REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL CASE NO. E014 OF 2025

SARAH NJERI MWANIKI.....APPELLANT

VERSUS

CHARLES WANJOHI NDERITU

MARY WAIRIMU KANYINGI.....RESPONDENTS

JUDGEMENT

1. Before this Court is the Memorandum of Appeal dated **7th March 2025** filed by the Appellant **SARAH NJERI MWANIKI** seeking the following orders:-

"1. THAT the appeal be allowed in its entirety.

2. THAT the Ruling of the Honourable Viola Sandra Kosgei Resident Magistrate in Nyeri Chief Magistrates Court Civil Case No. 6 of 2019 delivered on 18th February 2025 be set aside and/or varied.

3. THAT the Honourable Court grants any other/further reliefs as it may deem necessary.

4. <u>THAT</u> costs of this Appeal be provided for."

2. The Respondents **CHARLES WANJOHI NDIRITU** and **MARY WAIRIMU KANYINGI** opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated **13th December 2025** whilst the Respondent relied upon his written submissions dated **13th February 2026**.

<u>BACKGROUND</u>

3. The plaintiff (the Respondents herein) filed a plaint in the Magistrates

Civil Suit No. **6 of 2019** seeking judgment against the Defendant (the Appellant herein) as follows:-

"(a) Kshs 1,333,000.00 plus interest at court rates.

(b) Costs of the suit."

4. On **12th February 2019** the Respondents put in a request for default

judgment under **Order 10 Rule 4** of the **Civil Procedure Rules 2010**. The Lower court granted judgement in default on **11th April 2019**.

5. Thereafter the appellant filed a Notice of Motion dated **11th October 2024** seeking to stay execution of the decree and seeking an opportunity to file a defence to the suit.

6. Vide a judgment delivered on **18th February 2025**, the trial court

dismissed the appellant's application in its entirety. Being aggrieved by that ruling the appellant filed this present appeal which is premised upon the following grounds

"(1) <u>THAT</u> the learned Trial Magistrate erred in law by failing to hold and find that a default judgment had been irregularly entered against the Appellant, thereby occasioning a gross miscarriage of justice.

(2) <u>THAT</u> the learned Trial Magistrate erred in law by holding that the Appellant had approached the Court after unreasonable delay, yet the Appellant had explained her delay, thereby occasioning a miscarriage of justice.

(3) <u>THAT</u> the learned Trial Magistrate erred in law by holding that the Appellant's draft statement of

defence did not raise triable issues, to be determined on merit, thereby occasioning a gross miscarriage of justice.

(4) <u>THAT</u> the learned Trial Magistrate erred in law and fact to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a gross miscarriage of justice."

<u>ANALYSIS AND DETERMINATION</u>

7. I have considered this appeal together with the record of proceedings before the Lower Court and the submissions filed by both parties.

8. This a first appeal and in this regard I take cognizance of the holding in **Imanyara & 2 others v Attorney [2016] KECA 557 (KLR)** in which the Court of Appeal stated as follows:-

This being a first appeal it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal is are well settled. Briefly put, they are that

this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

See <u>Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V Brown [1970]</u> E.A.L

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in <u>Peters -vs- Sunday Post Ltd</u> <u>[1958] EA 424</u>. In its own words:-

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of***

circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide……”

9. The question for determination is whether the trial court was justified in dismissing the appellant's application to set aside the ex parte judgment.

10. The first thing to consider herein is whether the judgment entered was regular or irregular. In the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR) the Court of Appeal** as follows:-

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under

Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah (supra), Patel v E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioki [2004] 1 KLR 173).*

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether there has been inordinate delay in applying to set aside the right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is

fundamental and permeates our entire justice system."

11. The record indicates that the Respondents first issued to the Appellant a demand letter dated **24th September 2018**. The demand letter was sent by registered mail. The Appellant did not deny that the postal address to which the letter was sent was hers.

12. After filing the suit the Appellant was served with a Summons to enter appears as evidenced by the Affidavit of service dated **22nd January 2019** sworn by one **Christopher Wanjohi Wamatu**, a licensed process server *[see Page 40 of Record of Appeal*]. The affidavit indicates that the Appellant was served on **17th January 2019** at her home in Muringato Farm, near Dedan Kimathi University of Technology at about 12.16pm. That the Appellant accepted service but declined to sign the copies.

13. The appellant denies that she was served. She states that on the date in question she was not in her home but was residing in the Lavington area of Nairobi as she had a doctor's appointment on **17th January 2019**. She produced

a sick sheet issued from Maria Immaculate Hospital. A copy of the sick sheet appears as Annexture '**SNM -2'** at **Page 33** of the record of appeal. It grants the appellant sick off for three (3) days from **16th January 2019**.

14. I do agree with the learned trial magistrate that there is no indication that the appellant was attending a doctor's appointment on **17th January 2019**. Thus in all probability the appellant was in fact in her home on the day of service. The fact that the appellant did not apply to cross-examine the process-server is also very telling.

15. The notice seeking default judgment was filed on **12th February 2019** and was served upon the appellant on **12th March 2019** as evidenced by the affidavit of service dated **12th March 2019** sworn by **Christopher Wanjohi Wamatu**. The appellant did not challenge this affidavit of service.

16. As stated earlier default judgment was entered by the court on **20th February 2019**. The decree was issued on **11th April 2019** [*see Page 12 of the record of appeal*] yet still the appellant sat pretty and took no action until five (5)

years and some months later when she filed the stay application dated **11th October 2024**. This inordinate delay has not been satisfactorily explained. The appellant having been properly served each step of the way and having chosen to take no action cannot now cry foul.

17. Further I have perused the draft statement of defence attached to the application dated **11th October 2024**. I do agree with the trial court that the same amounts to a mere denial and does not raise any triable issues.

18. For the above reasons I find no merit in this appeal. The same is hereby dismissed in its entirety. Costs will be met by the appellant.

Dated in Nyeri this 17th day of April 2026

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MAUREEN A. ODERO
JUDGE