



**Co-operative Bank of Kenya v Gitonga (Civil Suit 216 of 2017)
[2026] KEMC 31 (KLR) (19 February 2026) (Ruling)**

Neutral citation: [2026] KEMC 31 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT 216 OF 2017
PA NDEGE, SPM
FEBRUARY 19, 2026**

BETWEEN

CO-OPERATIVE BANK OF KENYA PLAINTIFF

AND

BENJAMIN MUNYEKI GITONGA DEFENDANT

RULING

1. The application before me for determination is a notice of motion dated 24th June, 2025 filed under certificate of urgency on 24th June 2025. It is made under Order 51 Rule 1 of the *Civil Procedure Rules*, Section S 22, 1A, 1b and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Article 159 (2)(d) of the *Constitution* and ‘all enabling provisions of the Law’.
2. The application is filed by the Defendant/Judgment debtor and seeks the following orders:
 1. Spent
 2. Spent
 3. That the entire suit be struck out for failing to comply with the provisions of the *Civil Procedure Act* and Rules.
 4. That in the alternative and without prejudice to prayer (3) above, the ex parte Judgment entered in the matter be set aside and the applicant herein be granted unconditional leave to defend the suit.
 5. That costs of the application be in the cause.
3. The Application is supported by the grounds on the face thereof and the affidavit of Benjamin Munyeki Gatonga, the Applicant. The application is opposed. The Plaintiff/Decree holder filed a Replying



Affidavit dated 23rd July 2025 in opposition to the application. The Application was canvassed by way of Written Submissions.

Facts

4. This case was instituted on 13th March 2017 vide a Plaint 28th January 2017 claiming a liquidated amount of Kshs. 341,329.85/=, interest and costs. Following the failure to file a defence and/ or enter appearance by the defendant, the Plaintiff/ Respondent requested for judgement vide a Request of Judgement dated 21st February 2021 that was lodged on 2nd September 2021. Judgement was then entered on 3rd September 2021. The Plaintiff/ Respondent thereafter commenced execution proceedings culminating in the execution process that is the subject of this application.
5. In the affidavit of Defendant in support of the application, he avers that the suit abated by virtue that the first summons issued on 2nd September 2021 were not served and the Plaintiff did not make any applications for reissuance of the summons. The Applicant also argues that any purported service is defective since the registered postal address used by the Plaintiff does not belong to the Applicant. The Defendant further avers that the applicant has a good defence which it has annexed to the affidavit and should be allowed to defend the case.
6. Through the Replying Affidavit of Martha Kavilu dated 23rd June 2017, the Plaintiff avers that the application is misconceived, mischievous and intended to deny it the fruits of its judgement. The Plaintiff avers that it filed the suit on 13th March 2017 contemporaneously with the Summons to enter Appearance which were issued on 13th March 2017 and subsequently reissued on 3rd April 2019 and 2nd September 2020. Through a process server Migui Mungai whose affidavit of service, the Plaintiff served upon the Applicant, the Plaintiff avers that the applicant neither filed a defence nor entered appearance and since it is a liquidated claim the Court rightfully and regularly entered judgement in its favour.
7. It is the Plaintiff's position that the applicant was all along aware of this suit and court orders but deliberately chose not to respond to the same and that the Applicant does not deserve the orders sought. That in the event the Court is inclined to grant the orders sought then the Applicant be ordered to deposit the decretal amount in a joint interest earning account.

Determination

8. I have carefully considered the pleadings and the submissions of parties in respect of this application. Two broad issues arise for determination:
 - i. Whether the suit abated or is liable to be struck out.
 - ii. Whether the judgment in default should be set aside.
9. The first issue is whether the suit against the Defendant abated and should be struck out for want of issue and service of valid summons to enter appearance. Order 5 Rule 3 (5) stipulates that: 'Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with Subrule (2) of this Rule.'
10. It is trite law that where no summons to enter appearance are served within 12 months, the suit abates. The validity of summons can be extended where such summons is issued but not served within 12 months from the date of the first issue. I find that indeed the first summons were issued on 13th March 2017. The summons were reissued on 3rd April 2019 and subsequently on 2nd September 2020. As such the suit had not abated at the time of the judgement. The successive re-issuance of summons indicates



that the suit remained alive. I am therefore satisfied that the suit had not abated at the time judgment was entered.

11. The principles for setting aside judgements in default of appearance and defence have been well set in numerous decisions of courts. In the case of *Amagove v Ultimate Manpower & General Supplies Ltd* [2024] eKLR, the Learned Judge held as follows:

The law on setting aside of ex parte proceedings is now well settled. It contemplates a two-pronged approach to the matter: -

- a. Where the proceedings were undertaken without service of court processes on the opponent, they are deemed as irregular. As such, the court is obligated to set aside the resultant orders as a matter of right to the aggrieved party.
- b. Where the proceedings were regularly conducted after service of pleadings and other processes on the aggrieved party, he has no right to insist on setting aside the resultant orders. However, the court may exercise its discretion to set aside the orders if the aggrieved party is able to demonstrate that he has a good defense to the action or that he was prevented from being present in court during the hearing due to justifiable reasons.

