



REPUBLIC OF KENYA



Kihara v Mathenge (Civil Appeal 86 of 2019) [2025] KEHC 7914 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 86 OF 2019
JK NG'ARNG'AR, J
JUNE 5, 2025**

BETWEEN

JAMES KARIUKI KIHARA APPELLANT

AND

DANIEL WOKABI MATHENGE RESPONDENT

*(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kerugoya
(Hon. A. Ithuku, CM.) delivered on 31st October 2019 in CMCC NO. 105 OF 2019)*

JUDGMENT

1. In his Notice of Motion dated 8th August 2019, the appellant invoked section 3A of the [Civil Procedure Act](#) seeking the following reliefs:
 1. That this Honorable Court be pleased to set aside the judgment entered ex parte on the 5th day of August 2019 in favor of the plaintiff;
 2. That the defendant be allowed to file defense and other accompaniments out of time;
 3. That the costs of this application be provided for.
2. The application was supporting by his affidavit sworn on 8th August 2019 stating as follows: he learnt from rumors that a case had been filed and judgment entered against him; he discovered that it was / *Kerugoya CMCC NO. 105 of 2019*; he could not file his memorandum of appearance; he was never served with the summons yet he was a well known court process server; the plaintiff was on a witch-hunt to arm-twist the law through the back door; he had a strong defence; the ex parte judgment paved the way for loopholes in unexpeditious (sic) justice system; and it was in the interest of justice to set aside the judgment in favor of a rigorous hearing.
3. Opposing the appeal, the respondent filed a Replying Affidavit sworn on 26th August 2019. He prayed that the application be dismissed with costs on the following grounds: service of summons to enter appearance was regular; the application did not raise triable issues; there was no defence furnished to the



court; the application failed to establish irregularity in the process leading up to the ex parte judgment; the judgement was regular; and he was not deserving of the orders of the court as he was indolent.

4. Upon considering the application and the response thereto, the trial magistrate found that the application lacked merit. It was dismissed with costs. The appellant is dissatisfied with those findings. He filed a memorandum of appeal dated 7th November 2019 that raised seven grounds disputing the findings of the learned magistrate. In summary, the appellant was condemned unheard having not been given an opportunity to defend himself and, in the process, breached his constitutional rights; the appellant was not duly served; the application was improperly dismissed on technical grounds; and the court erred in finding that there was no draft defence annexed to his application. In view of the foregoing, the appellant prayed that the appeal be allowed by setting aside the impugned ruling and substitute the same with an order allowing his Notice of Motion dated 8th August 2019.
5. The appeal was canvassed by way of written submissions. However, as I retired to write this judgment, I was only impressed with the appellant's written submissions. Dated 20th July 2024, the appellant adopted his memorandum of appeal to submit that the appeal as with merit. He prayed that the same be allowed.
6. I have considered the appellant's written submissions, examined the record of appeal and analyzed the law. The appellant has invited this court to interfere with the exercise of discretion by the trial magistrate. As a first appellate court, I should not interfere with the exercise of discretion by an inferior court unless I am satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion. [See *Mombasa Cement Limited v Kitsao & 34 others* [2022] KECA 562 (KLR)].
7. The appellant has invited this court to interfere with the exercise of the learned magistrate's discretion to dismiss his application to set aside the ex parte judgment entered against him on 5th August 2019. Before discerning whether the learned magistrate was correct or otherwise in his findings, we must first distill whether the judgment entered was regular or irregular. Fortunately for this court, the Court of Appeal has had the advantage of ruminating itself on this discourse. Sitting in Mombasa, the learned judges in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) held:

“From the outset, it cannot be gainsaid that a distinction has always existed between a 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 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 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 factors 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah* (supra), *Patel v E.A. 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 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 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.”

8. Turning to the record, it is discernible that the appellant was served with the summons but failed to enter appearance. The court relied on the return of service sworn by Francis Muchina where he exemplified how the appellant was served with the summons and the pleadings. It was stated that when the appellant was attending a hearing in Criminal Case No. 413 of 2019 in Kerugoya Law Courts, the appellant was identified by the respondent to the process server. He was then served at 10:30 a.m. though did not append his signature.
9. Though the appellant indicated that he traced the file after he got wind from ‘innuendo’ that he had been sued, he did not peruse this affidavit or call for the cross examination of the process server. In fact, those averments were not challenged. Instead, the appellant raised issues that really failed to challenge the competency or otherwise of service of the summons. He doesn’t even detail how the alleged rumor, as he calls it, met him. It is almost as though he was putting up a defence because it is available in law and he was forced to say something; not because it is merited. I therefore find that the judgment was regular on account of the fact that service was proper. Was the trial court wrong in failing to set aside the judgment?
10. The trial court was called upon to take into account unexhaustive factors including whether the defence raises a triable defence. Regrettably, I have looked at the record and the application and find that not only did the appellant not attach a draft defence, he also failed to set out grounds that would warrant the trial court to reopen the case and have it heard on its merits. There was nothing placed before the trial court that would warrant it to take into account. As I have said, I don’t think the appellant was interested in putting up a spirited defence; he was just an obstinate mule clutching on straws.
11. No sufficient grounds or at all were tabled before the learned magistrate to justify the exercise of discretion in the appellant’s favor. The discretion was judicious and not out of whims, caprice or sympathy. Accordingly, I find that the appeal herein lacks merit and it is hereby dismissed but with no orders as to costs since the respondent did not participate in this substantive appeal.

It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JUNE 2025
IN THE PRESENCE OF;**

No appearance for the Appellants

Mathenge holding brief for the Respondents

Siele /Mark (Court Assistants)



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J. NG'ARNG'AR
JUDGE

