

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
JUDICIAL REVIEW CASE NO. E006 OF 2024

PHILIP MUCHUKI.....1ST

APPLICANT/RESPONDENT

JOSEPH MWAURA.....2ND

APPLICANT/RESPONDENT

VERONICA WANGUI.....3RD

APPLICANT/RESPONDENT

VERSUS

GEORGE KOINE MARUGU.....1ST

RESPONDENT/APPLICANT

MARY NJAMBI MBURU.....2ND

RESPONDENT/APPLICANT

JACKSON MWAURA MUCHUKU...3RD

RESPONDENT/APPLICANT

FRANCIS KIMUHU.....4TH

RESPONDENT/APPLICANT

APOLLO NDERITU MURIITHI.....5TH

RESPONDENT/APPLICANT

THE JUJA SUB COUNTY TRADE OFFICER.....6TH

RESPONDENT

COUNTY ATTORNEY, KIAMBU COUNTY.....7TH

RESPONDENT

R U L I N G

Brief facts

1. The application dated 17th June 2025 seeks for orders of setting aside of the judgment dated 23rd May 2025, the decree dated 10th June 2025 and all consequential orders. The applicants further seek for the case to be re-opened to allow them present their response to the application dated 17th June 2024.
2. The ex parte applicant/respondents filed a Replying Affidavit dated 2nd July 2025 in opposition to the application.

1st - 5th Respondents' /Applicants' Case

3. The applicants state that the judgment dated 23rd May 2025 was given without sufficient material facts and misapprehension as they were not served yet the respondent had fully participated in the Juja market election and lost by becoming position two. The applicants state that they were only served with the decree on 13th June 2025.
4. The applicants aver that the elections were conducted fairly, all due process and notice were issued to the participating parties by CEC Trade Department Kiambu County. Following the elections, the applicants state that they all got appointment letters from the county government as per the law subscribed on market management committee elections.

5. The applicants argue that the affidavit of service claiming to have served upon them is an absolute farce and needs to be re-examined by the court and the process server therein cross examined. The applicants further argue that they stand to suffer irreparable harm as there is imminent threat of removal from office without just cause.

The 1st - 4th Applicants/Respondents' Case

6. The respondents state that they duly served the applicants with the application both physically and through WhatsApp but they deliberately chose not to participate in the proceedings. The 1st respondent states that he did not participate in the alleged election.
7. The respondents aver that judgment is regular and properly entered and the same should not be disturbed.
8. The respondents state that the elections were not conducted fairly and the 6th respondent had no legal right to call and conduct elections. Further the purported calling and conduct of elections of the officials of the Juja modern market traders by the County Government was unlawful and illegal. Additionally, the County of Kiambu cannot impose leaders on the Juja modern market traders.
9. The respondents aver that the applicants have confirmed in their affidavit that they were represented by an advocate who failed to update them on the happenings and thus they cannot allege that they were not served.

10. The respondents argue that if the applicants are aggrieved by the judgment, they ought to lodge an appeal.

11. Parties put in written submissions.

The Applicants' Submissions

12. The applicants rely on **Article 50(1) of the Constitution** and the cases of **Oluoch Eric Gogo vs Universal Corporation Ltd [2015] eKLR** and **Shadrack arap Baiwo vs Bodi Bach [1987] eKLR** and submit that they were condemned unheard as the respondents proceeded to obtain judgment without any evidence of proper service. The applicants further rely on the decisions in **Patel vs East African Cargo Handling Services Ltd [1974] EA 75**; **Shah vs Mbogo & Another [1967] EA 116** and **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR** and submit that the court has unfettered discretion to set aside *ex parte* judgments where it is shown that failure to appear was due to an excusable mistake, inadvertence or want of service. Due to lack of service by the respondents, the applicants argue that they should not be punished for a procedural lapse not of their making.

13. The applicants argue that the proceedings leading to the judgment were tainted by fraudulent conduct, collusion and lack of candor by the respondents. The respondents

deliberately misled the court into proceeding *ex parte* knowing they had not served them.

