Mattan Contractors Limited v Mwangi (Civil Appeal E005 of 2024)
[2024] KEHC 13526 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13526 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E005 OF 2024

DKN MAGARE, J

OCTOBER 30, 2024

BETWEEN

MATTAN CONTRACTORS LIMITED ..... APPELLANT

AND

JORAM KAMANGA MWANGI ..... RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment in Civil Suit No. 53 of 2017 delivered in Karatina Principal Magistrate's Court on 12/9/2019. It is one of those strange appeals that are not only hilarious but mind boggling. The appeal, as pleaded is anathema to good pleading at best and misplaced at worst.

    a. The Appellant looks to have a very good case raising two poignant issues, that is, whether the Respondent was entitled to leave to file appeal out of time.

    b. Whether the Appellant was served.

2. The next question is whether this good case is before the court herein. It is important for parties to know that courts are not manned by hypothecaries, soothsayers and magicians. They are manned by mortals trained in the art of litigation. The courts only deal with cases before them and nothing more.

3. The 6 grounds of appeal are a classical study on how not to write a Memorandum of Appeal. They are prolixious, repetitive, argumentative and unseemly. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth: -

    > " 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

4. The Court of Appeal had this to say in regard to Rule 86 (which is pari materia with Order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. The Memorandum of Appeal in Civil Appeal No. E005 of 2024 raises only one ground, that is, whether the learned magistrate erred in law and fact in allowing the Respondent's suit despite the fact that the Appellant was not served with the summons and had no notice of the Proceedings.

Background

6. The background of this case is equally a study in hyperbole, subterfuge and skulduggery. It is not easy to fathom, who has sinned more than the other in this matter. The firm of P.G. Kaingu filed a certificate of urgency dated 1/3/2017. It appears the minute is wrong in relation to the date as it is indicated as 2016, though the suit was filed in 2017. The matter appeared before F. Macharia, SPM, as she was then. She made the following orders: -

> Upon perusing the application dated 1/3/17, the supporting affidavit dated 1/3/2017 and a further supplementary affidavit dated 6/3/2017, I find that the application has merits (sic) and allow it as prayed.

7. This was in Karatina Miscellaneous case No 4 of 2017. The application was for the Respondent to bring a suit out of time. The grounds were that a police abstract and medical report were not obtained in time. The Respondent had allegedly been injured on 5/10/2013 and ought to have filed suit before 5/10/2016. The accident is said to have involved motor vehicle registration number KBS 318 T along Karatina- Nyeri road. The Respondent is said to have gotten a police abstract on 23/11/2016. He visited Dr. Wokabi on 19/12/2016 who wrote a medical report. There is on record, a demand letter dated 8/3/2017. Annexed thereto was a police abstract with all relevant details.

8. Armed with the newly minted order extending time, the Respondent filed suit, being Karatina Principal Magistrate's Court Civil Suit No. 53 of 2017 on 15/5/2017. This was exactly 2 years and 222 days from the date of occurrence of the accident.

9. Summons to Enter Appearance were extracted on 15/5/2017. Whether they were served, is a matter now, surprisingly left to this court to determine. The Respondent had other documents including a P3 form dated 12/08/2014 issued in blank for the part the Kenya police were to issue. It is however indicated to be for OB 7/5/10/13 and filled by staff officer, traffic, Karatina.

10. The Respondent filed an affidavit. The affidavit is dated 24/8/2018, one year, 3 months and 9 days after issuance of summons to enter appearance.

Submissions

11. The Appellant filed submissions dated 22/7/2024 that they did not have an opportunity to present their case. They termed this as a blatant violation of its right to a fair hearing under Article 50 of *the Constitution*. Reliance was placed on the case of Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR where the Court held that the right to a fair trial must also be adhered to and upheld in civil cases.

