



REPUBLIC OF KENYA



KENYA LAW
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**Ndunda v Nairobi City County & another (Civil Appeal 279 of 2017)
[2023] KEHC 19650 (KLR) (Civ) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 279 OF 2017

CW MEOLI, J

JUNE 29, 2023

BETWEEN

MICHAEL MUASYA NDUNDA APPELLANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

SILVERSTAR INVESTMENT LIMITED 2ND RESPONDENT

(Being an appeal against the ruling and order of Honourable M.W. Njagi, PM delivered on 29th May 2017 in First Class Magistrates Court, City Court RMCC No. 9 of 2015)

JUDGMENT

1. This appeal emanates from the ruling delivered on 29.05.2017 in RMCC No. 9 of 2015 before the First Class Magistrates Court, City Court. Nairobi City County (hereafter the 1st Respondent) lodged a suit before the First Class Magistrates Court, City Court being RMCC No. 9 of 2015 against Michael Muasya Ndunda (hereafter the Appellant) by way of the plaint dated 30.04.2015 seeking the sum of Kshs. 2,953,920/- costs of the suit and interest thereon. The claim was for alleged unpaid annual rates in the sum of Kshs. 137,568/- from 1st January 2000 until December 2015 together with interest thereon at the monthly rate of 3% from 1st January 2000 up to 30th April 2015 in the sum of Kshs. 2,816,352/-, in respect to the property known as L.R. No. 2259/196 off Karen Road (the subject property) said to be owned and/or occupied by the Appellant at all material times.
2. Upon the request of the 1st Respondent, an *ex parte* judgment was entered, in default of appearance and/or defence, as prayed in the plaint against the Appellant on 22.06.2015. Consequently, the Appellant filed the Notice of Motion dated 4.05.2016 (“the application”) seeking to set aside the *ex parte* judgment, and a further order to the effect that the suit was without legal or factual basis since



- the Appellant had paid all the requisite rates in respect to the subject property. The grounds on the face of the application were amplified in the supporting affidavit of the Appellant who swore that he was never served with summons to enter appearance, or any other notices issued subsequently.
3. That he had all along regularly paid his rates in respect to the subject property up to and inclusive of the rates due for the month of December 2016. Hence had a defence which raised triable issues and it would be prejudicial and unfair if he was condemned unheard. That he was the registered proprietor of the subject property as well as the property known as L.R. No. 2259/196 situated in Runda, the latter property which he acquired on 3.08.1994 and forms the subject of separate proceedings namely RMCC No. 34 of 2014 between himself and the 1st Respondent.
 4. That the process server (Ezekiel Masai) who purportedly effected service of the pleadings, summons and notices in the suit against him did not attach a copy of his process server's certificate for the year 2015 for verification whether he was qualified to act in such capacity. The Appellant further swore that at the time he purchased the subject property, it was vacant and remains vacant to date, and yet the process server purported to have effected service by attaching the pleadings and summons on an avocado tree rather than pursuing other alternative modes of service.
 5. The Appellant averred that the 1st Respondent further acted in bad faith by purporting to sell the subject property to Silverstar Investment Limited (hereafter the 2nd Respondent) for the consideration of Kshs. 5,200,000/- out of which the latter paid a sum of Kshs. 4,000,000/- despite the subject property being last valued at a sum of Kshs. 28,000,000/-. That in view of the foregoing circumstances, it would only be fair for the ex parte judgment to be set aside and that no prejudice would be visited upon the 1st Respondent.
 6. The 1st Respondent opposed the application through a replying affidavit sworn on 20.05.2016 by advocate Karisa Iha. Therein, the advocate stated that while it is not in dispute that the Appellant was at all material times the proprietor of the subject property, he was required by law to ensure that all and any outstanding rates were paid as and when they fell due. That service of the pleadings and summons was properly effected by affixing the requisite documents on a tree situated on the subject property, in line with the modes of service set out in the *Rating Act*, Cap. 267. Further that, service of the said pleadings and summons was effected by a competent and qualified process server, whose certificate for the year 2015 was annexed to the replying affidavit. That the subject property was later passed on to the 2nd Respondent through a public sale and hence the Appellant no longer has any legal interest therein. That the rates in respect to the subject property were paid from the proceeds of the public sale and consequently, the application had been overtaken by events.
 7. The 2nd Respondent similarly opposed the application by putting in Grounds of Opposition dated 6.06.2016 reiterating the averments made in the replying affidavit mentioned hereinabove, to the effect that it is a *bona fide* purchaser of the subject property following a public auction held on 19.11.2015 and hence the application was fatally defective.
 8. The trial court by way of the ruling delivered on 29.05.2017 dismissed the application. Thus, provoking the instant appeal which was brought through the memorandum of appeal dated 5.06.2017 based on the following grounds:
 - “ 1. The learned magistrate erred in law and in fact in finding that the Appellant's application to set aside *ex-parte* Judgment had no merit.
 2. The learned magistrate erred in law and in fact in finding that the Appellant had been served with Summons.



