Kenny Muthoka Maluki t/a Nzambani Hardware & another v Mabati Rolling Mills Limited (Civil Appeal E057 of 2021) [2022] KEHC 13114 (KLR) (26 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13114 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E057 OF 2021

MW MUIGAI, J

SEPTEMBER 26, 2022

BETWEEN

KENNY MUTHOKA MALUKI T/A NZAMBANI HARDWARE .... 1ST APPELLANT

STELLAR KAVUTHA MUTHOKA T/A NZAMBANI HARDWARE .... 2ND APPELLANT

AND

MABATI ROLLING MILLS LIMITED .... RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate at Mavoko Law Courts by C.C Oluoch delivered on 14th April 2021 in the Chief Magistrate's Court Mavoko Civil Case Number 64 of 2014)

JUDGMENT

Background

1. The Appeal arises out the Ruling delivered by the Trial Court delivered on 14th of April 2021 on Notice of Motion Application dated 19th June 2016 dismissing the Application with costs to the Respondent.

Notice of Motion

2. The Notice of Motion application is dated 19.06.2017 brought under Section 1A. 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 10 Rule 11, Order 12 (1), Order 22 Rule 22, Order 36 Rules 2,7 and 10, Order 51 Rule 1 of the *Civil Procedure Rules* 2010 seeks the following orders, That;

    i. There be stay of execution of the judgment and decree in this suit pending the hearing and determination of the Application inter parties

ii. The default ex-parte interlocutory judgement entered against the Defendants/ Applicants on the 1st March 2017 and the ex-parte proceedings and herein and all consequential orders in this matter be set aside and the warrants of attachment and sale be set aside / lifted and the Plaintiff do pay the Auctioneer's fees

iii. The Defendant/ Applicant be granted unconditional leave to file their defense.

iv. The Hon. Court to make such further orders and/or directions as it deems fit and just to grant.

3. The Application is supported by the affidavit of Kenny Muthoka Maluki dated 19th June 2017 in which he deposed that he received summons to enter appearance on 3.3.2017 at 4.30pm and sought to settle the matter out of court, however judgement had already been entered against him on 1.03.2017. He stated that he learned that judgment had been entered against him on 16.06.2017 when he received a proclamation of attachment of property from Transfield Auctioneers dated 15/06.2016 and immediately instructed the firm of M/S Kiongera Kariuki and Company Advocates to act on his behalf. He contends that he has never been served with a notice of entry of judgement. He stated that he had a good defense with high chances of success and it would only be fair to him if the judgement was set aside and will not be prejudicial to the Plaintiff.

4. In response, the Plaintiff filed a replying affidavit dated 17.07.2017 deposed by its legal assistant, Maureen Cosmas in which she stated that the Respondent's allegations were false and made without full disclosure. She said that the summons was received by the 2nd Defendant for herself and on behalf of the 1st Defendant on 2.02.2017 and stamped on the reverse of the said Summons to enter appearance. An affidavit of service was seen by Patrick Muniu on 14.02.2017 and filed on 27.02.2017.

5. On 27.02.2017, the Respondent requested for judgment in default of filing defense and vide a letter dated 6.03.2017, the Defendants were served and made aware of the existence of the judgment through the firm of Mwinzi & Associates. The Applicants requested their advocates to have the interlocutory judgement set aside upon payment of Kshs 3,500 throw away costs to which they responded that the judgment would be set aside on condition that Kshs 10,000 is paid as throw away costs , a Defense would then be filed within 14days and they file a memorandum of appearance of notice of appointment for certainty that they would come on record but this never happened.

6. The Respondent deposed that on 15.03.201 drew a notice of entry of judgment and sent it to the Defendants via registered mail, waited for 2 months for a response and there being none, vide a letter dated 3.05.2017 requested for a decree and certificate of costs from the Hon. Court which was issued on 8.05. 2017. It was deposed that on 8.06.2017, the Respondent drew an application for execution requesting for warrants of attachment to be issued to Trans Field Auctioneers. It was further deposed that the draft defense was a sham with no substance considering the Defendants acknowledged in writing owing the debt and issued cheques to the Respondent. The Trial Court was asked to dismiss the Application and direct the Defendant/ Applicant to pay auctioneers fees.

7. A further affidavit was deposed by the 1st Defendant on 25th September 2017 in which he stated that the summons were served upon them on 3rd of March 2017 and he contends that the affidavit of service sworn on 24th February 2017 is false and he will move the court at the appropriate time to have the process server examined to establish the truth. He contends that the explanation given on the alleged error is unsatisfactory and should be disregarded. He denies service of the notice of judgment and opines that they would not have been vigilant in proceedings that they did not know about.

