

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAHURURU**  
**CIVIL APPEAL NO. E008 OF 2024**

**JOSEPH MWEMA GATHUO.....**  
**.....APPELLANT**

**-VERSUS-**

**JEREMIAH BAIYA NJENGA.....RESPONDENT**

**JUDGMENT**

- 1.** The Appellant, Joseph Mwema Gathuo, sued the Respondent, Jeremiah Baiya Njenga, for breach of contract. The claim was for Ksh.670,000/- and, interest thereon, plus costs.
- 2.** No appearance was made in the matter, hence a request for judgment was made pursuant to Order 10 of the Civil Procedure Rules,2010. In the result, an interlocutory judgment was entered on 24<sup>th</sup> August 2022. Notice of entry of judgment dated 29<sup>th</sup> August 2022 was sent to the Respondent. A decree and certificate thereof were drawn and Auctioneers instructed to attach movable properties in execution of the decree.
- 3.** Through a Notice of Motion dated 04/10/2023, the Respondent (Defendant) sought stay of execution of the decree and certificate of costs dated 07/10/2022. That: The Respondent (Defendant) be granted leave to file a statement of defence; the default judgment and decree dated 07/10/2022 and all consequential orders be set aside, so that the Respondent could be granted leave to defend the suit.
- 4.** The application was premised on grounds that the Respondent was not served with summons to enter

appearance and pleadings in the suit and that he only became aware of the suit when he received a call from a person who identified himself as an auctioneer who inquired where to find him for purposes of proclaiming his goods pursuant to warrant of attachment issued in the suit.

5. That the service was purportedly through *Whatsapp*, a mode of service that was not accessible to him leading to entry of default judgment against him. That the Defendant (Respondent) has a strong and arguable defence that raises triable issues to the plaintiff's (Appellant) claim, and as such it is in the interest of justice for the defendant be given an opportunity to present his case which will not make the plaintiff suffer any prejudice as he will have the opportunity to present his case.
6. In response, the Appellant (Plaintiff) through a replying affidavit, deposed that on 25/07/2022 scanned copies of summons to enter appearance, plaint, verifying affidavits, list of witnesses and witness statement and a list of documents all dated 14/07/2022 as well as bundle of documents were served on the Respondent (defendant) electronically through his known and used *Whatsapp* number which he received on the same day.
7. That despite service he failed to enter appearance within the prescribed time hence the Respondent (Defendant) was duly notified of the entry of the judgment through a notice on 29/08/2022 through *Whatsapp*. That upon M/s Icon Auctioneers being instructed to execute the warrant of attachment issued and on establishing that the Respondent

(Defendant) owned Motor Vehicle Registration No. KAR 068V and also Motor Vehicle KAR 831K that was jointly owned with Family Bank Limited, which he hid and disposed in a well-orchestrated move to defeat execution of the decree.

- 8.** That the stated Auctioneers being unable to execute the warrants, the Appellant was compelled to instruct another auctioneer, Anthony Kinuthia Nyokabi trading as, Auto tech Auctioneer, and on further warrants being issued, the Respondent (Defendant) was served at Doss Doss Enterprises and assorted goods proclaimed. That on going to attach the goods the Respondent had mischievously taken out the County licence of his business in the name of John Ndungu Kamau hence the goods could not be attached.
- 9.** The second auctioneer was equally frustrated and being unable to execute attachment compelled the Appellant (Plaintiff) to request the court to allocate the warrant of arrest to another auctioneer, Tango Auctioneers & General Merchants who secretly followed the Respondent (Defendant) after he closed his Doss Doss Enterprises supermarket at night and established that he resided in his own house at Chemi Chemi area. And, on realising that he could no longer obfuscate and frustrate execution of the court decree, he rushed to court to make the instant application.
- 10.** The Appellant (Plaintiff) refuted the allegation that the Respondent (Defendant) came to learn of existence of the suit on 19/09/2023, as he paid a sum of Ksh.150,000/- on 29/04/2023; 02/05/2023; and, 02/08/2023, respectively,

being part payment of the decretal sum, by depositing the money on the plaintiff account and sending the deposit slip to his advocate using the same *whatsapp* number used to serve him all along, which he now alleges that he ceased using three years ago.

**11.** Further, following information from his advocate, prior to serving the Respondent he contacted him on the *Whatsapp* number used for service that he now claims to have ceased to use three (3) years ago.

**12.** In the Ruling dated 04/03/2024, the trial court reached a finding that as deposed by the Respondent (Defendant), the Appellant (Plaintiff) who knew the Respondent and his place of business for more than 5 years should at the outset have effected personal service therefore failure to file a statement of defence was not deliberate. In the result the court found that the pleadings were properly served hence the default judgment was irregularly entered. For that reason, the application was allowed and costs were to be in the cause.

**13.** Aggrieved, the Appellant proffered this appeal on grounds that:

***The learned Trial Magistrate erred in law and fact in failing to analyse the evidence on record; the service of summons effected to the Respondent via his known and used Whatsapp number was not proper; to appreciate that the discretion to set aside default judgment must not be exercised capriciously but in the bid to serve justice; to appreciate the evidence adduced***

***through replying affidavit; and, that the Appellant had already paid part of the decretal amount in the sum of Ksh,150,000/- hence admitting the default judgment.***

**14.** The appeal was canvassed through written submissions. It is urged circumstances in which the court can exercise discretion to set aside default judgment were stated by the Court of Appeal in **United India Insurance v East Africa Underwriters (Kenya) Ltd [1985] eKLR** that:

***“...The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong....”***

**15.** That from the facts presented even if the magistrate’s decision was discretionary, she misapprehended the fact by failing to consider that the Respondent admitted the default

judgment when he partly paid the decretal amount. Further that the court failed to consider that the application to set aside the default judgment was inordinate, having been made one year after the default judgment was entered.

