**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**CIVIL DIVISION**
**CIVIL SUIT NO. 180 OF 2019**

**DANIEL NG'ANG'A…… PLAINTIFF**

**-VERSUS-**

**PAUL NG'ANG'A MACHARIA…… ……DEFENDANT**

**AND**

**RISPA WABURI……OBJECTOR**

## RULING

### The First Application

1. Before the court for analysis and determination are two (2) applications. The first is **the Notice of Motion dated 7.10.2025** (the first application). It was filed by **Paul Ng'ang'a Macharia** (the Defendant). It is anchored on Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (CPA); Order 10 Rule 11, Order 19 Rule 2, Order 22 Rule 22(1) and Order 51 Rule 1 of the Civil Procedure Rules (CPR) and Articles 48, 50 and 159 of the Constitution of Kenya, 2010. It seeks the following orders:

***(i) Spent.***

***(ii) Spent.***

***(iii) Spent.***

***(iv) THAT this Honourable court be pleased to grant the Defendant unconditional leave to defend the suit and the suit do start de novo.***

***(v) THAT at the hearing of the instant application this Honourable court be pleased to allow the Defendant/Applicants Counsel to cross-examine the deponent of the Affidavit of Service dated 29th October 2019 and filed on 7th November 2019.***

***(vi) THAT the costs of this application be provided for.*** sic

2. The first application is supported by the grounds found on the body of the application and in the Supporting Affidavit sworn by the Defendant. The Defendant has contested service of Summons to Enter Appearance. He has deposed that that interlocutory judgment was entered against him in the present suit on 4.12.2019 pursuant to an affidavit of service sworn on

29.10.2019; that he was never served with a notice of entry of judgment and only came to learn of the existence of the suit following service of warrants of attachment of movable property and proclamation notice upon his wife on 2.10.2025.

3. He has deposed that soon thereafter, he instructed his advocates on record to peruse the court file; that it was discovered that an interlocutory judgment had been entered and the matter had proceeded for formal proof on 17.11.2021 resulting in final judgment in favour of **Daniel Ng'ang'a** (the Plaintiff) on 29.11.2022 to the tune of Kshs. 3,600,000/- in damages and that the purported service of summons to enter appearance and the pleadings is questionable, hence his prayer seeking to cross examine the process server on the contents of his affidavit of service in that regard.

4. The Defendant has asserted, further, that the interlocutory judgment is prejudicial to him since he was not granted an opportunity to defend the suit and has therefore been condemned unheard; that unless the prayers sought are granted, he stands to suffer grave prejudice by way of loss of his goods in execution of the decree; that he has a good

defence with reasonable chances of success and therefore urges this court to find in his favour, given that the Plaintiff herein does not stand to suffer any serious prejudice if the first application is allowed as prayed.

**The Replying Affidavit**

5. The first application is opposed by the Plaintiff through a Replying Affidavit sworn on 24.10.2025. The Plaintiff has termed the first application as lacking in merit, being an abuse of the court process and a constituting delaying tactic.
6. The Plaintiff has averred that his advocate, Kiroko Ndegwa, effected service of the Summons to enter appearance and pleadings upon the Defendant personally and that the Defendant accepted service but declined to sign the advocate's copy as shown in the affidavit of service sworn by the advocate detailing the manner and details of service.
7. The Plaintiff has averred, further, that despite being served, the Defendant neglected to enter appearance or file a statement of defence, prompting a request for entry of an interlocutory judgment; that in considering the said request,

the court interrogated the contents of the affidavit of service before proceeding to enter the interlocutory judgment; that even thereafter, the Defendant despite having been served with the relevant notices for mention and formal proof as well as the judgment notice, failed to attend court at any point; that when the matter thereafter proceeded for taxation, the Defendant was duly served with the Bill of Costs and the taxation notice but did not participate in the said proceedings and that service was effected through the Plaintiff's registered WhatsApp mobile number but he did not take any action, until commencement of the execution process.

8. The Plaintiff has averred that no draft statement of defence has been annexed to enable this court ascertain whether a triable defence exists and that no reasonable explanation has been tendered to warrant a setting aside of the interlocutory judgment and consequent proceedings and therefore the first application has not been brought in good faith.
9. The Defendant filed a supplementary affidavit sworn on 10.11.2025 in which he has reiterated his earlier averments that he was never personally served with summons to enter

appearance or other documents relating to the suit; that the affidavits of service relied upon by the Plaintiff do not compliance with the mandatory provisions of Order 5 Rules 15, 16 and 22C of the CPR Amendment Rules 2020 and are therefore defective and that the respective affidavits of service fail to detail the exact date, time, place and manner of alleged service.