12. It was also submitted that the lower court erred in allowing the Respondent to file suit out of time contrary to Sections 27 and 28 of the *Limitation of Actions Act* that required an applicant who applies for extension of time to show that their failure to proceed in time was due to material facts of a decisive character that were at all times outside their knowledge. Reliance was placed among others on the case of Hellen Kiramana v PCEA Kikuyu Hospital [2015] eKLR where the Court held that the facts outside the knowledge of a Plaintiff are facts of a very decisive nature that the Plaintiff did not have opportunity to know.

13. Further, the Appellant relied on the case of County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR, where the Supreme Court of Kenya held that:

> " It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon.

14. It was also submitted that the ruling was in bad form because the decision was recorded on the cover of the Court file but there was no formal record in the file. On the impugned judgment, it was submitted that the judgment was irregular. The Appellant relied on Gulf Fabricators v County Government of Siaya [2020] eKLR where the Court stated that:

> " If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process"

15. Reliance was also placed on Kabutha v. Mucheru, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he was then), stated as follows:

> " [W]ith respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right.
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> Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an

applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.

16. Finally, the Appellant submitted that the lower court erroneously relied on the medical report dated December 21, 2016 by Dr. W.M Wokabi and the Police Abstract dated November 23, 2016. However, the makers of the said documents were not called to produce them, contrary to section 35 of the *Evidence Act* on whether the makers could not be availed.

17. It was submitted that the judgment contravened Order 21 Rule 3 of the Civil Procedure Rules because it was neither signed nor dated by the Magistrate. Reliance was placed on Sumbeiyo Primary School & 3 others v Kipsait Ayabei & another [2015] eKLR to submit that the Judgment ought to be nullified.

18. The Respondent on his part filed submissions dated 16/8/2024. It was submitted that the Respondent properly obtained leave before filing the suit as required under Sections 27, 28 and 30 of the *Limitation of Actions Act*. It was submitted that the Respondent had since received the decretal sum and the matter had been closed to the Respondent.

19. Further, that the police abstract and medical report were properly produced in the lower court as provided under Section 35(1) of the *Evidence Act*. It was also submitted that the Appellant was guilty of laches and litigation must come to an end. Reliance was placed on the case of Edward Akongo Oyugi & Others vs Attorney General (2019) eKLR.

Analysis

20. The court is bound to take judicial notice of places and boundaries or geographical subdivision pursuant to Section 60(1) of the *Evidence Act*. The old cemetery in Nairobi is the War Cemetery which is a few miles from city centre on Ngong Road adjacent to Nairobi Race Course within the Ngong Forest Reserve. Bunyala Road on the other hand is on the other side while Kibera railway is equally in another world. Based on the nature of the affidavit of service, the court should never have entered judgment.

21. Further, by the time summons were returned they had expired. It is not plausible that a gentleman could be served a year earlier but no affidavit of service was filed. Of critical importance, the Respondent did not file the order granting leave and defend their leave. The Respondent proceeded as if suit was filed within time.

22. The court did not in its judgment address the issue of being granted leave to appeal out of time. It must be remembered that even in formal proof the Respondent was under duty to prove their case. This is in twofold – related to liability and secondly related to filing the suit out of time. In this case the same was not given to the court to address. Even the witness statement that was produced in evidence did not refer to the order extending time.

23. The question in my mind, is what is the place of the order extending time. First, such an order must be produced in court. Without production, the court is bound to dismiss the suit for being time barred. The court has no jurisdiction to hear a suit that is stale. A decision based on a nullity cannot stand. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) that:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every

proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

24. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings. A court of law downs tools in respect of the matter before it the moment it finds it has no jurisdiction. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he was then stated as doth:

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
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> "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

25. The court was faced with a case, clearly of unserved summons. The summons had expired by the time they were brought to court, with an untenable affidavit of service. Further, there were no reasons for extension of time within which to file suit. A court cannot proceed with a case on the basis that it is not challenged. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to defining Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

26. Proceeding without proper service and without an order extending time to file suit is to act without jurisdiction. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a

Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

27. This then brings this court to the jurisdiction of this court. Does the court have jurisdiction to handle this matter? There appears to have been an application for review, whose fate is not clear from the record. However, that issue was dealt with in Misc. E034 of 2022 (Erroneously indicated as Appeal No. E034 of 2022). The court extended time to appeal for reasons that it is not known who was served.