**16.** The Respondent submits that the trial court exercised its discretion and applied the guiding principles in setting aside the default judgment. That to set aside a default judgment the court must determine whether it was regular or irregular. That a regular judgment would be one entered where a defendant was duly served but, failed to enter appearance or file a defence. And, in such a case the court has power to set aside the default judgment pursuant to Order 10 Rule 11 of the Civil Procedure Rules, 2010.

**17.** That an irregular default judgment, under which the current case falls, on the other hand arises where judgment is entered without proper service or contrary to the rules of which would call upon the court to set it aside ***ex debito justitiae*** (as a matter of right). But, service of summons was purportedly effected through *Whatsapp*, a mode of service that was not accessible to the Respondent, leading to entry of the default judgment. Reliance in this regard was placed on ***Kamau v Miringu, (Civil Appeal E046 of 2021(2024) KEHC*** where it was emphasized:

***“... 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....”***

**18.** That the Appellant did not rebut through affidavit the argument by the Respondent having not been served hence the trial court correctly found that the judgment was irregular. That in **Odhiambo v Mose (Civil Appeal E022 of 2022)(2023) eKLR** the High Court in affirming the wide discretion available to the court under Order 10 Rule 11 sated that:

***“Where judgment is regular, the court must examine the totality of the circumstances, including whether there is a triable issue, the reason for the default, and whether justice and common sense support hearing the matter on merits.”***

**19.** Further, that the Respondent’s draft defence disclosed triable issues as such the appellate court would be slow to interfere with the discretion of the court unless there is evidence of misdirection, error of principle or manifest injustice. Reliance was placed on **Mbogo v Shah (1968) EA 93** where the court held that:

***“A Court of Appeal should not interfere with the exercise of discretion by the trial judge unless it is satisfied that the judge misdirected or acted on matters not properly before him”***

**20.** And that the Respondent like every litigant is entitled to a fair hearing under Article 50 of the Constitution of Kenya. Also, that the Appellant has not shown that he will suffer prejudice that cannot be remedied by an award of costs.

**21.** This being a first appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

***"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions..."***

**22.** Guided by the principle, this court is bound to consider what transpired at the trial court and reach its independent conclusions. On the question whether the default judgment was regularly entered such that the learned magistrate exercised the discretion aptly, Order 10 Rule 11 of the CPRs provides thus:

***Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.***

**23.** The power granted to the court is discretionary. What the court should ensure is justice being done to parties. The

Appellant is required to demonstrate valid reasons for setting aside the default judgment. In **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)** the Court of Appeal delivered itself thus:

***“...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).**

24. Summons to enter appearance and Pleadings generally were electronically served on the Respondent per the argument put forth by the Appellant. Order 5 Rule 22C of the CPRs provides as follows:

***Mobile-enabled messaging Applications [Order 5, rule 22C]***

***(1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.***

***(2) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.***

***(3) Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.***

***(4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.***

**25.** According to the replying affidavit to the application to set aside the default judgment, the Appellant (Plaintiff) advocate, an officer with authority to serve the documents stated that service was properly effected. The Respondent did advance an argument that service was purportedly effected through *Whatsapp* No. 0724 736874 which was registered in his name but he gave it to his children who were minors and he did not have access to it for 3 years.

**26.** It is not in doubt that service was effected through a *Whatsapp* No. registered in the name of J.B. Njenga. This is proved by the fact of two (2) grey ticks which establish the fact of the message having been successfully delivered. Further, the grey ticks having turned blue was a fact that the recipient read the information. It is alleged that minors were in possession of the Cell phone, which would be an indication of the message having not been accessible to the Respondent. What was however not established was the existence of the alleged minors. It is he who alleges that is obligated to prove. The Respondent, however, did not prove the allegation.

**27.** The narrative of the manoeuvre to avoid execution of the decree was well demonstrated and making part payment of the decretal sum may go to establish being liable. However, the draft defence attached raises issues worth being determined. For that reason, it will be in the interest of justice for the case to be heard.

**28.** In *Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another [2009] eKLR*, the Court of Appeal stated as follows:

***“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”***

**29.** In dismissing the application, the trial court exercised the discretion bestowed upon it. The Appellant has demonstrated the prejudice suffered so far regarding costs expended as he engaged auctioneers in an endeavour to find the Respondent who was elusive and also legal fees. These should have been taken into consideration while making the order as to costs.

**30.** In the upshot, I find and hold that the trial court exercised its discretion as provided by the law hence affirm the order setting aside the default judgment. But, the trial court erred in not awarding costs to the Appellant (Plaintiff) who did suffer prejudice. For that reason, I call to this court the order of the trial court directing the costs to be in the cause, which I set aside and substitute by an order directing ***Jeremiah Baiya Njenga*** (Respondent/Defendant) to pay costs to ***Joseph Mwema Gathuo*** (Appellant/Plaintiff); costs at the lower court as well as costs of the appeal. Hence the appeal succeeds and is allowed to that extent.

**31.** It is so ordered.

**Dated and Delivered virtually this 29<sup>th</sup> day of September, 2025.**

**L. N. MUTENDE**

**JUDGE**