10. The Defendant has claimed that the WhatsApp number through which service was purportedly effected in not his current active number since he has been a resident of the United States (USA) for over three (3) years.

11. Regarding the defence, the Defendant has stated that there is no mandatory requirement that a party ought to annex a draft statement of defence in a claim of this nature and that he has a good defence which raises triable issues including that he was not a proper defendant to the suit.

**The Second Application**

12. **The Notice of Motion dated 15.10.2025** constitutes the second application. It was filed by **Rispa Waburi** (the

Objector) under Section 3A of the CPA; and Orders 22, Rules 51 and 52 of the CPR, seeking the following prayers:

***(i) Spent.***

***(ii) Spent.***

***(iii) Spent.***

***(iv) THAT the Proclamation by Frontline Auctioneers on 2nd October 2025 over the household goods being television, microwave, sofa sets, water dispenser, fridge etc belonging to the Objector be set aside.***

*(v)* ***THAT costs of this application be provided for.***

13. The second application is anchored on the grounds laid out on its face and in the supporting affidavit sworn by the Objector, that she is the occupier and tenant of the property known as **L.R. No. Thika Municipality Block 10/832 Thika Greens Estate** (the property); that on 2.10.2025 Frontline Auctioneers (the Auctioneers) proclaimed her various household goods in execution of the decree issued in the present suit; that the said proclamation is irregular since the goods in question belong to her and not the Defendant and

that unless the order sought is granted, she stands to suffer grave prejudice since she is a third party to the proceedings and no decree has been issued against her for execution.

**The Replying Affidavit**

14. The Plaintiff has opposed the second application through his replying affidavit sworn on 5.11.2025. He has averred that the property in question constitutes the matrimonial home of the Defendant; the Objector and therefore the assertions by the Objector that the proclaimed goods exclusively belong to her cannot hold water and that she cannot assert that she is a tenant in the said property.
15. The Plaintiff has further challenged the authenticity of the receipts tendered in support of the second application, averring that the same are handwritten and do not bear the official stamps and serial numbers as well as the respective purchase dates; that in the absence of any sufficient material to demonstrate otherwise, the proclaimed goods belong to the Defendant and are therefore available for proclamation and

attachment and therefore, the second application ought to be dismissed with costs.

**Oral Submissions**

16. The two (2) applications were canvassed together through oral arguments and cross-examination of **Jackson Kiroko Ndegwa**, advocate, pursuant to prayer (v) of the first application. The Advocated told the court in corss-examination that he is the Managing Partner at the firm of Sunkuli Ndegwa Wanjiku & Co. Advocates; that that he swore an affidavit of service on 29.10.2019 showing that he personally served the summons to enter appearance and the pleadings relating to the suit, upon the Defendant, who was personally known to him, at Murang'a Law Courts on 12.09.2019 where the Defendant was attending a court session in Criminal Case No. 1270 of 2019 in which he was a party to and that to his knowledge, an interlocutory judgment was entered against the Defendant on the basis of his affidavit of service.

17. He testified, further, that he subsequently effected service of the notice of interlocutory judgment, as well as service of a

Mention Notice on 4.05.2022 and a copy of the decree upon the Defendant through his personal WhatsApp number and attached screenshots evidencing service to his affidavit of service.

18. **Mr. Mbue Ndegwa** advocate for the Defendant, argued the first application. He relied on the grounds stated on the body of the first application and the supporting affidavit. He reiterated that the Defendant was unaware of the existence of the suit until the time execution commenced.

19. He submitted that it has not been established that the summons and pleadings were effected upon the Defendant and further that the purported service of subsequent notices and documents via WhatsApp is questionable; that in the absence of blue ticks indicating receipt or delivery of the documents, it cannot be said that service was duly effected upon the Defendant; that in the absence of proper service, it is clear that the Defendant was condemned unheard; that no notice of entry of judgment was ever served upon the Defendant prior to commencement of the execution process as required under

Order 22, Rule 6 of the CPR and that in the circumstances, the first application ought to be allowed to pave way for the Defendant to defend the claim against him.

