



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CIVIL SUIT NO. 306 OF 2017

DANIEL **SUMBI.....1ST**
PLAINTIFF

WINROSE **MWIKY.....2ND**
PLAINTIFF

AND

NYANDUSI **KERONYA.....**
DEFENDANT

RULING

1. The notice of motion before this court is dated 7/03/2025 and has been filed by the defendant, who has moved it within the provisions of **Articles 50 & 159 (2) (d) & (e)** of the **Constitution of Kenya, Sections IA, IB, 3A** and **95** of the **Civil Procedure Act, Orders 10 Rule 11, 22 Rule 22 (1), 45 Rule 1** and **50 Rule 6** of the **Civil Procedure Rules (CPR)** and all other enabling provisions of the law. He seeks the following reliefs from this court:

- a. Spent.**
- b. Spent.**
- c. This honourable court be pleased to set aside and/or vacate the interlocutory judgment and decree dated 18/10/2023 and all consequential orders and proceedings thereto in the current suit against the defendant.**
- d. This honourable court be pleased to order that the pleadings in the matter be served upon the defendant.**
- e. The defendant be granted leave to file his defence and other necessary responses.**
- f. The process server who occasioned a falsified affidavit of service be summoned to be cross-examined on averments culminating in the entry of interlocutory judgment.**
- g. This honourable court be pleased to issue any such or further orders as it may deem necessary in the interest of justice.**
- h. The costs of this motion to be provided for.**

2. The motion is supported by several grounds on the face thereof and the defendant's supporting affidavit, sworn on the instant date. A summary of the grounds in support of the motion are as follows: a) On 5/03/2025, he became aware of the warrants of attachment dated 4/03/2025 for a decretal sum of Kshs. 1,651,438/-, which originate from a decree issued

on 18/10/2023; b) he has never been served with any summons to enter appearance and/or any pleadings thereto, as required by **Order 5** of the **Civil Procedure Rules (“CPR”)**, and therefore, the impugned judgment was irregular and breaches the principles of natural justice as enshrined in **Article 50** of the **Constitution**; and

3. C) The defendant had not been served with a notice of entry of judgment as required by **Order 22 Rule 6** of the **CPR** before the service of the warrants of attachment and proclamation notice. Lastly, d) he will be prejudiced as the impugned judgment had been entered against him without notice, and he had moved the court promptly without undue delay. He also availed the warrants for sale and the proclamation notice for assessment by this court.
4. On service, the plaintiffs, through the replying affidavit of the 1st plaintiff deposed on 28/03/2025, contested the motion and explicitly stated that: a) the defendant, who was employed by the Department of Defence (**“DOD”**) in Hurlingham, Nairobi at the time, was unreachable, making service upon him impossible; b) consequence, by a court order dated 24/4/2018, the plaint and summons were served via substituted means, specifically through advertisement in the Standard Newspaper on 27/04/2018 and 3/05/2018; and
5. C) Subsequently, the case was scheduled for a hearing and proceeded undefended and judgment was entered in favour of

the plaintiffs; d) following amendments to the **CPR** permitting service via *WhatsApp* and email, he served the notice of entry of judgment and execution on 22/01/2025 on the defendant, with a subsequent reminder issued on 30/01/2025. However, the defendant remained unresponsive, which led to an application for warrants of attachment. Finally, e) the defendant and his counsel approached him to negotiate a settlement of the decretal amount. In his view, the defendant was dishonest and unworthy of the orders sought.

