



**Mwandale v Integrated Science and Engineering Projects Ltd (Cause 1618 of 2018) [2024] KEELRC 2756 (KLR) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2756 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1618 OF 2018  
JW KELI, J  
NOVEMBER 11, 2024**

**BETWEEN**

**NICOLE ASHLEY MWANDALE ..... CLAIMANT**

**AND**

**INTEGRATED SCIENCE AND ENGINEERING PROJECTS  
LTD ..... RESPONDENT**

**RULING**

1. The Applicant following the entry of judgment in default against it for the claimant filed the instant application under certificate of urgency by way of Notice of Motion dated 22<sup>nd</sup> July 2024 under the provisions of Order 10 Rule 11 and Order 51 of the Civil Procedure Rules and Sections 1A,1B and 3A of the *Civil Procedure Act* and Article 159(2)(a, b and d) of *the Constitution* of Kenya and all other enabling provisions of the law. The Applicant sought the following reliefs:-
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to set aside the judgment entered against the Judgment Debtor on 28.03.2024 and all consequential orders therefrom.
  - d. That the Judgment Debtor be allowed to file its defence out of the prescribed time.
  - e. That orders be issued to the Decree Holder to effect service of all the pleadings upon the Judgment Debtor
  - f. That costs of this application be provided.



2. The germane of the application was the grounds in the application and the supporting affidavit of Caleb Opati William dated 22<sup>nd</sup> July 2024 and his further affidavit of 12<sup>th</sup> September 2024 and the annexures therein.
3. The Applicant contended that on the 28.03.2024 a decree arising from this matter was served upon the Judgment Debtor, condemning it to pay Kshs. 410,500.00 exclusive of interest and a further Kshs. 150,000.00 in costs to the Decree Holder. That this was the first time the Judgment Debtor became aware of this claim as it had not been served with summons to enter appearance or any other pleadings, mentions or hearing notices.
4. That the Judgment Debtor believes it has a meritorious defence which raises triable issues. That it would be unjust to condemn the Judgment Debtor unheard.
5. The Applicant stated that the application was brought without inordinate delay and that the grant of the orders sought would not prejudice the Decree Holder and there was no loss she could suffer that could not be put right by an order of payment of costs.
6. The Applicant through the affidavit of Caleb Opati William denied having been served with summons and the statement of claim. It challenged the affidavit of service relied on of Anthony S. Lyuba of P.O. Box 8384-00200 Nairobi. They challenged the said return of service for lack of the name of the person served. The affidavit referred to a gentleman without disclosing the position held in relation to the Respondent. That being a company, service should have been to its director or other principal officer of the company. That the filed affidavit of service did not disclose name of the person served or indicate time of service. The Applicant annexed the letter by M/S Guserwa & Co. Advocates and Decree issued on 20.05.2024.
7. The Applicant contended that having not been served with summons to enter appearance and the statement of claim it could not have entered defence hence judgment of 28<sup>th</sup> March 2024 was obtained irregularly.

## **Response**

8. In opposition to the application, the Decree Holder swore affidavit dated 14<sup>th</sup> August 2024. She relied on the demand letter and annexed affidavit of service dated 4<sup>th</sup> July 2020 of Antony S. Lyuba. The Applicant averred that, upon her advocate filing of the suit, she personally took the process server to effect service on the defendant company. That prior to the filing of the suit a demand letter was done dated 9<sup>th</sup> October 2018 of which she accompanied her advocates' messenger to serve. She averred that the summons were affected by the Court process server in her presence at the defendant's offices and upon Eng. Caleb Opati who declined to sign. That the service was proper as the Applicant had not denied having its offices at Heri Paradise nor having a Director by the name of Eng. Caleb Opati.
9. That the Applicant had not denied having its address as Post Office Box No. 62000-002000 Nairobi nor the email cited in the pleadings. That there was no filed draft defence to demonstrate that the Applicant had defence to her claim for lawful dues. That the Applicant had not provided proof of payment of any of the lawful dues claimed. That the application was without merit. Annexed to the affidavit was demand letter dated 9<sup>th</sup> October 2018 and affidavit of service dated 4<sup>th</sup> July 2020 by Antony S. Lyuba. The said affidavit of service produced by the Respondent indicated service was done on the 1<sup>st</sup> day of April 2019 of summons and the statement of claim at the Respondent's office at Heri Paradise apartments, Suite C8 along Dennis Pritt Road where the said Antony stated he met a gentleman by the name Eng Caleb Opati at the office who received the summons and claim but declined to sign. The Court noted the said annexure bore no Court stamp.