20. **Mr. Kiroko Ndegwa**, counsel for the Plaintiff in opposing the first application, maintained that service of summons was duly effected upon the Defendant personally, as earlier averred in cross-examination; that subsequent service of notices was similarly effected through the Defendant's personal WhatsApp number, which number is not disputed and that it is untrue that the Defendant only came to learn of the existence of the suit at the point of execution, as purported.

21. Counsel submitted that the Defendant ought to have annexed a draft statement of defence to the first application, but did not; that in the absence thereof, it is impossible for this court to ascertain whether his defence raises any triable issues as purported and therefore the first application ought to be dismissed with costs, but should this court find otherwise, then the Plaintiff ought to be awarded thrown away costs.

22. In a rejoinder, **Mr. Mbue Ndegwa** argued that the rules on service are clear and that there has been non-compliance on the part of the Plaintiff and/or his advocate on the subject of service. On whether a triable defence exists, it is counsel's submission that no triable issues have been set out in the relevant affidavit material.

23. The Objector did not participate in the first application.

24. In urging the court to allow the second application, **Ms. Maina**, advocate for the Objector, contended that the proclaimed goods belong to the Objector who is not a party to the suit; that the goods in question belong solely to the Objector and not the Defendant and as such, are unavailable for execution; that it has been shown that the Objector is a tenant residing in the property; that no material has been tendered to support the Plaintiff's averments that the property in which the proclaimed goods are situated, constitutes matrimonial property between the Defendant and the Objector; that the allegations made by the Plaintiff remain unsubstantiated and that the Objector has discharged the

burden of proof and hence the second application ought to succeed.

25. To oppose the second application, **Mr. Kiroko Ndegwa** counsel for the Plaintiff, submitted that the tenancy agreement tendered by the Objector contravenes Section 19 of the Stamp Duty Act since the same ought to have been registered and the requisite stamp duty paid in order for it to be acceptable; that the various receipts tendered by the Objector purporting purchase of the various proclaimed goods also contravene Section 19 of the Stamp Duty Act since they do not contain the relevant serial numbers; that there is no doubt that the Objector herein is the wife to the Defendant and in the circumstances, it would be proper for the second application to be dismissed with costs, to enable the Plaintiff enjoy the fruits of his judgment.

26. In her rejoinder, **Ms. Maina** submitted that the lease/tenancy agreement in question does not exceed a term of two (2) years and hence need not be registered; that there is no existing law requiring receipts to bear serial numbers in

order for them to be acceptable and that the allegations made by counsel for the Plaintiff are untenable.

**Analysis and Determination**

27. I have considered both applications and the grounds and submissions in support of each. The background of this case is that the Plaintiff filed the present suit against the Defendant through a plaint dated 22.08.2019. He was seeking general, exemplary and aggravated damages plus costs and interest thereon, in a claim founded on defamation.

28. The record shows that upon the Defendant's failure to enter appearance and/or file a statement of defence within the statutory timelines, an interlocutory judgment was entered against him on 4.12.2019 upon the Plaintiff's request. Consequently, the matter proceeded for formal proof on 17.11.2021 and upon close of submissions, judgment was delivered in favour of the Plaintiff on 18.11.2022. He was awarded general damages in the sum of Kshs. 3,000,000/- and exemplary damages in the sum of Kshs. 600,000/- bringing the total award to Kshs. 3,600,000/-.

29. Going by the record, the Plaintiff subsequently commenced the execution process, thereby triggering the two (2) applications now before the court for determination.

30. In respect to the **first application**, the prayers sought include the prayer for leave to cross examine the Plaintiff's advocate on the contents of his affidavit of service dated 29.10.2019. This prayer has been granted and is therefore spent. The remaining prayer seeks to set aside the interlocutory judgment and leave to defend the suit unconditionally upon re-opening of the suit for hearing *de novo*.

