



REPUBLIC OF KENYA



KENYA LAW
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**Keya v Mukui (Civil Appeal E014 of 2025)
[2025] KEHC 18243 (KLR) (2 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E014 OF 2025
PJO OTIENO, J
DECEMBER 2, 2025**

BETWEEN

DAVID OGUTU KEYA APPELLANT

AND

JACKSON KAMAU MUKUI RESPONDENT

(Being an Appeal from the Ruling of the Hon. Magwi Wilkister Ghati (RM), delivered on 27th March 2025 in Kitale Small Claims Court, Commercial Case No. E109 of 2024)

JUDGMENT

1. Before the court for determination is an appeal against Ruling delivered on 27th March 2025 by the adjudicator in Kitale SCCCOMM/E109/2024 by which the appellants application for setting aside a default judgment was dismissed. Before the trial court, the Respondent instituted proceedings against the Appellant in July 2024, seeking the recovery of a liquidated sum of Kshs 780,000/= on the basis of an alleged loan agreement entered into between the parties on or about 1st February 2024, which loan the Claimant asserted the Appellant had failed to repay.
2. On 25th July 2024, a default judgement was entered against the Appellant for failure to file its defence within the prescribed period. Through a Notice of Motion dated 4th March 2025, the Appellant moved the trial court seeking orders to set aside the default judgment entered on 25th July 2024, recall the warrants of arrest, and suspend the execution proceedings. The application was premised on the grounds that the Appellant was never served with court documents and was thus unaware of the proceedings, resulting in him being condemned unheard. The Appellant also deposed that the underlying agreement forming the basis of the claim was obtained under duress and coercion while he was in police custody, solely to secure his release.
3. Despite directions issued on 13th March 2025 for the Respondent to file a response, the record indicates that no replying affidavit or submissions were filed by the Respondent's counsel as at 25th March 2025.



Nonetheless, the Learned Magistrate proceeded to deliver the Ruling on 27th March 2025, dismissing the application with costs.

4. The court based its decision on three central findings; first, that the Affidavit of Service on record showed the Appellant was duly served; second, that the CTS automatically notifies parties of dates, and the Appellant did not deny that the contacts provided on the system were his; and third, that the annexed statement of claim did not raise any triable issue.

The Appeal

5. Aggrieved by the Ruling, the Appellant filed this appeal and later amended the Memorandum of Appeal on 20/5/2025 to prefer eight grounds. The eight grounds are discerned by the court to be capable of being clustered into three to be whether; (i) the Learned Magistrate erred in dismissing the application when the Appellant raised a fervent defence with triable issues; (ii) the Learned Magistrate condemned the Appellant unheard, contravening Article 50 of *the Constitution*; and, (iii) the Trial Court erred by finding service was proper despite the controversial issues regarding the legitimacy and irregularity of service raised.
6. The court directed that the Appeal be canvassed through written submissions. From the records, only the Appellant filed its submissions dated 7/8/2025. There is none filed by the Respondent or its counsels. That however if of no consequence when the mandate of the court on a first appeal is appreciated

The Submissions

7. The Appellant's submissions focus on four key areas; the procedural irregularity of the service, the existence of a substantive defence on the merits, the impropriety of the Trial Court's reliance on electronic data, and the ethical conflict of the Claimant's legal representation.
8. On the irregularity of the default judgement, the Appellant submitted that the affidavits of service sworn on 22nd July 2024 and 18th November 2024 by Jackson Nyongesa Simiyu were fabricated and manufactured by the firm of M/S Kisa Ronny & Co. Advocates. The submissions relied on an affidavit allegedly sworn subsequently by the process server on 24th July 2025, in which he contested the service, claiming he never received instructions and that his signature was forged. Based on this, the Appellant argued that service was irregular, defective, insufficient, and unlawful, rendering the default judgment irregular.
9. On the impropriety of the CTS data reliance, the Appellant submitted that the Trial Court erroneously relied on the unverified CTS data as an alternative mode of notification. The Appellant alleged that the email address and mobile phone number on the system were manufactured by the Claimant during e-filing to irregularly influence the court's decision to satisfy service. The Trial Court's reliance on this uncertified data, in the absence of a proper service validation, was therefore flawed and resulted in bias.
10. Crucially, the Appellant contended that he had a plausible defence on the merits. The central argument was that the instrument of claim/undertaking used as the main evidence was obtained under duress and undue force while the Appellant was under incarceration at Kitale Police Headquarters, solely to secure his release. Furthermore, the Appellant disputed the quantum, admitting only a balance of Kshs. 510,000/=, not Kshs. 780,000/=, and claimed that the Claimant failed to prove the advancement of the said monies. These factors were presented as constituting clear triable issues that the court should have adjudicated.