3. The learned magistrate erred in law and in fact in not finding that the Ex-parte Judgment was irregular, and the Decree therefrom was executed in violation of the mandatory provisions of Order 22 Rule 6 of the [Civil Procedure Rules](#).
 4. The learned magistrate erred in law and in fact in failing to take into account the applicable Legal principles which entitled the Appellant to the Order sought as a matter of right.
 5. The learned magistrate erred in law and in fact in taking into account irrelevant and inapplicable legal principles and failed to appreciate that the Appellant's liability to the First Respondent was not a relevant issue to the Appellant's application.
 6. The learned magistrate erred in law in dismissing the Appellant's application." (sic)
9. The appeal was canvassed by way of written submissions. In addressing the key issue raised on appeal which is the disputed service of summons to enter appearance, counsel for the Appellant anchored his submissions on the ground that no proper service was effected upon him since the 1st Respondent did not comply with the provisions of Sections 15, 17 and 26 of the [Rating Act](#). Which required the 1st Respondent to give the Appellant a period of 30 days within which to pay the requisite rates, and in the event of non-payment, to issue a written demand before instituting formal proceedings.
 10. The Appellant's counsel submitted that the demand requests forming part of the record of appeal do not contain the Appellant's postal address and further, that the purported service did not comply with the provisions of the [Rating Act](#) or the [Civil Procedure Rules](#) on service. It was argued that the action by the process server of leaving the summons on an avocado tree situated in the subject property cannot be deemed to be proper service. The court was therefore urged to exercise its discretion in allowing the appeal and in setting aside the *ex parte* judgment for want of service of the summons.
 11. The 1st Respondent's counsel on his part reiterated that going by Order 10 Rule 11 of the [Civil Procedure Rules](#) and the decision in [K-Rep Bank Limited v Segment Distributors Limited](#) [2017] eKLR courts have unfettered discretion in matters pertaining to the setting aside of default judgments. Counsel argued that in the present instance, the judgment entered is regular since it was demonstrated before the trial court that service of summons had been effected. Here citing [Fidelity Commercial Bank Ltd v Owen Amos Ndung'u & Another](#) HCCC NO. 241 of 1991 and [David Kiptanui Yego & 134 others v Benjamin Rono & 3 others](#) [2021] eKLR on the distinction between regular and irregular judgments.
 12. Counsel further argued that the mode by which service was effected on behalf of the 1st Respondent is provided for in Section 17 of the [Rating Act](#) hence proper. Counsel further relied on the decisions in [Taib v Minister for Local Government & 4 others](#) (2008) 3 KLR (EP) 433 and [Electrical Marketing \(Wholesale\) Ltd v Nairobi City County & 2 others](#) [2019] eKLR where the respective courts appreciated the various modes of service provided for in the law. It was submitted that the alternative modes of service set out in the [Civil Procedure Rules](#) and relied upon by the Appellant are inapplicable in this case. For those reasons, it was asserted that the appeal is without merit and ought to be dismissed.
 13. On behalf of the 2nd Respondent, its counsel cited the decision in [Tree Shade Motors Limited v D.T. Dobie And Company \(K\) Limited & Another](#) [1998] eKLR on the nature of a defence raising proper grounds for setting aside a default judgment. He submitted that in the present instance, the Appellant did not annex a draft statement of defence to the application to demonstrate the manner in which he stood to suffer prejudice if the orders sought were denied. Counsel reiterated the submissions by his



counterpart on behalf of the 1st Respondent that service of summons was properly effected as seen in the affidavit of service tendered and hence the *ex parte* judgment was regular. To buttress that argument, counsel drew attention to *Shadrack Arap Baiywo v Bodi Bach* [1987] eKLR where the Court of Appeal acknowledged that an affidavit of service ideally constitutes sufficient evidence of proper service. The concluding submission therefore was that no proper grounds have been established to warrant a setting aside of the ruling and a consequent setting aside of the *ex parte* judgment. The court was thus urged to dismiss the appeal with costs.

14. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.
15. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

16. From the record of the trial court, the Appellant’s application was expressed to be brought under Section 3A of the *Civil Procedure Act*, Order 10, Rule 11; Order 22, Rule 25 and Order 51, Rule 1 of the *Civil Procedure Rules*. In disallowing the application, the trial court reasoned that the Appellant had not tendered any evidence to support his averment of payment of the requisite rates and thus concluded that the Appellant had not paid rates in respect to the subject property and therefore had no proper defence. The trial court further found that the Appellant was duly served with the summons to enter appearance thereby making the *ex parte* judgment regular.
17. The grant or refusal to set aside or vary a judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. The Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR stated:

“This Court ought not to interfere with the exercise of a Judges’ discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (supra):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”.