12. In the case of *Baraka Apparel EPZ (K) Ltd v Rose Mbula Ojwang T/A Faida 2002 Caterers* [2007] eKLR the Court of Appeal summarized the principles in the following terms –

There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.

This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

13. Order 10, rule 4 of the *Civil Procedure Rules* provides that:

(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

14. Following the Defendant's failure to enter appearance and file a defence, the Court on 3rd September 2021 entered a judgment in default against the Defendant. The claim being for a liquidated sum, the entry of the judgment was proper and in accordance with the provisions of Order 10 of the *Civil Procedure Rules*.

15. Upon the Plaintiff executing the decree of the Court, the Defendant now denies service of the Summons to Enter Appearance. The Plaintiff has exhibited an affidavit of service sworn by a duly authorized process server indicating personal service at the Defendant's place of work at Nyandarua County Assembly, Ol Kalou. The Plaintiff further produced evidence of acknowledgment and a proposal by the Defendant to liquidate the debt by instalments of Kshs. 7,000/= per month.

16. The Defendant was vested with the burden to prove that he was not served. He did not apply to cross-examine the process server nor file a supplementary affidavit rebutting the detailed averments in the



Replying Affidavit. The Defendant also did not address the issues raised in the Replying Affidavit in his Written Submissions. Therefore, the Plaintiff's evidence remains unchallenged. A mere denial of service, without more, does not suffice to displace the presumption of proper service arising from a duly sworn affidavit of service.

17. An Affidavit of Service on 2nd December 2020 filed on 2nd September 2021 sworn by Migui Mungai an advocate of the High Court of Kenya elaborates that the Plaintiff effected service of the Summons and to Enter Appearance and the Plaint dated 18th December 2020.
18. In the case of *Amagove v Ultimate Manpower & General Supplies Ltd* [2024] eKLR (Supra), the Learned Judge held as follows:

Where an Applicant is challenging the regularity of a decision on grounds of non-service of court pleadings, it is incumbent on him to impugn the contested service. Ordinarily, this is done by, inter alia, challenging the validity of the affidavit of service. As such, it is expected that such applicant will cross examine the deponent to the affidavit of service to demonstrate that it is founded on falsehoods.

In the case of In *Shadrack Arap Baiywo v Bodi Bach* [1987] eKLR, the Court of Appeal observed as follows on the matter:-

There is a presumption of services 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."

The court in the *Shadrack Arap Baiywo Case* (*supra*) went further to comment as follows:-⁹ All that can be concluded is that the appellant had the burden of proof to disprove service, and on the strength of the return of service and affidavit of the process server, the burden of proof was not discharged by the appellant's mere denials. The affidavit of the process server appears much the stronger evidence.

19. I am therefore satisfied that service was effected and that the judgment entered on 3rd September 2021 was regular. Having found the judgment to be regular, the next question is whether the Defendant has demonstrated sufficient cause and whether the draft defence discloses triable issues.
20. The draft defence contains general denials of indebtedness and, in the alternative, alleges full repayment of the loan and invokes the in duplum rule under Section 44A of the *Banking Act*. No particulars or computation has been tendered to demonstrate how the Plaintiff's claim offends the in duplum rule. The defence consists largely of mere denials and unsubstantiated assertions.
21. A triable issue is not one that is fanciful, shadowy or raised merely to gain time; it must be bona fide and supported by material capable of raising a genuine dispute worthy of judicial interrogation. Such issue must be discernible from the pleadings and supported by some credible foundation. In the present matter, the Defendant has not laid before this Court any material to elevate his denials beyond mere assertions.
22. Further, the delay from the time judgment was entered in 2021 to the filing of the present application in 2025 has not been satisfactorily explained. The exercise of discretion must take into account the length of delay, the reason for the delay, the prejudice to the opposite party and the overall interests of justice. An unexplained and inordinate delay militates against the favorable exercise of judicial discretion, particularly where the decree holder has been kept from enjoying the fruits of a lawful judgment from



2021. This Court is equally mindful that the Plaintiff, having lawfully obtained a regular judgment through due process, is entitled to enjoy the fruits of that judgment without undue obstruction or delay.

Conclusion

23. In the totality of the circumstances, I am not persuaded that this is a proper case for the exercise of discretion in favour of the Defendant. The result is that the application is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF FEBRUARY, 2026

HON. ALOYCE PETER NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of:

Masinde.....for the Plaintiff/Respondent

N/afor the Defendant/ Applicant