11. Finally, the Appellant raised a significant professional ethics issue, alleging that M/S Kisa Ronny & Co. Advocates, the Claimant's firm, drafted the undertaking. Since this undertaking is the foundation of the suit, the firm assumed the role of a witness to the transaction and the circumstances of its execution. The election of counsel to represent one of the parties to the agreement and institute proceedings on the Claimant's behalf, it was contended, amounted to a conflict of interest, contrary to the LSK Code of Standards of Professional Practice and Ethical Conduct under Rule 6, paragraph 96 necessitating their disqualification.

Issues, Analysis and Determination

12. The court having considered the grounds raised in the Memorandum of Appeal, the trial record, and the submissions filed by the Appellant, finds the following three issues to be ripe for determination. First, whether the Learned Magistrate erred in finding that the Appellant was properly served and that the default judgment entered on 25th July 2024 was regular; secondly, whether the defence advanced by the Appellant constitutes a triable issue warranting the setting aside of the default judgment, and lastly, whether it was tenable in ethics for Mr Kisa Ronny advocate to have acted for the claimant having been present when the agreement was done.
13. The jurisprudence in Kenya maintains a clear distinction between a regular and an irregular default judgment. The difference between the two was elaborated in detail by the Court of Appeal in *Kyelu v Mulwa* [2025] KEHC 12036 (KLR) where it was stated that:

“A default judgment can either be regular or irregular. It is regular where there is proof that the defendant was served with summons to enter appearance but failed to do so for one reason or another. It is irregular where service was not effected upon the defendant and in that case, it should be set aside as a matter of right. If the default judgment is regular, the court has discretion to determine whether or not to set it aside depending on various considerations.”
14. In the circumstances, the trial court relied on the existence of Affidavit of Service sworn on 22nd July 2024 as a proof of effected service. The court further notes that the Appellant subsequently adduced evidence in its Replying affidavit of 24th July 2025 alleging that the said process server repudiated his own initial affidavit, claiming his signature was forged and the document manufactured.
15. The court takes the view that an assertion that a court process server has repudiated an affidavit filed in court, claiming forgery and lack of instruction, is not merely a denial of service as was held by the trial court. It is a direct challenge to the procedural integrity of the Court process itself. In such circumstances, the Trial Court's obligation extends beyond simply reviewing the filed document. When service is materially disputed by evidence of the very person said to have effected service, the dispute on service becomes of such grave nature which ought not to be glossed over. The least the court can do when it doubts the process server is to summon him for cross-examination to resolve the conflict and establish the truth. The Trial Court's failure to investigate and interrogate this grave allegation demonstrates casual dealing with the matter that passes as grave abuse of the court process. Repudiated affidavit ought not have been blessed and glorified in the face of the very grave allegations. The court finds that the fact of service was put into serious doubt and the judgment was thus subject to being set aside as of right.
16. As held in *Yooshin Engineering Corporation -vs- Aia Architects Limited* (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment), when a judgment is found to be irregular, it must be set aside *ex debito justitiae* because the party has been condemned unheard, a violation of



fundamental justice principles. The court is then relieved of the need to consider the merits of the defence or the length of the delay. The court stated as follows:

“What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.”