See; *United India Insurance Co. Ltd v. East African Underwriters (K) Ltd* [1985] E.A 898: -

18. The object of the discretion conferred on the court to set aside was enunciated in the case of *Shah v Mbogo and Another* [1967] E.A 116:

“The discretion to set aside an ex-part 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.”

19. Distinguishing regular and irregular exparte orders or judgments, Platt JA (as he then was) stated in *Bouchard International (Services) Ltd vs. M'Mwereria* [1987] KLR 193 (as cited with approval in *Miarage Co Ltd v Mwichuiri Co Ltd* [2016] eKLR) that:

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... 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 judgment 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...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction”.

20. To be determined in the present appeal is the key question whether the trial court correctly exercised its discretion based on the facts presented before it. The record of the lower court reveals that the Appellant on the one part through his affidavit material vehemently denied service of any court process in respect the suit in the lower court, particularly service of the summons to enter appearance. On the other part, the 1st Respondent maintained that service was properly effected upon the Appellant in the



manner provided for under Section 17 of the [Rating Act](#), Cap. 267 Laws of Kenya. The said provision expresses that:

- “(1) If, after the time fixed for the payment of any rate, any person fails to pay any such rate due from him and any interest on any such unpaid rate as provided in section 16 of this Act, the rating authority may cause a written demand to be made upon such person to pay, within fourteen days after service thereof on him, the rate due by such person and interest thereon calculated in accordance with section 16(3) of this Act which demand shall be in the appropriate form in the Second Schedule.
- (2) If any person who has had such demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate and interest in the manner hereinafter prescribed.
- (3) Every plaint in such proceedings shall set forth the particulars of the land on which the rate was levied, of the rate so due and demanded and of any interest payable thereon.
- (4) Every summons issued in proceedings taken under this section shall order the defendant to appear and answer the claim on a day to be therein specified, and every such summons may be served—
 - (a) by post; or
 - (b) by fixing it on or to some conspicuous part of the land; or
 - (c) by any mode of service authorized by any Rules made under the [Civil Procedure Act](#)”

21. The procedure of effecting service of summons is further spelt out in Order 5, Rule 8 of the [Civil Procedure Rules](#) (CPR) and the contents of the affidavit of service stipulated in Order 5, Rule 15 of the [CPR](#). Order 5, Rule 8 provides that:

- “(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
- (2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”

22. Order 5 Rule 15 of the same rules provides that:-

- (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. (Emphasis Added)
23. The contents of the affidavit of service sworn by the court process server named Ezekiel Masai on 16.06.2015, disclose that on 11.06.2015 the said deponent went to the subject property where he attached the summons and a copy of the pleadings on an avocado tree situated therein, upon failing to trace the Appellant on the said property. From the record, it is apparent that subsequent notices were served upon the Appellant in a similar manner, as sworn by the same process server.
24. It is not in dispute that the Appellant was at all material times the registered owner of the subject property. It is also apparent from the material tendered on behalf of the 1st Respondent both before the trial court and on appeal that the service of summons was guided by Section 17(4) (*supra*) which permits a party to serve summons upon a defendant by fixing it on or to some conspicuous part of the land. That said, the question arises as to whether the proper procedure for service of demand notices prior to filing the suit was complied with, and if so, whether the summons was properly served upon the Appellant.
25. Beginning with the issue of service of the demand notice(s) for unpaid land rates, further to Section 17(1) and (2) of the *Rating Act* (*supra*), Section 26 of the said Act makes provision for the mode of effecting such service, as set out below:

- “(1) Except where otherwise provided by this Act, any notice required to be published under this Act by the rating authority shall be published by advertisement once in the Gazette and in one or more newspapers circulating in the municipality.
- (2) Any notice, demand or other document required or authorized to be sent or served under or for the purposes of this Act may be sent or served either—
- (a) by delivering it to the person to or on whom it is to be sent or served; or
 - (b) by leaving it at the usual or last known place of abode or business of that person, or, in the case of a company, at its registered office; or
 - (c) by ordinary or registered post; or
 - (d) by delivering it to some person on the premises to which it relates, or, if there is no person on the premises to whom it can be delivered, then by fixing it on or to some conspicuous part of the rateable property; or
 - (e) by any method which may be prescribed:

Provided that, if the rating authority, having attempted to send or serve a notice, demand or other document by one of the methods provided in paragraphs (a), (b), (c), (d) and (e) of this subsection, has reason to believe that such notice has not been received by the person to whom it was addressed, it may advertise, in the manner provided in subsection (1) of this section, the general purport of such notice, demand or other document, and thereupon such notice, demand or other document shall be deemed to have been received



by such person, and any such advertisement may refer to one or more notices, demands or other documents and to one or more rateable owners.

