

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**IN THE CONSTITUTIONAL AND HUMAN RIGHTS**  
**DIVISION**  
**CONSTITUTIONAL PETITION NO. E004 OF 2023**

**PHILLIP NZYUKO MUSYA .....**  
**PETITIONER/RESPONDENT**

**VERSUS**  
**HORNBILL PUB**  
**LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. Before this Court for determination is a Notice of Motion dated 24<sup>th</sup> January 2025, seeking;
  - a. Spent
  - b. That the judgment entered *ex parte* on 17<sup>th</sup> December 2024 be hereby set aside, reviewed and or varied to enable the Applicant file its response to the petition.
  - c. That there be a stay of execution of the decree dated 18<sup>th</sup> January 2025.
  - d. A time be named within which the said response of the Respondent to this petition may be filed.
2. The application is supported by the grounds stated in the application and the supporting affidavit deponed by Anthony Mwikaria a director of Romantomwi Investments which runs

an establishment known as Hornbill Pub in Machakos. He explains that the draft decree dated 18<sup>th</sup> December 2025 only came to his attention, on 22<sup>nd</sup> January 2025, in his capacity as a Director of Romantomwi Investments, and until then he was unaware of Petitions No. E004 of 2023 and E005 of 2023.

3. He asserts that, contrary to the Respondent's claims, the Applicant was never served with the Petitions and thus denied the chance to defend itself. He further urges that the Petitions wrongly cited "Hornbill Pub", which is merely a trading name and not a legal entity, and that the entity actual owner and operator is Romantomwi Investments Limited.
4. That since no proper service of pleadings occurred and judgment was entered *ex-parte*, the applicant seeks to have the judgment set aside and execution stayed. He contends that the Applicant was denied (a fair hearing) and stresses that the allegations of constitutional rights violation are unfounded, as patrons have always enjoyed the premises, with clear notices displayed regarding the business operations and the requirement of consent for photography and the social media promotion.
5. The petitioner/respondent opposed the application through a Replying Affidavit sworn on 5<sup>th</sup> February 2025 by Philip Nzyuko Musya. He urged that the application and supporting affidavit of Anthony Mwikaria do not warrant the grant of orders sought. He contends that the application was not

properly executed or adopted by the applicant and should therefore be struck out.

6. He stated that the matter was filed on 14<sup>th</sup> March 2023, with pleadings served at the applicant's business premises in Machakos Town. A mention notice was served for 3<sup>rd</sup> June 2024, supported by an affidavit of service sworn on 24<sup>th</sup> May 2024 but the applicant failed to appear or file pleadings.
7. He further stated that on 3<sup>rd</sup> June 2024 the court was not sitting, and the matter rescheduled to 24<sup>th</sup> July 2024 when, again, the applicant was absent. Judgment was subsequently delivered on 17<sup>th</sup> December 2024, followed by service of a Notice of Entry of Judgment dated 18<sup>th</sup> December 2024, a draft decree and a forwarding letter dated 14<sup>th</sup> January 2025. The respondent urges that the applicant only acted after receiving these documents having been indolent.
8. The Respondent maintains that the applicant was duly served and not condemned unheard, and stresses that no enforceable decree exists since only a draft decree was served. He further challenges the propriety of J.K. Gataguta & Company Advocates being on record having failed to seek leave to come on record after final judgment had been delivered. The Respondent disputes claims of financial ruin, noting no evidence was provided.
9. The Respondent further argues that the Applicant failed to produce any CR12 or company documents proving Romantomwi Investments Limited, confirming the

directorship or legal standing. He averred that, without these documents, the alleged rightful respondent in the petition, Romantomwi Investments Limited, remains unsubstantiated.

10. He questions the alleged notices on privacy and consent, which were not attached, and observes that the Applicant's draft replying affidavit merely repeats the application without addressing the petition substantively. He concludes that the application is an afterthought triggered by execution proceedings.
11. The application was canvassed through written submissions. The Applicant's submissions are dated 15<sup>th</sup> March 2025, while the Respondent's submissions are dated 23<sup>rd</sup> April 2025.

