Njuguna & another (Suing as the Legal Representative of the Estate of Benson Kimani Muchohi - Deceased) v Sarbor Enterprises (Civil Case 143 of 2019) [2025] KEHC 9215 (KLR) (Civ) (26 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9215 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 143 OF 2019

TW OUYA, J

JUNE 26, 2025

BETWEEN

CATHERINE WANJIKU NJUGUNA ..... 1ST PLAINTIFF

SAMUEL KANG'ETHE NJUGUNA ..... 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BENSON KIMANI MUCHOHI - DECEASED

AND

SARBOR ENTERPRISES ..... DEFENDANT

RULING

1. The Applicant has moved this honourable Court via an Application dated 1st October 2024 seeking to set aside the ex-parte judgment that was entered against the Defendant (Applicant) together with all consequential orders arising therefrom be set aside and that the Defendant be granted leave to appear and file his Defence to the Plaintiff's (Respondent)claim out of time.

2. The Application is supported by the affidavit of David Kimeli, a director of the Applicant, substantially on ground that summons to appear were not personally served on the Applicant thus his ability to appear to file his defence. The Applicant only learnt of the suit through its insurer. It is also urged that the defendant has a good defence which raises triable issues and it is in the interest of justice that the defence be heard on its merit.

3. The Application has been opposed by the Respondent through the Replying Affidavit of Catherine Wanjiku Njuguna, who deposed that prior to the institution of the suit, the Applicant was duly served with a Demand letter via registered post. The demand letter was also served upon the Applicant's

Insurance Company who acknowledge receipt by affixing its official stamp. The contents of the letter were never contested by the Applicant's insurer.

4. It is further deponed that several attempts were made to serve the Applicant physically but the Respondent's process server was unable to trace their physical address. As a result, the Respondent was granted leave to serve the summons through substituted service. The Respondent then placed the summons in the Daily Nation newspaper dated 22nd June 2021. Despite service of summons through substituted service, the Applicant refused to enter appearance.

5. The Respondent further contends that the draft Defence does not raise triable issues and the same is merely a dilatory tactic to deny the Respondent the enjoyment of the fruit of his judgment.

6. The Motion was canvassed through written submissions. Counsel for the Applicant anchored his submissions on Order 10 rule 1 of the Civil Procedure Rules which empowers the court to set aside or vary an ex-parte judgment in default upon just terms. Counsel urged that the said power is discretionary and is therefore intended to avoid injustice or prejudice to a party to a suit. While reiterating that he was not personally served with the summons to enter appearance, the Applicant submits that had he been served, he would have appeared and defended the suit as he has a good defence to the allegation set out in the Plaint. Regarding the substitution service in the Daily Nation, the Applicant submits that there is a possibility that he missed the advertisement on 22nd June 2021 since not everyone buys the Daily Nation. He relies on the case of *REMCO Ltd v Mistry Jakva Parbat & Co Ltd* [2002] EA, *Kanji Naran v Velji Ramji* 1954 EACA, *National Bank of Kenya Ltd v Isaac Ngige Njoroge t/a Good hope Service Station Ltd* [2006]eKLR, to urge that if there is no proper service of summons to enter appearance, the resulting judgment is an irregular one that the court must set aside, *ex debito justiciae*.

7. Citing the case of *Mwalia v Kenya Bureau of Standards* [2002]1EA, Counsel for the applicant submitted that the conditions for setting aside ex parte judgments are now settled and that the Applicant has duly met all the conditions. It is further submitted that the Applicants defence raises triable issues which ought to go to trial. Therefore, it would be in the interest of justice to grant the prayers sought in the Application dated 1st October 2024.

8. The Respondents, through Counsel, anchored their submissions on the case of *Francis Wambugu v Babu Owino & Others*, SC Petition No. 15 of 2018 and *Eudicus Fundi Nyaga v Purity Nkirote Nyagah* [2022]eKLR to urge the position that the exercise of discretion by the court could only be faulted if the use of the discretionary power was based on a whim and that the court failed to consider the prevailing circumstances that need to be taken into account. The Respondent has also relied on the case of *Gulf Fabricators v County Government of Siaya* [2020]eKLR to urge the position that service of summons to enter appearance was properly effected upon the Applicant.

9. Regarding the assertion that the defence raises triable issues, counsel for the Respondent submitted that the defence does not raise any triable issues as there is no evidence shown that the deceased was the one responsible for the accident in question. Reliance has been placed on the case of *Claire Cherop Langat & Another v Jane Njeri Muchai* Nakuru HCCA No. 73 of 2020 to urge the position that it is pretextual to allege contributory negligence upon a fare paying passenger. Also, the Applicant has been indolent in filing the instant application despite being aware of the existence of the ex parte judgment.

10. The court has considered the parties' rival affidavit material and submissions. The two prayers in the Motion seek the setting aside of the interlocutory judgment and for leave to defend the suit.

11. The law on setting aside of interlocutory judgments is captured in order 10, rule 11 of the *Civil Procedure Rules* which states that:

> " 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."

12. Evidently, the power of the court to grant or refuse an application to set aside interlocutory judgment is discretionary. The exercise of such discretion though, should take care of prevailing circumstances and ensure that justice is served to all parties. Therefore, the discretion should be exercised both judiciously and justly.

13. The objective of the discretion conferred upon the court was spelt out in the case of *Shah v Mbogo & Another* [1967] EA 116 as hereunder:

> " The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

14. The well-established principles of setting aside interlocutory judgments were laid out in the case of *Patel v East Africa Cargo Handling Services Ltd*(1974) EA 75 as per Duffus P. who stated as follows:

> " 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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

15. The difference between the two was elaborated in detail by the Court of Appeal in CA No. 6 of 2015 *James Kanyita Nderitu v. Marios Philotas Ghika & Another* [2016] eKLR, where it was held that:-

> " ....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 in the whole it is in the interest of justice to set aside the default judgement, among others."