14. The applicants submit that the subject matter of the proceedings relates to the management of Juja Market, a function that squarely falls under the County Government of Kiambu and its sub county trade office under the Fourth Schedule of the Constitution and thus the proceedings were without jurisdiction *ab initio* and any resultant judgment or decree is null and void.
15. The applicants refer to **Article 159(2)(d) of the Constitution** and the case of **Richard Ncharpi Leiyagu vs IEBC & 2 Others [2013] eKLR** and submit that the right to be heard is a fundamental principle of justice and denying a litigant that right ought to be the very last resort. The applicants argue that no prejudice will be occasioned to the respondents if the judgment is set aside and the matter is heard on its merits.

The Respondents' Submissions

16. The respondents submit that they served the 1st - 5th applicants but they chose not to participate in the proceedings. The respondents rely on the cases of **James Kanyiita Nderitu & Another vs Mario Philotas Ghikas & Another [2017] eKLR**; **Patel vs East Africa Cargo Handling Services Ltd (1974) EA 75** and **Wachira Karani vs Bildad Wachira [2016] eKLR** and submit that setting aside regular judgment is at the discretion of the court and the applicants ought to

demonstrate sufficient cause for setting aside a regular judgment. The respondents argue that the applicants have not shown any sufficient cause as they have not established any accident, inadvertence or excusable mistake or error to enable the court exercise its discretion in their favour. Further, the applicants have failed to provide any valid reasons for not filing their defence in time which does not warrant exercise of the court's discretionary power to set aside the judgment.

The Law

Whether the application has merit.

17. Under **Order 10 Rule 11 of the Civil Procedure Rules** the court can set aside or vary such judgment and any consequential decree or order upon such terms as are just. It provides as follows:-

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.

18. The 1st - 5th applicants have argued that they were not served and therefore judgment ought to be set aside *ex debito justitiae*.
19. The Court of Appeal in **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another** **[2016] KECA 470** held:-

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 others. See Mbogo & Another vs Shah (supra), Patel vs E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another vs Kubende [1986] KLR 492 and CMC Holdings vs 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 addition, the court will not venture into considerations of whether the intended defence raises triable issues 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.

20. Looking at the record, the 1st - 4th respondents filed an application dated 9th May 2024 seeking for leave to apply for orders of certiorari bringing to the court and quashing the applicants purported elections of 15/03/2024 and letter dated 26/02/2024. The application was allowed and leave was granted to the respondents to file their substantive application. The 1st - 4th respondents filed their substantive application dated 17th June 2024 and on

19th July 2024 they confirmed that they had served the applicants but only the 6th and 7th respondents filed their response. I have perused the affidavits of service annexed by the 1st - 4th respondents and noted that they served the 1st - 5th applicants with the application dated 26th June 2024. It is noted that there is no affidavit of service in respect of the substantive application dated 17th June 2024 on the applicants. Furthermore, the 1st - 4th respondents have stated that they served the 1st - 5th applicants through WhatsApp and physically, but they did not annex any evidence to show proof of service through WhatsApp or even physically. Thus, it is discernible that the 1st - 4th respondents did not serve the 1st - 5th applicants with the application dated 17th June 2024, which is the substantive application on judicial review proceedings.

21. As such, the respondents having failed to serve the substantive motion on the applicants, this court hereby sets aside its judgment delivered on 23rd May 2025 gives orders as follows:-

- a) That the substantive motion be served a fresh on all the 1st - 5th respondents/applicants and 6th and 7th respondents.
- b) That the applicants shall have 21 days following service to file their responses.

c) That the orders issued in the application dated 24/06/2025 are hereby put on hold pending hearing and determination of these proceedings.

d) That mention to confirm compliance be on 04/02/2026.

22. Accordingly, the application dated 17th June 2025 has merit and is hereby to be allowed.

23. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 20TH DAY OF NOVEMBER 2025.***

**F. MUCHEMI
JUDGE**