### **Applicant's submissions**

12. The Applicant, provided a brief introduction. It seeks to have the judgment delivered on 17<sup>th</sup> December 2024 set aside and execution of the decree on 18<sup>th</sup> January 2025 stayed, arguing that he was denied a fair hearing under Article 50 of the Constitution. The Applicant identified six issues for determination namely; a) whether the *ex parte* judgment should be set aside b) whether execution of the decree should be stayed c) whether the failure to serve the Respondent/Applicant violated its constitutional rights d) whether the Respondent/applicant has the right to file a

response/defence to the petition e) whether the Petitioner/Respondent sued the wrong entity f) whether the petitioner/applicant's actions were lawful given the nature of the establishment.

13. On setting aside, the *ex parte* judgment the Applicant referred to Article 50(1) of the Constitution, and the case of ***Owino Ger versus Marmanet Forest Co-operative Society Limited & Another [2014] eKLR***, and ***Patel versus E.A. Cargo Handling Services Limited [1974] EA 75***, to submit that he only became aware of the decree on 22<sup>nd</sup> January 2025, long after the judgment had been delivered *ex parte*. He contends that this deprived him of the right to defend the claim against him and that he should therefore be granted an opportunity to file his response or defence to the petition, to avoid an injustice and ensure that justice is served and all relevant facts are fully presented before the Court.
14. On whether stay of execution should be granted, the Applicant relies on Order 42 Rule 6 of the Civil Procedure Rules, as well as the cases of ***Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others [2014] eKLR*** and ***Kenya Shell Limited versus Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-198] I KAR 1018***. He urges that execution of the decree would cause irreparable financial harm that may cripple its business operations and that he meets the threshold for the grant of a stay.

15. On the third issue, whether the failure to serve the Applicant violated its rights, the Applicant submits that it was never served with the pleadings, thus violating its right to a fair hearing under Article 47(1) of the Constitution. He relies on the case of ***Mbaki & Others versus Macharia & Another*** [2005] 2 EA 206.
16. Regarding whether the Respondent sued the wrong entity, the Applicant contends that the proper party to the suit should have been Romantomwi Investments Limited, which manages the business. By suing Hornbill Pub Limited, the Respondent misdirected its claim, and the suit should therefore be struck out against the current Applicant.
17. On whether the Applicant's actions were lawful, the Applicant submits that the applicant was entitled to take photographs of patrons in the establishment, as it is a public venue where individuals have a reasonable expectation of being photographed. The Applicant further refers to ***Muiruri versus Credit Bank Limited & Another*** [2006] eKLR, and further asserts that clear notices were placed within the premises notifying patrons that photographs would be taken for promotional purposes. Consequently, the Applicant maintains that the Petitioner's claim is unfounded and should not be entertained.
18. The Applicant concluded its submissions by urging the Court to grant the relief sought in the application.

### **Respondent's submissions**

19. The Respondent commenced its submissions with a brief introduction to the matter. In analyzing the facts and the law, the Respondent submits that the present application was filed after judgment was delivered on 17<sup>th</sup> December 2024. While referring to Order 9 Rule 9 of the Civil Procedure Rules and the case of ***John Langat versus Kipkemoi Terer & 2 others [2013] eKLR***, the Respondent contends that where an advocate seeks to come on record after judgment, leave of the court must first be obtained. Failure to comply with this requirement renders the application fatally defective.
20. The Respondent further submits that there is no decree dated 18<sup>th</sup> January 2025, nor has any such decree been annexed to the present application. After judgment was delivered, only a Notice of Entry of Judgment dated 18<sup>th</sup> December 2024, a draft decree, and a forwarding letter dated 14<sup>th</sup> January 2025 were drawn and served. Citing the case ***In Exclusive Estates Limited versus Kenya Posts and Telecommunications Corporation & Another [2005] 1 EA 53***, the Respondent argues that a draft decree is not a document capable of being stayed, as it has not been endorsed by the Court and consequently cannot be executed.

