

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCLC NO. E043 OF 2024

**HALAKE
WAQO.....PLAINTIFF/RESPONDENT**

DIDA

VERSUS

**TUNASCO INSAAT ANONIN
SIRKET
LIMITED.....DEFENDANT/APPLICANT**

RULING

1. Before this court for determination is the notice of motion dated 13th April, 2025 filed by the defendant/applicant and it is expressed to be brought under **Articles 25, 48, 50 (1), 159 (2) (d)(e) of the Constitution, Sections 1A,1B and 3A of the Civil Procedure Act and Order 10 Rule (6) (9), and Order 51 Rule (1) of the Civil Procedure Rules, Section 10 of the Judicature Act and Rule 3(1) and (2) of the High Court (Practice and procedure rules)**, seeking the following orders:-

- 1. *Spent.***
- 2. *That the firm of Musyoki Musango & Co. Advocates be allowed to come on record on behalf of the applicant.***
- 3. *That the honourable court be pleased to stay and/ or arrest the intended execution by the plaintiff pursuant to the request for judgment endorsed on 8th April 2025 pending the hearing and determination of this application.***

- 4. That the honourable court be pleased to set aside the interlocutory judgment entered on 8th April, 2025 and the matter be set down for hearing afresh.**
 - 5. That the draft defence herein be deemed as duly filed and leave be granted to the defendant/ applicant to file its notice of preliminary objection, list of documents, list of witnesses, witness statement out of time to defend the case presented by the plaintiff/ respondent.**
 - 6. That the honourable court be pleased to give such order that would be just and fit to grant in the circumstances for the facilitation of the ends of justice.**
 - 7. That costs be in the cause.**
2. The application is premised on the grounds *inter alia* that the defendant/applicant was not served with the mention notices and neither was the same filed. The application was supported by the affidavit of Abdulwalli Shariff, the director of the defendant/ applicant sworn on even date. The defendant/applicant deposed that together with the plaintiff/respondent, they have been on amiable talking terms with respect to returning the title deed.
- Further, that he does not know Abel Marube Ondieki or any

other person from the firm of Masangya & Co. Advocates. The defendant/applicant deposed that it has never been served with any of the mention notices, and that the plaintiff/respondent's approach is trial by ambush.

3. The defendant/applicant deposed that there will be no prejudice if the court sets aside the interlocutory judgment, and that the draft defence and counterclaim raises weighty issues.
4. The application was opposed vide the replying affidavit of the plaintiff/respondent sworn on 11th July, 2025. The plaintiff/respondent deposed that service of the pleadings was properly effected by Abel Marube Ondieki as per the affidavit of service sworn on 9th February, 2024. He deposed that the assertion that the defendant/applicant did not have a secretary at the material time is unsubstantiated.
5. The plaintiff/respondent deposed that the defendant/applicant is keen on defeating justice by delaying the justice system and preventing him from getting what is owed to him. Further, that there is no prejudice suffered as the defendant/applicant has never shown interest in defending this suit.
6. The court directed that the application be canvassed by way of written submissions. None of the parties filed their written

submissions. Be that as it may, I have considered the application and the reply thereof. The issue for determination is *whether the court ought to set aside the interlocutory judgment entered on 8th April, 2025.*

7. To begin with, the prayer seeking the firm of Musyoki Musango & Co. Advocates to come on record on behalf of the defendant/applicant has not been contested. Prayer 2 of the application is hereby allowed as prayed.
8. **Order 10 Rule 11** of the **Civil Procedure Rules** provides that where judgement 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. In the instant case, the defendant/ applicant argued that it was never served with the pleadings herein, and that the affidavit of service bears the name of a receptionist by the name Lillian who was not working at the office at the time. The defendant/applicant further contended that the mention notices were never served and it is only the 10th mention notice that was duly served upon them.
9. The question for consideration at this stage is whether the judgment entered was regular or irregular. From the records contained in this file, there was no memorandum of appearance

filed at the time the judgment was entered. It is therefore clear that the judgment entered was irregular. In this case, the affidavit of service sworn on 9th February, 2024 by Abel Marube Ondieki deponed that a secretary by the name Lillian directed the process server to the office of the Directors where he met Mr. Shariff. On the other hand, the plaintiff/respondent argued that the claim that the said Lillian was not a receptionist has not been substantiated. While this issue has been contested, the court at this stage is unable to confirm whether indeed the said Lillian is a receptionist at the said office.

