

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. E1045 OF 2024

**ABSOLUTE ADVENTURES SAFARIS LIMITED.....
APPELLANT**

=VERSUS=

**PHILIP SOITA & ELIZABETH NASIMIYU (AS PERSONAL
REPRESENTATIVES OF THE LATE SOITA KHAEMBA
WABULAKU).....RESPONDENT**

**(Being an appeal from the Ruling of Hon. L. A. Mumassaba
(PM) in Milimani CMCC No. E2745 of 2022 delivered on 14th
August 2024)**

JUDGMENT

1. The trial court dismissed an application dated 13th June 2024 which was seeking to set aside an Exparte Judgment entered on 21st March 2024 against the Appellant in this appeal who was the 2nd Defendant.
2. The trial court found that the firm that acted for the Appellant did not file a notice of appointment.
3. The Appellant filed this appeal against the said Ruling delivered on 14th August 2024 on the following grounds:-

- (i) That the Learned Magistrate erred in law and in fact by failing to consider that the Appellant was not aware of the suit and never participated therein.**
- (ii) That the Learned Magistrate erred in law and in fact by failing to consider the Appellants was not served with pleadings.**
- (iii) That the Learned Magistrate erred in law and in fact by failing to consider that the alleged substitute service was not proper.**
- (iv) That the Learned Magistrate erred in law and in fact by failing to consider that the Appellants defense raised triable issues which would occasion grave injustices if the same is not heard on merit.**

4. The parties filed written submissions as follows:- the appellant submitted that the failure to file the notice of appointment in a timely manner was an inadvertent lapse that occurred in the course of preparing and filing the application.

5. The appellant acknowledged this error and assured the court that it was not a deliberate attempt to flout procedural requirements.

6. The appellant argued however that despite the argument, the oversight was rectified evidencing good faith and commitment to compliance with legal requirements.
7. The appellant argued that a notice of appointment though procedurally significant is fundamentally a formal communication. It neither confers nor curtails the advocate's capacity to act, nor does it affect the substantive rights of the parties.
8. That the lower court subsequently failed to strike the proper balance between procedural compliance and the broader quest for justice.
9. The decision to dismiss the Appellant's application on such a technical ground overlooks the constitutional guarantee of a fair hearing under Article 50(i) and disregards the statutory objective of expeditious and proportionate resolution of disputes under Section IA of the Civil Procedure Act.
10. The appellant submitted that the sacred principle of natural justice is that no individual or entity should be condemned unheard.
11. This foundational tenet of fairness is enshrined in Article 50(1) of the Constitution of Kenya, 2010, which guarantees every party the right to a fair hearing.

12. It is further fortified by Order 10 Rule 11 of the Civil Procedure Rules, which underscores the necessity of affording a defendant a fair opportunity to defend themselves before a judgment is entered against them.
13. The appellant submitted that one of the respondent's claims is that service was effected via email lack evidentiary backing.
14. That the law requires strict adherence to electronic service protocols as highlighted under Order 5 Rule 22B. the respondents failure to adhere to these mandatory requirements renders the alleged service defective.
15. That the absence of proper service thus deprived the appellant of the opportunity to defend itself and participate in proceeding violating its constitutional right to be heard under Article 50(1).
16. The insurer, as a corporate entity, cannot be treated as a substitute for the Appellant in this matter. Service upon the insurer, if it occurred, does not fulfill the legal requirement of properly notifying the Appellant, who is the rightful party to the suit.
17. The Appellant could not have acted to protect its rights without knowledge of the pending suit. The failure to serve the

Appellant directly cannot be construed as willful neglect or gross indifference on the part of the Appellant. Accordingly, the Respondent's failure to effect proper service is inexcusable, and the Appellant should not be unjustly penalized as a result.

18. The appellant submitted that in the instant case its draft defence raises several significant triable issues, including contributory negligence.
19. The Appellant alleges that the Plaintiff's claim disregards reckless conduct by the deceased, who, as a pillion passenger on motor vehicle KMDW 930D, engaged in behavior that contributed to the accident.
20. This issue, among others raised by the Appellant, cannot be dismissed as frivolous or inconsequential as it is a material matter that merits proper adjudication to ensure a just resolution of the dispute.
21. The respondent on the other hand submitted that the appellant was aggrieved by the decision of the lower court and not this court's decision.
22. That the court is yet to render its decision on the appeal lodged before the court by the appellant so there can be no record of appeal of the high court. it was thus their argument that the record of appeal is thus irredeemably defective. And in

principle the appellant has filed 2 records of appeal before this court one relating to the trial court and one relating to this appeal which is pending determination.

23. On whether the appellant was properly on record before the lower court the respondent submitted that there was no notice of appointment on record. The 2nd applicant was therefore unrepresented.
24. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.
25. In the present case Judgment had been rendered on the 21/5/2018 where there was a determination of the Court and therefore the provision of Order 9 Rule 9 were applicable herein. As per the provisions of Order 9 Rule 9, the correct procedure that was to be followed in the present case where the Applicant's Appeal had been dismissed, was that counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of

Advocates before filing the application to set aside the orders of the Court.

26. On the disputed service of pleadings the respondent argued that the person who was supposed to swear the supporting affidavit is indicated as Edinah Masanya. However, the person who swore the supporting affidavit dated 18/6/2024 was Michael Njoroge and so in principle there is no supporting affidavit to support the motion by the said Edinah Maseya.
27. The said Njoroge did not dispute service and does not claim that he was not served with pleadings. He only states that he was not aware of the suit. The respondent argued that a supporting affidavit is thus fundamental to an application where a party wishes to rely on exhibits to his application.
28. Under Order 51 Rule 4 of the Civil Procedure Rules states that every notice of motion shall state in general terms the grounds of the application and where any motion is grounded on evidence by affidavit a copy of any affidavit intended to be used shall be served. the respondent argued that this section is couched in mandatory terms and consequently the notice of motion lacks merit as it has no foundation to stand on as there is no affidavit by the person whose grounds of the motion is based on.

29. The sole issue for determination in this appeal is whether the trial court was right in dismissing the application dated 18th June 2024 which was seeking to set aside the Exparte Judgment entered on 21st March 2024.

30. The right to a fair hearing, as enshrined in Article 50(1) of the Constitution of Kenya, is a cornerstone of our judicial system.

31. The Constitution mandates courts to administer justice without undue regard to procedural technicalities.

32. The failure to file a notice of appointment, while a procedural lapse, did not in itself negate the advocate's authority to act for the client, nor did it prejudice the respondent in any material way.

33. This oversight, which was subsequently rectified, should not have been used as a basis to lock out the appellant from being heard on the merits of its application to set aside the judgment.

34. The trial magistrate erred in principle by elevating a procedural technicality—the failure to file a notice of appointment of advocates—above the substantive ends of justice.

35. Furthermore, the trial court failed to adequately consider the appellant's fundamental contention that it was not served with the summons to enter appearance.
36. The principles governing service are not mere formalities but are designed to ensure that a defendant is made aware of the suit and is afforded an opportunity to defend themselves.
37. Order 5 Rule 22B of the Civil Procedure Rules provides strict guidelines for service via email, requiring an affidavit of service that deposes to the fact that the advocate has received a positive response or confirmation.
38. The respondent's claim of email service was not substantiated with such evidence, rendering the purported service defective.
39. Where there is no proper service of summons, any judgment entered is irregular and must be set aside *ex debito justitiae*—as a matter of right.
40. The appellant, being a corporate entity distinct from its insurer, could not be expected to defend a suit of which it had no knowledge.
41. Its failure to participate was therefore not willful but was a direct consequence of the respondent's failure to effect proper service.

42. Finally, the appellant's draft defence raises triable issues. A defence does not have to be incontrovertible to be considered triable; it only needs to raise a bona fide issue that deserves a hearing.
43. A "triable issue" is one which raises a prima facie defence and should not be struck out unless it is hopeless.
44. To deny the appellant an opportunity to present this defence at a trial would occasion a grave injustice, as it would be condemned to pay a substantial sum without having its day in court.
45. The overriding objective of the Civil Procedure Act, as captured in Section 1A and 1B, is to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.
46. This objective is best served by allowing the suit to proceed to a full hearing on its merits, where all parties can present their evidence and be heard.
47. For these reasons, the appeal is merited and it is hereby allowed and the ex parte judgment entered on 21st March

2024 is set aside as well as the subsequent ruling of the trial court delivered on 14th August 2024.

48. The appellant is granted unconditional leave to file and serve its defence within 14 days from the date the lower court file, Milimani CMCC No. E2745 of 2022, is received at the Chief Magistrate's Court for hearing on its merits.

49. The Appellant to pay the Respondent thrown away costs of Kshs.20,000 before the case is heard,

50. ORDERS TO ISSUE ACCORDINGLY.

**Dated, signed and delivered this 7th day of November 2025
virtually via MT at Voi High Court.**

**ASENATH ONGERI
JUDGE**

In the presence of:-

Court Assistants: Millicent/Mabishi

.....**for the Appellant**

.....**for the Respondent**