21. The Respondent submits that the Applicant should not be granted leave to defend itself, noting that the matter was instituted on 14<sup>th</sup> March 2023 and that the pleadings were duly served upon the Respondent through its business establishment located in Machakos Town. An affidavit of service sworn on 11<sup>th</sup> April 2023 confirmed such service. The matter was then slated for mention on 3<sup>rd</sup> June 2024, with a mention notice drawn and served upon the Respondent, and an affidavit of service sworn on 24<sup>th</sup> May 2024 confirming service. The Respondent emphasizes that the Applicant has neither contested the service effected by the process server, nor has it sought to cross-examine the process server. Had the Applicant done so, the Court could have benefited from the information obtained during such cross-examination in determining whether service was properly effected.
22. Referring to the case of ***CMC Holdings Limited versus Nzioki***, as considered by the Court in ***Peter Mwangi Kimai versus Golden Homes Limited & 2 others [2017] eKLR***, the Respondent submits that the Court ought to focus on whether the draft replying affidavit raises any triable issues sufficient to warrant reopening the matter. The Respondent contends that the draft replying affidavit sworn on 24<sup>th</sup> January 2025 does not raise any triable issues; rather, it merely affirms the contents of the petition. Accordingly, there are no grounds to persuade the Court to set aside its judgment. The Respondent further submits that, despite the

Applicant's argument that Hornbill Pub Limited does not exist, the draft replying affidavit fails to clarify that Hornbill Pub is a trading name owned by Romantomwi Investments Limited. Moreover, the Applicant has not annexed a CR12 from the Companies Registry to confirm the directorship of the said company.

23. In conclusion, the Respondent submits that the present application is devoid of merit and ought to be dismissed, as not even equity can aid the Applicant.

### **Analysis and Determination**

24. I have considered the affidavits by parties and submissions made in respect of the motion. It is this court's view that the issues for determination are;
- a. Whether advocates M/s J. K. Gataguta & Co. are properly on record.**
  - b. Whether the *ex parte* Judgment should be set aside, reviewed or varied.**
  - c. Whether the court should grant stay of execution of the decree dated 18<sup>th</sup> January 2025.**

### **Whether advocates M/s J. K. Gataguta & Co. are properly on record.**

25. The Respondent urges the Court to find that M/s J. K. Gataguta & Co. Advocates are not properly on record, having failed to seek leave of the court to come on record as

required under Order 9 Rule 9 of the Civil Procedure Rules. The respondent therefore argues that the application is fatally incompetent and should be struck out.

26. **Order 9 rule 9 of the Civil Procedure Rules** provides as follows:

***“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***

***(a) upon an application with notice to all the parties;***  
***or***

***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”***

27. The purpose of order 9 rule 9 is clear: it ensures that a change of advocate, or a decision by a party to act in person after judgment, cannot be effected without leave of the Court or consent between the outgoing and incoming advocates. The rule is deliberate, designed to protect the interests of an advocate who has handled a matter to its conclusion. As observed in ***Kochieng v. County Assembly Service Board & Another (Civil Case 3 of 2019) [2023] KEHC 1681 (KLR)***, the provision safeguards advocate’s from being unjustly removed after judgment.

28. In the present circumstances, I note that there was no advocate on record at the time the petition was filed and upto when judgment was entered. The protective purpose of the rule is therefore not engaged in the same way as where an outgoing advocate exists. The matter was undefended there having been no representation by the Applicant, directly or through a firm of Advocates. Accordingly, this Court finds that Order 9 Rule 9 of the Civil procedure Rules does not automatically render the appearance of M/s J. K. Gataguta & Co.'s incompetent. Indeed, the firm filed a Notice of Appointment of Advocate dated 24<sup>th</sup> January 2025 which confirms the firm's appointment.
29. The Respondent's objection based solely on Order 9 Rule 9 cannot therefore stand where the factual basis for the rule's application is absent.

