Silverstone Quarry (K) Limited v Kingo t/a Joverest Enterprises & another (Civil Appeal E017 of 2024) [2026] KEHC 1167 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1167 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E017 OF 2024

RC RUTTO, J

FEBRUARY 5, 2026

BETWEEN

SILVERSTONE QUARRY (K) LIMITED ..... APPELLANT

AND

JOSHUA MUTUO KINGO T/A JOVEREST ENTERPRISES ... 1ST RESPONDENT

RHEMAT AUCTIONEERS ..... 2ND RESPONDENT

(An appeal from the ruling and order of the Chief Magistrate's Court at Mavoko (B.A. Ojoo, RM.) delivered on 18th January 2024 in CMCC No. 463 of 2016)

JUDGMENT

1. This appeal challenges the exercise of discretion by the trial court in its ruling dated 18th January 2024. By plaint dated 10th May 2016, the 1st respondent sued the appellant in Mavoko CMCC No. 463 of 2016. The suit arose from allegations of breach of contract. According to the plaint, the 1st respondent averred that between 17th March 2016 and 18th March 2016, it delivered 13 lorries of building sand within Mlolongo at the request of the appellant, with the expectation that the appellant would pay a sum of Kshs.243,968.00. However, the appellant failed to remit the said sums of money hence the suit.

2. By judgment of the trial court dated 13th September 2023, the trial court found that the 1st respondent had proved its case on a balance of probabilities. The 1st respondent was awarded the sums claimed together with interest and costs. Following that judgment, by Notice of Motion dated 11th October 2023, the appellant sought the following reliefs:

    1. ...Spent;

    2. ...Spent;

3. That the Honourable Court be and is hereby pleased to lift, vacate and/or set aside the proclamation undertaken by the 2nd respondent under the proclamation notice dated 4th October 2023 on instructions from the 1st respondent in its entirety;

4. That this Honourable Court be pleased to set aside the irregular judgment entered against the applicant herein, and court proceedings that occurred in absence of the applicant and thereby issue an order reopening the suit and allowing the defendant to call its last witness, the forensic document examiner;

5. That costs of this application be provided for.

3. By a ruling delivered on 18th January 2024, the trial magistrate dismissed the Notice of Motion with costs to the 1st respondent. Dissatisfied with that decision, the appellant filed a memorandum of appeal dated 31st January 2024 raising six grounds challenging the findings of the learned magistrate.

4. In summary, the appellant contended that the trial court erred in holding that it had failed to satisfy the threshold for setting aside the judgment and reopening the case to call its last witness. It argued that the denial amounted to a breach of its constitutional right to be heard under Articles 50 (1) and 159 (2) (d) of *the Constitution*. The appellant maintained that it had provided sufficient justification for the reliefs sought; that the court ought to have considered its prior conduct of attending court and not condemned it for non-attendance in the absence of proper service of hearing and mention notices; that the trial court wrongly found the application to have been filed with inordinate delay; and that the trial court failed to take into account the fact that its counsel was unwell and therefore unable to actively participate in the proceedings. For those reasons, the appellant prayed that its appeal be allowed, the ruling of the trial court dated 18th January 2024 be set aside and the Notice of Motion dated 11th October 2023 be granted.

5. The appeal was heard on the basis of the parties' written submissions. The appellant filed extensive submissions framing five issues for determination. On the first issue, it argued that it had met the threshold for setting aside judgment under order 12, rule 7 of the Civil Procedure Rules. It explained that its primary counsel was unwell and unable to participate further in the proceedings while the instructing counsel, who was to hold brief mis-diarized the dates.

6. The appellant admitted that it had participated in the trial proceedings up to the point when its second witness was scheduled to testify. It argued that the mix-up was sufficient reason to set aside the judgment. In any event, it maintained that it was never served with subsequent mention, hearing or judgment notices and no evidence of service was produced. The appellant further contended that contrary to the trial court's finding, its application was filed timeously, approximately one month after judgment was delivered and only two days after receipt of the proclamation notice. It therefore submitted that proper grounds had been demonstrated for the grant of the orders sought and that, in the interest of justice it should have been allowed to fully ventilate its case.

7. The appellant further submitted that it had met the threshold for reopening the case. It explained that the mis-diarization of dates was inadvertent and that it only intended to call one remaining witness to conclude its defence. According to the appellant, this last witness, a forensic document examiner, would have provided crucial evidence that could shed more light on the issues in dispute and potentially persuade the trial court to reach a different conclusion. On the third issue, the appellant argued that granting the orders sought would not prejudice the 1st respondent, who would still have the opportunity to cross-examine the witness. On the fourth issue, it emphasized that the mistake of counsel should not be visited upon the client, particularly in light of the constitutional guarantee of the right to a fair hearing. It therefore urged this court to allow the appeal.

8. The respondent opposed the appeal through written submissions He argued that no sufficient reasons had been advanced to justify the delay and that the appellant's right to be heard under Article 50 of *the Constitution* had not been infringed. He observed that after he closed his case, the appellant failed to prosecute its defence for nearly eight months. Summarizing the trial court proceedings, the respondent submitted that the appellant was undeserving of the court's discretion. In his view, the reasons advanced were false and amounted to mere excuses. He therefore urged this court to dismiss the appeal.

