

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
KITALE**

ELRC APPEAL NO. E001 OF 2025

(Before Hon. Lady Justice Maureen Onyango)

(FORMALLY ELDORET APPEAL NO. E003 OF 2021)

**NATIONAL CEREALS AND PRODUCE BOARD.....
APPELLANT**

VERSUS

**JOSEPH NYONGESA WASIKE.....
RESPONDENT**

*(Being an appeal from the Ruling and/or decision of Honourable
Gwaro Mary Immaculate (Senior Principal Magistrate) delivered
in Kitale CMELRC NO. 2 of 2019 on 28th April 2021*

JUDGMENT

1. This is an appeal arising from the ruling of Hon. Gwaro Mary Immaculate (Senior Principal Magistrate) delivered on 28th April 2021 in Kitale CMELRC No. 2 of 2019, wherein the learned magistrate dismissed the Appellant's application dated 8th March 2021.
2. In the Memorandum of Appeal dated 5th May 2021 the Appellant sets out the grounds of appeal as follows:

- a) THAT the learned trial magistrate erred in law and fact in failing to hold and/or find that right to defend is cherished.
- b) THAT the learned trial magistrate erred in law and fact in failing to set aside ex parte proceedings and interlocutory judgment and/or the subsequent judgment delivered on 6th October 2020.
- c) THAT the learned trial magistrate erred in law and fact in failing to hold that the Appellant's non-attendance at the hearing was caused by no fault of its own but due to non-service of pleadings.
- d) THAT the learned trial magistrate erred in law and fact in failing to hold that the Appellant's non-participation in the matter was due to and/or as a result of improper service and/or non service of the summons, a ten (10) days' notice of entry of interlocutory judgment and a hearing notice.
- e) THAT the learned trial magistrate erred in law and fact in failing to hold that service of the summons to enter appearance and/or pleadings was not satisfactory and in line with the law hence erroneous ex-parte proceedings.

- f) THAT the learned trial magistrate erred in law and fact in failing to hold that if at all there was service then the same was irregular, improper and defective for want of compliance with the law.
- g) THAT the learned trial magistrate erred in law and fact in failing to allow the Appellant's Application to avert execution in order to prevent loss and prejudice to the Appellant who stands condemned unheard.
- h) THAT the learned trial magistrate erred in law and fact in failing to appreciate the provisions of Article 50 of the Constitution of Kenya, 2010 as to the right to be heard.
- i) THAT the learned trial magistrate erred in law and fact in failing to set aside the judgment delivered on 06/10/2020 when the Appellant had demonstrated and/or shown a good defence to the claim that raises serious triable legal issues for determination on merit.
- j) THAT the learned trial magistrate erred in law and fact in failing to exercise judicial discretion in determination of the Application before it in a fair

manner to enhance and promote access to justice as enshrined under the Constitution of Kenya, 2010.

3. The Appellant prays for the following reliefs:

a. That the *ex parte* proceedings undertaken, the judgment entered in this matter and the subsequent proceedings and/or orders if any be set aside *ex debito justiciea*

b. That the Appellant be granted leave to file its defence to the claim and the draft defence attached thereto be deemed properly filed and served subject to payment of court fees only.

4. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 24th October 2025 whereas the Respondent's submissions are dated 15th January 2026.

Appellant's submissions

5. In its submissions, the Appellant framed the issues for determination to be: -

- i. Whether the learned trial magistrate erred in law and fact in holding that the Appellant was duly served with summons to enter appearance without proper proof of service and consequently in failing to set aside the ex parte proceedings, interlocutory judgment and subsequent judgment,
 - ii. Whether the learned trial magistrate properly exercised her discretion in declining to set aside the ex-parte judgment despite the Appellant having demonstrated a plausible defence raising triable issues,
 - iii. Whether the trial court's ruling/decision violated the Appellant' s right to a fair hearing under Article 50 of the Constitution and thereby occasioned a miscarriage of justice.
6. On the first issue, the Appellant submitted that the learned trial magistrate fell into error by holding that the Appellant had been duly served with summons to enter appearance without proof of service in accordance with the law; declining to set aside the ex parte proceedings and the resultant judgment despite clear evidence that the Appellant had been condemned unheard due to want of

service; and failing to appreciate that the defence exhibited by the Appellant raised triable issues warranting determination upon a full hearing.

