

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

(Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E207 OF 2025

ABDUL HUSSEIN..... APPELLANT

VERSUS

KESIAH ALICE OKELLO.....RESPONDENT

**[Being an appeal from the ruling of Hon. J.B. Kalo delivered on 17
September 2025 in Mombasa CMELRC No. E133 of 2022]**

JUDGMENT

The appeal arises from the ruling delivered on 17 September 2025 in Mombasa CMELRC No. E133 of 2022.

The Appellant filed an application dated 2 October 2023 seeking to set aside the ex parte judgment delivered on 8 June 2023 and to be granted leave to file a response out of time. The Learned Magistrate analysed the application and held that a party's failure to attend court when a summons is issued means that the party who fails to enter an appearance despite being served with a summons cannot turn back and claim a right to be heard. There was an Affidavit of Service confirming service of summons at the premises at Blue Room after

being pointed out by the Respondent. The Appellant did not deny having premises at such a location and had merely made a generalised statement that he was not served and that the Affidavit of Service was full of falsehoods.

The Learned Magistrate thus held there was proper service upon the Appellant. It was not honest to deny the fact of service. The application was dismissed with costs.

The matter before the trial court proceeded ex parte because the plaintiff had been served with summons and failed to enter an appearance or file a response. The Appellant filed an application seeking a stay of execution and permission to file a response to the claim. The application was dismissed in the ruling delivered on 17 September 2025.

Aggrieved by the ruling, the Appellant filed this appeal on the grounds that the Learned Magistrate erred in law and fact in finding that there was proper service of summons, without properly addressing the lack of proof of such an assertion. The reliance on the Affidavit of Service, without calling or examining the court process used to verify the alleged service upon the Appellant, was in error.

Other grounds of appeal are that the trial court failed to find that there was a proper response with triable issues deserving to be heard on merit. The evidence on record was disregarded, leading to an erroneous judgment. The ruling

delivered on 17 September 2025 should be set aside, and the Appellant should be allowed to respond to the claim and to a hearing on the merits.

On the appeal, the Appellant submitted that the ex parte judgment is irregular since he was denied a hearing. There is a plausible response to the claim, and if allowed to file a response out of time for lack of service of summons, the matter will proceed on merit.

The Appellant submitted that the trial court did not summon the process server for examination on the alleged service of summon as held in **Hui Commercial Enterprise (Africa) Co. Ltd v Ndunguli & 13 others [2023] eKLR**. The trial court relied on a weak Affidavit of Service. It was alleged that service was effected in the Blue Room without providing the required details under Order 5 Rule 12 of the Civil Procedure Rules. The service threshold was not met in this case.

The trial court failed to appreciate that there is a good response, and if allowed time to file and proceed with the hearing, it will emerge that the Respondent was not entitled to the claims made. The discretion to allow the application dated 2 October 2023 was not applied, and the dismissal of the same has denied the Appellant a fair hearing.

The Respondent attended but failed to file any written submissions on the appeal.

Determination

The issues are the dismissal of the application dated 2 October 2023, in which the Appellant sought to stay execution; the setting aside of the ex parte judgment delivered on 8 June 2023; and, further, the seeking of leave to file its response out of time. The application was made on the grounds that there was no service of summons. The process server did not effect summons, and if this was done, it was not done properly. The Decree and certificate of costs did not comply with Order 21 rule 8 and 9 of the Civil Procedure Rules, hence the ex parte judgment should be set aside.

The trial court proceeded with the hearing of the claim on the strength of the Affidavit of Service dated 30 May 2022 filed by Jeseccah Agatha Peter to the effect that as a Court Process Server, she received summons, statement of claim, and the supporting documents from the claimant's advocate and on 13 April 2022 proceeded to the Respondent's premises located near Blue Room Hotel within Mombasa County. At the premises, the Respondent [the claimant] pointed out that the Appellant had an introduction and service of summons.

The court has wide powers and discretion to set aside an ex parte judgment as held in CMC Holding Limited v Nzioki [2004] KECA 143 (KLR). The discretion of the court must, however, be exercised upon reasons and must be exercised judicially.

Even on appeal, the court cannot interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or the Court acted perversely on the facts. This is trite law, and there are many decided cases in support of the proposition. In **Magunga General Stores vs Pepco Distributors [1987] 2 KAR 89**, the court held:

The Court, on an appeal, will not interfere with the exercise of a discretion on an application for summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts.

On this basis, the returns on service upon the Appellant are not challenged. The trial court heard the Respondent and delivered judgment on 8 June 2023. See Manduku v Mongare & 5 others [2026] KEELC 1162 (KLR)

The fact of service, though said not to have been effected properly, is not challenged in any material way. Where the Appellant required the Court Process Server to be summoned and examined on the facts of the Affidavit of Service dated 30 May 2022, there was no such application. It was not the court to call for the Court Process Server. The court was already satisfied that there was proper service. The Appellant, as the applicant and party seeking to set aside the judgment delivered on 8 June 2023, had the duty to seek the recall of the Court Process Server.

It is not sufficient to state that the mandatory provisions of Order 5, Rule 21 of the

Civil Procedure Rules were not strictly adhered to. As the party seeking the court's discretion to be applied in his favour, the Appellant had a duty, while prosecuting the application dated 2 October 2022, to state his case clearly and firmly to the extent of seeking to have the Court Process Server recalled.

Where such a need was not necessary, the Learned Magistrate was bound by the returns submitted in court that there was proper service, and hence the judgment entered in favour of the Respondent was valid and procedural.

With proper service and the Appellant failing to attend court to file an appearance and a response, proceeding to a plausible response, however justified, would negate the procedure undertaken to confirm service of summons and the returns through the Affidavit of Service dated 30 May 2022. The Learned Magistrate well addressed the application dated 2 October 2023. The findings thereof cannot be faulted.

The subject of the appeal, thus addressed, has no merit. The appeal is dismissed. The Respondent did not file any submissions. No orders on costs.

Delivered in open court at Nairobi, this 24th day of April 2026

**M. MBARŪ
JUDGE**

In the presence of:

Court Assistant: Catherine and Omar

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and