**Whether the *ex parte* Judgment should be set aside, reviewed or varied**

30. The Applicant seeks to set aside, review, or vary the judgment delivered on 17<sup>th</sup> December 2024 contending that it was never served with the pleadings and was therefore condemned unheard. The Respondent, however, maintains that service was properly effected, the Applicant willfully failed to participate in the proceedings, and that no legal basis has been established to warrant the exercise of the Court's discretion.

31. The starting point is the legal framework governing the setting aside of *ex parte* judgments. **Order 10 Rule 11 of the Civil Procedure Rules** provides that;

***“11. Setting aside judgment [Order 10, rule 11]  
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.”***

32. Under the said provision, the Court retains wide discretion to set aside or vary such judgments. However, this discretion must be exercised judicially, not capricious, and is guided by two critical considerations:

- a. whether the judgment was regularly or irregularly entered and;
- b. whether the Applicant has demonstrated sufficient cause for non-attendance, coupled with a plausible defence raising triable issues.

33. In ***Shah v Mbogo & another [1967] E.A.*** it was held that:

***“The court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should therefore be refused.”***

34. The key question in the circumstances of this case is whether the applicant was properly served. If service was defective, the judgment would be irregular and the Court would ordinarily be obliged to set it aside *ex debito justitiae* as was held in the case of ***Mwala v Kenya Bureau of Standards*** **EALR (2001) 1 EA 148** as follows; -

***“To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”***

35. In the present case, the record contains affidavits of service sworn on 11<sup>th</sup> April 2023 and 24<sup>th</sup> May 2024, confirming that the Petition and the hearing notice were duly served upon

the Applicant's business establishment. The deponents set out in detail how service was effected, the location served and the individual who received the documents. The Applicant has not sought to cross-examine the process server, a step that is ordinarily taken where service is disputed. The Applicant has equally not provided any evidence dislodging the affidavits of service or demonstrating that the process server reached the wrong premises or served the wrong persons.

36. In law, an affidavit of service constitutes *prima facie* evidence of proper service. Order 5 rule 3(b)iii permits service upon the premises, as an acceptable mode of service on a corporation. Unless rebutted by credible evidence or tested through cross-examination, courts are entitled to rely on it. The Applicant's bare denial of service unsupported by factual rebuttals or a request to test the evidence is insufficient to displace the presumption of regularity. The Court is therefore persuaded that service of the Petition and subsequent notices was properly effected and the Applicant's non-attendance was not due to its own inaction rather than lack of service. On that basis, the *ex parte* judgment was regularly entered.
37. The next question is whether the Applicant has demonstrated sufficient cause to warrant the setting aside of a regular judgment. The Applicant claims it only became aware of the matter after service of the draft decree, but this assertion is contradicted by the record of service and its failure to

challenge it. A party who has been duly served but elects not to participate in proceedings cannot later claim to have been denied the right to be heard. The right to a fair hearing does not protect a party who deliberately chooses to ignore court proceedings.

38. Moreover, the Applicant's draft replying affidavit does not raise substantive triable issues that would justify the Court to exercise its discretion in favour of reopening the matter. The applicant assertions that the wrong entity was sued and that notices existed within the establishment, are unsupported by evidence. No CR12, ownership documents or copies of the alleged notices have been furnished. Without proof of evidence, these assertions remain speculative. It is important that there exists a *bona fide*, arguable defence and not a mere assertion of one is central to the exercise of discretion in setting aside a regular judgment.
39. Turning to the prayer for review or variation, the Applicant has not satisfied any of the grounds in Order 45 Rule 1. It has not demonstrated the discovery of new and important evidence that was unavailable at the time of judgment, nor has it identified any error apparent on the face of the record. Its objections on lack of proper service, potential financial constraints, lack of fair hearing and service on wrong entity served all of which have been discounted in this ruling do not warrant an order of review under the circumstances as they are specific to the application as opposed to the merits of the

petition. Review is not intended to afford a losing party a second bite at the cherry, merely because it is dissatisfied with the outcome.

