

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**  
**APPELLATE DIVISION**  
**CIVIL APPEAL NO. E1396 OF 2023**

**JAMES SIKU OJWANG.....**  
**.....APPELLANT**

**VERUS**

**NICHOLAS GAKONDI KAHI.....1<sup>st</sup>**  
**RESPONDENT**

**KENNETH MUTENO.....2<sup>nd</sup>**  
**RESPONDENT**

**CHAGEMA JOHN KEDERA.....3<sup>rd</sup>**  
**RESPONDENT**

**(Being an appeal from the Ruling delivered by  
Honourable Rawlings Liluma Musiega Senior Resident  
Magistrate on 17<sup>th</sup> November 2023 in Milimani  
Commercial court CMCC No. 7749 of 2017 )**

**ARISING FROM**  
**CHIEF MAGISTRATE COURT AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 7749 OF 2017**

**NICHOLAS GAKONDI KAHIU** .....  
.....**PLAINTIFF**

**VERSUS**

**JAMES SIKU OJWANG'** .....  
**DEFENDANT**

**JUDGEMENT**

**A. Introduction**

1. This appeal arises from the ruling/order of **Hon. R.L Musiega, Senior Resident Magistrate** dated 17<sup>th</sup> November 2023, where he refused to set aside the interlocutory judgment dated 16<sup>th</sup> April 2019 and the subsequent final judgment entered against the appellant on 10<sup>th</sup> July 2023.
2. The respondent had filed the primary suit as against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondent herein and claimed compensation for injuries sustained in a road traffic accident, which occurred on 4<sup>th</sup> July 2017, along Roaster-Thika superhighway involving motor vehicle **KAN 820F ( the 1<sup>st</sup> suit motor vehicle)**, which he was driving and Motor vehicle **KBP 202Q Volkswagen station Wagon**, ( the 2<sup>nd</sup> suit motor vehicle) driven by the 2<sup>nd</sup> respondent, but beneficially owned, used and insured by the appellant. The accident occurred when appellant's motor vehicle was driven in a careless and negligent manner resulting in it ramming into the back of the 1<sup>st</sup> suit motor vehicle, thereby causing it

to roll off the road and as a result caused him to suffer serious bodily injury.

3. After effecting service upon the appellant, the 1<sup>st</sup> respondent counsel did file an affidavit of service sworn by one Benedict Mutuku, a licenced process server, who confirmed that he did serve the appellant on 4<sup>th</sup> December 2018, at his residence in South C. Satisfied that proper service of summons had been effected the trial court did enter interlocutory judgment against the appellant on 16<sup>th</sup> April 2019 and the matter proceeded for formal proof, whereupon final judgment was entered as against the appellant on 10<sup>th</sup> July 2023 in the sum of **Kshs.1,092,075/=** plus costs and interest.
4. The appellant upon being served with notice of entry of judgment on 10<sup>th</sup> July 2023, filed his application dated 31<sup>st</sup> July 2023 seeking to set aside the interlocutory judgment and all subsequent proceedings on the basis that he was not served with summons to enter appearance, as he had by then secured employment and reported to his new work station in Mombasa. In response the 1<sup>st</sup> respondent insisted that the appellant was properly served but chose to ignore the court process. He was therefore guilty of laches and had also failed to demonstrate that his defence raised any triable issue. He thus urged the court to dismiss the said application.

5. The trial court did consider the said application and found that the same lacked merit and proceeded to dismiss the same for being unmerited. Wholly dissatisfied by the said Ruling/Order the appellant did file this appeal and raised the following grounds of appeal;

***a. That the learned trial Magistrate grievously erred in asserting that the Appellant was duly served with the court process, an assertion he vehemently contested.***

***b. That the learned trial magistrate made a critical error in upholding the validity of the affidavit of service dated 7<sup>th</sup> November 2018, falsely assuming that it had been properly served on the Appellant, while in reality the sworn statements in the affidavit by one BENEDICT MUTUKU MUSEMBI are wholly fabricated.***

***c. That the learned trial Magistrate seriously misdirected himself by neglecting to acknowledge that the Appellant had been working and residing in Mombasa since 2017, completely refuting the claim in the aforementioned affidavit of service that falsely places the Appellant in South C, Nairobi.***