16. When it comes to an irregular judgment, the court stated:

> "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 justiciae*, as a matter of right."

17. Flowing from the above, the first question arising for determination is whether the Applicant was duly served with summons to enter appearance, and whether the interlocutory judgment entered is regular. As mentioned hereinabove, the Applicant denied service of summons. And when confronted with the evidence of substituted service, he contended that in this digital age, he might have missed the advertisement of 22nd June 2021 since not everyone reads the Daily Nation.

18. Order 5, rule 8 requires that summons be personally served upon a defendant wherever it is practical, unless the Defendant has an agent empowered to accept service on his behalf in which case, service upon the agent shall be sufficient.

19. The Respondent has demonstrated that the process server first attempted to serve the summons to the Defendant in person but was unable to as his known mobile number was also not going through. Moreover, the Demand Notice that he served through registered post did not elicit any response from either the Applicant or the insured. Having failed to reach the Applicant to effect service personally, the Respondent moved the honorable court for leave to effect service of summons through substituted service and the court granted the orders sought.

20. Notably, the Applicant does not in any way dispute the averments in the affidavit of service by the process server. He only raises concern that he wasn't served on the basis that not everyone gets to read the Daily Nation. I believe that the court in granting the order for substituted service was persuaded that indeed the application was merited. In any case, the legality of the manner in which the substituted service was effected has not been challenged in the instant application.

21. In *Ephraim Njugu Njeru v. Justin Bedan Njoka Muturi & 2 others* [2006] eKLR held as follows:-

> "Substituted service is normally ordered where the court is satisfied that there is reason to believe that the person to be served is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. Service in the ordinary way is generally personal service."

22. The purpose of the requirement for effective service of summons cannot be disputed. As stated by the Court of Appeal in *Giro Commercial Bank Ltd v Ali Swaleh Mwangula* [2016] eKLR:

> "Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend.

23. In light of the above, there is no doubt that the Applicant was properly served with summons to enter appearance. The argument that the not everyone reads the Daily Nation in my view, is not evidence of failure to effect service. The failure by the Applicant to read the newspaper is not evidence of failure to effect service of summons through substituted service. Therefore, the interlocutory judgment that was entered against the Applicant was valid and regular.

24. The other issue that this court ought to consider is whether the Applicant's defence raises triable issues. A court is additionally required to determine whether a defence raises triable issues even if the service of summons is found to be regular and valid.

25. The court in the case of *Tree Shade Motors Ltd v D.T. Dobie & Another* (1995-1998) 1 EA 324 reasoned that:

> " Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

26. The term 'triable issue' was defined by the Court of Appeal in the case of *Ternic Enterprises Limited v Waterfront Outlets Limited* [2018] eKLR thus:

> " ... a triable issue" is an issue which raises a prima facie defence and which should go to trial for adjudication ...The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend."

27. As already observed, the Respondent's suit is based on the tort of negligence. The Applicants draft statement of defence annexed to the Application contains the denial of averments made in the Plaint. The Applicant further claims contributory negligence and discredits the 100% apportionment of liability. Consequently, the court is satisfied that the Applicant's statement of defence raises triable issues which to be ventilated at the hearing of the suit.

28. On the question of likely prejudice to the Respondent, there is no indication from the material before the court, and the Respondent did not demonstrate that, if the interlocutory judgment were set aside he would be prejudiced in a manner that cannot be adequately compensated by way of costs.

29. The High Court of Kenya at Nakuru in *Langat & another v Muchai* (Civil Appeal 73 of 2020) [2022] KEHC 3117 (KLR) remarked that:

> " ...the Court can set aside an ex parte judgment for good cause. The Court is usually guided by three large-picture considerations: The first is a judicial policy that as much as possible the Court should determine cases on their substantive merits rather than technicalities as commanded by Article 159 of the *Constitution*.
>
> The second one is the judicial policy that venial errors of inattentiveness or ephemeral inaction occur and are a part of normal life and where they so occur, it is inappropriate, absent a showing of bad faith, to punish a litigant for such errors by driving them from seat of justice permanently.
>
> The third consideration is a corollary to the second: it is that the Court will, however, not utilize its discretion to benefit a litigant who is acting in bad faith and merely aims to prolong litigation or otherwise delay its resolution."

30. In balancing the twin interests of justice to ensure that cases are disposed in a just, expeditious and fair manner and that a litigant is not denied a chance to ventilate triable issues before a competent tribunal, I find that the balance tilts in favor of the latter.

31. The upshot is that the Defendant's Notice of Motion application dated 1st October 2024 is allowed in the following terms:

    a. The interlocutory judgment and decree issued on 2nd June 2023 and all consequential orders arising therefrom be and are hereby set aside.

    b. The Defendant is hereby granted leave to file and serve statement of defence and all requisite documentation within 30 days from the date hereof.

    c. The Defendant/Applicant shall pay to the Plaintiff/Respondent thrown away costs of Ksh. 150,000 within 21 days from the date hereof.

    d. In default of compliance with order (a), (b) and (c) above, the order vacating the interlocutory judgment shall automatically lapse without further reference to this court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26th JUNE, 2025.

HON. T. W. Ouya

JUDGE

For Defendant/Appellant ..... Kiplagat

For Plaintiff/Respondent ..... No Appearance

Court Assistant ..... Brian