

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO. E802 OF 2023**

**EAST AFRICAN PAINTS & MINING LTD .....**

**APPELLANT**

**VERSUS**

**GRACE VILLAS RESORTS ..... 1ST**

**RESPONDENT**

**LAIBON VILLA GUEST HOUSE ..... 2ND**

**RESPONDENT**

***(Being an appeal from the Ruling of Hon. W.K. Micheni  
(CM) delivered on 19<sup>th</sup> July 2023 in Milimani CMCC E205  
of 2020)***

**JUDGMENT**

**Background**

1. The Appellant sued the Respondent before the lower court seeking recovery of sums allegedly due from the Respondents arising out of supply of goods and related transactions. The Respondent did not enter appearance or file a defence and, as a result, the Appellant obtained ex parte/default judgment.

2. The 1<sup>st</sup> Respondent subsequently moved the court to set aside the judgment, contending that it had not been properly served with the summons to enter appearance and plead, and that it had a defence raising triable issues. The trial court allowed the application, thereby prompting the present appeal.

### **The Appeal**

3. The Appellant challenges the decision of the Learned Magistrate on several fronts, principally contending that the trial court erred both in law and fact in its findings on service of summons, evaluation of evidence, and the setting aside of the ex parte judgment.

4. Firstly, the Appellant argues that the Learned Magistrate failed to properly evaluate the pleadings and evidence on record, thereby wrongly concluding that there was no proper service of summons. It is contended that the affidavit of service sufficiently demonstrated proper service in accordance with Order 5 Rule 10 of the Civil Procedure Rules, including clear particulars of the person served, who was an employee of the Respondent.

5. Secondly, the Appellant faults the trial court for disregarding the evidentiary weight of the affidavit of service and for failing to appreciate that the Respondent did not take steps to challenge the same, particularly by summoning the process server for cross-examination. The

Appellant maintains that, in law, such failure should have led to a presumption of proper service.

6. Thirdly, it is contended that the Learned Magistrate misapplied the law relating to disputed service, including the principles set out in ***Shadrack Arap Baiywo vs. Bodi Bach***, and further erred by failing, even suo motu, to call the process server where service was in dispute.
7. Fourthly, the Appellant asserts that the trial court failed to consider that the 1st Respondent had actively participated in the proceedings without raising any objection to service, thereby waiving any right to subsequently challenge the same.
8. Fifthly, the Appellant challenges the finding that the delay in filing the application to set aside the judgment was excusable, arguing instead that the delay was inordinate and unjustified.
9. Finally, the Appellant contends that the Learned Magistrate erred in setting aside a regular ex parte judgment and in finding that the defence raised triable issues, maintaining that the defence consisted of mere denials and did not warrant the exercise of discretion in favour of the Respondent.
10. The Appeal was canvassed by way of written submissions.

## **The Appellant's Submissions**

11. The Appellant submits that the ex parte judgment was regularly entered under Order 10 of the Civil Procedure Rules after proper service of summons. It argues that service was effected upon an employee or agent of the 1st Respondent as shown in the affidavit of service, and that the Respondents did not challenge that affidavit by calling for cross-examination of the process server.
12. The Appellant relies on ***Shadrack Arap Baiywo vs. Bodi Bach [1987] eKLR***, where the Court held:  
***“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.”***
13. It also cites ***Hass Petroleum Limited vs. A.O. Basid Limited [2015] eKLR***, where it was stated that  
***“The veracity of the averments in the various Affidavits on record can only be ascertained upon cross-examination of the Process Server.”***
14. The Appellant further contends that the Respondents participated in objector proceedings without raising the issue of service and thus waived any such objection. Reliance is placed on ***Nanjibhai Prabhudas & Company Ltd vs. Standard Bank Ltd [1968] EA 670***, where the Court of Appeal held:  
***“Even if the service of the summons was defective, the defect constituted an***

***irregularity capable of being waived and did not render the service a nullity.”***

15. The Appellant additionally argues that the application to set aside the *ex parte* judgment was brought after inordinate delay, that the draft defence raises no triable issues, and that the objector proceedings were incompetent for want of capacity on the part of the person who initiated them.