### **Hearing of the Application interpartes.**

10. Counsel for the parties made oral submissions on the application on the 14<sup>th</sup> October 2024.
11. Counsel for the Applicant, Ms. Oduk, relied on the grounds of the application and the affidavit of Eng. Caleb Opati William of 22<sup>nd</sup> July 2024 and a further affidavit of 12<sup>th</sup> September 2024. Counsel submitted that there was no service of the summons, the statement of claim and any hearing dates throughout the entire proceedings. Counsel relied on the affidavit of service by Antony S. Lubwa of 29<sup>th</sup> July 2019 annexed in the further affidavit of Eng. Caleb Opati William of 12<sup>th</sup> September 2024 to submit that the affidavit of service produced by the Respondent of 4<sup>th</sup> July 2020 was not in Court record. That the affidavit of service on Court record was defective for lack or indication of time of service and lack of identification of the name of person served and did not comply with requirement that service to a Company be to a Secretary or Director. That the affidavit of service did not have the evidence of service. That consequently the service was defective and the judgment be set aside. To buttress its submissions the Applicant relied on the decisions in *Gulf Fabricators v County Government of Siaya Civil Appeal of 2019*, *Asivila Bonareri v Rose Obaga Civil Case No. 7 of 2019* and *Agigreen Consulting Corporation Ltd v National Irrigation Board Civil Case No. E252 of 2019* to submit that the said decisions established that where the affidavit of service is defective the judgment ought to be set aside as of right, that further there would be no need to call the process server to be cross-examined and no need of the Applicant to show a good defence.
12. Counsel for the Respondent M/S Guserwa, opposed the application and relied on the replying affidavit sworn on the 14<sup>th</sup> August 2024 of Eng. Nicole Ashley Mwandale, the Respondent. Counsel submitted that the law required verification of denied facts. Counsel questioned why the Applicant did not see the need to file draft defence for Court to check whether it has a viable defence. Counsel submitted that there was no security of the judgment already entered to justify the stay. Counsel submitted that the application had no merit where service was effected was not denied as being in office of the defendant and further the Applicant did not deny the Respondent accompanied the process server. She questioned the rationale of the Applicant not cross-examining the process server.

### **Decision**

13. The application was brought under Order 10 rule 11 of the Civil Procedure Rules which states; “Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
14. The Respondent is a corporation. The procedure for service is as per Order 5 Rule 3 of the Civil procedure Rules to wit:- “Subject to any other written law, where the suit is against a corporation the summons may be served—
  - a. on the secretary, director or other principal officer of the corporation; or if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—
    - i) by leaving it at the registered office of the corporation;
    - ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the Court to the registered postal address of the corporation; or
    - iii) if there is no registered office and no registered office or physical address of the corporation, by leaving it at the place where the corporation carries on business; or
    - (iv) by sending it by registered post to the last known postal address of the corporation.”



15. After service it is required of the person serving to file affidavit of service. The content of the affidavit service is as provided for under Order 5 Rule 15 of the Civil Procedure Rules to wit:-
  - “(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.
  - (2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month’s imprisonment or both.”
16. In the instant case the Applicant stated that it was not served with the Court summons, the statement of claim and annexures and neither with any hearing date during the proceedings leading to the judgment of Justice Ocharo Kebira of 28 March 2024 entered in favour of the Respondent against the Applicant.
17. The Respondent vide her replying affidavit of 14<sup>th</sup> August 2024 averred that the service of Court summons by the Court process server was effected in her presence at the defendant’s office and upon Eng. Caleb Opati who declined to sign the same. That the Applicant had not denied being the registered owner of P.O Box 62000-00200 or email under the pleadings. That the Applicant did not have defence for her unpaid dues. The Applicant annexed her demand letter addressed to Eng. Caleb Opati of 9<sup>th</sup> October 2018 and affidavit of service dated 4<sup>th</sup> July 2020 by Antony S. Lyuba.
18. The Applicant vide further affidavit of Eng. Caleb Opati of 12<sup>th</sup> September 2024 denied the authenticity of the affidavit of service produced by the Respondent in her replying affidavit of 14<sup>th</sup> August 2024 and stated that it had no stamp of the Court . In comparison he produced affidavit of service dated 29<sup>th</sup> July 2019 by the same Antony S. Lyuba with the stamp of the Court and stated that the affidavit was defective for failure to identify the name of the person who received the summons, statement of claim and annexures and declined to sign for them as stated in the said affidavit. Contrary to the affidavit of service produced by the Respondent, the affidavit with stamp of the Court had no name of the person served.
19. The Court finds that it was not in dispute that the hearing date or any other proceedings’ date was not effected upon the Applicant.
20. The Court established that vide a letter dated 10<sup>th</sup> July 2024 the Applicant requested the Registrar of the Court for the copy of the Court file.
21. The parties produced affidavit of service of summons at variance. This is a Court of record. The Court perused the record and established that the only affidavit of service of the summons on record was dated 29<sup>th</sup> July 2019 and filed in Court on the 26<sup>th</sup> August 2019. The said affidavit just like the one produced by the Respondent was sworn by Antony S. Lyuba who averred that on the 1<sup>st</sup> April 2019 he received the summons , statement of claim and annexures from M/S Guserwa & Company Advocates with instructions to serve the same upon the Applicant. That he proceeded to the Applicant’s / Respondent’s offices at Heri Paradise Apartments, Suite C8 along Dennis Pritt Road where he met a gentleman at the office who received copies of the said document and declined to sign.
22. The Court deduces from the said affidavit of service on record that, contrary to the averments of the Respondent, that the said affidavit of service on record did not disclose the time of service, the name of the person served at the Respondent’s office or the name of the person identifying the