7. According to the Appellant, the foundation of any judicial proceeding is the principle of *audi alteram partem*, a right codified under Article 50(1) of the Constitution which guarantees every person the right to a fair hearing. The Appellant submitted that the question of service of pleadings was central to the orders sought before the trial court and once raised, the trial court had a duty to fully determine the issue while remaining alive to the overriding principles of law.
8. The Appellant contended that, in the absence of proper service, the interlocutory judgment and all subsequent proceedings were irregular, void *ab initio*, and ought to have been set aside *ex debito justitiae*.
9. Relying on Rule 28 of the Employment and Labour Relations Court (Procedure) Rules, 2024, the Appellant maintained that there was no indication or evidence on record as to whom the alleged summons were served upon and that the court record was silent on the identity,

designation, or capacity of the person said to have received the process on its behalf.

10. On this basis, the Appellant submitted that without evidence by way of an affidavit of service identifying the person served, there could be no confirmation that service was effected as envisaged by law, thereby rendering the alleged service defective and irregular and the resultant proceedings a nullity.
11. The Appellant further submitted that, although a demand letter addressed to it was exhibited on record, there was no indication that it was ever received as the document bore no stamp of acknowledgment, signature of receipt, or certificate of posting, nor was there any affidavit or certificate of service annexed to confirm dispatch or delivery. It was therefore contended that the demand letter could not be relied upon as proof of notice or prior communication regarding the suit.
12. The Appellant thus asserted that there was no proof of service on record by way of an affidavit of service to demonstrate that summons and pleadings were ever served upon it, and that the Respondent did not avail any return copy received, signed, or stamped by the Appellant.

13. It is the Appellant's submission that where a defendant is not properly served, or where service is questioned, the court lacks jurisdiction to proceed and any proceedings, interlocutory judgment, and final decree are irregular and liable to be set aside *ex debito justitiae* as of right. In support of this position, the Appellant relied on **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another (2016) KECA 470 (KLR)**, **Frigonken Ltd v Value Pak Food Ltd HCCC No. 424 of 2010** and **Shabban Keah, Millsons Management & Gladys Mutisya v Patrick Omondi Opiyo Civil Appeal No. 131 of 2012 (2016) KEHC 2242 (KLR)**.
14. On the second issue, the Appellant submitted that even if service had been regular, the law governing the setting aside of ex parte judgments provides that the discretion of the trial court, though wide, must be exercised judiciously and guided by the principles of justice, fairness and the need to avoid hardship or injustice caused by excusable mistakes or procedural irregularities. Reliance was placed on **Patel v E.A. Cargo Handling Services Ltd (1974) EA 75**.

15. The Appellant submitted that its conduct did not disclose any intention to obstruct or delay justice and that the application to set aside was filed promptly upon learning of the judgment, demonstrating diligence and good faith. It maintained that the trial magistrate erred in dismissing the application for alleged lack of merit rather than viewing it through the lens of justice and fairness.
16. The Appellant further submitted that the learned trial magistrate misdirected herself in finding that the Appellant had not demonstrated the loss it was likely to suffer if the judgment was not set aside, maintaining that the right to be heard is constitutionally protected and that its denial constitutes obvious prejudice that does not require further proof.
17. On the issue whether the trial court's ruling violated the Appellant's right to a fair hearing under Article 50 of the Constitution and thereby occasioned a miscarriage of justice, the Appellant submitted that the right to a fair hearing provided for under Article 50(1) of the Constitution extends to corporate entities, entitling them to defend suits filed against them and to challenge claims made in their absence. It submitted that the Appellant was never served

with summons to enter appearance and only became aware of the judgment months later upon receipt of a demand for payment.