8. The 1st Defendant contends that the judgment was not regularly entered as they were not involved from the beginning, the suit did not meet the standard of proof required to warrant interlocutory judgment

and it was not shown how the amounts were arrived at. He opined that the invoices do not show the value of the goods claimed. He said his Defense was properly on record and that the auctioneer's fees should be paid by the Respondents for procedural execution proceedings.

9. With leave of the court, Plaintiff/ Respondent filed a further affidavit deposed by its legal officer, Aphline Bella Adhiambo Otieno dated 8th February 2021 in which she stated that when the application came for hearing on 5th July 2017, they were given leave to file a replying affidavit and the interim orders were extended. On 19th July 2017 the court ordered that the application be disposed of by written submissions, they filed their submissions on 25th August 2017. On 27th September 2017, the Defendant's counsel did not appear and the interim orders were not extended and they instructed the advocate to pursue execution and have the Defendant's goods proclaimed.

10. The Defendants advocate filed an application to cease acting due to lack of instructions which was to be heard on 25th October 2017. Subsequently, the Defendants through its advocates on 16th November 2017 wrote a letter to the Plaintiff's advocates enclosing a cheque of Kshs 300,000/- and promising to make payment of Kshs 300,000/- every fortnight but defaulted by 18th January 2017 leading to them instructing auctioneers again.

11. On 19th February 2018, the auctioneers forwarded to them a cheque of Kshs 150,000/- being further payment. The defendants continued to make payment and when they changed auctioneers, the Defendants made a further payment of Kshs 200,000/-, Kshs 100,000/- on diverse dates. A cheque of Kshs. 100,000/- was also issued on 3rd June 2019.

12. It was her contention that through their auctioneers, they carried out investigations that led to them establishing that the Defendants owned Nzambani Park House and that is when they filed a garnishee application attaching all money payable as rent to the Defendants. The Defendants did not respond and the court issued the garnishee order.

13. The Application was disposed of by written submissions and the court rendered its ruling in which the court dismissed the application with costs to the Plaintiff/ Respondent. The application was to come for inter partes hearing on 9th April 2020 but due to Covid-19 pandemic, the Courts were closed and they were issued with a mention date for 7th July 2020, when he served the Defendant's advocates, they were informed that they no longer had instructions from the client. Upon service of the order dated 16th March 2010 on the Defendants tenants, Kenya Women Micro- Finance Bank Limited sought to be joined as an interested party to these proceedings

14. The Defendant instructed the firm of L.N Ngolya Advocates to represent for them and they filed the present application. The Plaintiff/Respondent contended that the Applicants had gone to a 3 years slumber and only awakened when the garnishee order nisi had been obtained, that during these 3 years period, they made payments in a bid to settle the decretal sum. The court was urged to look at the Defendants conduct and the Plaintiff claimed that it will suffer great prejudice if the default judgment is set aside.

Trial Court Ruling

15. While relying on Order 10 Rule 11 of the *Civil Procedure Rules*, *Patel v EA Cargo Handling Services Limited* [1975] EA 75 and *Mohammed & Another v Shoka* [1990] KLR 463 the Trial Court determined three issues for determination; whether the Respondent served summons to enter appearance and plaint upon the Applicants, whether the Applicants have a good defense to the claim and whether the Respondent is likely to be prejudiced if the court allows the Application.

16. On the first issues, the court found that both Summons bear a stamp by Nzambani Hardware but there is an error on the date of service. The court made an inquiry as to the possibility that the 1st Respondent was possibly served after the entry of interlocutory judgement and found that there were correspondences exchanged by the parties including a letter dated 6.03.2017 from Mwinzi & Associated to Guandaru Thuita & Company Advocates in which the advocates address 1st and 2nd Applicants interest and attempt to reach a compromise in setting aside the judgment. The Plaintiff's advocate responded on 13.03.2017 and on 15.03.2017 sent notices of entry of judgment.

17. The court found that the Applicants were aware of the suit against them and had been duly served with summons and that there was an interlocutory judgment and there are copies of postage receipts to confirm dispatch of the same. The Defendant/ Applicant went further to write a letter enclosing a cheque of Ksh 300,000/- after the court had issued a decree of Kshs 4,167,345.18 and subsequently cheques meant to go towards settling the decretal sum. The Trial court thus found that they were aware of the interlocutory judgement which was regular.

