



**NCBA Bank Kenya PLC (Formerly NIC Bank Limited) v G North  
& Sons Limited & 3 others (Commercial Civil Suit E883 of 2021)  
[2023] KEHC 19197 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19197 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL SUIT E883 OF 2021**

**EC MWITA, J**

**JUNE 16, 2023**

**BETWEEN**

**NCBA BANK KENYA PLC (FORMERLY NIC BANK) LIMITED ..... PLAINTIFF**

**AND**

**G NORTH & SONS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PATRICK MUGAMBI ..... 2<sup>ND</sup> DEFENDANT**

**SARASTRO HOLDINGS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**PAUL WANDERI MDUNGU ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 4<sup>th</sup> defendant filed a motion application dated August 26, 2022 under Order 10 rule 11 of the *Civil Procedure Rules*, seeking to set aside default judgment entered against him on August 5, 2022, and leaved to enter and defend.
2. The gist of the application, according to the 4<sup>th</sup> defendant, is that the 4<sup>th</sup> defendant was not one of the original defendants when the suit was filed. The plaint was later amended and the 4<sup>th</sup> defendant joined in the suit. The 4<sup>th</sup> defendant was, however, not served with summons to enter appearance and was, therefore, not aware of the suit.
3. The plaintiff obtained default judgment against the 4<sup>th</sup> defendant which the 4<sup>th</sup> defendant argues was irregular and applied to have it set aside. According to the 4<sup>th</sup> defendant, he does not reside in Gigiri as the process server alleged and could not have been served in that address.



4. The 4<sup>th</sup> defendant relied on the decision of *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, that an irregular judgment should be set aside as a matter of course. The 4<sup>th</sup> defendant urged that the judgment, being irregular, be set aside and he be granted unconditional leave to enter and defend.

## Response

5. The plaintiff opposed the application through a replying affidavit sworn by Ngatia Mbogo, the plaintiff's counsel. Counsel stated that the 4<sup>th</sup> defendant was properly served with summons to enter appearance and had always been aware of the suit.
6. Mr. Mbogo asserted that the process server, (Noel M. N. Munyithya) visited the 4<sup>th</sup> defendant's house No. 52 along Gigiri off Limuru road behind the Embassy of the Republic of Rwanda on May 26, 2022 but was not allowed to enter the premises for purposes of serving the 4<sup>th</sup> defendant. Instead, the process server was harassed and manhandled by a police officer manning the gate as he attempted to effect service, which was intended to defeat administration of justice.
7. The process server also sent the summons and pleadings to the 4<sup>th</sup> defendant's known email address on May 27, 2022 but no appearance was entered or defence filed. As a consequence, a regular default judgment was entered against the 4<sup>th</sup> defendant.
8. The plaintiff relied on the decision in *Mbogo v Shah* [1968] EA 93 on setting aside *ex parte* judgments. The plaintiff also relied on the decision in *Fidelity Commercial Bank Limited v Owen Amos Ndungu & another* (HCCC No. 244 of 1998 (UR), cited in *K-Rep Bank Limited v Segment Distributors Limited* [2017] eKLR on the distinction between a regular and irregular default judgment.
9. The plaintiff argued that the judgment entered against the 4<sup>th</sup> defendant was regular and should not be set aside. The plaintiff further relied on *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2014] eKLR, that an affidavit of service contains sworn factual evidence of the deponent, and *Baiyo v Bodi Bach* (Civil Appeal No. 122 of 1986 (UR) which restated the principle in *Miruka v Abok & another* [1990] KLR 544, that there is a qualified presumption in favour of the process server. The plaintiff urged that the application be dismissed with costs.

## Determination

10. The 4<sup>th</sup> defendant applied to set aside default judgment entered against him on grounds that he was not served with summons to enter appearance. The plaintiff however maintained that the 4<sup>th</sup> defendant was properly served but failed to enter appearance or file a defence.
11. Order 10 rule 11 states that where judgment has been entered under the Order, the court may set aside or vary such judgment and any consequential decree or order on terms that are just. The Order thus gives the court wide discretion when dealing with an application to set aside a default judgment.
12. The 4<sup>th</sup> defendant's case is that he was not served with summons to enter appearance. The 4<sup>th</sup> defendant took issue with the affidavit of service which he argued was false. According to the 4<sup>th</sup> defendant, he does not reside at the address where service was allegedly effected and, therefore, he could not have been served there.
13. Whether or not to set aside a default judgment is an exercise of discretion, depending on how the default judgment was entered. From the contestations in this application, the issue before court is whether the default judgment was regular or irregular. If a regular judgment, the court has wide



discretion to set aside the judgment on terms that are just. If irregular, the judgment is to be set aside as a matter of course.

14. In *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, the Court of Appeal distinguished between a regular and an irregular default judgment, stating:

[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.

Regarding an irregular default judgment, the court opined:

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.

15. The distinction between a regular and an irregular default judgment is that in the former, the defendant will have been properly served but for some reason, no appearance was entered or defence filed. In the case of an irregular default judgment, no service will have been effected at all or the service, if any, was not proper.
16. The court retains wide discretion under Order 10 rule 11 to set aside a regular judgment and any consequential decree or order on just terms. On the other hand, an irregular judgment is to be set aside without difficulty and on no terms at all.
17. In this case, the 4<sup>th</sup> defendant argued that he was not served with summons and, therefore, the default judgment entered against him was irregular. The plaintiff maintained that the 4<sup>th</sup> defendant was properly served and the judgment entered against him was regular.
18. I have perused the record and the affidavit of service. The record shows that the 4<sup>th</sup> defendant was not a party when the suit was initially filed. He was joined in the suit through amendment of the plaint on April 13, 2022. The request for judgment was dated June 13, 2022 to which was attached an affidavit of service by Noel M. N. Munyithya sworn on May 27, 2022.



