



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CORAM: F. MUGAMBI, J**  
**CIVIL APPEAL NO. E183 OF 2024**

**BETWEEN**

**SERAH NDUTA WANGARURO**

**TERESIA WAMBUI WANGARURO** (*Suing as Administrators of the*

*Estate of the late* **MARY WANJIKU WANGARURO** .....  
**APPELLANTS**

**VERSUS**

**DOROTHY KAJUJU KIMATHI** ..... **1<sup>ST</sup>**  
**RESPONDENT**

**MAINA NJUE** ..... **2<sup>ND</sup>**  
**RESPONDENT**

**BENARD KARIUKI NJOROGE** ..... **3<sup>RD</sup>**  
**RESPONDENT**

(Being an appeal from the Ruling of Hon. PK  
Rotich, SPM delivered on 19<sup>th</sup> December, 2023  
in Nairobi MCOMM Civil Suit No. 8205 of 2004)

**JUDGMENT**

**Introduction and Background**

1. This appeal arises from a Notice of Motion application dated 13<sup>th</sup> December 2022 and filed in **Commercial Civil Suit No. 8205 of 2004**. The appellants, who were the applicants in the trial court, sought leave of the court to substitute the 3<sup>rd</sup> defendant, Mary Wanjiku Wangaruro (the deceased), with her administrators Sarah Nduta Wangaruro, Teresia Wambui Wangaruro, and John Mungai Kinyanjui. They also sought to set aside an interlocutory judgment entered on 11<sup>th</sup> May 2005 together with subsequent orders emanating therefore, pending hearing and determination of the suit, an injunction restraining the respondents from dealing with the deceased's property known as **Olenguruone/Keringet Block 2/319 (Mwahe)** until the matter is heard and determined and leave to file a defense and contest the claim on its merits.
2. The application was canvassed by way of written submissions and on 19<sup>th</sup> December 2023, the trial court delivered its Ruling dismissing the application with costs to the 1<sup>st</sup> respondent in this appeal. Aggrieved by the said Ruling, the appellants filed

the instant appeal through the Memorandum of Appeal dated 26<sup>th</sup> July 2024.

- 3.** In essence, the appellants' case is that the learned Magistrate erred in both fact and law by failing to require formal proof of liability against their late mother, despite the necessity of establishing whether she had guaranteed the disputed loan. They maintain that the interlocutory judgment was irregularly entered since service was never effected, pointing out that no affidavit of service exists to confirm delivery of the amended plaint. They argue that in deciding whether to set aside the judgment, the Magistrate disregarded their defence, thereby denying them a fair hearing and infringing their constitutional right to access justice.
- 4.** The appellants further contend that they have suffered grave prejudice by being condemned to repay a loan never secured by their deceased mother, even though the actual borrowers admitted liability. They criticize the Magistrate for dismissing their explanation that the deceased was unaware of the proceedings and that her heirs only

discovered the suit after her death, and for wrongly attributing undue delay to them despite their prompt action once they became aware.

5. They also assert that the Magistrate failed to recognize the prejudice they would endure from execution of an ex parte judgment and unlawful attachment of property, absent any evidence that their mother guaranteed the loan. The appellants emphasize that justice was not seen to be done, as they were denied the opportunity to defend themselves even after substitution as administrators of the estate, and were condemned unheard to repay a loan they neither benefitted from nor guaranteed. Finally, they argue that the Magistrate erred in dismissing their claim as unmeritorious and in suggesting they lacked diligence, despite their consistent attendance and effort to prosecute the matter.
6. In reply to the appellants' assertions, the 1<sup>st</sup> respondent maintains that the interlocutory judgment was properly entered pursuant to **Order 10 Rule 4(1) of the Civil Procedure Act**, as the deceased was duly served. She points to the

affidavit of service filed in court as proof of proper service. Relying on this Court's decision in **Ammah Service Station Limited V Boss Customs Limited, [2025] KEHC 5792 (KLR)**, she argues that formal proof is unnecessary in liquidated claims where a defendant fails to respond. She further asserts that the deceased voluntarily offered her property as security for the loan advanced to the Kenya Informal Traders Association (KITA).

7. The 1<sup>st</sup> respondent emphasizes that the application to set aside the judgment was made nearly two decades after the interlocutory judgment had been entered, a delay the trial court rightly found inordinate. She also notes that substitution of parties was only sought in 2022, long after the appellants claim to have discovered the existence of the suit.

### **Analysis and Determination**

8. Since this is a first appeal, it is necessary to restate the scope within which this Court may re-evaluate

the evidence. As was clearly set out in **Selle & Anor V Associated Motor Boat Co Ltd & Another, (1968) E.A 123**, a first appellate court is obliged to reconsider the evidence on record, evaluate it afresh, and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses and must therefore give due allowance to the trial court's advantage in that regard.