18. The Appellant submitted that, despite evidence of non-service and procedural irregularities, the trial court dismissed its application to set aside the ex parte judgment, thereby denying it the constitutional right to a fair and impartial hearing. In support of this position, the Appellant relied on ***Stecol Corporation Limited v Susan Awuor Mudemb (2021) KEHC 2912 (KLR)*** and ***Wilbur Earl Hightower v Mark Kithinji Mbatiah (2020) KEELC 2407 (KLR)***.
19. In conclusion, the Appellant urged the Court to allow the appeal, set aside the ruling of the trial court delivered on 28th April 2021, set aside the ex parte proceedings, interlocutory judgment and final judgment entered against it; grant leave to file its defence out of time and remit the matter for hearing on the merits.

The Respondent's Submissions

20. On its part, the Respondent identified the issues for determination to be: -

- i. Whether summons to enter appearance were served upon the Appellant,
 - ii. Whether the Appellants have a triable defense,
 - iii. Whether the judgment entered herein is regular.
21. On the first issue, the Respondent submitted that before filing suit, a demand notice was served upon the Appellant and that, after filing the suit, the Appellant was served with summons to enter appearance and all relevant documents. It is the Respondent's submissions that the pleadings were received by the Appellant's depot manager, who signed the copies, and a return of service by the process server was filed in court to prove that service was effected.
22. The Respondent contended that service was properly effected and that it was illogical for the Appellant to allege non-service while referring to the summons in a letter to Victoria Insurance Brokers. The Respondent submitted that the Appellant had not denied knowledge of the depot manager who received the summons on its behalf.
23. The Respondent submitted that the Appellant did not request to cross-examine the process server, which it argued was a clear indication that service was properly effected. In support, it relied on ***Miruka v Abok &***

***Another* [1990] KLR 541, *Karatina Garments Ltd v Nyanarua* [1976] KLR 94, and *Keroka Highway Service Station Ltd v Maurice Odongo Ogot* [2020] eKLR.**

24. On the second issue, the Respondent submitted that the draft statement of defence comprised mere denials, did not raise triable issues and was not a reasonable defence to the claim. In support of this position, the Respondent relied on the case of ***CFC Bank Limited v Charles K. Arap Tanui* [2008] eKLR, *Roy McKenzie v Cartrack Kenya Limited & Another* [2014] eKLR, and *Michael Juma Otieno v Martin Luther Omondi Ocholla* [2015] eKLR.**
25. Further, it is submitted that although the draft defence had been annexed in the trial court, it did not form part of the record of appeal, thereby denying this Court the benefit of determining whether it raised triable issues.
26. On the third issue, the Respondent submitted that the judgment entered herein was regular since service of summons to enter appearance was properly effected and that the trial court, in its ruling, made a clear analysis of the issue. In addition, the Respondent submits that the Appellant's letter to Victoria Insurance Brokers was proof

that service of summons was proper and that the interlocutory judgment entered was regular.

27. The Respondent maintained that the judgment was not an irregular ex parte judgment since the Appellant was duly served with summons and accompanying documents.
28. In the end, the Respondent urged the Court to find that the trial court did not err in declining to set aside a regular judgment and to allow the Respondent to proceed with execution and enjoy the fruits of its judgment.

Analysis and Determination

29. I have carefully considered the record of appeal, the ruling of the trial court, the grounds of appeal, and the rival submissions by the parties. In my view, the issues that present themselves for determination in this appeal are: -
 - i. Whether summons to enter appearance were duly served upon the Appellant,
 - ii. Whether the failure to serve a hearing notice rendered the ex parte proceedings irregular and in violation of the Appellant's right to a fair hearing,
 - iii. Whether the draft defence raised triable issues,
 - iv. What orders should issue.