9. I have considered the appellant's written submissions, examined the record of appeal and analyzed the applicable law. In Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976, the court laid down guiding principles on the exercise of discretion, it stated:

> " It is a common ground that it is a matter for discretion whether or not to set aside a judgment under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgment. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

10. The subject application was supported by the affidavit of Mohammed Shalima, the appellant's counsel. In the Notice of Motion dated 11th October 2023, the appellant stated that pursuant to the judgment of the trial court dated 13th September 2023, the 1st respondent was awarded Kshs.243,968.00. The appellant argued that the decision was unfair because it denied it the opportunity to call one of its key witnesses. It therefore claimed that its constitutional right to fair hearing under Article 50 of *the Constitution* had been violated. Following the judgment, the 1st respondent instructed the 2nd respondent to execute the decree by way of a proclamation notice dated 4th October 2023 which was served upon the appellant on 9th October 2023.

11. The appellant indicated that it was last in court on 29th March 2023 when it sought an adjournment to call a forensic expert. The matter was then adjourned to 24th May 2023. It explained that, having attended court on several occasions, it had every intention of defending the suit to its conclusion However, it argued that the 1st respondent failed to serve it with subsequent mention, hearing, and judgment notice. As a result, it was unaware of the proceedings, which culminated in what it termed an irregular judgment.

12. The appellant further stated that when the matter was listed for mention on 24th May 2023, its counsel requested a colleague to hold his brief. Unfortunately, the colleague encountered insurmountable challenges with network connectivity. Thereafter, the counsel instructed the office clerk to peruse the court file, but those instructions were not carried out. The appellant argued that it should not suffer for the mistake of its counsel. It added that the instructed advocate had since left the firm, further complicating matters.

13. The deponent also averred that he had been indisposed due to illness, which rendered him physically incapable of actively monitoring and participating in the case. He emphasized that the appellant had

an arguable defence and warned that if the orders sought were not granted, the respondents were likely to proceed with execution, thereby occasioning injustice.

14. From the record, it is not disputed that the matter proceeded to hearing on 15th August 2022 when Miss Kendi appeared for the appellant. The 1st respondent closed its case paving way for the hearing of the appellant's case. After examination of DW1, Miss Kendi sought an adjournment to call two more witnesses. The matter was adjourned to 16th November 2022 where the deponent was present but hearing did not proceed. The appellant's counsel was directed to serve the 1st respondent with the next hearing date which was fixed for 15th February 2023.

15. Despite being aware of the date, neither the appellant nor his counsel attended court on 15th February 2023. The matter was stood over to 29th March 2023 where Ms. Kitolo, holding the deponent's brief, informed the court that she was not ready to proceed. The matter was adjourned to 25th May 2023 with the court marking it as the last adjournment.

16. When the matter was listed on 25th May 2023, neither the appellant nor his counsel was present. The trial court indulged the parties giving it more time to be present in court. However, none of the were present. Consequently, the court closed the appellant's case and directed the parties to file written submissions The appellant was subsequently absent on 29th June 2023, 2nd August 2023 and 13th September 2023 when the judgment was delivered. It was only thereafter, on 11th October 2023 that the appellant filed the application seeking to set aside the judgment.

17. The appellant raised several complaints. First, it argued that it was never served with subsequent mention, hearing, and judgment notices. However, the record shows that on 29th March 2023, the appellant's counsel was expressly informed that the adjournment granted was the last one, and the matter was fixed for hearing on 25th May 2023. For this crucial date, service was unnecessary since counsel was present in court and aware of the adjourned date.

18. Second, the appellant contended that its counsel was unwell and therefore unable to proceed with the matter. Yet, the record demonstrates that various counsel appeared and represented the appellant at different stages. Even if the deponent was the appellant's primary counsel, this did not absolve the appellant itself from monitoring the progress of its case. After all, it was the appellant who had been sued. A diligent litigant, genuinely interested in prosecuting its defence, would have remained vigilant in tracking developments in the matter regardless of counsel's circumstances.

19. The appellant also claimed that it suffered internet connectivity challenges and that its clerk failed to follow up on the matter. This explanation is unconvincing. The record shows that parties were served with mention notices via email, including the one issued when the appellant was absent on 15th February 2023. Clearly, the appellant had access to email communication, as evidenced by its subsequent attendance on 29th March 2023.

20. Had the appellant been genuinely committed to prosecuting its case, it would have contacted the court registry or checked the Case Tracking System (CTS) to confirm the progress of the matter and verify hearing dates. Instead, it remained passive and only raised complaints after judgment was entered. Notably, the only evidence of follow-up was an email dated 12th June 2023, seeking clarification on what transpired in court on 24th May 2023. This belated inquiry underscores the appellant's lack of diligence.

21. On the question of whether the judgment was irregular, I find otherwise. A review of the judgment shows that the trial considered the evidence presented and made its determination. Distinguishing between a regular and irregular judgment as to invoke the jurisdiction of the court in setting aside an ex

parte judgment, the Court of Appeal in James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another [2016] KECA 470 (KLR) said:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).
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> In an irregular default judgment, on the other hand, 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 issue 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.

22. The above draws a clear distinction between regular and irregular default judgments. In regular default judgments, the defendant is duly served but fails to act, and the court exercises discretion in deciding whether to set aside. In irregular default judgments, where service of summons was not effected, the judgment is set aside as of right. In this case, the appellant had actively participated in the proceedings and was aware of the hearing dates. The judgment was therefore regular.

23. The reasons advanced to justify the application were weak and unconvincing. I find that the appellant did not act in good faith and failed to demonstrate sufficient grounds for the exercise of discretion in its favor. Accordingly, I am satisfied that the trial court properly exercised its discretion in dismissing the application to set aside the judgment dated 13th September 2023. For these reasons, the present appeal lacks merit and is hereby dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 5TH DAY OF FEBRUARY, 2026

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant