REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. E026 OF 2025

VICTOR OPIYO MUNGAYO……. APPELLANT

VERSUS

CARREN AKINYI ODHIAMBO……. RESPONDENT

(Appeal arising from the order, made in the ruling of Hon. Kassim Akida, Adjudicator, of 31st March 2025, in Busia SCCCOMM No. E274 of 2024)

JUDGEMENT

1. The claim, at the Small Claims Court, was filed by the appellant, against the respondent, for Kshs. 765,000.00, for breach of contract. It was filed on 17th December 2024, and summons to enter appearance in the cause served on 8th December 2024, according to the affidavit of service on record, sworn on 17th December 2024. Default judgement was entered, on 27th December 2024, and a decree issued, dated 28th December 2024. Thereafter, proceedings to execute the decree commenced.

2. A Motion was filed, on 1st March 2025, by the respondent, seeking stay of execution, and the setting aside of the *ex parte* judgement of 27th December 2024. It also sought other orders, such as the striking out of the suit, and the barring of the firm of Okeyo Ochiel & Company, Advocates, from the proceedings. The respondent claimed that she had never been served with summons to appear, and notice to show cause. She argued that the case was driven by malice, on the part of the appellant, after she rebuffed his sexual advances. She asserted that the documents, relied upon as evidence, were forgeries. She sought to have the court process server,

who allegedly served the process upon her, to be summoned to court for cross-examination.

3. A ruling was delivered, on that application, on 31st March 2025. The trial court concluded that the service was proper, and the resultant *ex parte* judgement was regular. The *ex parte* judgement was, nevertheless, set aside, on the basis that the respondent had a plausible defence, which raised triable issues.

4. The appellant was unhappy with that outcome, hence the instant appeal. His grounds of appeal revolve around the trial court setting aside the liquidated judgement, despite the respondent having admitted indebtedness; allowing the application, despite absence of a draft defence; the respondent having failed to file written submissions; discretion having been exercised injudiciously; and the ruling of the court being against the weight of the evidence.

5. Directions were given, herein, on 28th July 2025, for disposal of the appeal, by way of written submissions. I have seen, on the record, written submissions by the appellant, which I have read and considered the arguments made.

6. The Small Claims Court Act, Cap 10A, Laws of Kenya, for the matter at the trial court was brought under that law, gives discretion to the trial court to set aside orders that it had earlier made, and to make such orders as it thinks fit. The relevant provision, section 43, reads, "*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 fit*."

7. Section 43 is a general provision, applying to "*any ... orders*" of the Small Claims Court. Rule 11 of the Small Claims Court Rules is more specific, for it targets default judgement. Rule 11(1)(2)(3) of the Small Claims Court Rules deals with the process of entry of a default judgement, while Rule 11(4)(5)

deals with setting aside of an order entering a default judgement. Section 43 of the Small Claims Court Act and Rule 11 of the Small Claims Court Rules are to be read together.

8. Rule 11(4) of the Small Claims Court Rule sets out the grounds upon which the Small Claims Court may set aside an order entering a default judgement. These include where the default judgement was entered inadvertently; or the applicant has a valid defence, with probability of success; or there are other sufficient reasons or grounds, warranting the setting aside of the default judgement, decree or order.

9. The combined effect of section 43 of the Small Claims Court Act and Rule 11 of the Small Claims Court Rules should be that the Small Claims Court has discretion to set aside a default judgement.

10. The appellant does not appear to have a problem with that, and appears to be more concerned about how that discretion was exercised. He argues that, as the respondent did not file a draft defence, she had not demonstrated that she had a plausible defence to the claim, which raised triable issues, and which stood a chance of success. His other argument is that she had admitted the claim, based on the material that he had placed on record.

11. Setting aside an order of the court is always at the discretion of the court. Even a regular default judgement can be set aside. A regular default judgement would be the one entered where there was proper service, but the applicant failed to appear or file defence. A regular default judgement would only be set aside where it is demonstrated that the applicant has a defence, which raises triable issues, and with a likelihood of success. The courts have tended to lean towards the arguability of the case, rather than the success itself, for it is often difficult to gauge probability of success,

before all the evidence is in, and has been subjected to a trial, through having it buffeted by arguments, submissions or cross-examination.

12. The appellant argues that the respondent had not demonstrated any defence, for no draft was attached to her application. It is, indeed, true that the respondent did not attach, to her application for setting aside, a draft defence. That, however, is not to say that she had no defence. There are many ways of disclosing a defence. The draft defence is but just one of them. The defence can also be disclosed in the affidavit sworn in support of the application. A defence disclosed in an affidavit would, in fact, be a stronger defence, compared with a draft defence, for it would be founded on statements made on oath.

13. The affidavit of the respondent, sworn on 1st March 2025, disclosed a defence. She alleged that the documents relied on, by the appellant, to obtain the judgement, were forged. She gave the background, that she was a widow, and the appellant had been hitting on her, hoping to establish a relationship with her, but she had rejected his advances. They say that there is no fury comparable to that of a scorned woman. Affairs of the heart present a deadly cocktail. People have lost lives, and others have been maimed permanently, where love, whether real or imagined, does not go right. The respondent painted the appellant as a person suffering from a "scorned man" syndrome, and argued that the whole dispute was a manifestation of fury, sparked off by her act of rebuffing his unwanted and unwelcome sexual advances.