6. When parties appeared before this court on 29/05/2025, **Ms Nyariki**, representing the defendant, argued the motion orally and urged the court to grant it. In contrast, **Mr. Sikata**, representing the plaintiffs, relied on the court record and the replying affidavit. After carefully considering the motion, its grounds, affidavits, and the rival submissions, the only issue that arises for resolution is **whether the judgment dated 18/10/2023 and the consequential orders should be set aside in the circumstances of the case.**
7. The 1st defendant contends that the judgment constituted an irregular default judgment on the basis that he was purportedly never served with notices, pleadings, or summons. Accordingly, he duly petitioned this court for intervention pursuant to **Order 10 Rule 11** of the **CPR**, which authorises the court to set aside or vary such judgment and any subsequent decree or order on equitable terms. To counter this argument, the plaintiff's counsel asserts that the judgment

was proper, as demonstrated by return of service, and maintains that the motion should be viewed from the perspective of a regular default judgment.

8. The question that subsequently arises is whether the impugned judgment is an irregular or regular default judgment, and if so, what orders may be issued by the court. To address this, guidance is sought from the Court of Appeal decision of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**, which distinguished these types of judgments and the respective orders that ensue therefrom.
9. In this decision, the court described a regular default judgment as one issued when a defendant has been adequately served with a summons to enter appearance, but, for various reasons, fails to appear or file a defence, leading to a default judgment. **Under Order 10 rule 11** of the **CPR**, such a defendant has the right to request the court to set aside the default judgment and to grant him leave to defend the case.
10. In such a case, the court has complete discretion to decide whether to set aside the default judgment. It considers factors like the reason for the defendant's failure to file a memorandum of appearance or defence, the time elapsed since the judgment was entered, whether the proposed defence presents triable issues, the potential prejudice to each party, and whether setting aside the judgment serves the

interests of justice, among other considerations. **See also Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR) and Mbogo v Shah [1968] EA 93.**

11. Regarding an irregular default judgment, it pertains to a situation where a judgment has been entered against a defendant who has neither been served nor properly served with a summons to appear. In such circumstances, the default judgment is void *ab initio*. The court is not obliged to be prompted by a party; upon becoming aware of the irregularity, the court may *sua sponte* set aside the judgment. Furthermore, the court will not consider whether the intended defence raises triable issues or whether there has been undue delay in requesting the setting aside of the irregular judgment.

12. Turning to the record, the suit was filed in 2017, approximately eight years ago. On 5/04/2018, the plaintiff's counsel informed the court that the defendant had been evasive, and the court permitted service by substituted means, which was duly effected in accordance with the court's directions. The defendant was given 21 days to enter an appearance and file a defence, but he failed to do so. The matter then proceeded to formal proof, and judgment was subsequently delivered. Evidence of such service is contained in the return of service of 18/06/2018, which shows pleadings and summons were served on 3/05/2018. The defendant has not contradicted this service, and this court finds that the judgment is a regular default judgment.

13. When faced with such judgments, the court exercises unfettered discretion in deciding whether or not to set aside the default judgment, and these non-exhaustive principles were summarised in **James Kanyiita Nderitu (Supra)** in the following manner: -

“...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.”

14. In this case, the defendant has not provided any grounds to justify the court's exercise of discretion in his favour. Furthermore, he has not submitted any draft defence for assessment to determine whether he has any triable issues or a *prima facie* defence that warrants a trial. The defendant has not denied that the notice of entry of judgment and execution was properly served upon him via his telephone no. on 22/01/2025. Additionally, he has not denied contacting the plaintiffs to settle the decretal sum. The impugned judgment was rendered approximately one and a half years to the time the motion was filed, and he has not explained why he did not

promptly initiate proceedings upon the service of the notice of judgment and execution. Moreover, this is a very old matter, and the plaintiffs will be significantly prejudiced if the orders sought are granted.

15. On the premises, this court is not persuaded that the defendant merits an order to set aside the judgment. It determines that the notice of motion dated 7/03/2025 lacks merit and is consequently dismissed with costs awarded to the plaintiffs. The plaintiffs' costs of the motion are assessed at Kshs. 15,000/=.

Orders accordingly.

Delivered and Dated at Machakos this 11th day of November, 2025.

**HON. A. Y. KOROSS
JUDGE
11.11.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Mr. Sikuta for plaintiff/respondent.

N/A for defendant.

ORIGINAL