40. In conclusion, this court is satisfied that the judgment of 17<sup>th</sup> December 2024 was regularly entered; the Applicant has failed to demonstrate sufficient cause for non-attendance; no substantive or credible triable issues have been shown to justify reopening the matter; and the strict grounds for review have not been met. This court therefore finds no basis in law or equity, to set aside, review or vary the judgment.

**Whether the court should grant stay of execution of the decree dated 18<sup>th</sup> January 2025**

41. The present application seeks a stay of execution pursuant to Order 22 Rule 22 of the Civil procedure Rules and Order 42 Rule 6 of the Civil procedure Rules. Order 22 Rule 22 of the Civil Procedure Rules provides that;

***“22. When court may stay execution [Order 22, rule 22]***

- (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree***

***or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”***

42. Order 42 Rule 6 of the Civil procedure Rules provides that;

***“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (1) unless -***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

43. Both provisions contemplate the existence of a decree or order. In the absence of an extracted decree or order, there is nothing to execute or stay. In the case of ***Interactive Gaming & Lotteries Limited v Flint East Africa Limited & 2 others*** [2014] eKLR the court stated: -

***“... a clear reading of Order 42 rule 6(1) of the Civil Procedure Rules contemplates the existence of an order or decree without which a stay of execution under the said provision may not be granted. Accordingly, I find that the application dated 6th May, 2014 is premature and the same is struck out with costs to the plaintiff.”***

44. The court record shows that the applicant was served with a draft decree, while the Respondent maintains that a decree dated 18<sup>th</sup> January 2025 exists. The threshold inquiry is whether the Registrar has signed and sealed a decree and whether it has been formally extracted and served. No evidence has been produced to confirm that a decree has

been extracted and served upon the Applicant. Without a decree, there is nothing to be stay. Guided by the above authority, the court finds the application is pre-mature and a non-starter for seeking order of stay of execution hence ought to be struck out.

45. Even if the Court were to assume, *arguendo*, that a valid decree dated 18<sup>th</sup> January 2025 exists, the Applicant would still need to satisfy the strict requirements under Order 42 Rule 6 and Order 22 Rule 22 of the Civil procedure Rules. The settled principles require the applicant to demonstrate, the following: (i) No unreasonable delay in filing the stay application; (ii) a real risk of substantial or irreparable loss if execution proceeds; and (iii) the provision of such security as the court may direct for due performance of the decree.
46. On substantial loss, this limb requires the applicant to clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of ***Shell Ltd vs Kibiru and Another* [1986] KLR 410** in which *Platt JA* explained that substantial loss may arise either where payment of damages would cause undue hardship to the applicant, or where the respondent would be unable to refund the decretal sum if the appeal succeeds. The court emphasized that substantial loss is the cornerstone of granting stay, and without evidence of such loss, respondents should not be kept out of their money. In the present case, the Applicant merely asserts that execution would cause “immeasurable financial ruin,” but

has filed no independent, cogent evidence or any documentary proof to quantify or substantiate this claim. No evidence has been provided to show that execution will cause loss that cannot adequately be compensated by damages or costs. Mere assertions without proof do not discharge the burden of demonstrating substantial loss.

47. On delay, judgment was delivered 17<sup>th</sup> December 2024 and the application was filed on 24<sup>th</sup> January 2025. The applicant acted promptly. I find the applicant satisfied this condition as there is no inordinate delay.
48. On security, for the due performance of the decree that may ultimately be binding upon him, it is noted that the applicant has not made any averment either in the grounds in support of the application or in the supporting affidavit that he is ready and willing to offer security. This is one of the conditions imposed by Order 42 Rule 6 of the Civil Procedure Rules. The applicant's failure to address this condition renders the application deficient.
49. In view of the foregoing the court finds that the application dated 24<sup>th</sup> January 2025 lacks merit. The same is dismissed with no order as to costs.

Orders accordingly.

Dated, signed and delivered at Machakos this 18<sup>th</sup> day of December, 2025.

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....Petitioner

.....Respondent

Selina Court Assistant

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