18. The Trial Court found that the Defendant had admitted being in debt and made part payments thus the Defense does not raise triable issues. The court also found that setting aside the judgment would be prejudicial to the Plaintiff as a lot of action had taken place between the time judgment was entered and when the application was filed. Being aware of the judg

19. ment, they made part payments, several attempts at execution including making payment to an auctioneer, garnishee proceedings which were stopped by this Application.

The Appeal

20. Dissatisfied by this judgement, the Appellants filed a memorandum of appeal dated 28th April 2021 seeking the following orders;

    i. That the appeal be allowed

    ii. The Ruling of the Trial Court pronounced on 14/4/2021 be set aside and the Appellants notice of motion dated 19.62017 be granted

    iii. The cost of this appeal be awarded to the Appellants

21. The Appeal is founded on the grounds that;

    a. The learned Trial Magistrate erred both in law and fact by dismissing the Appellant's Notice of Motion dated 19.06.2017 despite the fact that the said application had met the threshold for setting aside an interlocutory judgement.

    b. The learned Trial Magistrate erred both in law and fact by dismissing the Appellants' application dated 19.06.2017 notwithstanding the fact that service of summons to enter appearance was doubtful

    c. The learned Trial Magistrate misdirected itself when it found and held that the Appellant's proposed Defense did not raise triable issues yet a quick glance at paragraph 4 of the proposed Defense is crystal clear that the Appellants denied ever applying for a credit facility from the Respondent. The purported interest was also challenged noting that the Respondent is not mandated to offer the alleged facility.

    d. The learned Trial Magistrate erred both in law and fact by failing to find and hold that the Respondent was under a mandatory legal obligation to list the matter for formal proof noting

that was entered on record [albeit irregularly] was a provisional judgment incapable of giving rise to execution either by attachment or Notice to Show Cause.

e. The Trial Magistrate erred both in law and fact by failing to find and hold that the Respondent acted contrary to the law by purporting to commence execution against the Appellants yet there was an order of stay of execution pending the hearing and determination of the subject application.

22. The Appeal was canvassed by way of written submissions.

Appellant's Submissions Dated 20.01.2022

23. The Appellant contended that the summons to enter appearance was served after entry of the interlocutory judgement which was highly irregular and violated the provisions of Order 5 Rule 1 of the *Civil Procedure Rules*. The Appellant contends that as a result, the interlocutory judgment of 1.03.2917 was illegal, irregular and warranted setting aside ex debito justitiae. That he was shocked that the Respondent commenced execution before complying with Order 22 Rule 6 of the *Civil Procedure Rules* and he submitted that an interlocutory judgment is provisional in nature as it does not amount to a final judgement which he says the Respondent did not apply for.

24. It was submitted that the Respondent proceeded to proclaim despite their being an order issued on 20.6.2017 and the current application indicates that the execution by auctioneers on 15.06.2017 flew in the face of the order of stay of execution. The Appellant submitted that they were entitled to unconditional leave to defend the suit since the draft defense raise triable issues.

25. He further submitted that had the Trial Court scrutinized the purported application for credit account and guarantee, she would have come into an inescapable conclusion that the documents refer to a different entity namely, Nzambani Hardware which is a company as correctly captured in the personal guarantee which is a spate legal entity. He opined that the trial court erred in finding that they had admitted to the debt and the alleged acknowledgement does not refer to the transactions alleged in the Plaint.

Respondent's Submissions Dated 30.05.2022

26. While placing reliance on the case of *James Kanyita Nderitu V Maries Philotas Ghika & Another* [2016] eKLR, it was submitted that there are two questions to be determined when deciding whether to set aside a judgement. The first issue was whether the judgement was irregular and whether the Defendant is deserving the exercise of discretion. On the first issue, it was submitted that the trial court pondered over this issue of service and found that service had properly been effected through the conduct of the Appellants. One of the Appellants advocates expressed awareness of the existence of the judgment and thereafter the Appellants forwarded a series of payments to the Respondents towards the decretal amount which not only demonstrates that they were aware but also agreed to be paying in instalments till completion.

27. The Respondent submitted that the summons was received on 3rd February 2017 and not 3rd March 2017 on page 71 of the record and proper service was effected on the 1st Appellant through his wife, the 2nd Appellant. The affidavit of service indicates that both Appellants were served on the same date and it is not true that they were served on different dates as alleged by the Appellants. The respondent contended that the date on the summon was written by the 2nd Respondent herself and not the process server and the date was erroneous as the Summons were returned to court on 27th February 2017 before the date of 3rd March 2017. The court was urged not to allow the 2nd Appellant to take advantage of her own mistake on defeating a legitimate claim.