28. When there is no service, the suit abates. A passage from the judgment of Lord Green M. R. in Orais vs. Kanseen (1943) I.K.B. at page 262, which was adopted with approval in Court of Appeal decision in the case of Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289, comes in handy:

> " Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.
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> The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."

29. In the case of Kenya Bus Service Limited and Others -Versus - Attorney General and The Minister for Transport and Others NRB HC Misc. 413 of 2005" (marked as 'C') the Court held that:-

> " 2. Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Acts of Parliament or Statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations.
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> Sir Isaac J H JACOB writing in his work entitled The Reform of Civil Procedure Law and Other Essays. In Civil Procedure (1982) Version has described the inherent powers in clear terms at page 224:
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> "The answer is that the jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". This description has been criticized as being "metaphysical" but I think nevertheless that it is apt to describe the quality of

this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court, it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.The Judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the Judicial function of administering justice according to law in a regular, orderly and effective manner."

The need to administer justice in accordance with *the Constitution* occupies an even higher level due to the supremacy of *the Constitution* and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the Judicial hierarchy of values. I therefore hold that the court does have inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside ex-parte orders which by their very nature are provisional; see Wea Records Limited V Visions Channel 4 Limited & Others (1983) 2 Aller 589 cited by the 2nd interested party's Counsel Nani Njoroge Mungai and which this court applied in R V Land Registrar Kajiado & 2 Others Exparte John Kigunda HC Misc 1183 of 2004 (unreported). As indicated in the citations of authorities elsewhere in this ruling this court has invoked this power to deal with non disclosure of material facts such as the existence of court cases which have a bearing on the case at hand or where the process is used not to advance the cause of justice but to subvert it or use for an ulterior purpose.

30. A court cannot allow illegal proceedings to remain. It can on its own or on application set aside oppressive proceedings meant to gain an undue advantage.

31. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

32. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

33. The duty of the first appellate Court was set out as a retrial in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the court in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular

circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

34. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

35. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

36. On the other hand where the court did not have the advantage of hearing the witnesses, the first appellate court has a wider discretion. In the case of *Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018)* [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

37. The situation is different when it comes to documents since documents speak for themselves. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal (Ouko, Kiage and Murgor JJA) held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

38. This case turns on 3 documents. The first one is an affidavit of service, as set out in grounds 2 and 3 of the memorandum of appeal. The Appellant had an option of setting aside as set out in Order 10 Rule 11 as follows:

> 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.

39. Section 67 of the *Civil Procedure Act* provides an original decree passed ex parte. The said section posits as doth:

> 67.(1) An appeal may lie from an original decree passed ex parte.
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> 2. No appeal shall lie from a decree passed by the court with the consent of parties.

40. My lamentations are that this matter could have been handled better. Service should have been effected and delay explained to the required standard. However, the Appellant opted to proceed and attack the original decree. I have already found that the judgment was null and void for lack of service. For emphasis, a company is served though its officers or other modes of service provided by L.N. 22/2020, rule 6, being an amendment to Order 5 Rule3, which now provides as follows:

> Subject to any other written law, where the suit is against a corporation the summons may be served-
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> a. on the secretary, director or other principal officer of the corporation; or
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> b. if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)
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> i. by leaving it at the registered office of the corporation.
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> 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
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> 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
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> iv. by sending it by registered post to the last known postal address of the corporation.