9. This principal was further affirmed in **Mark Oiruri Mose V R, [2013] eKLR** where the court held that:

***“This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”***

- 10.** Guided by these principles, and having carefully considered the record, the parties' pleadings, and their written submissions, the central issue for determination is whether there was merit in dismissing the application dated 13<sup>th</sup> December 2022 seeking to set aside the interlocutory judgment entered on 11<sup>th</sup> May 2005. The appellants faulted the trial court for entering an *ex parte* judgment without proof of proper service upon the deceased.
- 11.** The question of whether an *ex parte* judgment is regular or irregular has been succinctly addressed by the Court of Appeal in **James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another, [2016] KECA 470 (KLR)** where the Court held that a distinction must be drawn between regular and irregular judgments. A regular judgment is one entered after proper service of summons but in default of appearance or defence, while an irregular judgment is one entered without proper service of summons.

**12.** In the latter case, the judgment is a nullity and must be set aside *ex debito justitiae*, without the need to consider the merits of the defence. Conversely, where the judgment is regular, the court has discretion to set it aside, considering factors such as the reason for default, whether the defence raises triable issues, and the interests of justice.

**13.** At the heart of the appeal before me is the question of whether proper service was effected upon the deceased. The trial court was confronted with this issue and noted that:

***“It is very clear that the 3<sup>rd</sup> defendant (deceased) was properly served with summons to enter appearance and had knowledge that this suit had been instituted, as demonstrated by the affidavit of service filed before the entry.”***

**14.** The record however, confirms that an initial plaint dated 30<sup>th</sup> July 2004 was filed against KITA, Bernard Kariku Njoroge, Maina Njue, and Mary

Wanjiku Wangaruro, (the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively). While it is evident that the 1<sup>st</sup> respondent in this appeal did take out summons to enter appearance, what remains unclear is whether the summons, together with the accompanying pleadings, were ever served particularly, upon the deceased (the 4<sup>th</sup> defendant). An amended plaint dated 9<sup>th</sup> September 2004 was subsequently filed, yet even in respect of that pleading, there is no evidence on record to demonstrate that it was ever served upon the deceased.

**15.** Given that the appellants' challenge squarely rests on the issue of service, the burden lay with the respondents to provide clear and cogent proof of such service. Indeed, nothing would have been easier than producing the relevant affidavit of service or other documentary evidence to demonstrate proper service.

**16.** The respondents' position is further weakened by their own written submissions dated 12<sup>th</sup> September 2025. In those submissions, the 1<sup>st</sup> respondent expressly acknowledged that Mary

Wanjiku Wangaruro, (the deceased and alleged guarantor), could not be traced until 2016, when it was discovered that she had already passed away. Her beneficiaries were only identified in 2019. This admission is telling, as it directly contradicts the assertion that the deceased had been properly served with the initial or amended pleadings in 2004 or 2005. If indeed she remained untraceable for over a decade, it is implausible that service could have been effected during the earlier period.

- 17.** This inconsistency raises profound doubt as to the regularity of the interlocutory judgment entered in 2005 and strongly supports the appellants' contention that the judgment was founded on defective or non-existent service. A closer scrutiny of the record further reveals that the only affidavit of service available is that sworn by **Francis M. Njoroge** on 17<sup>th</sup> May 2005. That affidavit confirms service of summons solely upon Bernard Kariuki Njoroge, one of the defendants, and makes no mention whatsoever of service upon the deceased, Mary Wanjiku Wangaruro.

- 18.** In the absence of any affidavit or credible evidence demonstrating that the deceased was served with either the original plaint or the amended plaint, the foundation upon which the interlocutory judgment was entered against her collapses.
- 19.** Service of summons is not a mere procedural formality; it is the mechanism through which a defendant is brought before the court and afforded the opportunity to be heard. The failure to demonstrate service renders the judgment irregular and liable to be set aside *ex debito justitiae*, in accordance with the determination in **James Kanyiita Nderitu & another (supra)**.
- 20.** Had the trial court properly evaluated the evidence and the circumstances under which the personal representatives eventually discovered that judgment had been entered against their late mother without her ever being heard, it would have reached a different conclusion. The appellants cannot be faulted for the delay in challenging the judgment, as they were victims of events that were entirely beyond their control. Justice demanded that the court acknowledge this reality and set

aside the interlocutory judgment, and restore the appellants' right to be heard. The trial court's failure to appreciate these circumstances resulted in a miscarriage of justice, which this appellate court must now correct.

### **Disposition**

**21.** Accordingly, for the reasons that I have set out above, I find this appeal meritorious. It is hereby allowed in its entirety, with the result that the application dated 13<sup>th</sup> December 2022 in **Civil Suit No. CMCC 8205 of 2004** is allowed as prayed. The interlocutory judgment entered on 11<sup>th</sup> May 2005 is set aside, and the matter shall proceed to hearing on its merits. Given the age of the suit and the need to bring closure to the parties, I direct that the case be heard on a priority basis. The appellants shall have the costs of this appeal.

**DATED, SIGNED AND DELIVERED IN NAIROBI  
THIS 13<sup>TH</sup> DAY OF FEBRUARY 2026.**

**F. MUGAMBI  
JUDGE**

**Delivered in presence of:**

Ms Wangui for the appellant/applicant

Mr Mungai for the respondent

Court Assistant: Lillian

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