



**Kuria v Mwaura & 3 others (Commercial Case E032 of 2025)
[2025] KEHC 17231 (KLR) (Commercial and Tax) (20 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E032 OF 2025**

PM MULWA, J

NOVEMBER 20, 2025

BETWEEN

MARY WAIRIMU KURIA APPELLANT

AND

KIMANI KIRORE MWAURA 1ST RESPONDENT

STEPHEN KINUTHIA MBURU 2ND RESPONDENT

STEPHEN KARANJA KANGETHE 3RD RESPONDENT

VIRTUAL AUCTION LIMITED 4TH RESPONDENT

*(Being an appeal against the ruling and order of Honourable
Becky Cheloti (PM) delivered on 24th January 2025)*

JUDGMENT

1. The Appeal before me is against the ruling of the trial court dismissing the Appellant's application to set aside an interlocutory judgment entered on 14th March 2024 for the sum of Kshs. 6,285,000. The interlocutory judgment arose from the failure of the defendants to file a defence. The Appellant contends that she was neither served with a summons to enter an appearance nor did she instruct any advocate to represent her in the suit.
2. The Appellant filed an application in the trial court seeking to have the interlocutory judgment set aside and for leave to file a defence. This application was dismissed by the court on 28th January 2025. Dissatisfied with the dismissal, the Appellant filed this appeal by a memorandum dated 4th February 2025.



3. The memorandum of appeal raised nine grounds which, in summary, challenge the findings of the learned magistrate on service of summons, representation by counsel, regularity of the interlocutory judgment, and the right of the Appellant to be heard.
4. The appeal was heard by way of written submissions.

Issues for Determination

5. Having considered the trial court record, the grounds of appeal and submissions of the parties, the following issues arise for determination:
 - i. Whether the trial court erred in dismissing the application to set aside the interlocutory judgment on the basis that the appellant was not served;
 - ii. Whether the interlocutory judgment was regular and properly entered; and
 - iii. Whether the appellant is entitled to unconditional or conditional leave to defend the suit.

Analysis and determination

6. The application dated 22nd August 2024 sought to set aside the interlocutory judgment entered together with the consequential orders.
7. Order 10 Rule 11 of the Civil Procedure Rules empowers this court to set aside or vary a default judgment entered in default of appearance of defence. It provides:

“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.”
8. This being a first appeal, this Court is guided by the principles laid down in *Abok James Odera t a A.J. Odera & Associates v John Patrick Machira t a Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal restated that a first appellate court has the duty to re-evaluate, reassess, and re-analyze the evidence on record and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses.

Whether the Appellant was served with Summons

9. Service of summons to enter appearance is a fundamental requirement for the assumption of jurisdiction over a defendant. Order 5 Rule 1(1) and (2) of the Civil Procedure Rules, 2010 provide that when a suit has been filed, summons shall issue to the defendant requiring appearance within the time specified therein. Rule 15(1) further provides that service must be effected personally unless the court orders otherwise.
10. The Appellant has maintained that she was never served and that no affidavit of service was ever produced before the trial court to demonstrate compliance with Order 5.
11. The Respondent, on the other hand, contended that service was duly effected, though I find no process server's affidavit was exhibited in the lower court proceedings.



12. It is trite law that a judgment entered without proper service of summons is irregular and must be set aside *ex debito justitiae*, as a matter of right. In *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR, the Court of Appeal held that:

“Where a default judgment is irregularly entered, the same ought to be set aside *ex debito justitiae* as a matter of right...The court does not exercise discretion in such a case.”

13. Similarly, in *Kenindia Assurance Co. Ltd v Commercial Bank of Africa Ltd* [2003] eKLR, the court emphasized that a party must be duly served to confer jurisdiction. Where service is not proved, the proceedings and judgment founded thereon are a nullity.

14. In the present case, the trial court appears to have relied on the mere assertion that the Appellant was aware of the proceedings through counsel, allegedly on record. However, the Appellant has consistently denied having instructed the said firm of advocates. No letter of instruction, notice of appointment, or affidavit from the alleged counsel was placed before the court to establish such authority.

15. In the absence of a valid affidavit of service, I find that the learned magistrate erred in holding that the Appellant had been duly served and represented.

On the regularity of the interlocutory judgment

16. The interlocutory judgment was entered for a sum of Kshs. 6,285,000. The record reveals that the plaintiff sought recovery of the said sum allegedly advanced as a loan, together with interest. The question arises whether this constituted a liquidated demand within the meaning of Order 10 Rule 4(1) of the Civil Procedure Rules.

17. A liquidated demand must be one whose amount is either agreed upon or ascertainable by a fixed formula without further evidence. A claim cannot be said to be liquidated unless it is a specific sum that has been ascertained or is capable of being ascertained without further evidence.

18. The alleged loan agreement was disputed, and its terms were not admitted or proved at the interlocutory stage. It follows that the claim required proof through evidence and was therefore not liquidated. Entry of an interlocutory judgment for a liquidated amount in such circumstances was therefore irregular.

19. The main concern of the court is to do justice to the parties, and that a judgment obtained in default should be set aside if the defendant demonstrates a reasonable defence on the merits.

On whether the Appellant should be granted leave to defend

20. The draft defence annexed to the Appellant’s application raised triable issues, including the existence and validity of the alleged loan, the manner of disbursement, and the alleged default. The presence of even a single bona fide triable issue is sufficient ground to grant leave to defend (*See Tree Shade Motors Ltd v D.T. Dobie & Co. (K) Ltd & Another* [1995–1998] 1 EA 324).

21. Moreover, Article 50(1) of *the Constitution of Kenya, 2010* guarantees every person the right to a fair hearing. It would therefore be unjust to deny the Appellant an opportunity to defend herself in a case where service was doubtful and where triable issues exist.

22. In view of the foregoing analysis, I find that the interlocutory judgment entered on 14th March 2024 was irregular and should have been set aside *ex debito justitiae*.

23. Accordingly, I make the following orders:



- i. The appeal is hereby allowed.
- ii. The ruling and order of the trial court dated 28th January 2025 are hereby set aside.
- iii. The interlocutory judgment entered on 14th March 2024 is vacated.
- iv. The Appellant is granted leave to file and serve her statement of defence within fourteen (14) days from the date hereof.
- v. Costs of this appeal shall abide the outcome of the suit before the lower court.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 20TH DAY OF NOVEMBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Kangethe for Appellant

Court Assistant : Carlos

