



A Plus Motors Limited v ANM alias AN (Minor Suing Through Her Mother and Next Friend EMM) & 3 others (Civil Appeal E116 of 2025) [2026] KEHC 991 (KLR) (2 February 2026) (Ruling)

Neutral citation: [2026] KEHC 991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E116 OF 2025
NIO ADAGI, J
FEBRUARY 2, 2026**

BETWEEN

A PLUS MOTORS LIMITED APPLICANT

AND

ANM ALIAS AN (MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND EMM) 1ST RESPONDENT

JANE WANJIRU MAINA 2ND RESPONDENT

TILAS MACHARIA 3RD RESPONDENT

ISAACK NJOROGE KAGWIMA T/ A A PLUS BUSINESS CONSULTANTS 4TH RESPONDENT

RULING

1. The 1st Respondent herein filed a matter at the Small Claims Court in Machakos being SCCC E896 of 2023 between ANM alias AN (minor suing through mother and next friend EMM) vs Jane Wanjiru Maina, Tilas Macharia & Isaack Njoroge Kagwima T/A A Plus Business Consultant whereby she claimed for, amongst other prayers, general damages for pain and suffering.
2. The claim arose from a road traffic accident that occurred on 10th July, 2023 whereby the 1st Respondent herein was hit by M/V registration number KCV xxxJ.
3. The said vehicle was registered in the name of the 2nd Respondent herein but was, allegedly beneficially owned by the 3rd Respondent and was in control of a person whose number was indicated in the Police Abstract as 070xxx. The phone number is registered in favour of the 4th Respondent whose business name is similar to that of the Appellant.



4. The firm of P.G. Wanyonyi & Co. Advocates entered appearance for the 3rd and 4th Respondents herein and, allegedly, for the Appellant.
5. The Appellant averred that they only learnt about the matter when they were served with a ten (10) days' proclamation notice prompting the Appellant to file an application dated 25th February, 2025 seeking to have the judgment delivered and all consequential orders thereto set aside and the court to declare the warrants of attachment and sale issued on 26/08/24 and the proclamation dated 21/02/25 as unlawful, irregular, null, and void.
6. Upon considering the application and submissions made thereto, the learned Adjudicator in the Ruling dated 10th April, 2025 dismissed the same with costs.
7. Being aggrieved by the said ruling the Appellant filed the instant appeal vide a Memorandum of Appeal dated 5th May 2025 raising the following 9 grounds of appeal:-
 - a. The trial court erred in law by dismissing the application to set aside the default judgement despite making a positive finding that the Appellant was not properly served with court process,
 - b. The trial court erred in law in failing to appreciate that the purported entry of appearance by an advocate who had no instructions from the Applicant could not cure the lack of personal service or confer jurisdiction upon the court.
 - c. The Learned Adjudicator misdirected herself in law by holding that the failure to attach a draft defence was fatal to the application to set aside judgement, notwithstanding the acknowledged procedural violations.
 - d. The Learned Adjudicator misdirected herself in law by holding that the that the failure to attach a draft defence was fatal to the application to set aside judgement, notwithstanding the fact that, the Appellant's defence was stated in its application to set aside the judgement dated 27th May 2024.
 - e. The honourable court exercised its discretion in judiciously and contrary to settled principles governing the setting aside of default judgements by failing to take into account relevant factors and relying on technicalities.
 - f. The Learned Adjudicator erred in law by failing to take into account the relevant consideration in her ruling.
 - g. The ruling violated the Applicant's Constitutional right to a fair hearing under Article 50 of the [Constitution](#) of Kenya, 2010.
 - h. The ruling was against the weight of the evidence and established legal principles and occasioned a miscarriage of justice.
8. The Appellant prayed that:-
 - a. The appeal be allowed.
 - b. The ruling and order delivered on 10th April 2025 be set aside.
 - c. The matter be remitted to the Small Claims Court for fresh hearing on merits.
 - d. Costs of this appeal be provided for.



9. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 6th March 2025; the 1st Respondent's submissions are dated 4th August 2025 while the 3rd & 4th Respondents' submissions 23rd October 2025.
10. The Appellant submitted and prayed that the appeal be allowed and the judgment of the lower court be set aside on the ground that the Appellant was never served with summons and pleadings and hence the trial was conducted in breach of the Appellant's right to a fair hearing under Article 50(1) of the Constitution of Kenya, 2010 and the rules of natural justice. This non-service deprived the court of jurisdiction and rendered the entire proceedings a nullity.
11. The 1st Respondent submitted that it is imperative to have a draft defense and/ or draft reply attached to an application seeking to set aside the judgement for want of service or any other reason. Failure to do so renders the application fatal ab initio. Consequently, there are no sufficient grounds herein which indicate that the appeal has any chance of success and as such is not deserving of any of the orders sought herein.