17. Service and its propriety aside, even when the service was proper as the trial court found, it was still bound to consider whether the Appellant presented a defence raising triable issues, which would merit setting aside the judgment on discretionary grounds as under Order 10, Rule 11 of the Civil Procedure Rules. A triable issue is defined as an issue which raises a prima facie defence and which should go to trial for adjudication. A trial issue does not mean an issue that must prevail at the trial.
18. The Appellant’s primary defence is that the undertaking, which forms the core evidence of the Respondent’s claim, was signed under duress while the Appellant was incarcerated in police custody, compelled to comply to secure his release and attend to his family. That assertion was never controverted or displaced by the respondent.
19. Under contract law, duress is one of the vitiating factors in any contract and occurs when wrongful pressure is exerted upon a party to coerce them into a contract against their will or judgment, resulting in a voidable contract. The threat of immediate harm, such as continued or wrongful incarceration, to compel the signing of a document is an archetypal example of duress. The question as to whether the police custody amounted to illegitimate pressure that deprived the Appellant of his free will is a serious question of fact requiring evidence and cross-examination. The Trial Court’s categorical declaration that the defence never raised any triable issue in the face of detailed allegations involving police intervention in a clearly civil dispute is a manifest misdirection. That misdirection is so glaring that cannot be left to stand.
20. however, the Appellant disputed the debt amount, stating that the actual balance owed was Kshs. 510,000/=, not the Kshs. 780,000/= claimed. He elaborated that Kshs. 50,000/= was diverted to a third party, John Makhanu, at the Claimant’s instruction, and that the Claimant failed to prove the advancement of the full amount.
21. This assertion even when ambivalent as it is, is critical to the court for it leads the court to the determination that there was indeed an agreement to lend but the agreed debt was never disbursed in full. It presented to the court below a good ground to run away from uncontested position and only confront a dispute. With that assertion, it is clear to this court that a sum of 510,00 was admitted. When so admitted, it must be excluded from the dispute because court exist to resolve disputes and never to infer a dispute where the parties think otherwise.
22. The totality of the evidence demonstrates that the Appellant raised substantial triable issues on both the enforceability of the contractual instrument and the amount claimed. The appellant was entitled to the order for conditional setting aside which the court below denied him. That denial must now be remedied with orders of setting aside the judgment on terms
23. Finally, the Appellant alleges that M/S Kisa Ronny & Co. Advocates, having drawn the contested undertaking, are placed in a conflicting position where they are necessary witnesses to the transaction. This allegation was never challenged by the Respondent. The Evince Act, The Law Society of Kenya Code of Conduct and decided cases requires advocates to avoid representation where they may be



called as witnesses or where a substantial risk exists that their expected professional independent judgment may be materially and adversely affected by duties owed to a third person.

24. In the court's mind, the core factual controversy in this suit is the validity or otherwise of the undertaking, specifically whether it was executed under duress while the Appellant was in police custody. Since M/S Kisa Ronny & Co. Advocates drafted this central instrument, their knowledge of the circumstances of its execution including the environment and the participants present, undoubtedly renders them necessary, material, competent and compellable witnesses to the dispute. They ought not to have acted for the claimant against the respondent and should not continue to Act for him.
25. Accordingly, the Court finds that the continued representation of the Respondent by M/S Kisa Ronny & Co. Advocates in the Trial Court proceedings place the firm in an irreconcilable conflict of interest, thereby undermining the integrity and perceived fairness of the trial process. See *Uhuru Highway Developers & 3 Others Versus Central Bank of Kenya & 4 Others* [2003] KECA 189 (KLR)
26. In the upshot, the court finds the appeal herein to be meritorious and is hereby allowed with the consequence that the trial court's Ruling delivered on 27th March 2025 in the suit is hereby conditionally set aside and, in its place, substituted an order setting aside the default judgment on conditions that the admitted sum of Kshs 510,000 be deposited into an escrow account in the name of the Advocates for the parties within 30 days from today.
27. The appellant having succeeded, court awards to him the costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF DECEMBER, 2025

PATRICK J O OTIENO

JUDGE

