



Kenya Orient Insurance Limited v Mutinda & another (Civil Appeal E124 of 2024) [2026] KEHC 4347 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E124 OF 2024
F WANGARI, J
MARCH 5, 2026**

BETWEEN

KENYA ORIENT INSURANCE LIMITED APPELLANT

AND

FLORENCE MAKELETE MUTINDA 1ST RESPONDENT

KENYA WOMEN FINANCE TRUST BANK LIMITED 2ND RESPONDENT

(Being an appeal against the ruling of Hon. Akee (RM) delivered on 29th April 2024 in Mombasa Chief Magistrate's Court Civil Suit No. 706 of 2016, Florence Makelete Mutinda v Kenya Orient Insurance Limited & Kenya Women Finance Trust Bank Limited.)

JUDGMENT

1. The Appellant filed the appeal against the ruling of the court delivered on 29th April 2024 on their Notice of Motion Application dated 2nd November 2023. The Appellant in the application prayed for orders that the trial court declares the issuance of warrants of attachment of the movable property dated 25th October 2023 in execution of the judgments delivered on 15th June 2023 illegal, unlawful, null and void for all intents and purposes, and that costs of the application be provided for.
2. The application was based on grounds that the Plaintiff obtained ex-parte judgment on 15th June 2023 totaling to Kshs. 1,471,701 against the Defendant/Applicant. That in execution of the said ex-parte judgment, the Plaintiffs served the 1st Defendant/Applicant with warrants of attachment dated 25th October 2023 after serving the applicant with a judgment notice on 28th July 2023. That the 1st Defendant filed an application dated 4th September 2023 seeking stay of execution, setting aside of the ex-parte judgment, leave to defend the suit and costs of the application.
3. That the application was heard ex-parte in the first instance and set down for hearing on 12th September 2023 when it issued orders for maintenance of status quo which were extended on 4th October 2023



pending the hearing and determination of the Notice of Motion dated 4th September 2023. That with the application pending determination and subsisting interim orders, the Plaintiff in contempt served the Defendant with a re-issued proclamation of attachment of movable property dated 25th October 2023 and warrants of attachment of movable property in execution of a decree dated 15th June 2023.

4. The court delivered its ruling on the Application on 29th April 2024 dismissing the 1st Defendant's Notice of Motion. Consequently, the judgment entered by the court on the 15th day of June 2023 was not set aside.
5. Being dissatisfied, the Appellant appealed the ruling through the Amended Memorandum of Appeal dated 16th May 2024 on grounds that the trial magistrate misdirected herself on the principles of setting aside judgment, that the learned magistrate exercised her discretion wrongly in failing to take into account the correct principles and misapprehending the facts of the case.
6. Further, that the learned magistrate erred in law in failing to hold that there was no service of summons and that the defence as drafted disclosed triable issues, that the learned magistrate erred in law in failing to hold that with the type of claim before the court, which was unliquidated, had no provision for entry of interlocutory judgment, and that the trial court misdirected itself in holding that the Appellant had participated in the proceedings yet the judgment in issue was an ex-parte judgment.
7. The Appellant prayed that the appeal be allowed with orders that the ruling dated 29th April 2024 be set aside and be replaced with an order allowing the Appellant's Notice of Motion, and that the Appellant do have costs of the application and the appeal.

Submissions

8. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 7th February 2025 argued that the magistrate finding that witnesses were heard and cross examined by all parties as against the Appellant was not borne out of the court record. That the court misdirected itself and it is on that basis that the ruling should be set aside. That the Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* (2016) eKLR elucidated the principles that where the ex-parte judgment is regular, it can only be set aside if it is shown that the proposed defence raises triable issues.
9. The Appellant submitted that the court was wrong in alleging that the claim was a special damage or liquidated claim hence validating the entry of interlocutory judgment. The Appellant relied on the position of the court in *Rosemary Wanjiru Kungu v Directline Assurance Company Limited* (2017) eKLR and *Kuria Kihara Waithaka & 2 others v John Joseph Tito* (2019) eKLR. That the interlocutory judgment being irregular should therefore be set aside as a matter of right.
10. The Appellant further argued that it is not in dispute that the Appellant is a corporation and/or a company. That Order 5 Rule 3 of the Civil Procedure Rules provides that summons ought to have been served on either the company secretary, director or any principal officer and if they could not be traced after many attempts, the summons would be left at the company office.
11. The Appellant stated that the position was laid out in *Cooperative Insurance Co. Limited v Faisure Insurance Brokers Ltd*, HCC No. 534 of 2007 and reiterated in the case of *Agigreen Consulting Corp Limited v National Irrigation Board* (2020) eKLR. The Appellant submitted that there was no proper service, therefore the judgment based on it is irregular. That in the instance of this court finding that the interlocutory judgment was regular, the proposed defence ought to be considered as it raises triable issues.



12. The 1st Respondent in their submissions dated 7th August 2025 argued that the matter was fully settled and they relied on Order 5 Rule 5 (1) of the Civil Procedure Rules which provides that where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith. The 1st Respondent prayed that the appeal be dismissed and record this matter as settled.