41. Other than registered post above, the additions vide legal notice No. L.N. 22/2020, rule 6, of 26/2/2020 known as the Civil Procedure (Amendment) Rules, 2020 are not useful, the entry of judgment having been entered in 2019. The said rule 6 states as follows: -

> 6. Rule 3 of Order 5 of the principal Rules is amended in paragraph (b) (iii) by deleting the words "postal address" and substituting therefor the words "registered office or physical address"

42. Summons had expired by the time a request for judgment was made. Expired summons cannot be returned. Order 5, rule 2 provides for the duration and renewal of summons as doth:

> 1. In 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.
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> 2. Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.
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> 3. Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

4. Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

5. An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

6. As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

7. Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

43. In effect there was no service of valid summons and no evidence that the Appellant was served. The issue of failure to enter appearance is irrelevant when there are no summons served. Failure to serve automatically vitiates the judgment. The next question is what will the court do with such a finding. This was not an appeal from an application to set aside but a merit-based appeal, with 2-pronged Approach – that is, service of summons and extension of time. I have already found on service as there is no provision for serving a gentleman. It is the officers of the corporation who should be served. There are also other avenues including service on their registered address. None of these were used in the current circumstances.

44. In underscoring the rules of procedure as necessary to realize natural justice and therefore fair trial, the Court in FCS Ltd vs Odhiambo & 9 Others [1987] KLR 182 – 188 stated inter alia as follows:

> "The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the court would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of Section 3A of the *Civil Procedure Act* on inherent jurisdiction of the court to do justice."

45. On extension of time, the attack or challenge on leave is to be done in the main suit. The Respondent did not file any order granting leave or testify on raison d'etre for not filing suit within time.

46. Ex parte order cannot be taken to be final orders. In David Gicheru v Gicheha Farms Limited & another [2020] eKLR the Court held that:-

> "The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

47. Defendant can only challenge the leave at the trial by way of cross-examination on the circumstances of late filing of the case. In the case of John Gachanja Mundia v Francis Muriira & Another [2017] eKLR, A. MABEYA, J stated as follows:

> 26. The view this Court takes is that, a Defendant can only challenge the leave at the trial by way of cross-examination on the circumstances of late filing of the case. It is only after he successfully mounts such a challenge that the incidence of proof shifts back to the Plaintiff to

defend the leave obtained exparte. This happened in the present case but the 1st respondent failed to discharge that burden. Ground number 1 succeeds.

48. Leave to extend time to appeal out of time can only be challenged in the suit and the appeal. In the case of Nation Media Group Limited & 2 others v Margaret Kamene Wambua [2021] eKLR, the court observed, and I agree, that:

> The respondent was awarded Kshs.200,000 as damages. The appeal is not on quantum. I am satisfied that the trial court properly allowed the application for leave to file suit out of time. The appellant is within the law to challenge the order granting leave within this appeal. (See Mary Wambui Kabugu –v- Kenya Bus Services Ltd. Civil Appeal No. 196 of 1995). There was no requirement that the appellant must have filed an appeal first on the issue of extension of time before the suit was heard.

49. In the case of Amos Muthinja M'mungania v John Gaitho & another [2016] eKLR, F. Gikonyo stated as follows:

> In fact, the law is that matters of limitation of actions should be decided in the trial after the court has taken into account all evidence, circumstances and facts of the case especially those tendered by the plaintiff to bring the suit within the exception in Section 27 of the Limitations of Actions Act. Fortunately, this subject is replete with very clear judicial decisions which I need not multiply except cite the case of (1) Oruta vs Samuel Mose Nyamato [1984] KLR 990 (2)Transworld Safaris Kenya Ltd –vs- Somak Travel Ltd [1997] eKLR, (3)Mbithi vs Municipal Council of Mombasa & another. (1990 -1994) E.A. and (4) Divecon Ltd vs Shrinmkhana S. Samani. Therefore, I refuse to accept the proposition by the Appellant that the learned trial magistrate did not have jurisdiction to set aside the leave to file suit out of time herein. Indeed, I belong to the school of thought which posit that matters of limitation of actions should never be tried as preliminary objections or in a summary manner but at the trial upon the evidence of parties.
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> 7. I will add one more thing: that the requirement of the law (Order 2 rule 4 of the Civil Procedure Rules) that matters of limitation must be specifically pleaded in the defence underscores the intention of the law that limitation should become an issue for trial. See the case of Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 0f 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (supra) thus:
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> ''It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *Limitation of Actions Act*..."
>
> Accordingly, a proper understanding of Section 27 of the *Limitation of Actions Act*, the plaintiff bears the legal burden to show that material facts relating to his or her cause of action were outside the persons' knowledge. I have looked at the proceedings, as recorded by the trial magistrate. The explanation given by PW1 on this subject was that the advocate he had instructed to follow-up the accident claim cheated him that he had filed suit when he had not. He blamed the said advocate for the delay in filing the suit. He was cross-examined on this particular matter of limitations of action. Again he was re-examined by Mr. Kiogora on the issue of Limitation of Action. All that he did was to blame his advocate for the delay. The question I must ask myself is whether the reason for delay constitutes material fact for purposes of Section 27 of the *Limitation of Actions Act*. On this I find help in the words of

