



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E017 OF 2024

BAKEVILLE

LIMITED.....**APPELLANT/APPLICANT**

VERSUS

AHMED SAID OMAR.....

.....**RESPONDENT**

RULING

1. In its judgment delivered on 20th October 2025, this Court dismissed the appeal herein and directed that the security deposit of Kshs. 456,000/- held in court be released. Pursuant to that order, the Respondent filed an application dated 10th November 2025 under certificate of urgency seeking release of the said funds. On 13th November 2025,

the Court certified the application urgent and directed that it be served for *inter partes* hearing on 26th November 2025. On the scheduled hearing date, there was no appearance on behalf of the Appellant, and the Court proceeded to allow the application. Subsequently, and apparently unaware of both the application and the ruling, the Appellant filed the present application dated 19th December 2025 seeking, *inter alia*, orders that the *ex parte* proceedings, ruling, and consequential orders issued on 26th November 2025 be set aside, varied and/or vacated *ex debito justitiae*; that the application dated 10th November 2025 be dismissed for non-compliance with the Court's directions issued on 13th November 2025; and that the Court grant such further orders as may meet the ends of justice, together with costs.

2. The application is supported by the grounds set out on its face and the affidavit of Mt. Arnold Oriwa, learned counsel for the Appellant. Counsel contends that the Appellant was neither served with the application dated 10th November 2025 nor with the orders issued on 13th November 2025. He avers that he only became aware of the application and the

resultant orders on 18th December 2025 upon receiving a Ruling notice in respect of a bill of costs and after conducting a search on the e-filing system. It is his position that the Court was misled into believing that service had been properly effected, whereas the Respondent's Counsel had in fact served the Appellant's former advocates through the email address info@makalla.law. On that basis, he maintains that the impugned orders were improperly and maliciously obtained and ought to be vacated. He further contends that the security deposit has not been subjected to statutory deductions and therefore cannot be utilized by the Respondent in its entirety.

3. Opposing the application the Respondent filed a replying affidavit sworn on 28th January 2026. He avers that the application dated 10th November 2025 as well as the court order issued on 13th November 2025 were duly served upon counsel for the Appellant through arnoldoriwa@gmail.com on 14th November 2025. He further depones that the same email address had previously been used to effect service of a taxation notice dated 2nd December 2025, a bill of costs dated 2nd November 2025, and a ruling notice dated 15th

December 2025, all of which were duly received. For this reason, the Respondent contends that it is implausible for Counsel to have received the latter documents and not the application and order. On that basis, the Respondent urges the Court to dismiss the application with costs.

4. In a further affidavit sworn on 4th February 2026, Counsel for the Appellant reiterates that the application and the order were in fact served on the email address info@makallalaw.com, belonging to the Respondent's previous counsel, as evinced by the affidavit of service marked "AO-3". Additionally, it avers that the affidavits of service are irregular for want of payment of the requisite filing fees, as demonstrated by the CTS screenshots annexed to the further affidavit. He therefore maintains that service was improper and that the Respondent misled the Court into allowing the application using an improper return of service.

5. The application was canvassed by way of written submissions.

Appellant's Submissions

6. The Appellant submits that the application turns on two broad issues, namely: whether this Court has jurisdiction to set aside an irregular ruling and/or orders, and whether the Appellant's right to a fair hearing and the rules of natural justice were violated. On jurisdiction, the Appellant contends that this Court possesses the inherent power to set aside an irregular ruling or order. It argues that where service of process is not proper, any resulting proceedings are fundamentally defective and cannot be allowed to stand, as they offend the principles of natural justice. Consequently, the Appellant maintains that the impugned ruling and orders are liable to be set aside *ex debito justitiae*, (as of right and not as a matter of judicial discretion). It highlights the fact that service was effected on info@makallalaw.com Counsel previously on record and Arnoldoriwa@gmail.com instead of arnoldoriwa@gmail.com. Additionally, the Appellant submits that the purported affidavits of service were never properly filed or paid for, and therefore do not form part of the record.

7. On that basis, the Appellant contends that the Court was misled into proceeding in its absence, thereby violating its

right to be heard. Reliance is placed on **James Kanyiita Nderitu & another v Marios Philotas Ghika & another [2016] eKLR**, where the Court of Appeal drew a distinction between regular and irregular judgments, holding that an irregular judgment entered into without proper service is liable to be set aside as of right. The Appellant further relies on **Gulf Fabricators v County Government of Siaya [2020] eKLR**, for the proposition that an irregular judgment may be set aside in limine. In the alternative, the Appellant urges the Court to exercise its discretion in its favour, citing **Philip Kiptoo Chemwolo & another v Augustine Kubende (1982-1988) KAR 103**, for the proposition that courts should lean towards substantive justice unless there is evidence of deliberate obstruction of justice since mistakes will always be made from time to time. It also relies on the case of **Murai vs Wainaina (No. 4) [1982] KLR 38**, where it was held:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel

compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”

8. On the second issue the Appellant submits that the failure to effect proper service and to notify the Applicant of the ruling amounted to a violation of its right to a fair hearing under Article 50(1) of the Constitution. It urges the Court to administer justice without undue regard to technicalities citing Article 159(2) of the Constitution. Reliance is placed on **Wachira Karani v Bildad Wachira [2016] eKLR**, in which it was stated:

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

9. In conclusion, the Appellant urges the court to allow the application.

Respondent’s Submissions

10. In response, the Respondent reiterates that service was properly effected through the email address arnoldoriwa@gmail.com, which was provided by counsel for the Appellant. He relies on the affidavit of service dated 14th November 2025 and maintains that it is untenable for Counsel to claim non-service, yet he duly received the taxation notice and bill of costs dated 2nd December 2025 through the same email address. The Respondent further

submits that this Court is *functus officio*, having already rendered itself on the application for release of the security deposit. In that regard, reliance is placed on **Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others [2018] eKLR**, where the doctrine of finality in litigation was underscored.

11. With respect to the contention that the monies are subject to statutory deductions, the Respondent submits that decretal sums are not subject to such deductions. He cites the case of **Ibrahim Manyara v Registered Trustees of the Agricultural Society of Kenya [2014] eKLR** in support of that proposition. He further argues that the statutory deductions contemplated under section 49(2) of the Employment Act are limited to awards made by a Labour Officer, and invokes section 3(2)(a)(ii) of the Income Tax Act to contend that compensation awarded after the termination of employment does not constitute taxable income. The Respondent thus urges the Court to dismiss the application with costs.

Disposition

12. The question before the Court is simply whether there is an irregular or unlawful decision on account of purported non-service of process. Contrary to the assertions by the Respondent, this Court is not *functus officio* as it is still seized of the matter. Turning to the question of service, the Court has reviewed the CTS and the same reveals the address for service was for the advocate who was on record for the party at the Magistrates Court. The proper course is to serve the advocate who has had conduct of the matter and where a party appeared in person, upon the party.
13. The Appellant was properly served and therefore nothing turns on the issue of service. The sums awarded as a decretal sum are not income for purposes of Income Tax. As held in the case of **Ibrahim Manyara v Registered Trustees of the Agricultural Society of Kenya** (*supra*), compensation awarded after the termination of employment by a labour court does not constitute taxable income. The decretal sum is therefore not subject to taxation as it is not income for purposes of the Act.

14. The long and short of the foregoing is that the judgment of this Court is thus not properly impeached and the Appellant's notice of motion is dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Kisumu this 20th day of April

2026

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