Whether summons to enter appearance were duly served upon the Appellant

30. The Appellant's primary contention is that it was never served with summons to enter appearance and was therefore condemned unheard. However, from a perusal of the record, it is clear that summons to enter appearance were served and received by Lorraine Adhiambo, the Appellant's depot manager, on 16th September 2019. Her name appears alongside the Appellant's stamp. The presence of the corporate stamp is prima facie evidence that the document was received at the Appellant's office.
31. While the Appellant questioned the identity and capacity of the recipient, it did not deny that the stamp appearing on the summons is its official stamp, nor did it provide evidence to demonstrate that the said recipient was a stranger or unauthorized person. In the absence of such rebuttal, the stamped summons constitute sufficient proof that service was effected at the Appellant's premises.
32. Courts have consistently held that service upon a corporation may be effected through its offices and acknowledged through its official stamp, unless evidence is led to show fraud, misrepresentation, or receipt by an

unauthorized person. No such evidence was tendered in the present case.

33. I therefore find that summons to enter appearance were duly served upon the Appellant. Consequently, the interlocutory judgment entered upon its failure to enter appearance cannot be said to have been irregular on account of non-service of summons.

Whether the failure to serve a hearing notice rendered the ex parte proceedings irregular and in violation of the Appellant's right to a fair hearing

34. Although the court has found that summons to enter appearance were duly served, the inquiry does not end there. The trial court itself acknowledged in its ruling that the Appellant was not served with a hearing notice despite the court directing that such notice be served.
35. Service of a hearing notice is a fundamental procedural requirement. It ensures that a party who has been served with summons but has not entered appearance is nonetheless afforded notice of the hearing date before the court proceeds ex parte.

36. The failure to serve a hearing notice after directions by the trial court that the service be effected deprived the Appellant of an opportunity to participate in the proceedings at the hearing stage. This omission rendered the ex parte hearing procedurally irregular, notwithstanding the earlier service of summons.
37. As rightly submitted by the Appellant, the right to be heard is a cardinal principle of natural justice and is protected under Article 50(1) of the Constitution of Kenya. As was stated in *In Patel vs. E.A Cargo handling Services Ltd (1974) E.A. 75* at page 76, by Sir William Duffins P: *“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself or fetter the wide discretion given by the rules. I agree that where it is a regular Judgment as it is the case here, the court will not usually set aside the Judgment unless it is satisfied that there is a defence on merit. In this respect defence on merit does not mean, in my view, a defence that must succeed. It means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”*

38. In the instant case there is no evidence that the Appellant tried to obstruct or delay the cause of justice. Further, no mention was made about prejudice to the Respondent that could not be compensated by way of costs or damages. There was thus no reason why the trial court could not exercise its discretion in favour of the Appellant.

Whether the draft defence raised triable issues

39. The next question is whether the Appellant's draft defence raised triable issues warranting the setting aside of the ex parte proceedings. The Respondent contended that the draft defence did not form part of the record of appeal and that, even as annexed to the application before the trial court, it comprised mere denials.

40. I have perused the Record of Appeal and can confirm that the draft defence is indeed on record, appearing at page 36 thereof. The Respondent's assertion to the contrary is therefore not supported by the record.

41. An appellate court is entitled to consider whether a draft defence raises triable issues when determining whether to set aside an ex parte judgment. A triable issue is not one that must succeed, but one that merits judicial

consideration at a full hearing. Upon reviewing the draft defence, I am satisfied that it raises issues that would require interrogation at trial. The defence contests liability and the factual basis of the claim, matters that cannot be conclusively determined without the benefit of oral evidence and cross-examination.

42. I therefore find that the learned trial magistrate erred in holding that the defence disclosed no triable issues.

What orders should issue?

43. In the circumstances, I find that the learned trial magistrate did not properly and judiciously exercise her discretion and that the refusal to set aside the ex parte proceedings resulted in a miscarriage of justice.

44. Accordingly, the appeal succeeds in the following terms: -
- i. The ruling of the trial court delivered on 28th April 2021 is hereby set aside.
 - ii. The ex parte proceedings, interlocutory judgment and final judgment are set aside.

- iii. The Appellant is granted leave to file its defence out of time. The same should be filed within 14 days from the date of this judgment.

 - iv. The file is remitted back to the trial court for hearing and determination on the merits.
45. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON
THIS 26TH DAY OF FEBRUARY, 2026**

**MAUREEN ONYANGO
JUDGE**