14. That was a probable defence. Was it founded on truth? I do not know. Only facts, presented at a trial, could establish that. The trial court was persuaded, and, within its discretion, exercised its jurisdiction, under section 43 of the Small Claims Court Act and Rule 11 of the Small Claims Court

Rules. The appellant has not demonstrated that the exercise of the discretion was arbitrary or wrongful.

15. I would have no issue with the exercise of the discretion and jurisdiction, under section 43 and Rule 11, but my concern would be with the jurisdiction under section 34(1) of the Small Claims Court Act. Under that provision, the Small Claims Court, or the adjudicator, is required to determine the claim within 60 days of its filing. The claim herein was filed on 17th December 2024. 60 days, from 17th December 2024, lapsed on 17th February 2024. 17th February 2024 was the effective date, by which the claim ought to have been determined, so that after that date there would be no jurisdiction for determining the suit. The default judgement was entered on 27th January 2024. That default judgement determined the matter. 27th January 2024 was within the 60 days envisaged under section 34(1) of the Small Claims Court Act.

16. The question that would arise would be with the setting aside of the order of 31st March 2025. Was it made within jurisdiction? It was, of course, made outside the 60-day limitation period, whose cut-off date was 17th February 2024. Indeed, the application itself was filed way outside that 60-day period. The date, of the filing of the said application, is not apparent on the face of that application, but the application is dated 1st March 2025, which would mean that it was filed sometime between 1st March 2025 and 31st March 2025. It was filed long after the Small Claims Court, or the adjudicator, had long lost jurisdiction to hear and determine the matter.

17. The decree of 27th January 2024 was set aside, and the respondent was allowed to file her papers, for the matter to be heard within 30 days. The question would be who, or which court, was going to hear the matter, for the Small Claims Court, or the adjudicator, lost the jurisdiction to hear

and determine the matter on 17th February 2024. There is nothing in the Small Claims Court Act which allows extension of the 60-days jurisdiction, in section 34 of the Act, upon the lapse of the same, by effluxion of time. So, after setting aside the default judgement, and allowing the respondent to file an answer or response to the claim, what next? Who was going to hear the matter?

18. Section 43 of the Small Claims Court Act and Rule 11 of the Small Claims Court Rules do not set timelines, within which the setting aside application is to be filed and determined. That is unlike section 41 of the Small Claims Court Act, which requires a review application to be filed within 30 days of the order or award sought to be reviewed. There appears, though, to be some untidiness, between section 41 of the Small Claims Court Act and Rule 29 of the Small Claims Court Rules. Section 41 provides for 30 days for filing a review application; while Rule 29 talks of 3 months, and limits the 30-day review to cases where the court is acting on its own motion. My interest, though, is not on review, but setting aside. Since no timelines are given, for bringing setting aside applications, it should follow that setting aside should be subject to the reasonableness test.

19. Would it be reasonable to seek setting aside after the 60-days jurisdiction has lapsed? What would be achieved by the setting aside, in the circumstances? Why? Because the court or adjudicator, setting aside the judgement, would have no jurisdiction to hear and determine the claim thereafter. There is no provision for the renewing of the jurisdiction after its lapse, under section 34(1). It would only be reasonable to seek setting aside, of the default judgement, within the 60-day jurisdiction, to enable the filing of a response, and hearing and determination within the 60-days period. Anything done outside that 60-days period would be a total waste of time, for the court, setting aside the

judgement, would have no jurisdiction to render another determination thereafter, due to effluxion of time.

20. The application, for setting aside the default judgement of 27th January 2024, was brought more than a year had lapsed after that judgement had been entered, and more than a year after the Small Claims Court had lost jurisdiction to determine the claim. The setting aside was hollow, for the Small Claims Court had no jurisdiction to handle the matter thereafter. The fact that the court could not handle the matter, thereafter, meant that the application was filed after an unreasonable lapse of time, and the trial court should not have entertained it, on account of want of jurisdiction.

21. This is one of the incongruities of the Small Claims Court Act. It offers a relief, or remedy, under section 43 of the Small Claims Court Act, as read with Rule 11 of the Small Claims Court Rules, which amounts to a no relief or remedy, for persons who come to establish or discover the existence of the proceedings after lapse of the 60-days, for it would serve no purpose, for them, to seek setting aside of the proceedings conducted within the 60 days, after lapse of that period.

22. The trial court found that the respondent had been served properly, and the default judgement was regular. She would only have herself to blame.

23. I would allow the appeal herein, not on account of the grounds raised and addressed by the appellant, but on the basis of jurisdiction. It was unreasonable to set aside the judgement of 27th January 2024, more than a year after the Small Claims Court had lost jurisdiction, for it left the court stuck with proceedings that it could not advance, for want of jurisdiction.

24. The appeal herein is hereby allowed, with the consequence, that the order of the trial court, of 31st March 2025, allowing the application, dated 1st March 2025, is hereby set aside, and substituted with an order dismissing the said application, of 1st March 2025. Each party shall bear their own costs.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 4TH DAY OF DECEMBER 2025.

WM MUSYOKA
JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates
Ms. Juma, instructed by Okeyo Ochiel & Company, Advocates for the appellant.
Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.