



- a. *Spent*;
- b. THAT the Honourable Court be pleased to grant leave to the firm of Kagna & Advocates to come on record for the Respondent/Applicant and to file its defence and other pleadings out of time;
- c. *Spent*;
- d. *Spent*;
- e. THAT the *ex parte* judgment ordering the Respondent to deposit Kshs. 1,895,010/- within 21 days into the Judiciary Account be set aside, and the Respondent be granted leave to file its response out of time and ventilate the same on merit.
- f. THAT the proposed response, list of witnesses and documents accompanying the response attached hereto be deemed duly filed and served upon payment of requisite court fees.
- g. THAT the process server be cross examined on his/her affidavit of service to enable the court determine the facts of the case.
- h. *Spent*

i. THAT costs of the application be borne by the Claimant.

2. The application is supported by the grounds set out on its face and the supporting affidavit sworn by Mr. Noreez Shamji, a Director of the Respondent. He avers that the Respondent was never served with summons to enter appearance or with the Memorandum of Claim, and only became aware of the existence of the suit through the Claimant at a much later stage. Upon gaining such knowledge, he states that he promptly instructed Counsel, who then informed him that judgment had already been entered. Upon further inquiry, he deposes that it emerged that the Claimant had effected service through an email address that did not belong to the Respondent, namely noorez@rallyrtechmotors.com, instead of the correct address, info@rallytecmotors.com, reflected in the Respondent's certificate of registration marked as annexure"NS-4".

3. On the basis of the foregoing, the Respondent contends that the judgment was entered in error and ought to be set aside.

It maintains that unless the application is allowed, the Claimant may proceed with execution, including attachment and sale of its property, thereby occasioning it substantial prejudice. The Respondent further asserts that it has a meritorious defence, that the application has been brought without undue delay, and that the prejudice it stands to suffer cannot be adequately compensated by an award of costs.

4. The application is opposed by the Claimant through a replying affidavit sworn on 28<sup>th</sup> February 2026 by Ms. Rose Omamo, its Secretary General. She disputes the Respondent's assertion that there was no service, maintaining that there was correspondence between the parties during the pendency of the suit using the very email address now disowned by the Respondent. In particular, she refers to the attachments at pages 7-8 of the replying affidavit, which, according to her, demonstrate that the Claimant sent documents to the Respondent and received responses through both noorez@rallyrtechmotors.com and info@rallytecmotors.com. She contends that this

correspondence is clear evidence that the Respondent was aware of the suit.

5. In light of the foregoing, the Claimant urges the Court to dismiss the application with costs, arguing that the Respondent was indolent and deliberately failed to defend the claim. It further asserts that allowing the application would set a bad precedent by permitting litigants who have ignored proceedings to enter proceedings at their convenience.
6. Additionally, the Claimant urges the court to review its judgment and award it the Kshs. 1,895,010/- sought in line with the tabulation at page 58 of the trial bundle.
7. Directions were subsequently taken on 2<sup>nd</sup> March 2026 regarding the filing of submissions. The Respondent filed its submissions on 7<sup>th</sup> March 2026, while the Claimant, by a letter dated 17<sup>th</sup> March 2026, elected to rely entirely on its replying affidavit.

#### Respondent's Submissions

8. The Respondent identifies raises three principal issues for determination, namely: whether the prayer for review of the judgment is properly before the Court; whether there was proper service upon the Applicant; and who should bear the costs of the application. On the Claimant's request that the court awards compensation as per the tabulation in its trial bundle, the Respondent submits that such a prayer amounts to a review of the judgment. It asserts that a review cannot be sought through a replying affidavit, but must comply with Rule 74(3) of the Employment and Labour Relations Court Rules, 2024, which requires a formal application by way of notice of motion supported by an affidavit and accompanied by the decree or order sought to be reviewed.

9. On the issue of service of summons, the Respondent submits that it was defective and incapable of sustaining the proceedings. It asserts that the service upon the Directors personal email contravened Rule 28(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024, that mandates among others service of pleadings to a corporate entity's known email address. The Respondent maintains that the email address used was not its official address; that

the director was not served in his official capacity or on behalf of the Respondent; and that no evidence was tendered to demonstrate that the company had authorised the use of the said email for purposes of service. It therefore submits that, in the absence of a proper affidavit of service identifying the person served and their capacity within the Respondent, the proceedings culminating in the judgment are a nullity. In support of this position, the Respondent relies on the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**, **Frigoken Limited v Value PAK Food Limited [2011] KEHC 749 (KLR)**, and **Shabban Keah, Millsons Management & Gladys Mutisya v Patrick Omondi Opiyo [2016] KEHC 2242 (KLR)**. The Respondent/Applicant further invokes Article 50(1) of the Constitution on the right to a fair hearing, submitting that the right extends to corporate entities. In this regard, it relies on **Stecol Corporation Limited v Susan Awuor Mudemb [2021] KEHC 2912 (KLR)** and **Wilbur Earl Hightower v Mark Kithinji Mbatiah [2020] KEELC 2407 (KLR)**, to underscore that denial of an opportunity to be heard

amounts to a miscarriage of justice. In the premises, the Respondent urges the Court to exercise its discretion to set aside the *ex parte* judgment, reopen the matter, and allow it to ventilate its defence on the merits. It also prays that the process server be summoned for cross-examination. On costs the Respondent urges the court to exercise its discretion in its favour pursuant to section 27 of the Civil Procedure Act. In conclusion, the Respondent prays that the application be allowed in line with the principles governing the setting aside of *ex parte* judgments as articulated in the case of **Wainaina v Kiguru & another [2024] KEELC 5865 (KLR)**. It expresses willingness, in the alternative, to pay thrown-away costs of Kshs. 30,000/- within 30 days of the ruling as a condition for the setting aside of the judgment.

#### Disposition

10. The issue for determination is the quest by the Respondent/Applicant for a setting aside. The factors a court has to consider include the plausibility of the defence proposed, not one that must succeed but one that is more than merely arguable. The applicant must show valid reason

for the failure to act/defend the suit. These include lack of proper service of summons, mistake or negligence of counsel for the party. There is a consideration of the prejudice that may be faced by the successful party.

11. The Court has considered these factors and ascertains that the Respondent was sued and failed to enter appearance. The Court did not doubt the Respondent was duly served per the documents in Court. The Respondent has only become active because there is a judgment to contend with. That is not enough basis to reverse the judgment made in the case. The motion is devoid of merit and is dismissed with costs.

It is so ordered.

**Dated and delivered at Kisumu this 20<sup>th</sup> day of April**

**2026**

**Nzioki wa Makau, MCI Arb.  
JUDGE**