- (3) Any notice, demand or other document by this Act required or authorized to be served on the owner or occupier of any premises may be addressed by the description “owner” or “occupier” of the premises (naming them), without further name or description.
- (4) When any notice, demand or other document required or authorized to be sent or served under or for the purposes of this Act has been sent by ordinary or registered post, delivery or service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which a letter would be delivered in the ordinary course of the post.”

26. From the court’s review of the record, it is apparent that the 1st Respondent did not tender any credible evidence to demonstrate compliance with the above modes of service by the process server and the 1st Respondent in respect of a rate demand upon the Appellant to make him aware of any outstanding arrears prior to institution of the suit. Section 17 of the *Rating Act* envisages that the service of a demand notice for rates on the defaulter will precede the filing of a suit by the concerned authority against the defaulter. Here it seems that the 1st Respondent opted for the short route of invoking subsection (2) of Section 17, avoiding the service of a demand notice.
27. Regarding service of court process, the *Rating Act* is silent on what would constitute a conspicuous part for affixing process on a property. Nevertheless, as earlier mentioned, the process server who effected service of the summons and copy of the pleadings relating to the suit admitted to having affixed the documents on an avocado tree situated on the subject property. While the process server stated in his affidavit of service that he opted to do so upon being unable to find the Appellant, he did not state or show that he had taken any reasonable or diligent efforts in trying to trace the specific whereabouts of the Appellant or attempts made at exploring other efficient modes of service available under the law, especially upon taking into account the averments by the Appellant that the subject property was vacant and uninhabited.
28. This begs the question: how was the Appellant then expected to learn of the existence of the suit filed against him? It is noteworthy that the purpose and intent behind service of summons and pleadings is to bring the existence of a claim to the attention of a party being sued so that the said party can take appropriate steps should they wish to do so. Put another way, the service of the plaint and summons to enter appearance represents a critical step in giving notice to a defendant. In that regard, the Court of Appeal stated in *Giro Commercial Bank Ltd v Ali Swaleh Mwangula* [2016] eKLR that: -

“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. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff’s claim.”

See also *Gemstaviv Limited v Kamakei Ole Karia & 5 others* [2015] eKLR.



29. In view of all the foregoing, the court is persuaded that there was no proper service of the summons and the ex parte judgment resulting therefrom was irregular. And consequently, that the trial court proceeded from error having failed to appreciate that the *ex parte* judgment against the Appellant was irregular, and that the discretion it was exercising was intended to avoid injustice and hardship arising from such irregularity. The trial court therefore wrongly exercised its discretion. That being the case, it may be unnecessary to delve into the question whether a triable defence was demonstrated, save to state that ex facie, the Appellant had put forth depositions in disputing the 1st Respondent's claim. An irregular ex parte judgment, however, is liable for setting aside *ex debito justitiae*, as a matter of right.
30. The second facet of the appeal lies with whether the trial court erred in concluding that the Appellant was indebted to the 1st Respondent. As earlier mentioned, the trial court in its decision reasoned that in the absence of any supporting material by the Appellant, it was clear that he owed outstanding arrears in rates in respect to the subject property and yet the Appellant swore in his affidavit that he had made full payment towards his rates. Upon its review of the record, the court finds that this constituted a premature determination of a substantive issue which could only be determined upon a full hearing. The court finds that by making such a conclusive determination at the preliminary stages of the suit, the trial court grossly erred and misdirected itself on the matter.
31. The upshot therefore is that the court is satisfied that the appeal herein is merited, and it is hereby allowed. The order of the lower Court dismissing the Appellant's Notice of Motion dated 4th May 2016 is hereby set aside and is substituted with an order allowing the prayer seeking the setting aside of the ex parte judgment entered on 22nd June 2015, the decree, and other consequential orders. The Appellant shall file his defence in the lower court suit within 30 days of this decision (this to allow for administrative delays in remitting back the file to the lower court).
32. The suit shall proceed with expedition before any other magistrate of competent jurisdiction other than M.W. Njagi (Principal Magistrate). The costs of the Motion dated 4th May 2016 shall abide by the outcome of the suit, while costs arising from this appeal shall be borne by the respective parties. The Deputy Registrar of this Court is directed to ensure the prompt return of the lower Court file.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

Appellant: N/A

For the 1st Respondent: N/A

For the 2nd Respondent: Mr. Njugi

C/A: Carol