## **(ii) The Respondents' Submissions**

16. The Respondents oppose the appeal and support the ruling of the trial court. They submit that the central issue was whether proper service of summons had been effected, and that the lower court correctly found doubt as to service.

17. They argue that the court was not bound to summon the process server in every case and retained discretion on whether or not to do so. They also maintain that service was not effected in accordance with Order 5 of the Civil Procedure Rules.

18. The Respondents further submit that their defence raises substantive triable issues, including limitation, delivery of goods, and the existence of a contractual relationship.

**19.** The Respondents' position is that the appeal is an attempt to shut them out from being heard on the merits and to revive an *ex parte* judgment despite the existence of arguable issues fit for trial.

20. Having considered the Memorandum of Appeal, record of appeal, and rival submissions, I find that the main issue for determination is whether the appeal is merited.

21. The law on entry of default judgment is found in Order 10 Rule 4(1) of the Civil Procedure Rules, which provides that:

**“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons... the court shall... enter judgment against the defendant... together with interest... and costs.”**

22. The law on scrutiny of service is also clear. Order 5 Rule 16 of the Civil Procedure Rules provides:

**“On any allegation that a summons has not been properly served, the court may examine the serving officer on oath... and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”**

23. The distinction between a regular and irregular ex parte judgment was stated in *Mwala vs. Kenya Bureau of Standards* [2001] 1 EA 148:

***“Where the judgment sought to be set aside is a regular one, then all the above considerations as to the exercise of discretion should be borne in mind... Where on the other***

***hand, the judgment sought to be set aside is an irregular one... the same ought to be set aside not as a matter of discretion, but ex debito justitiae.”***

24. On the object of the discretion to set aside, the Court court had the following to say in ***Jomo Kenyatta University of Agriculture and Technology vs. Musa Ezekiel Oebal [2014] eKLR:***

***“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”***

25. On triable issues, the settled principle remains that where a defence raises even a single bona fide triable issue, the defendant ought to be heard.

26. The Appellant’s main complaint is that the lower court should not have set aside the ex parte judgment because service had been proved by affidavit and because the process server was never cross-examined.

27. I have considered the Appellant’s complaint and I find that it is true that an affidavit of service is prima facie evidence of service. It is also true that there is a presumption in favour of the process server’s return unless rebutted. That is however not the end of the matter as where the court is confronted with credible contest as to service, it must examine the entire circumstances and

decide whether it is sufficiently satisfied that service was proper.

28. The wording of Order 5 Rule 16 CPR is permissive. It states that the court *may* examine the serving officer. This means that the rule does not make cross-examination mandatory in every dispute on service. I therefore do not agree with the Appellant's argument which treats the calling of the process server as a condition precedent to any finding adverse to the affidavit of service.

29. The lower court had the duty to evaluate the affidavit of service, the challenge mounted against it, the surrounding facts, and the overall justice of the case. I find that the mere existence of an affidavit of service did not deprive the court of that evaluative role.

30. I further find that the question before this court is not whether this court, sitting at first instance, might have come to a different view on service. It is whether the learned magistrate misdirected herself in law or principle. From the material presented, I am not persuaded that she did.

**31.** The issue of service was not frivolous. It was a live issue. Once the lower court found doubt sufficient to justify setting aside and allowing the matter to proceed on the merits, it cannot be said that it acted outside the law.

32. On whether the Respondent waived objection to service, the Appellant argued that by participating in objector proceedings, the Respondents waived any complaint regarding service. The doctrine of waiver is fact-sensitive.