Analysis

13. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... 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 allowance in this respect ...”

14. I have considered the Record of Appeal, the Supplementary Record of Appeal and submissions by the Appellant and the 1st Respondent. The issues for determination are: -

- a. Whether there was proper service of summons upon the Appellant
- b. Whether the ex parte judgment was regular or irregular
- c. Whether the trial court properly exercised its discretion in declining to set aside the judgment
- d. Whether execution undertaken during subsisting interim orders was lawful
- e. Whether the matter was compromised under Order 25 Rule 5 of the Civil Procedure Rules
- f. What orders on costs should issue

15. On service of summons, the Appellant is a corporation. Order 5 Rule 3 of the Civil Procedure Rules provides that service upon a corporation shall be effected upon the secretary, director or other principal officer, or by leaving the summons at the registered office.

16. Proper service is the foundation of a valid judgment and where there is no proper service, any ensuing judgment is irregular and must be set aside. In *Shadrack Arap Baiywo v Bodi Bach* [1987] KECA 69 (KLR), the Court of Appeal held that;

“The first ground emphasizes that if there is no service, then ex debito justitiae, the judgment by default must be set aside. Of course, judgment by default can only be entered if there has been an initiating process, concerning which the defendant is in default.”

17. Further, in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR), the Court of Appeal distinguished between regular and irregular default judgments and that where there is no proper service, the judgment is irregular and the defendant is entitled to setting aside as of right. The Court of Appeal held;

“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.”

18. Upon perusal of the record, there is no clear demonstration that summons were served in strict compliance with Order 5 Rule 3. The trial court did not undertake a detailed inquiry into the mode of service but instead proceeded on the assumption of participation by parties. If indeed there was no proper service, the judgment entered on 15th June 2023 was irregular.
19. On whether interlocutory judgment was properly entered, the Appellant contends that the claim was unliquidated and therefore did not permit interlocutory judgment. Under Order 10 Rule 4 of the Civil Procedure Rules, interlocutory judgment may be entered in liquidated claims. Where the claim is unliquidated, the matter must proceed to formal proof.
20. In *Patel v E.A. Cargo Handling Services Ltd* (1974) EA 75, the Court emphasized that: -

“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex-parte judgment 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.”
21. If the claim was not purely liquidated, interlocutory judgment would have been improperly entered. The trial court’s finding that witnesses were heard and cross-examined by all parties contradicts the Appellant’s contention that the judgment was ex parte. The record must speak for itself. If the Appellant did not participate in the hearing leading to judgment, the characterization of participation was a misapprehension of fact.
22. On exercise of discretion, where a judgment is regular, the court has unfettered discretion to set it aside upon such terms as are just. In *Shah v Mbogo* [1967] EA 116 at 123B, it was held that;

“The 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.”
23. Additionally, where a proposed defence raises triable issues, the court ought to lean towards setting aside. In *Tree Shade Motors Limited v D.T. Dobie and Company (K) Limited & Another* [1998] KECA 40 (KLR), the Court held: -

“Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff’s claim. If it does, the defendant should be given leave to enter and defend.”



24. The trial magistrate appears to have dismissed the application primarily on the ground that litigation must come to an end and that the Plaintiff should enjoy the fruits of judgment. While that principle is valid, it cannot override the fundamental right to be heard, particularly where service is disputed and triable issues are raised. The discretion was therefore not exercised upon correct principles.
25. On execution during subsisting orders, the Appellant contends that warrants were issued and proclamation effected during subsisting status quo orders. Court orders must be obeyed. If interim orders maintaining status quo were in force, execution in defiance thereof would be improper. The trial court did not sufficiently interrogate this contention.
26. On alleged settlement, the 1st Respondent relies on Order 25 Rule 5 of the Civil Procedure Rules on compromise of suits. However, for a compromise to be recorded, it must be proved to the satisfaction of the court and formally recorded. In *Flora N. Wasike v Destimo Wamboko* [1985] KECA 149 (KLR), the Court of Appeal held that a consent judgment has contractual effect and must be clear and unequivocal.
27. There is no recorded consent or formal compromise on the record of the trial court. The assertion of settlement cannot defeat the appeal in the absence of a recorded agreement.
28. On costs, I exercise the discretion of this court and direct that each party bear its own costs.

Determination

29. In the upshot, this court makes the following orders;
 - a. The ruling dated 29th April 2024 is hereby set aside.
 - b. The Appellant's Notice of Motion application dated 4th September 2023 is allowed.
 - c. The ex parte judgment delivered on 15th June 2023 and all consequential orders, including warrants of attachment dated 25th October 2023, are hereby set aside.
 - d. The suit is reinstated for hearing on merit before the Magistrates Court
 - e. The Appellant shall have costs of the application and of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF MARCH, 2026

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HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

Mr. Kioko Advocate for the Applicant

N/A by the Respondent

Ms. Salwa, Court Assistant