31. **Order 10, Rule 11** of the **CPR** being the applicable provision in setting aside interlocutory judgments, provides that:

> ***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. The power of the court to grant or decline an application to set aside or vary such judgment or any consequential decree

or order, is discretionary. That discretion is wide and unfettered. The Court in **Shah v Mbogo & Another [1967] EA 116** stated as follows in respect of discretion of the court:

> ***"The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."***

33. The principles in **Shah v Mbogo** case were amplified further in **Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193**, cited with approval by the same Court in **Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR** as follows:

> ***"The basis of approach in Kenya to the exercise of the discretion to be employed or rejected…is that if service of summons to enter appearance has not been effected, the lack of an initiating***

***process will cause the steps taken to set aside ex debito justiciae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice…A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable***

***to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure…The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the***

***judge who acts ex parte… Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction."***

34. Flowing from the above, the first question arising for determination is whether the Defendant was duly served with summons to enter appearance, which would resultantly ascertain whether the interlocutory judgment entered is regular. The Defendant has on the one hand vehemently denied service of summons and the pleadings, and has further challenged the contents and competence of the affidavit of service on record. He has averred that he only came to learn of the existence of the suit at the point of service of proclamation and warrants of attachment upon his wife, the Objector herein.

35. On the other hand, the Plaintiff through his counsel, maintains that service was duly effected upon the Defendant in person at Murang'a Law Courts and later through his personal

WhatsApp number, but that he neglected to enter appearance and/or file his statement of defence, thereby resulting in entry of a regular interlocutory judgment.

36. The purpose of the requirement for effective service of summons cannot be disputed. As stated by the Court of Appeal in **Giro Commercial Bank Ltd v Ali Swaleh Mwangula [2016] eKLR:**

> ***"Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served***

***with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff's claim."***

37. Upon my perusal of the record, I have noted that the Plaintiff's request for judgment dated 29.10.2019 has backing in the affidavit of service sworn by advocate Kiroko Ndegwa (marked as **Annexure "DN-1"** to the Plaintiff's reply to the first application) stating that upon receiving the summons and pleadings on 12.09.2019 he proceeded to Murang'a Law Courts where he knew the Defendant would be attending a criminal case, namely Criminal Case No. 1270 of 2019, since he was an accused person therein. The advocate stated in his affidavit that upon his arrival, he met the Defendant who was personally known to him, and effected service upon him but that the Defendant declined to sign his copies. This was

restated during the advocate's cross-examination by counsel for the Defendant.

38. Upon my further perusal and consideration of the record, I have noted that the Defendant did not deny being at the abovementioned venue on the abovementioned date.

39. From the record, it is the Plaintiff's advocate's averment that subsequent mention and taxation notices, as well as a ruling notice, were served upon the Defendant through his personal WhatsApp number under **Order 5, Rule 22C** of the **CPR**, with affidavits of service having been sworn by the said advocate on 21.04.2022; 24.06.2022; 11.07.2024; 4.02.2025; 20.02.2025; and 10.04.2025 (**Annexures "DN-3", "DN-4", "DN-5", "DN-6", "DN-7" and "DN-8"** respectively). On his part, the Defendant has denied receiving the aforesaid notices.

40. **Order 5, Rule 8** of the **CPR** expresses that as far as is practicable, service shall be effected upon a defendant in person. That notwithstanding, pursuant to the recent amendments to the CPR, provision is made for additional modes of service, including electronic email (under **Order 5,**

**Rule 22B**) and mobile enabled messaging applications (under **Order 5, Rule 22C**).

41. I have noted from the record that the Defendant did not deny that the WhatsApp number, **+254717331330,** as shown in the affidavit of service referenced hereinabove as well as in the Plaintiff's replying affidavit to the Motion, belongs to him or that the number was not actively in use at any material time. Going by the averments and documentation on record, it is apparent that the relevant notices were forwarded to and received by the referenced mobile number.

42. In view of all the foregoing circumstances, I therefore find that in the absence of any contrary evidence, the Plaintiff and his advocate have reasonably demonstrated that service was duly effected upon the Defendant. Further, the Defendant through his advocate, had an opportunity to cross-examine the advocate, during which time it was disclosed that while the exact time of service was not indicated, the date and venue of service were maintained by the advocate and as it stands, no contrary material has been adduced to rebut the contents of

the respective affidavits of service. In my considered view, the omission by the advocate to set out the exact time and specific court in which service was effected would not, in itself, automatically render the affidavit of service defective.