As stated in ***Sita Steel Rolling Mills Ltd vs. Jubilee Insurance Company Ltd*** [2007] eKLR:

***“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it.”***

33. I am not satisfied that the conduct cited by the Appellant amounted to a clear, unequivocal and irrevocable waiver of the right to question service of summons in the main suit. Participation in later proceedings, without more, is not always equivalent to acceptance that original service was proper. That question depends on the nature of the participation and the context in which it occurred.

**34.** The lower court was entitled to hold, expressly or impliedly, that the circumstances did not amount to such waiver as would bar the Respondents from being heard on service and on their application to set aside.

35. The core question in this appeal is whether the trial court properly exercised its discretion in setting aside the ex parte judgment. This is because an appellate court does not lightly interfere with the exercise of discretion by a lower court. It may only do so where the court misdirected itself, took into account an irrelevant matter, failed to take into account a relevant matter, or arrived at a plainly wrong conclusion.

36. The guiding principle in ***CMC Holdings Ltd vs, Nzioki*** [2004] KLR 173 is that the discretion exists to avoid

injustice or hardship. The same spirit is captured in ***Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal [2014] eKLR.***

37. The record and the parties' submissions reveal that the learned magistrate was faced with a challenge to service, a delay which she expressly noticed, a proposed defence, and the competing need to balance procedural regularity with substantive justice.
38. The lower court nonetheless opted to allow the matter to proceed to hearing on the merits. To my mind, that is not, without more, a wrong exercise of discretion. Courts lean toward sustaining a hearing on the merits where there is a plausible dispute deserving ventilation, unless the conduct of the defaulting party is so plainly abusive and the case so hopeless that justice demands closure.
39. This court is not persuaded that the magistrate acted on wrong principle or that the resulting order plainly unjust. In fact, allowing the suit to proceed for determination inter partes better serves the objective of a fair hearing.
40. On whether the defence raises triable issues, I have considered the Respondents' position as summarized in the record. The proposed defence raises critical questions including whether the claim is time-barred, whether the goods were delivered, whether a valid contractual relationship existed, and the extent, if any, of the Respondents' liability.
41. I find that the issues raised are not idle or sham matters on their face. They are issues that go to the root

of liability. A defence need not succeed at this stage as it need only raise a bona fide question fit for trial.

**42.** Once triable issues appear, the court is slow to shut out a party. In my view, the learned magistrate cannot be faulted for concluding that the dispute ought to proceed to hearing.

43. The Appellant also attacked the capacity of the person who instituted the objector proceedings. Even assuming that argument raised a legitimate concern, it did not conclusively dispose of the wider question before the lower court, namely; whether the ex parte judgment should stand in the face of the challenge mounted.

44. I note that the magistrate was dealing with an application to set aside default judgment, not merely adjudicating the procedural standing of the objector proceedings in isolation. The existence of controversy over capacity did not oust the court's discretion to consider whether, in all the circumstances, justice required the matter to be reopened for hearing.

45. I therefore find that the complaint on competence of objector proceedings does not provide a sufficient basis for disturbing the ruling appealed from.

46. In the end, this court is not persuaded that the learned magistrate misdirected herself in law or in fact, or that she exercised her discretion on wrong principles.

47. The dispute on service was not frivolous. The permissive wording of Order 5 Rule 16 CPR did not compel the lower court to summon the process server before acting. The

question of waiver was not so clear and unequivocal as to preclude the Respondents from challenging the ex parte judgment. Further, the proposed defence disclosed arguable issues fit for trial. In those circumstances, the lower court cannot be faulted for preferring that the matter be heard on its merits.

48. The purpose of the discretion to set aside ex parte judgment is to avoid injustice and to ensure that parties are, where appropriate, afforded an opportunity to be heard. On the material before this court, I find no proper basis for appellate interference.

49. Accordingly, the appeal is hereby dismissed with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL, 2026.**

**HON. W. A. OKWANY**

**JUDGE**

**16/04/2026**

**FOR APPELLANT** No appearance

**FOR THE RESPONDENT** Wahome

**COURT ASSISTANT** Abdirizak

File closed

Lower Court file be sent back to the Lower court