***d. That the learned trial Magistrate erred by disregarding established principles and laws concerning the Appellants entitlement to file a***

***defense and present his case, thereby denying the Appellant a fair opportunity to be heard.***

***e. That the learned trial Magistrate failed to adequately consider the entirety of the evidence presented notably overlooking the fact that the appellant has been a resident of Mombasa since 2017, thereby rendering the purported service mentioned in the impugned affidavit false.***

***f. That the learned trial Magistrate exhibited an error in judgment by not recognizing the gravity of the Appellants application to set aside the courts ex parte judgment, which raises substantial concerns regarding the factual and legal aspects of the service of the court processes upon the Applicant.***

***g. That the learned trial Magistrate, in his evaluation of the evidence, misconstrued the applicable law and principles resulting in an erroneous decision that deprived the Appellant of his fundamental right to be heard before a court of law, contravening established norms of natural justice.***

***h. That the ruling of the learned trial Magistrate dated 17<sup>th</sup> November 2023 starkly reflects pronounced bias and lack of impartiality towards***

***the Appellant compromising the fundamental tenets of fairness to the judicial process.***

6. The Appellant thus urged this court to find that his Appeal has merit and be pleased to set aside the ruling of the trial court delivered on 17<sup>th</sup> November 2023 and that he be allowed to file his statement of defence and to subsequently defend the claim filed as against him.

## **B. Submissions**

### **Appellant submissions**

7. The appellant filed his submissions on 10<sup>th</sup> March 2025, wherein he submitted that the courts have long dealt with the issue of setting aside ex parte judgment and settled its principles in the celebrated case of **Shah Vs Mbogo & ANo (1967) EA & Shanzu Investments Ltd Vs The Commissioner of lands (1993) KLR.**

8. The trial court had erred in upholding the validity of the affidavit of service resulting in an irregular default judgment. **Order 5 Rule 6, 7 & 8 of the Civil Procedure Rules, 2010** provided that service of summons must be effected personally on the defendant and/or his authorised agent. In this instance, he had contested the authenticity of the affidavit of service sworn on 07.11.2018 by the process server, since at the time of alleged service, he had relocated

to Mombasa following a new employment opportunity and was not residing at South C as alleged.

9. Unfortunately, the learned trial magistrate had heavily relied on the said affidavit and discarded his appointment letter which was a misdirection. Reliance was placed in **INM Vs AJMN (2022) eKLR**, where it was held that where there was doubt as to the contents of the affidavit of service, there was need to cross examine the process server on its contents and that even if the appellant failed to do so, the court on its own motion could summon the said process server and have him cross examined.
10. He therefore urged this court to find that it was a misdirection of the trial court to ignore his letter of appointment and had therefore exercised its discretion in the wrong manner in dismissing the said application to have the judgment set aside. He urged the court to find the appeal filed had merit and to allow it as prayed thus giving him leeway to prosecute his defence.

### **Respondent's Submissions**

11. The 1<sup>st</sup> respondent on the other hand, relied on his submissions dated 19<sup>th</sup> April 2025, where he reiterated that the appellant was properly served by the process server Benedict Mutuku Musembi, who comprehensively detailed how he effected service, personally upon the appellant at his residence within South C estate, Nairobi. It was also worth

noting that the appellant did not dispute the contact details stated in the affidavit of service nor did he apply to call the said process server and have him cross examined on the averments made in the said affidavit. On the said basis, the appellants claim that he was not served did not hold any water and constituted blatant lies aimed at hoodwinking the court into allowing the frivolous application. Reliance was placed **MB Automobile Vs Kampala Bus Service (1966) EA 480, & Paul odido Vs Abdul Hakim Abeid & 2 Others (2021)** where it was held that it was desirable to cross examine the process server, where service was disputed.

