currently undergoing verification and confirmation and payments could only be made once the auditor general and the relevant authorities approved the plaintiff's claim. Further, from the annexed documents by the plaintiff, specifically the bank statement from First Community Bank issued on 12.02.2021, the same supports the plaintiff's allegation that the defendant had previously made part payment to it hence its averment that it only seeks from this court an order compelling the defendant to pay in full the balance owed.
36. To that end, this court holds the view that indeed, the defendant is and has been aware of the pendency of this suit. Therefore, the defendant is estopped from alleging that it was not served with the pleadings of the matter herein as it has not only been aware to it but also have made part payment towards the clearance of the amount owed. It is not enough for the county Attorney to claim that there is no record of service in their office. It is the duty of the plaintiff to keep their house in order. Indolence on the part of the defendants cannot be visited on the plaintiffs. It is trite that a successful party should not be hindered from enjoying the fruits of his judgment



37. This court exists to serve justice as expounded in article 48 of *the constitution* and access to justice not only encompasses a litigant having a forum and an opportunity to prosecute his case but also realizing the fruits of his judgment. As a consequence of the above, it is my considered view that the pleadings herein were served upon the defendant/applicant only that it refused and /or ignored to defend the same. I do not find any triable issues in the draft defence as the defendant has already honoured part of the claim a fact which is not denied. Indeed, litigation has come to an end.
38. From the foregoing, I am inclined to dismiss the application herein for lack of merit with costs to the respondent/ plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF MAY 2025**

**J. N. ONYIEGO**

**JUDGE**

