

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ISIOLO**  
**CIVIL APPEAL NO. E007 OF 2025**

**ANDREW ATAKU M'MUTIRITHIA & CHARITY MAKENA  
ATAKU (Suing as the legal representatives and  
administrators of the Estate of the late PETER  
THURANIRA**

**(Deceased) .....**

**.....APPELLANTS**

**VERSUS**

**JULIUS NGANGA NJIHIA .....**

**1<sup>ST</sup> RESPONDENT**

**JAGANA INVESTMENT.....2<sup>ND</sup>**

**RESPONDENT**

*(Being an Appeal against the Ruling and orders of Hon. M.  
A. ODHIAMBO, S.R.M., given on 17.03.2025 in Isiolo C.M.*

*CASE NO. E054 OF 2021)*

**JUDGMENT**

1. The Appellants herein filed a suit , at the trial court , seeking for damages following a road traffic accident which occurred on 28<sup>th</sup> May 2017 involving Peter Thurania( The deceased. ).The Respondents failed to enter appearance or file a defence, leading to entry of an interlocutory judgment on 20<sup>th</sup> September 2022. The matter proceeded for formal proof hearing. Judgment was delivered on 3<sup>rd</sup> October 2023 in favour of the Appellants and awarded a sum of Kshs. 2,830,550.
2. Upon the issuance of warrants of attachment, **Mamalo Auctioneers** attached the Respondents' motor vehicle (KBG 228 R) and trailer (ZB 6136) . This prompted the Respondents to file the Notice of

Motion dated 27th November 2024, before the trial court seeking for stay of execution and the setting aside of the ex-parte Judgment, on the grounds that they were never served with the summons to enter appearance.

3. In a Ruling delivered on 17<sup>th</sup> March 2025, the trial court allowed the application, set aside the judgment and ordered the release of the attached property.
4. Aggrieved by this decision, the Appellants moved to this court on Appeal and has set forth the following grounds :
  - a) *The Learned Senior Resident Magistrate erred in law and in fact in finding that, the Respondents were not served with summons to enter appearance despite the fact that the Respondents did not call the process server for cross-examination.*
  - b) *The Learned Senior Resident Magistrate erred in law and in fact in setting aside the judgment against the Respondents herein on the basis that court Summons were not effected upon the Respondents*
  - c) *The Learned Magistrate erred in law and in fact in purporting to make orders for release of Motor Vehicle Registration No. KBG,228R without hearing the parties on the merits.*
  - d) *The Learned Senior Resident Magistrate erred in law and in fact by making a ruling that is not otherwise supported by the evidence on record and the applicable law.*
5. The Appeal proceeded by way of written submissions.

## **Appellants' Submissions**

6. The Appellants submit that the trial magistrate erred in law by finding that the Respondents were not served with summons despite the existence of an Affidavit of Service sworn by one Pauline Njeri Wachinga. They further point out that the burden of proving failure of service lay squarely on the Respondents; that they failed to do so when they failed to call the process server for cross-examination. They argued that since the judgment followed a formal proof hearing, the court incorrectly applied Order 10 Rule 11 of the Civil Procedure Rules instead of the more stringent requirements of Order 12 Rule 7.
7. The Appellants contended that the court exercised its discretion unjustly by assisting a party that had deliberately evaded justice while the Appellants had expended significant time and resources in prosecuting the suit, which had effectively come to our close.

### **Respondents Submissions**

8. The Respondents, have argued that under the Rules of natural justice , they are entitled to a hearing. They contend that the purported service was improper and that it did not meet the threshold to warrant the entry of interlocutory judgement on the Respondents. That the trial court did not error in setting aside the interlocutory judgment entered.
9. The respondent further argue that the trial court was justified in exercising its discretion to allow the case to be heard on its merits, asserting that any

inconvenience to the Appellants could be cured by an award of costs.

### ***Analysis and Determination***

10. Upon perusal of the pleadings, submissions and the trial court record, I find the following issues arise for resolution:

- a) *Whether the Respondents were properly served with summons as required by law.*
- b) *What appropriate reliefs and orders should this court issue.*

11. It is trite law that for a court to have jurisdiction over a defendant, that party must be properly invited to submit to its authority via service of summons.

12. Order 5, rule 15 of the civil procedure Rules provide as follows:

*(1)The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.*

13. The law regarding contested service was elucidated in the case of ***Shadrack Arap Baiywo v.***

**Bodi Bach(1987) eKLR**, where the Court of Appeal held that:

*“There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in 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.”*

14. The Respondents denied service via the Affidavit, however he failed to cross-examine the process server. I have observed that the trial court placed the burden of applying to cross-examine the process server on the Appellant. That was erroneous. The onus to apply for and cross-examine the process-server is on who contests service, and in this case , it was the respondent to place such a request before the court.
15. Nevertheless , turning to the said affidavit of service and notwithstanding failure to cross-examine the process server, did the affidavit of service comply with the rules?
16. An affidavit of service must state the date, time and place of service. The process server is also required to name the person who identified the defendant. In her affidavit, the process server stated

that the defendants were identified to her by the plaintiff. However there are two plaintiffs in the suit. She did not specify which plaintiff knew and therefore was able to identify the defendants. Further the 2<sup>nd</sup> defendant is a company or business entity. All that the process server did was to say a security guard , who is not named identified the manager , was also not named. The affidavit of service is wanting in particulars or the process server was being evasive.

17. Am not satisfied that the service, if any, was proper. It is the finding of this court therefore that service was not proper, and the interlocutory judgment entered was therefore irregular. An irregular judgment entitles the Applicant the right to the vacation of the judgment , and to have the matter be heard on merit.as a matter of right, and not of discretion. In ***James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another(2016) eKLR***, the Court of Appeal held that an irregular judgment is set aside *ex debito justitiae* as a matter of right, whereas a regular judgment is set aside only upon the exercise of the court's discretion.

18. The Appellants have argued that since the judgement was delivered after a formal proof hearing, the governing rule is Order 12 Rule 7, not Order 10 Rule 11 , of the civil procedure Rules. Order 12 Rule 7 provides that: "*Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*"

19. The submission by the Appellant is incorrect, as order 12 deals with non-attendance, at the time of the hearing. There is nothing on record to show that the Respondent was served with Notice to attend the formal proof hearing. The correct position is that the Respondent did not file appearance or defence for the reason that they were never served with summons. The court's reliance on order 11 has therefore correct.

20. In setting aside *ex parte* judgments, the court takes into consideration other factors which include the question of whether the Applicant has got a defence which raises triable issues. In **Patel v. E.A. Cargo Handling Services Ltd (1974) EA 75**, the court observed:

*"The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court."*

21. I have perused the draft defence and under paragraph 3 thereof, the respondent has pleaded contributory negligence. The court further observes that the accident forming the subject matter of the suit involved a collision between a motor vehicle and a motorbike. Thus the draft defence does not constitute mere denial. The issues are triable. The Respondent deserves a hearing on merit therefore.

22. I have not found any reason to interfere with the findings of the trial court. The Appeal is without merit. It is hereby dismissed with costs to the respondent.

Dated , signed and delivered at Isiolo this 19<sup>th</sup> day of  
march 2026.

S. Chirchir

Judge .

ORIGINAL