REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. **E169** OF 2024

SAMUEL MBUGUA NJUGUNA

(Being the Chairman of Thiururi Coffee Factory……...……..…… APPELLANT

-VERSUS-

PELINGS SECURITY LIMITED.....1ST RESPONDENT

KOMOTHAI COFFEE GROWERS CO-OPERATIVE SOCIETY…2ND RESPONDENT

(Being an appeal from ruling and orders of the Small Claims Court at Thika (Hon Silvia A. Wayodi Kamau RM) civil case number E735 of 2022 dated 20th June 2024)

JUDGMENT

The appellant who was the 1st respondent in the trial court approached this court on appeal after his application to set aside judgment entered against him on 1st November 2022 for failure to enter appearance or file response to the claim was declined. In his application dated 13th March 2024, the appellant had claimed that he had not been served with court documents and that he had a good defence to the claim. In the ruling dated 20th June 2024, the trial court held that there was inordinate delay in bringing the application and proceeded to dismiss the application.

Being aggrieved by the ruling, the appellant lodged a memorandum of appeal dated 15th July 2024 which raises the following grounds;

1. ***THAT*** *the learned trial Adjudicator erred in law in dismissing the appellant's application dated 13/03/2024 despite the appellant having met all the requirements needed under the law for grant of such an application.*

2. ***THAT*** *the trial Adjudicator erred in law in failing to have regard and or consider application dated 13/3/2024 thus exposing the appellant to absolute danger of suffering irreparable damage.*

3. ***THAT*** *the trial Adjudicator erred in law in failing to find that the appellant and the 2nd Respondent are two distinct entities and that the appellant could not be made to carry the burden of the 2nd respondent even way after he had ceased being the 2nd respondent's employee and/or chairman.*

4. ***THAT*** *the trial Adjudicator erred in law in holding that the service of summons was in order despite glaring inconsistencies as pointed out by the appellant in his application of 13/3/2024.*

5. ***THAT*** *the trial Adjudicator erred in law in finding that the appellant had taken inordinately too long to apply to set aside the default judgement despite the appellant informing court that he was never served with summons thus didn't have knowledge of existence of the claim and/or the default Judgement.*

The application was said to be brought under Sections 1A and 1B of the Civil Procedure Act, Order 10 Rule 11, Order 22 Rule 22, Order 45 and Order 50 Rule 6

of the Civil Procedure Rules 2010 and all other enabling provisions of the law. These Sections and Rules are not applicable in proceedings before the Small Claims Court. The procedure applicable is provided in the Small Claims Courts Act and the Small Claims Court Rules. It therefore follows that the appellant cited the wrong provisions of the law. However, this court holds the position that citation of the wrong provisions of the law is not fatal to applications or proceedings before a court of law. What is important is that the parties identify their rights and reliefs known and available in law which they seek from the court. I will therefore treat the matter as if the application had been brought under Section 43 of the Act and Rule 11(4) of the Small Claims Court Rules which provide as follows;

Section 43

'The Court may on the application of any party to the proceedings set aside any of its orders and make such further orders as it thinks just.'

Rule 11(4)

'The Court may set aside a default judgment or any consequential orders given under this rule on the written request of any party that is aggrieved by the decree or order if the Court is satisfied, on evidence given by the applicant, and on hearing the other parties to the proceeding, that-

(a) the default was inadvertent;

(b) the applicant has a valid defence with a probability of success; or

(c) there are sufficient grounds to warrant setting aside the default judgment, decree or order.'

This being a first appeal, this court shall relook at the evidence produced by the appellant before the lower court in support of his application and come to its own

independent conclusion. That entails going through the application and the supporting affidavit, analysing the reasons given by the appellant against the opposition by the respondent and making my own independent conclusion on whether the court should have allowed the application.

It is an established principle of our jurisprudence that, a court will set aside a default judgement as a matter of right if it is satisfied that the judgement was irregular. An irregular judgement is one which was entered in a matter where the defendant or respondent was not served with court summons or documents or where it was entered erroneously or inadvertently or for some reason a necessary step was not taken when the same was entered.

A court will in its discretion set aside a regular judgment where it is shown that although the respondent was served and all the requisite steps had been taken, the respondent had excusable reasons for failure to enter appearance and/or where the court is convinced that the respondent has a good defence to the claim. In setting aside a regular judgment, it is always just and fair to compensate the claimant for the inconveniences suffered in the process.

In ***James Kanyiita Nderitu & another v Marios Philotas Ghikas & another (2016) KECA 470 (KLR),*** the Court of Appeal held as follows;

> *'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).***

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 this case, the appellant claimed that the judgement against him was irregular because he was not served with the statement of claim and the necessary notice to appear. The appellant in explaining the reasons for not filing response to the claim in time averred that he was not served with the claim documents. He also averred that he had a good defence in that he was not the chairman of Thiururi Coffee Factory at the time when the service was alleged to have been served and he could not be forced to carry the burdens of the said factory.

On the side of the 1st respondent who was the claimant in the lower court, it was sworn that the appellant was properly served and reliance was put on a certificate of service sworn by one Esther Kabura averring to the method of service. It was also averred that the appellant and the 2nd respondent appointed the firm of Mwakireti, Mutinda & Co. Advocates to act for them and that on 18-10-2022 a Mr. Onesmus Mwakireti appeared in court and stated that he was appearing for the said parties and asked for time to file a response after which they never appeared again nor filed the response following which interlocutory judgement was entered. Thereafter the said advocates were served with mentions and hearing notices. The 1st respondent also deponed that the application was brought with inordinate delay. It was also averred that the appellant did not have a good defence to the claim as he executed the agreement which formed the basis of the cause of action.

I have read the submissions of the appellant dated 22nd May 2025 and those of the 1st respondent dated 13th June 2025. To establish whether the appellant was served, the court needed to interrogate the certificate of service and if in doubt it would on application or suo moto call for clarification from the process server. The appellant also had a right to demand attendance of the process server for cross-examination which he did not do. Where an applicant fails to seek to exercise his rights to cross-examine the process server, he cannot come to the appellate court and complain that the court did not call for the process server's cross-examination like the appellant has done in his submissions.

The certificate of service which led to the entry of judgment shows at paragraph 3 that on 21-09-2022, the process server caused electronic mail service on the appellant's telephone number 070376xx50 which was not successful and that when

she called the appellant, he did not pick her calls. Following the failure, she on 28-09-2022 proceeded to Thiururi Coffee Factory in Kiambu but found the factory closed which forced her to proceed to the headquarters at Komothai Coffee Growers Cooperative Society Ltd where she found a lady receptionist called Mary Wairimu who upon explanation of the purpose of her visit made a call and confirmed to her that she had authority to receive correspondences on behalf of the factory. The receptionist received the mention notice and statement of claim by affixing the factory's rubber stamp.

The above is the much the process server swore. The process server did not explain how she ascertained that the telephone number belonged to the appellant neither was there proof of the calls or the messages she alleged to have made or sent to the said number. She also did not explain any other efforts she made to reach the appellant in person. She did not explain the relationship between the appellant and the 2nd respondent whose stamp appears on the mention notice and the statement of claim which was received by the aforesaid receptionist. Again, the certificate indicates that the receptionist had authority to receive correspondence on behalf of the factory but it is not clear whether the factory being referred to in this paragraph was the Thiururi or the 2nd respondent and what relationship existed between the two factories.

As rightly submitted by the appellant, at the time of service referred to, the 2nd respondent had not been joined in the statement of claim. The 2nd respondent was joined vide the amended statement of claim filed on 6-10-2022 yet the service upon it was on 28-09-2022. With this scenario, it is doubtful that the appellant was actually served with the statement of claim or first mention notice.

The 1st respondent argues that the fact that a firm of advocates filed notice of appointment showing that it was acting for the appellant and the 2nd respondent is sufficient proof of service. True, the notice of appointment was filed on 18-10-2022 which was before the interlocutory judgment was entered. There is nothing in the notice of appointment to show that the appellant personally gave instructions to the said advocates. I do not think that a notice of appointment in the circumstances of this case would satisfy the requirements for proof of service. In any event, the interlocutory judgment was not entered on strength of the notice of appointment but the certificate of service which I have found to be insufficient.

The trial court did not in its ruling state that it examined the contents or correctness of the certificate of service. Her ruling indicates that her reasons for denying the application was that there was inordinate delay. She did not consider that there was no proof that the appellant was aware of the claim and decided to ignore the proceedings. It is my finding that by failing to do this, the Honourable Adjudicator fell into an error and this court would be justified to interfere with her discretion. It was injudicious for the Adjudicator to fail to interrogate the issue of service which is a fundamental right of litigants. A right to fair hearing is inalienable and cannot be limited. No one should be condemned unheard however weak their case looks.

Having found that the appellant was not served, I do not think that it is necessary for me to evaluate whether the appellant had a good defence. The entry of judgment was irregular and should be set aside *ex debito justitiae*. In the ***James Kanyiita Nderitu & another v Marios Philotas Ghikas & another (Supra),*** the court stated that;

> *'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.'

In the final analysis, this appeal succeeds and the trial court's ruling dated 24th June 2024 is hereby set aside and substituted for an order allowing the appellant's application dated 13th March 2024 in terms of prayers 4 and 6. The appellant shall file his response to the claim within seven days from the date of this ruling. The lower court file shall be transmitted to the said court for mention and appropriate directions within the next fourteen days. The costs of this appeal are awarded to the appellant.

Dated, signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Tumu holding brief for Mungai for the appellant and Mr. Chege for the respondent.