28. The second issue is whether the Defendant is deserving the exercise of discretion, It was submitted that the defense consisted of general denials, that the Appellants have lumped up the paragraphs on the Plaint and made a sweeping statement of denial. This point was buttressed by the case of *Margaret Njeri Mbugua v Kirk Mweya Nyaga* (2016) Eklr.

29. It was submitted that the Appellants had admitted to the indebtedness of Kshs 2,854,346.02 and there were multiple undated cheques on record and no attempts were made at attenuating these prior admissions in the proposed Defense. Further that the Appellants effected certain payments and indication that they were aware of the debt and working towards reducing the same.

30. As regards the issue of delay, it was submitted that as per the record, the Appellants were aware of the default judgment by 6th March 2017 but only moved the court on 19th June 2017 after auctioneers had served them with a proclamation. The three months' delay has not been explained and the further delay in prosecuting the application on 23rd August 2017 when the Application was fixed for hearing, the Appellant's advocate never appeared in court and the interim orders were never extended. The Respondent proceeded to execute.

31. It was the Respondent's contention that the Appellants went into slumber and only woke up when he obtained Garnishee Order in respect of their premises. That it was apparent that the Appellants were only interested in delaying the Respondents realization of the fruits of the judgment by admitting the debt and commencing the payment thus engaging in deceit.

32. The Respondent submitted that the judgment was for a liquidated claim and the decree was final in terms with order 10 Rule 4 of the *Civil Procedure Rules*, Reliance was placed on the case of *Cimcria East Africa Limited v Kenya Power & Lighting Company Limited* [2017] eKLR and *Coach Safaris Limited v Gusii Deluxe limited*, Civil Appeal No 117 of 1996.

33. On the issue of execution when there was an order of stay in place, it was submitted that the stay orders lapsed on 27th September 2017 when the Appellant's counsel failed to show up in court and were never reinstated. He relied on the case of Eldoret H.C Case No 106 of 2009 *Solomon Kinoti & Another v Attorney General* [2011] eklr. In the end, the court was urged to dismiss the application.

Determination

34. I considered the Memorandum of Appeal, the Trial Court record and the submissions of the parties and I find that the main issue for determination is whether the Ruling of the Trial Court dated 14th April 2021 should be set aside and the appeal allowed in setting aside the Interlocutory judgment and admitting the draft Defense to be filed as part of the Trial Court's record.

35. This Court in a 1st appeal is dutybound to reevaluate all the evidence on record and arrive at its own conclusion. This was observed in the case of in the case of *Peters v Sunday Post Limited* [1958] EA 424 where it was held that:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this

opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. ....

Setting Aside Interlocutory Judgment

Service Of Summons

36. It is not in contention that an interlocutory judgment was entered against the Appellant on 1st of March 2017 and that they were served with Summons. The only contention is when they were served. It is also not in contention that the Appellant sought to set aside the judgment and has made some payments towards settling the decretal sum.

37. Order 10 Rule 6 of the *Civil Procedure Rules*, 2010 (hereinafter referred to as "the rules") define an Interlocutory judgment and provides that;

> Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

38. Order 10 Rule 4 of the *Rules* is on judgment on a liquidated amount. It provides;

1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

39. Order 10, rule 11 of the *Rules* provides that an interlocutory judgment in default of appearance or defense may be set aside, it provides 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."

40. The court has the discretion to set aside a default judgment as was observed in the case of the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, the Court held that:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

41. The guiding principles when exercising this discretion were discussed by the Court of Appeal in the case of *Thorn PLC v Macdonald* [1999] CPLR 660 as;

i. while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

ii. any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

iii. the primary considerations are whether there is a defense with a real prospect of success, and that justice should be done; and

iv. prejudice (or the absence of it) to the claimant also has to be taken into account.

42. In *Sebei District Administration v Gasyali & others* [1968] EA 300 the court observed that: -

> "The nature of the action should be considered. The defense if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court."

43. In the case *Mohamed & Another v Shoka* [1990] KLR 463 the Court set out the tenets a court should consider in entering interlocutory judgment to include:

i) Whether there is a regular judgment;

ii) Whether there is a defense on merit;

iii) Whether there is a reasonable explanation for any delay;

iv) Whether there would be any prejudice.

44. The first issue is to consider whether the judgement was regular. I rely on the case of *Fidelity Commercial Bank Ltd v Owen Amos Ndung'u & Another*, HCCC No. 241 of 1998 (UR), where the court stated thus:

> "A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right."

