

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 584 OF 2015

SAMSON

NJAU

NG'ANG'A.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH

ANTHONY

WAIKWA

GITHUKU....DEFENDANT/APPLICANT

RULING

1. This ruling determines the Defendant's Notice of Motion application dated `12th May 2025, seeking to set aside the judgment and decree dated 17th May 2016 and that the Defendant be granted leave to defend the suit.
2. The application is premised on the grounds set out therein and is supported by the affidavit of the Defendant, who deposes that an interlocutory judgment was entered against him on 17th May 2016 without his knowledge and that he was never aware of the existence of the suit.
3. The application is opposed. Samson Njau Ng'ang'a swore a Replying Affidavit on 3rd July 2025, contending that the interlocutory judgment was regularly entered after due service of summons to enter appearance and subsequent pleadings. He relies on affidavits of service on record and asserts that the Defendant was aware of the suit and even instituted parallel proceedings in Kitale touching on the same subject matter. He

characterizes the present motion as frivolous, an abuse of the court process, and a belated attempt to avoid satisfaction of a lawful decree. He further avers that no draft defence or triable issue has been disclosed and that the delay of approximately nine years is inordinate and unexplained.

4. The application was canvassed by way of written submissions. I have considered the motion, the affidavits on record, and the rival submissions.

Analysis and determination

5. The sole issue for determination is whether the Defendant has met the legal threshold for setting aside the judgment entered on 17th May 2016.
6. The power of the Court to set aside a default judgment is conferred by **Order 10 Rule 11** of the **Civil Procedure Rules**, which provides:

“Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

7. The principles guiding the exercise of that discretion are settled. In **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**, the Court of Appeal held that the discretion to set aside is wide and is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the course of justice.

8. Further, in **Shah v Mbogo & Another [1967] EA 116**, the Court stated that the discretion is to be exercised to prevent injustice or hardship resulting from accident, inadvertence or excusable error.
9. A distinction must be drawn between a regular and an irregular judgment. In **James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR**, the Court of Appeal held that where a judgment is irregular for want of service, the court will set it aside *ex debito justitiae*. However, where the judgment is regular, the court exercises discretion and considers, *inter alia*, whether there is a plausible defence and whether there has been undue delay.
10. The Defendant contends that he was unaware of the suit. The record, however, contains affidavits of service sworn by Benjamina N. Mutua on 16th May 2016, evidencing that summons to enter appearance were duly served upon him. Upon the Defendant's failure to enter an appearance or file a defence within the prescribed timelines, the Plaintiff lodged a Request for Judgment dated 16th May 2016. Consequently, an interlocutory judgment was entered on 26th August 2016, ordering the Defendant to pay the Plaintiff the sum of Kshs. 2,400,000 or, in the alternative, permitting the Plaintiff to sell land parcel Trans Nzoia/Gidea/35 to recover the outstanding consideration.
11. The Court has carefully perused the affidavits of service on record and is satisfied that service was properly effected, and that judgment was regularly entered following the

Defendant's failure to comply with the procedural requirements of entering an appearance and filing a defence. The Defendant has neither applied to cross-examine the process server nor tendered any cogent or credible material to impeach the veracity of the affidavits of service.

12. It is trite that an affidavit of service constitutes *prima facie* evidence of proper service. Where service is disputed, the evidential burden shifts to the applicant to rebut that presumption by credible evidence. A bare and general denial is insufficient to displace the presumption of regularity attaching to judicial proceedings.
13. In the absence of credible evidence rebutting service, I am satisfied that the interlocutory judgment entered on 17th May 2016 was regular.
14. Where judgment is regular, the Court must consider whether the Defendant has demonstrated a defence raising triable issues. Even one triable issue is sufficient to entitle a defendant to unconditional leave to defend - See **Tree Shade Motor Limited v D.T. Dobie & Company (K) Limited [1995-1998] 1 EA 324.**
15. In the present case, the Defendant has not annexed a draft defence nor set out the nature of the defence he intends to raise. The application is bare and does not disclose any arguable or triable issue. A party seeking the court's discretion must demonstrate that he has a defence on the merits. A mere assertion that he was unaware of the proceedings does not suffice.

16. Equally significant is the delay. Judgment was entered in May 2016. The present application was filed in May 2025, approximately nine years later. No satisfactory explanation has been offered for this inordinate delay. Equity aids the vigilant, not the indolent. Inordinate delay defeats equity and undermines the integrity of judicial proceedings.
17. The material placed before the Court further suggests that the Defendant instituted parallel proceedings relating to the same subject matter, which militates against his assertion that he was unaware of the dispute. That conduct lends credence to the Respondent's contention that the application is an attempt to reopen concluded litigation.
18. The discretion under Order 10 Rule 11 is not designed to aid a litigant who has slept on his rights or who seeks to obstruct the course of justice.
19. In the premises, I find that the interlocutory judgment entered on 17th May 2016 was regular, that no triable issue has been disclosed, and that the delay of approximately nine years is inordinate and unexplained.
20. Accordingly, the Notice of Motion dated 12th May 2025 is devoid of merit and is hereby dismissed with costs to the Plaintiff/Respondent.

RULING delivered virtually, dated and signed at **NAIROBI**

This **12th** day of **March** 2026.

P.M. MULWA
JUDGE

In the presence of:

N/A for Plaintiff/Respondent

Mr. Ojienda for Defendant/Applicant

Court Assistant: *Carlos*