

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

COMMERCIAL APPEAL NO. E044 OF 2022

SEVEN FOURTEEN LIMITED.....1ST

APPELLANT

JOSHUA MBITHI MWALYO.....2ND

APPELLANT

-VERSUS-

SYLVIA WANJIRU MERIE.....

RESPONDENT

JUDGMENT

Background

1. The Appellants filed a Notice of Motion dated 8 October 2021 in CMCC No. 5532 of 2017 seeking, among other orders, to set aside the judgment entered against them on 20 September 2019.
2. Their application was premised on the contention that they had not been served with the pleadings and therefore did not participate in the proceedings.
3. Upon consideration, the trial court held that the affidavit of service sworn by the process server on 14 August 2017 constituted sufficient proof of service upon the 2nd defendant. The court faulted the 2nd defendant for failing to enter appearance or file a defence within the prescribed time, thereby justifying entry of default judgment.

4. Dissatisfied with that ruling, the Appellants lodged the present appeal raising ten grounds, including allegations of bias, lack of jurisdiction, res judicata, improper service, denial of cross-examination of the process server, and failure to strike out the 2nd Appellant from the proceedings.
5. The Respondent opposed the appeal through a replying affidavit sworn on 2 July 2024, terming the appeal frivolous, vexatious, and overtaken by events. She pointed out that the Appellants had previously sought leave to liquidate the decree by instalments, admitted liability, and even made part payment. She further alleged that the Appellants mischievously filed a review application resulting in an order that was neither sought nor traceable on CTS, which was under investigation for suspected fabrication.
6. The Appellants filed written submissions dated 13th May 2025, while the Respondent filed submissions dated 20th May 2025.

Analysis and Determination

7. From the grounds of appeal and submissions, two issues arise for determination:
 - i. Whether the learned magistrate erred in assuming jurisdiction in CMCC No. 5532 of 2017 despite the pendency of Insolvency Cause No. 7 of 2017 before the High Court.
 - ii. Whether the trial court erred in declining to set aside the default judgment entered on 20 September 2019.

Whether the trial Court had Jurisdiction

8. On Jurisdiction, the Appellants argued that the trial court lacked jurisdiction since the High Court was already seized of Insolvency Cause No. 7 of 2017.
9. The record of appeal, however, shows that in **Insolvency Cause No. 7 of 2017 (Joshua Mbithi Mwalyo v Sylvia Wanjiru Merie)**, the High Court expressly observed that the extent of liability between the company and the applicant was unclear and directed that the creditor institute civil proceedings against both parties jointly so that the court could determine their respective liability.
10. In light of that direction, the Respondent was entitled to file a civil claim, and the trial court properly assumed jurisdiction.

Whether the trial Court erred in failing to allow Setting Aside of the Default Judgment

11. The Appellants sought to set aside the default judgment under Order 10 of the Civil Procedure Rules, which empowers the court to set aside or vary such judgment upon terms that are just.
12. The trial court declined the application, holding that the 2nd Appellant had been duly served but failed to enter appearance or file a defence.
13. The affidavit of service sworn by the process server detailed how service was effected, including his prior knowledge of the 2nd Appellant from earlier bankruptcy proceedings and his recognition of the Appellant as a parliamentary aspirant.
14. The Appellants denied service but offered no draft defence or substantial reasons to justify setting aside the judgment. **As held in Departed Asians Property Custodian Board v Issa Bakuya**

(Supreme Court of Uganda, Civil Appeal No. 18 of 1991), an application to set aside an ex parte judgment cannot succeed absent good or substantial reasons.

15. The Appellants were served in August 2017, yet only moved the court five years later. Such a delay demonstrates indolence inconsistent with the equitable exercise of discretion.

16. I therefore agree with the trial court that the affidavit of service was credible and sufficient, and that the Appellants failed to demonstrate grounds for setting aside the judgment.

Disposition

17. In the result, I find no merit in this appeal. The trial court acted within its jurisdiction and properly exercised its discretion in declining to set aside the default judgment.

18. Accordingly, the appeal is dismissed with costs to the Respondent.

19. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

15TH JANUARY 2026

A handwritten signature in blue ink, appearing to read 'ADO MOSES', is written over a light-colored rectangular background.

**ADO MOSES
JUDGE**

In the presence of: -

C/A - Moses

Ndingi.....for the Appellant.

Nyamweya..... for the Respondent.

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