19. The process server deposed that he was instructed to serve the 4<sup>th</sup> defendant with summons to enter appearance and amended plaint on May 17, 2022. He called the 4<sup>th</sup> defendant through his cellphone and agreed where they were to meet but no meeting took place. On May 26, 2022 he went to the 4<sup>th</sup> defendant's residence along Gigiri off Limuru Road behind the Embassy of Rwanda, House No. 52 at 3.30 with intention to serve the 4<sup>th</sup> defendant. At the gate, he found a gentleman who introduced himself as Ng'ang'a, who the process server later learnt was a police officer. Mr. Ng'ang'a informed the process server that the 4<sup>th</sup> defendant was inside the house.
20. The process requested to be allowed in but instead, Mr. Ng'ang'a called the secretary. The secretary came and informed the process server that any court documents were to be served through the 4<sup>th</sup> defendant's advocate whose name was, however, not disclosed. The process server requested to put the documents in an envelope and leave them but the secretary declined. At this point, Mr. Ng'ang'a demanded that the process server complies with instructions given.
21. Both Mr. Ng'ang'a and the secretary stood their ground and declined to allow the process server inside the compound. The two asked the process server to leave and serve through the advocate. The process server requested to be allowed to leave the documents at the gate but the two declined. The process server dropped the documents on the road near the gate and left.
22. On May 27, 2022, the process server again served the 4<sup>th</sup> defendant through his email address in accordance with the rules.
23. The process server did not say, first; where he got the 4<sup>th</sup> defendant's cellphone number through which he contacted the 4<sup>th</sup> defendant. Second, the process server did not say how he knew the 4<sup>th</sup> defendant's residential address since the affidavit of service is silent on this. The 4<sup>th</sup> defendant deposed that he does not reside along Gigiri, a fact that remains uncontroverted by the plaintiff or the process server.
24. The process server further stated that the 4<sup>th</sup> defendant was again served through email, but did not also say how she obtained the 4<sup>th</sup> defendant's email address.
25. Mr. Mbogo stated in the replying affidavit that the email address was in the indemnity but he did not say who gave the email address to the process server.
26. The rules allow service through a defendant's known email address. However, there should be evidence that the documents were received. There is no deposition that the email was sent to the 4<sup>th</sup> defendant's known email address that was in use or that the documents were received. This fact could only be stated by the process server and not Mr. Mbogo.
27. Since the 4<sup>th</sup> defendant is an individual, (natural person), Order 5 rule 8 (1) states that wherever practicable, service should be to the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent would be sufficient. The process server went to the address once but did not explain how he knew that the 4<sup>th</sup> defendant resided or worked at that address.
28. Apart from this one attempt to serve, the process server did not make a second attempt to serve the 4<sup>th</sup> defendant before he decided to leave the documents on the road. In this regard, the process server did not demonstrate that Order 5 rule 8 had been complied with.
29. The importance of proper service of summons to enter appearance cannot be over emphasized. That is what determines the course the court should take against a party who is properly served but fails to enter appearance or file a defence.



30. This position was underscored in *John Akasirwa v Alfred Inai Kimuso* (C.A. No. 164 of 1999) (UR), where the Court of Appeal stated:

Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfied itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with order 5 rule 9 (1)(now rule 8(1)). The ideal form of service is personal service, it is only when the defendant cannot be found, that service on his agent empowered to accept service is acceptable.

31. In the present case, the process server did not demonstrate what attempts were made to serve the 4<sup>th</sup> defendant personally before deciding to leave the documents on the road. Similarly, the process server did not explain who informed him that the 4<sup>th</sup> defendant could be found at that address or how the email address was obtained and that indeed the email address belonged to the 4<sup>th</sup> defendant. In short, the process server did not show that the 4<sup>th</sup> defendant had been served as required by law.
32. Every person has a right to be heard before judgment is passed against him or her. The right to be heard was underscored by the Supreme Court of India in *Sangram Singh v Election Tribunal Koteb* 1955 AIR 425, thus;

[T]here must be ever present to the mind the fact that our laws 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. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

33. This principle, though enunciated decades ago, is now firmly engraved in article 50(1) of our *Constitution*. In that regard, no judicial process should be conducted and a decision taken on the back of a litigant who is to be affected by the judicial process and the resultant decision without being given an opportunity to participate in those proceedings.
34. The mode of service employed in this case, cannot be said to have been proper service at all. In the circumstances, the default judgment entered against the 4<sup>th</sup> defendant was irregular because the 4<sup>th</sup> defendant had not been served, or properly served, with summons to enter appearance. This calls for setting aside of the default judgment ex debito justitiae, and as a matter of right to the 4<sup>th</sup> defendant.
35. Consequently, and for the reasons given above, the default judgment entered against the 4<sup>th</sup> defendant on August 5, 2022 is hereby set aside. The 4<sup>th</sup> defendant is granted leave to enter and defend. The 4<sup>th</sup> defendant do file and serve his defence within 14 days from the date of this order. No order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2023**

**E C MWITA**

**JUDGE**