10. At this stage, and bearing in mind that the decision to set aside interlocutory judgment is a discretion to be exercised by the court, I am persuaded to rely on the decision of the Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**, where it was stated as follows:-

“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. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

“[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.”

The approach of the courts where an irregular default judgment has been entered is demonstrated in the following cases. In Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010, the High Court expressed itself thus:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

Earlier in Kabutha v. Mucheru, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he then was) had expressed the principle thus:

“[W]ith respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.

(See also, Bouchard International (Services) Ltd v. M’Mwereria [1987] KLR 193, Remco Ltd v. Mistry Jadva Parbat & Co. Ltd. & 2 Others [2002] 1 EA 233 and Baiywo v. Bach [1987] KLR 89.”

11. Looking at the cited authority, and being mindful of the duty of this court which is ensure that no party who has approached the court is removed from the seat of justice, I find it in the interest

of both parties that the interlocutory judgment is set aside. I say so because the instant application has also been made without delay, and in fact the defendant/applicant filed a memorandum of appearance on 13th April, 2025 after this order was issued. The defendant/applicant has also filed its defence which in my view, deserves a chance to be tested in court.

12. Having said the above, it is also necessary to comment on the jurisdiction of this court as pleaded in the plaint. Paragraphs 3, 4 and 5 of the plaint dated 25th January, 2025 states as follows: -

“3. The plaintiff avers that he was approached by the defendant through its director who sought his assistance in providing to the defendant a security guarantee in favour of the defendant who had been awarded a tender from the Kenya Rural Roads Authority (KERRA) to upgrade to bitumen standard and maintain the Maralal-Losuk road vide notification award dated 22nd February, 2021.

4. The plaintiff avers that the parties agreed and willing entered into an agreement dated on the 30th June, 2021 wherein the defendant to provide his property being Land Reference Number 7918/782 Isiolo (Title Number I.R 202945) as a performance guarantee in favour of the defendant as per the terms of the agreement.

5. The plaintiff avers that thereafter a charge in favour of the interested party was registered against his property being Land Reference number 7918/782 (Title Number I.R. 202945) to a tune of Kenya Shillings 59,500,000/- being the performance guarantee amount.”

13. In the plaint, the plaintiff is seeking the following prayers: -

- i. The defendant be ordered to provide an alternative guarantee and to cause removal of the charge on Land Reference Number 7918/782 Isiolo (Title Number I.R. 202945) in favour of the interested party.***
- ii. Payment Kshs. 38, 050,000/-.***
- iii. Damages for breach of contract.***
- iv. Interest on (a) and (b) above from the date of filing of this suit.***
- v. Cost and interest at court rates from the date of the decree herein.***
- vi. Any other relief which this honourable court deems fit to grant.***

14. Looking at the paragraphs reproduced from the plaint and the prayers sought, the nature of dispute arising between the parties is commercial in nature. There is no dispute as to the interest in the title or ownership of the property. In my view, this is an issue

that ought to be heard and determined by the High Court and not the Environment and Land Court.

15. From the above, this court finds merit in the notice of motion dated 13th April, 2025 and grants the following orders: -

- i. The firm of Musyoki Musango & Co. Advocates is hereby allowed to come on record on behalf of the defendant/ applicant.***
- ii. The interlocutory judgment entered on 8th April, 2025 is hereby set aside.***
- iii. The draft defence is deemed as duly filed upon payment of the requisite filing fees.***
- iv. This file is hereby transferred to the High Court in Nanyuki for further directions.***
- v. Costs be in the cause.***

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 13TH DAY OF NOVEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
13/11/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Musyoka for the Defendant/Applicant - present

No appearance for the Plaintiff/Respondent