

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 224 OF 2017

JAMES ODUOR WANYANDE

PLAINTIFF

VERSUS

MAURICE ODUOR AMBIRO

DEFENDANT

RULING

1. Judgement was delivered for the Plaintiff on 2nd February 2023. Subsequently, the Defendant filed the Notice of Motion dated 14th October 2025 which is for determination before this court. He seeks the following Orders:

a) Spent.

b) Spent.

- c) That the Honourable Court be pleased to set aside the judgement dated 2nd February 2023.**
- d) That the Honourable court do dismiss the suit upon setting aside the judgement dated 2nd February 2023.**
- e) That the costs of this application be provided for.**

2. The application is based on grounds on its face and on the Defendant's supporting affidavit. He avers that upon perusal of the instant file on 7th October 2025, his Advocates on record unearthed that there is no affidavit of service confirming service of summons to enter appearance upon him.
3. Further, that he obtained a copy of summons to enter appearance dated 24th April 2017, and which were not collected for service within 30 days of issue as required by law. He claimed that failure to serve summons within thirty (30) days rendered the suit to have abated thus the

judgement issued herein is irregular and ought to be set aside as a matter of judicial duty. Further, that summons to enter appearance can only be valid for 12 months from the date of issuance but the summons herein were never ever extended.

4. He points out that as per affidavits of service on record filed on 26th April 2017, 30th April 2018 and 19th September 2022 purporting to serve pleadings upon him, summons to enter appearance were not served upon him.
5. The Plaintiff filed Grounds of Opposition to oppose the instant application. He avers that the application is res judicata as the issues raised herein were raised in a Notice of Motion dated 20th February 2023 and dismissed on 20th April 2023. Further, that the Defendant appealed the said Ruling in **CA NO. E205 OF 2023** which he later withdrew thus this court is functus officio. He contends that the application is an attempt to delay execution.

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

Submissions

7. The Defendant reiterates that there is no evidence on record of service of the summons to enter appearance dated 24th April 2017 upon him thus the judgement entered herein is irregular and ought to be set aside as of right. To this end, he relied on the case of **James Kanyiita Nderitu & another v Marios Philotas Ghika [2017] eKLR.**

8. He also submits that the summons to enter appearance dated 24th April 2017 expired on 23rd April 2018 and were never extended as required under Order 5 Rule 2 of the Civil Procedure Rules, thus the suit should be dismissed. To this end, he relied on the case of **Udaykumar Chandulal Rajani & 3 Others v Charles Thaithi [1991] eKLR** and **Pius Kimaiyo Langat v The Co-operative Bank of Kenya Limited [2017] eKLR.**

9. On the allegation that the application is res judicata, he submits that reliefs sought in his former application dated 20th February 2023, and those sought herein are different and that the substantive issue in the said application concerned leave to file a defence while the substantive issue herein is failure to serve summons.
10. On his part, the Plaintiff reiterates his Grounds of Opposition and submits that the suit is barred under Section 7 of the Civil Procedure Act as the Applicant cannot relitigate matters that have been heard and determined by a competent court.
11. Further, that having approached the Court of Appeal seeking stay of execution of the Ruling of 20th April 2023, the Defendant cannot return to this court to seek similar orders, thus his application is an abuse of court process filed to derail execution and he does not deserve any indulgence from this court as he has occupied the suit property and collects rent exclusively, three (3) years after entry of the judgment.

12. He further submits that this court's judgement in the matter is conclusive as the Applicant has failed in his bid to appeal against it thus he is bound by it.
13. To buttress his averments, the Plaintiff relied on the case of **National Bank Ltd v John Odawo Oluoch Kisumu High Court Civil case no. 205 of 1997[1997] eKLR** and **Mbogo v Shah [1968] E.A93 116.**

Analysis and Determination

14. Upon consideration of the instant Notice of Motion application including the supporting affidavit, Grounds of Opposition and rivalling submissions, the only issue for determination is whether the Defendant has demonstrated compelling reasons to set aside the judgement dated 2nd February 2023.
15. The Defendant's prayer is that the judgement delivered herein on 2nd February, 2023 ought to be dismissed and thereafter the entire suit be dismissed. He anchors his

prayers on allegation that he was not served with summons to enter appearance dated 24th April 2017. He argues that since the said summons were not served upon him within thirty (30) days and since they are only valid within 12 months after issuance, they abated by operation of law thus there was no suit which would be determined by the court.