12. Having been satisfied that the Ex parte Judgement was regular, it was upon the appellant to satisfy the court there was a good reason as to why the said judgment should be set aside but also on this score also failed to do so. The courts discretion could therefore not be exercised in their favour. Reliance was placed in **& CA No 6 of 2015 James Kanyita Nderitu Vs Maries Philotas Ghika & Another (2016) eKLR** where it was held that the court had unfettered discretion to determine whether or not to set aside the default judgement, while taking into account factors such as reason for the failure to file statement of defence, length of time that has lapsed since default, and whether the intended defence raises triable issues

13. Finally, as to whether or not the draft defence raised triable issues, the 1<sup>st</sup> respondent submitted that the same

consisted mere denials and did not raise any triable issues. In the alternative if the court were to be persuaded otherwise, he urged the court to condemn the appellant to pay thrown away costs and to order him to deposit the entire decretal sum in court pending re trial. Reliance was placed in the case of **David Kiptanui Yego Vs Benjamin Rono & 3 Others {2021} Eklr & Rayat Trading Co Ltd Vs Bank of Baroda & Tetezi House Ltd {2018} Eklr.**

14. The 1<sup>st</sup> respondent thus urged the court to find that the appeal lacks merit and be pleased to dismiss the same with costs.

### **C. Analysis & Determination**

15. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see **Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123**) & **Peters Vs Sunday Post Limited (1968) EA 123**

16. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of

the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of **section 78 of the civil procedure Act** a court of first appeal can appreciate the entire evidence and come to a different conclusion. See **Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316**

17. The only issue for determination in this appeal is whether the learned trial Magistrate correctly considered and applied the principles applicable in set aside interlocutory judgment.

18. **Order 5 Rule 8 of the civil procedure rules, 2010** provides that;

**Service to be on defendant in person or on his Agent**

**(1) Wherever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.**

**(2) A summons maybe served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.**

19. It is also mandatory that the process of service of summons do comply with the following and the same must be stated in the affidavit of service:

**“(a). The time when service was affected on the said person.**

**(b). The manner in which summons was served.**

**(c). The name and address of the person identifying the person served.**

**(d). The place where service was effected.**

**(e). If there is no personal service, the person serving must indicate the relationship between the person served and the person summons are directed at in a precise manner.**

**(f). Indicate that he required his/her signature in order to validate any purported service.” See Rapando Vs Constantine ouma & 6 others (2004) eklr,**

20. Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The Court discretion is unfettered and should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error. The court should also look at the draft defence to the plaint and accompanying witness statements to ascertain if the applicant’s defence raises triable issues. See **Patel -v- E.A. Handling Services Ltd (1974) EZ 75** and **Tree Shade Motor Ltd -v- D.T.**

**Dobie Co. Ltd CA 38 of 1998 and Mania -v-Muriuki (1984) KLR 407 .**

21. The other consideration/tenets, which the Court, which should be considered before setting aside interlocutory judgment, were set out in the case **Mohamed & Another -v- Shoka (1990) KLR 463** and the same include:

***i) Whether there is a regular judgment;***

***ii) Whether there is a defence on merit;***

***iii) Whether there is a reasonable explanation for any delay;***

***iv) Whether there would be any prejudice.***

22. The issue of regular judgment was addressed in the case **Mwala -v- Kenya Bureau of Standards EA LR (2001) 1 EA 148**, where the court stated;

***“to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or***

***defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debit justice for a court should never countenance an irregular judgment on its record.”***

23. Back to the issue at hand, the 1<sup>st</sup> respondents court process server ***Benedict Mutuku Musembi***, in his affidavit of service dated 7<sup>th</sup> November 2018, clearly explained how he traced the appellant, called him on his phone number ***0720887270***, but he was evasive in accepting personal service and eventually how he located his house at Mugoya Phase 2, popo road, Olive green, House 113, where personally served the appellant on 4<sup>th</sup> December, 2018 at 07.30hrs, but he refused to sign the summons to acknowledge receipt thereof. The respondent denied service and alleged that by then he had secured new employment in Mombasa and thus was not served.

24. In the case of ***Shadrack Arap Baiywo vs Bodi Bach (1987) eKLR***, the Court of Appeal did state that;

***“There is a qualified presumption in favour of the process server recognized in MB Automobile Vs Kampala Bus Service (1966) EA 480 at page 484 as having been the view taken by the Indian courts construing similar legislation. On Chitaley and Annaji***

**Rao; The code of Civil Procedure Volume II page1670, the learned commentators stated at**

**(3) Presumption as to service-There is a presumption of service as stated in the process servers report, and the burden lies on the party questioning it to show that the return is incorrect. But an affidavit of the process service is admissible evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service."**

25. The appellant did not apply to cross examine the process server to test the veracity of the averments made in the affidavit of service, nor did deny ever residing at the address of service and/or the phone number used to call him. His averment that he was in Mombasa working on the said date was a general assertion which could not be proved by an appointment letter. I do therefore find and hold that the presumption that the appellant was personally served was thus not displaced and the judgment subsequently entered as against him was regular.