person to be served contrary to the provisions of Order 5 Rule 15 of the Civil Procedure Rules to wit:- “(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.”(emphasis given) The Court returns that the Respondent’s affidavit was made of falsehoods and that the annexed affidavit of service dated 14<sup>th</sup> July 2020 was not on Court record. The Court holds that the affidavit of service on Court record of 29<sup>th</sup> July 2019 was defective for failure to meet the requirements of service on a corporation and of affidavit of service under Order 5 rules 3 and 15 of the Civil Procedure Rules respectively.

23. The Court finds that it is the said affidavit of service of 29<sup>th</sup> July 2019 that informed the Court to proceed with the suit as undefended pursuant to Order 10 Rule 2 of the Civil Procedure Rules to wit:-

“Affidavit of service upon non-appearance [Order 10, rule 2]

Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant he shall file an affidavit of service of the summons unless the summons has been served by a process-server appointed by the Court .”

24. In *Gulf Fabricators v County Government of Siaya (Civil Appeal 10 of 2019)* [2020] KEHC 5952 (KLR) (6 May 2020) (Judgment) a decision relied on by the Applicant, the issue of affidavit of service in default judgment was considered in depth by the Court . In paragraph 38 the Court relied on the decision in *Ali Bin Khamis V. Salim Khamis Korobe & 2 Others*, [1956] 23 EACA 195, where it was held inter alia that an order made without service of summons to Enter Appearance is a nullity which must be set aside ex debito justitiae.

25. The Respondent raised issue of the lack of annexing draft of defence to the application. The Court in the *Gulf Fabricators* case(supra) cited a decision of the Court of Appeal where the issue default judgment was considered in depth. The Court of Appeal in *CA No. 6 of 2015 James Kanyita Nderitu V Maries Philotas Ghika & Another* [2016]eKLR discussed a regular default judgment and an irregular one as follows:-

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the 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 appearances 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 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 (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).



In an irregular 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 justitiae*, 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. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo V Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”(emphasis on irregular default judgment)

26. The Court having held that, the affidavit of service on record of 29<sup>th</sup> July 2019 was defective for lack of; indication of time of service, name of person served and name of the person who identified the person to be served, contrary to the provisions of order 5 rule 15 of the Civil Procedure Rules, it follows that the judgment of 28<sup>th</sup> March 2024 obtained following the irregular proceedings was an irregular default judgment. The proceedings were in breach the cardinal rule of natural justice *Audi Alteram Partem*, that no party shall be condemned unheard. The Applicant was not even served with a single date of the Court proceedings.
27. The Court upholds the decision of the Court of Appeal *James Kanyita Nderitu V Maries Philotas Ghika & Another* [2016]eKLR to apply in the instant case where the Court held as follows:- “In an irregular 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 justitiae*, 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. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.” In the instant case the Court having found the affidavit of service leading to the proceedings was defective hence the Applicant was condemned unheard and upholding the said decision of Court of Appeal, returns that the judgment of 28<sup>th</sup> March 2024 has to be set aside as matter of right. The Applicant in such a case needed not have filed a draft defence or deposited security for the judgment in place.



28. In the upshot, the application dated 22<sup>nd</sup> July 2024 is allowed on account of defective affidavit of service and the default judgment entered for the Respondent against the Applicant and delivered on the 28<sup>th</sup> March 2024 by My Brother Justice Ocharo Kebira is set aside and all consequential orders with costs to the Applicant.
29. The Respondent is at liberty to serve the summons, the statement of claim and annexures afresh in compliance with the law for the suit to be heard de novo.
30. It is so Ordered.

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**JEMIMAH KELI**

**JUDGE**

In the Presence of:

C/A Caleb

Applicant:- Oduk

Respondent:- M/S Guserwa