16. On his part the Plaintiff contends that the application is res judicata as issues raised herein were raised in a Notice of Motion dated 20th February 2023 and dismissed on 20th April 2023.
17. As per the Court records, I note vide a Ruling delivered on 20th April 2023, this Court, Hon. Judge Lucy N Mbugua delivered a Ruling dismissing the Defendant's Notice of Motion dated 20th February 2023 in which he sought to set aside the judgement entered herein on 2nd February 2023 on the basis that he had been condemned unheard.

18. In the instant application, the Applicant seeks to set aside the said judgement on grounds aforementioned, that he was not served with summons to enter appearance and that the summons herein had abated.

19. Order 5 Rule 1(6) of the Civil Procedure Rules, states as follows:

“Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.”

20. Further, Order 5 Rule 2 (1) of the Civil Procedure Rules provides that:

“A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.”

21. The Defendant claims that the judgement entered herein was an irregular default judgement because summons were not served upon him. In **James Kanyiita Nderitu & Another [2016] eKLR**, the court stated that:

“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 justiae, 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....”

22. It was also stated as follows in **Kenya Power & Lighting Co Ltd v Abdulhakim Abdulla Mohamed & another [2017] eKLR**:

“The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the Appellant

to overreach, obstruct or delay the cause of justice, is to do justice to both parties...”

23. On his part, the Plaintiff contends that the application is res judicata. Section 7 of the Civil Procedure Act provides that:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

24. The Supreme court stated as follows in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**:

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated: - a. There is a former Judgment or order which was final; b. The Judgment or order was on merit; c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d. There must be between the first and the second action identical parties, subject matter and cause of action”

25. In this instance, I reiterate that vide a Ruling delivered on 20th April 2023, by Justice Lucy N Mbugua, she dismissed the Defendant’s Notice of Motion dated 20th February 2023 in which he sought to set aside the judgement entered herein on 2nd February 2023 on the basis that he had been condemned unheard. Further, as per court records, I note the Defendant had actually been represented by two law firms at different timings. Further, there was even a Ruling dated the 25th October, 2018 where he was represented by

one Odero, in an application where he sought to set aside orders issued on 22nd March, 2018, vide his Notice of Motion application dated the 9th April, 2018.

26. Yet in another Ruling dated the 3rd October, 2019, the Defendant was represented by an Advocate called Nasambu. Further, in an application dated the 5th August, 2022, the Defendant sought for his amended Defence including the List of Documents to be deemed to be duly filed and Justice Mbugua dismissed the application vide her Ruling dated the 7th December, 2022.

27. In her Judgement dated the 2nd February, 2023, at paragraph 3, she stated that the matter proceeded undefended although the Defendant was represented by an advocate from infancy stage of the suit. The question we hence need to ponder is if the Defendant was represented by one Mr. Awiti, then how did he know that there was a suit against him. He has now come seeking to set aside the judgement claiming it is

irregular since summons to enter appearance were never served upon him. It is trite that summons to enter appearance are issued and served to inform a party of the suit.

28. In the case of **Nanjibhai Prabhudas & Company Ltd v Standard**

Bank Ltd [1968] EA (K) 670 the Court of Appeal held inter alia:

'a. Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity. b. Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing:' Sir Charles Newbold at page 681 and 682 stated: *"The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High court; and it was not until at a very late stage that it was noticed that the seal was an*

incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant. The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequences that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”

29. In the foregoing, while relying on the legal provisions cited and decision quoted, I find that the objective of the summons to enter appearance was achieved since there was an unconditional appearance and participation in the proceedings which constituted voluntary and complete waiver of any defect that could have affected the said service of summons to enter appearance.

30. Since the Defendant has once more sought to set aside the impugned judgement, which he had initially done. I find that

the issue of seeking to set aside the impugned judgement was in issue in a previous application and hence his current claim that the judgement is irregular is dishonest. I hence find the instant application res judicata.

31. In the foregoing, I find the instant Notice of Motion application unmerited and will proceed to dismiss it with costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
29TH DAY OF APRIL, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Ochanda for Defendant/Applicant

Court Assistant: Joan