Kwach JA (as he then was) in the case of Mbithi vs Municipal Council of Mombasa (Supra) that:

"Material facts are restricted to three categories of fact, namely, (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action, (b) the nature or extent of the personal injury so resulting; and (c) the fact that personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable".

The judge went onto state that:

"It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character; that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to him, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action. Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive)

50. As has been observed elsewhere in this Judgment, if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to be set aside ex debito justitiae. This Court in Bouchard International (Services) Ltd v M'mwereria [1987] KLR 193 held that:

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
>
> While it is appreciated that the decision to set aside ex parte judgement is an exercise of discretion, this Court in the above matter held that: "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order, unless he has shown to have applied wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion, which may reverse or vary the order. Otherwise in interlocutory matters, the Judge might be regarded as independent of supervision. Yet an interlocutory order of the Judge may often be of decisive importance on the final issue of the case, and may be one, which requires a careful examination by the Court of Appeal.

51. On irregular judgments, the Court of Appeal in *Yooshin Engineering Corporation v AIA Architects Limited (Civil Appeal E074 of 2022)* [2023] KECA 872 (KLR) (7 July 2023) (Judgment) stated:

> What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a

> judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.
>
> However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.

52. It is therefore the finding of this court that the judgment of the learned magistrate was unsatisfactory as to amount to a complete mistrial. I am guided by the reasoning of the Court in Chandaria v Njeri [1982] eKLR where the Court of Appeal stated as follows:

> In my view the trial in the High Court, and the judgment of the learned judge, were so unsatisfactory as to amount to a complete mistrial. Many important issues were left undecided and not even considered. Much as I regret having to adopt this course I would allow this appeal with costs, and remit the suit to the High Court for retrial on properly framed issues unless the parties can agree to a settlement. It is in my view quite impossible, having regard to the unsatisfactory state of the record, for this Court to substitute its own findings...

53. Without having decided on the issue of extension of time, whether or not raised, the judgment is incomplete.

54. In the circumstances of this appeal, in my view, a new trial would achieve justice for both parties as opposed to dismissing the Respondent's suit in the court below. I am guided by Section78 of the *Civil Procedure Act* in the following terms:

> "78.(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
>
> a. to determine a case finally;
>
> b. to remand a case;
>
> c. to frame issues and refer them for trial;
>
> d. to take additional evidence or to require the evidence to be taken;
>
> e. to order a new trial.
>
> 2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

55. Therefore, I am persuaded that the judgment is irregular and untenable and a new trial is necessary.

Determination

56. In the circumstances, I make the following orders.

a. The Judgment of the lower court dated and delivered on 12th September 2019 is irregular and is set aside *in limine*.

b. The suit in Karatina PMC Civil Suit No. 53 of 2017 is hereby remitted to the lower court for a fresh trial.

c. In the circumstances, each party to bear own costs of the appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF OCTOBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Masaka for the Appellant

Mr. Kaingu for the Respondent

Court Assistant – Jedidah