Analysis and Determination

12. The 3rd and 4th Respondents herein who are also Appellants in Civil Appeal E168 of 2024 invited this honourable court to consolidate this appeal Civil Appeal No. E116 of 2025, (A Plus Motors Ltd v AN Muinge & Others) with Machakos Civil Appeal No. E168 of 2024 (Tilas Macharia & Isaac Njoroge Kagwima v AN Muinge), as they both emanate from the same judgment dated 27th May 2024 delivered in Machakos Small Claims Court Case No. E896 of 2023.
13. I have perused and considered the two files and found that the parties, cause of action, facts, and legal issues are similar. I will proceed to consolidate the two appeals and determine them jointly. I will therefore adopt a single record in this Appeal No. E116 of 2025 for purposes of efficient adjudication, avoidance of duplication and conflicting decisions.
14. This Court has also carefully considered the grounds of appeal, the record of appeal and the parties' submissions.
15. This being an appeal from the Small Claims Court, the jurisdiction of the Court is circumscribed in Section 38 of the Small Claims Court Act. Under section 38(1) of the Small Claims Court Act, 2016 an appeal to this court is limited to matters of law only. An appeal from any decision or order referred to in subsection (1) shall be final.
16. Accordingly, the court is not permitted to substitute the subordinate court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them.
17. The above provision means that this Court can only intervene if the evidence on record does not reasonably support the conclusions made by the trial court.
18. Section 43 of the Small Claims Court Act provide for setting aside of Court orders. It provides that:-

“The Court may on the application of any Party to the proceedings set aside any of its orders and make such orders as it thinks just.”
19. Rule 11 of the Small Claims Court Rules provides that the Small Claims Court has discretion to set aside a default judgement.



20. Rule 11(4) of the Small Claims Rules sets out the grounds for setting aside an interlocutory judgment. It provides:-

“The Court may set aside a default judgment or any consequential orders given under this rule on the written request of any party that is aggrieved by the decree or order if the Court is satisfied, on evidence given by the applicant, and on hearing the other parties to the proceeding, that:-

- a. the default was inadvertent;
- b. the applicant has a valid defence with a probability of success; or
- c. there are sufficient grounds to warrant setting aside the default judgment, decree or order.”

21. Upon reviewing the Memorandum of Appeal and the grounds therein, it is evident that the grounds of appeal though framed to allege errors in law, they raise factual issues as well. This Court will refrain from addressing factual issues and will confine its analysis strictly to matters of law. This court will therefore proceed to determine whether the Learned Adjudicator was right in dismissing the Appellant’s application seeking to set aside default judgement pursuant to the provisions of Section 43, Rule 11(4) of the Act.

22. It is now well settled from numerous precedents that a distinction exists between a default judgment that is regularly entered and one which is irregularly entered.

23. In an irregular judgment, the judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986 – 1989] EA 456).”

24. The Learned Adjudicator stated as follows;

“....I find that even if the Court has found out that service may not have been effected, the judgment against the 3rd Respondent cannot be set aside as there is no draft response filed for the court to evaluate whether the said response raised triable issues. Without it, I find that the prayer for setting aside the judgment herein would not serve the 3rd party, and therefore the same is declined”.

25. From the above caption of the ruling, what clearly comes out is that the Learned Adjudicator acknowledged that service may not have been effected upon the Appellant meaning the service was irregular and or inadvertent in the circumstances. Notwithstanding this, she went ahead and stated that the judgement against the Appellant cannot be set aside as there is no draft response filed for the court to evaluate whether the said response raised triable issues.



26. In *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR the Court said,
- “Where judgment is entered against a defendant who has not been served or properly served, such judgment is irregular and must be set aside *ex debito justitiae*.”
27. In *Agigreen Consulting Corp Ltd v National Irrigation Board* [2020] eKLR, the Court stated thus;
- “A default judgment founded on defective service is irregular and the court is entitled to set it aside as of right.”
28. It is my considered view that the Learned Adjudicator having found that the service may not have been effected upon the Appellant, she ought to have proceeded to set aside the default judgment *ex debito justitiae* (as a matter of right). She did not have to bother whether there was a response or not. By setting aside the default judgment, the Appellant would have gotten a chance to file a response to the Claim. I find the decision of the Learned Adjudicator to dismiss the application seeking to set aside default judgment to have been erroneous in law having found the default to be inadvertent.
29. In the end, I make the following orders:-
- a. The Appeal dated 5th May 2025 has merit and is allowed.
 - b. The order in (a) above will apply to Machakos High Court Civil Appeal No. E168 of 2024 arising from the same judgement in Machakos Small Claims Court Case No. E896 of 2023.
 - c. Following the decision in Eldoret Petition No. E010 OF 2024 as Consolidated with Petition No. E010 of 2024, the Claim in Machakos Small Claims Court Case No. E896 of 2023, is hereby transferred to Machakos Chief Magistrate’s Court for hearing and determination.
 - d. Costs will be in the cause to be filed.
30. Orders accordingly. Appeal files closed.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 2ND FEBUARY 2026

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 3RD FEBUARY 2026