43. It is therefore fair to state that unless and until proven otherwise, the presumption is that the contents of an affidavit of service are factual and truthful as to the circumstances of service. The court draws reference from the following reasoning by the Court of Appeal in **Shadrack Arap Baiywo v Bodi Bach [1987] eKLR:**

> ***"There is a qualified presumption in favour of the process server recognized in M B Automobile v Kampala Bus Service, [1966] EA 480 at page 484 as having been the view taken by the Indian Courts in construing similar legislation. On Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670, the learned commentators say:***

***"3. Presumption as to service – There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service."***

44. In view of the foregoing circumstances, and in the absence of any contrary material or evidence, I am satisfied that the interlocutory judgment entered on 4.12.2019 is regular.

45. That notwithstanding, in determining whether or not to set aside an interlocutory/default judgment, a court is likewise required to consider whether a party has a defence which raises triable issues, even where service of summons is

deemed to have been proper. The court in the case of **Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324** reasoned thus:

> ***"Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."***

46. In the instant application, it is apparent from the record that the Defendant did not annex a draft statement of defence to enable this court to determine whether that defence raises tribble issues. That being the position, I am inclined to agree with the submissions by the Plaintiff that in the absence of any

draft defence, there is no sure way of ascertaining whether a triable defence exists or not.

47. Having arrived at the above finding on the subject of regularity of the interlocutory judgment and the defence, I do not deem it necessary to consider the principle of prejudice.

48. Flowing from all the foregoing circumstances, I find that the Defendant has not tendered credible material or sufficient reasons to satisfy the exercise of my discretion in his favour. Consequently, the Notice of Motion dated 7.10.2025 fails.

49. Turning now to the **second application**, as earlier mentioned, the same has been brought by the Objector herein, seeking orders that the Proclamation by the Auctioneers on 2.10.2025 over the household goods: being a television, television stand, microwave, fridge, sofa sets and water dispenser etc belonging to the Objector, be set aside.

50. I have considered the averments by the Objector that the proclaimed household goods do not belong to the Defendant and are therefore not available for proclamation and attachment in any event. I have similarly considered the rival

averments by the Plaintiff, that the proclaimed goods constitute part of matrimonial property between the Defendant and the Objector, thereby causing the same to be available for proclamation and attachment.

51. From the record, it is apparent that the Objector was never a party to the suit, notwithstanding her marital relation to the Defendant. Further, it is my observation that the Plaintiff did not tender any credible material to indicate or infer that the proclaimed household goods were being held for and on behalf of the Defendant at any material time, in order for them to constitute properties available for proclamation and attachment in satisfaction of the decree issued against the Defendant.

52. The Objector has annexed various receipts to her supporting affidavit to the second application, to support her averments that the relevant household goods belong to her. Upon my perusal of the said receipts, I have not found anything to lead me to conclude that the same contravene Section 19 of the Stamp Duty Act.

53. The Objector has tendered a tenancy agreement dated 1.05.2025 entered into between her and 'Benkan Enterprises' as **Annexure "RW 2"** to support her averment that she is a tenant residing in the property and paying rent thereon. This documentation dispels the averment by the Plaintiff that the said property constitutes matrimonial property owned by the Defendant and the Objector.

54. In view of all the foregoing circumstances, I am satisfied that there was no legal or proper basis upon which the Auctioneers acting on the instruction of the Plaintiff, could attach the listed proclaimed household goods in execution of the decree herein. I thus find the proclamation of the respective household goods to be illegal and improper, and I am satisfied that the circumstances pertaining would warrant an exercise of my discretion in favour of the Objector.

55. Consequently, I grant the following orders:

**a) The Notice of Motion dated 7.10.2025 is hereby dismissed, with costs to the Plaintiff.**

**b) The Notice of Motion dated 15.10.2025 succeeds to the effect that the Proclamation by Frontline Auctioneers on 2.10.2025 over the household goods being television, microwave, sofa sets, water dispenser, fridge etc belonging to the Objector, be and is hereby set aside.**

**c) The Objector shall have the costs of the Notice of Motion dated 15.10.2025, to be borne by the Plaintiff.**

56. It is so ordered.

**Dated, signed and delivered this 22nd day of January 2026.**

**S. N. MUTUKU**
**JUDGE**

**In the presence of:**

1. Ms Mwangi holding brief for Mr. Kiroko Ndegwa for the Plaintiff
2. Mr. Mbui Ndegwa for the Defendant
3. Mr. Thuku for the Objector