26. As to whether the appellant has a defence on merit. In the case of, **Sebei District Administration -v- Gasyali & others (1968) EA 300** Sheridan J. observed that:

**“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”**

27. Also in **Tree shade Motor Limited Vs DT Dobie Co Ltd CA 38.98 and International Finance Corporation Vs Utexafrica Sprl (2001) CLC 1361**, the same principal was applied and the courts emphasised that even where Ex parte judgment was lawfully entered, the court should look at the draft defence to see if it contains a valid or reasonable defence and the test of having such a defence is issues raised are better than being merely arguable.

28. In considering the draft statement of defence the learned trial magistrate stated that the appellant did not have a defence on merit and had got what he bargained for since there was no inadvertence or excusable delay in failing to respond to the summons filed. With respect to the learned court, this was a misdirection as he failed to consider

the merits of the issues raised in the draft defence, and instead locked out the appellant based on his perceived conduct of failing to respond to the summons served.

29. The draft defence filed did raise several triable issues; as to whether the appellant was vicariously liable for the accident as he had not given the mechanic driving the suit motor vehicle at the time of the accident permission to do so, and secondly whether the owner of the 2<sup>nd</sup> suit motor vehicle, which had stalled on the road too, bore partial responsibility for the said accident. It was therefore an error to hold otherwise.

30. Finally, as to whether the respondent will be prejudiced if the default judgment is set aside and the matter is heard on merit, indeed he shall be prejudiced but the court has to balance that consideration with the appellants constitutional right not to be condemned unheard and find a proportional balance between the two competing rights. The resulting middle ground is that respondent can be compensated by way of costs and also by the court issuing sufficient safe guards/conditions while set aside the said judgment. See; **Rayat Trading Company Limited Vs Bank of Baroda & Tatezi House Ltd (2018) eklr**, where the court held that;

***“ If the court set aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimants***

***costs thrown away. In addition, the court may consider imposing a condition that the defendant must pay a specified amount of money into court to await the final disposal of the claim.”***

**D. Disposition**

31. The upshot is that this Appeal is merited. The ruling/Order of **Hon R.L Musiega, Senior Resident Magistrate** dated 17<sup>th</sup> November 2023 delivered in **MILIMANI COMMERCIAL COURT CMCC NO 7749 OF 2017** is hereby set-aside and the Appellant’s Application dated 31<sup>st</sup> July 2023 seeking to set aside the exparte judgment dated 16<sup>th</sup> April 2019 and the final judgment entered on 10<sup>th</sup> July 2023 is hereby allowed.
32. The Appellant is granted leave to file their statement of defence within the next 14 days from the date of delivery of this Judgement and will pay the 1<sup>st</sup> respondent thrown away costs of ***Kshs.50,000/=*** within 30 days of delivery of this judgment.
33. Vide the ruling dated 12<sup>th</sup> July 2024, issued by Hon Justice J. N Njagi the appellant was ordered to deposit as security the logbook and valuation report of his Motor vehicle registration Number ***KWB 868 Mercedes Benz***. The said security will be retained under the custody of the chief Magistrate pending the hearing and disposal of the primary suit.

34. This primary suit will be mentioned before the chief Magistrate - Milimani law court, for re-allocation before a different Magistrate and it will be heard on priority basis and determined within the next six months.

35. Each party will bear their own costs of this Appeal.

36. It is so ordered.

**Judgement written, dated and signed at MARSABIT this 17<sup>th</sup> day of MARCH 2026.**

**FRANCIS RAYOLA OLEL**  
**JUDGE**

**Delivered on the virtual platform, Teams this 17<sup>th</sup> day of MARCH, 2026.**

**In the presence of;**

N/A .....for Appellant

N/A .....for Respondent

Mr. Jarso .....Court Assistant

ORIGINAL