45. In the present appeal, the Trial Court issued Summons to enter Appearance (at Pg 95 of Record of Appeal) on 1st February 2017. The Summons to enter Appearance was filled in by the 2nd Defendant as having been served with Plaint and Summons at 4.30 on 3rd March 2017. The Affidavit of Service filled by one Patrick M. Muniu filed on 27/2/2017 (at Pg 74 of Record of Appeal) deposed he served the Defendant on 3rd February 2017, specifically the 2nd Defendant Stellah Kivutha Muthoka at their Hardware Shop opposite Naivas Supermarket in Kitui. The 2nd Defendant called 1st Defendant and thereafter signed stamped Nzambani Hardware and dated the Summons 3/3/2017, instead of 23/2/2017.

46. Clearly, the Summons was served before 3/3/2017 as request for judgment was dated & filed on 27/2/2017 (at pg 76 of record of Appeal) the Interlocutory judgment was entered o 1/3/2017. It is not logical and reasonable that service of the summons was after filing Affidavit of Service, and Request for judgment and interlocutory judgment was entered before service of the summons. All these processes were carried by different persons and different stages/places. The Court wonders how they all conspired to have an Interlocutory judgment entered before service of summons.

47. The discrepancy has been explained satisfactorily by the filing of the affidavit of service and the acknowledgement of the judgement by the Appellants through their letter dated 6th March 2017. The Appellant could not have been seeking to set aside a judgment he was not aware of and this makes the assertion that he was served on 3rd of March 2017 to be false as he would have alluded to the same in his letter.

48. Having been duly served, the Defendants had 15 days from the 3rd February 2017 to enter appearance, in response to the Summons to Enter Appearance. That period lapsed on 18 February 2017. There was no appearance entered by any of the Appellants or on their behalf. An affidavit of service that confirmed service of Summons attached was filed on 27th February 2017 as well as a request for judgment filed on an even date are also on record. The service was regular and sufficient in the circumstances.

49. The Appellants advocate wrote on 6th March 2017 to the Respondent seeking to have the judgement set aside with throw away costs of Kshs 3,500 that I agree with the Trial court goes to show that the Appellants were aware that judgement had been entered against them. The Appellant has not denied the contents of that letter nor that he instructed the said advocate. What then was he seeking to set aside?

50. In the instant case, there is no dispute that the Applicants were properly served with the Summons to enter appearance, and that at the time the judgment was entered, the Defendants had not filed a reply and/or a defense thereto. Therefore, the ruling entered on 1st, March ,2017 in favor of the Plaintiff is valid and regular

Does Defense Raise Triable Issue(s)

51. A perusal of the Plaint indicates that the sum is liquidated and does not need investigations into the said sum through formal proof proceedings as provided by Order 10 Rule 4 of the *Rules*.

52. By the 1st Defendant's letter dated 21st March 2016 to the Respondent, the Appellants state in part;

> We acknowledge that we have an outstanding balance of Ksh 2,854,346.02and we have taken long to settle the amount.
>
> The debt outstanding was for goods delivered by the Respondent to the Appellants and the debt admitted there was no basis for formal proof.

53. The draft defense contains mainly denial of all the contents of the plaint. The Appellants contend that the Plaintiff is not mandated by law to offer such services, much less charge an interest amount on such facility. On record is a letter dated 21st March 2016 from Nzambani Hardware acknowledging the debt of Kshs 2,854,346.02 and the delay in settling the same. The letter also seeks indulgence and has a promise to settle the debt once money is received from the County Government of Kitui.

54. Subsequently, the Appellants made the following payments towards settling the claim;

    a. There are 7 undated cheques on record from Nzambani Hardware though it is not clear whether the same were honored or not.

b. the Appellants advocates, Messrs. A.M Kilonzo & Co advocates on 15.11.2017 wrote to the Respondents and enclosed a banker's cheques of Kshs 300,000/- being part payment of the decretal sum

c. A cheque of Kshs 150,000/- dated 16th February 2018

d. A cheque of Kshs 100,000/- dated 25th April 2018

e. A cheque of Kshs 200,000/- dated 15th March 2019

f. A cheque of Kshs 100,000/- dated 7th April 2019

54. The Appellants did not challenge the Respondents Agreement with them on delivery of materials on credit and repayment with contracted interest. Instead, there is an admission of the debt by the Appellants to the Respondent and part payment of the outstanding debt has been undertaken by the Appellants to the Respondent.

55. From the evidence disclosed by pleadings, correspondence and submissions on record, the defense does not raise triable Issue(s) for full hearing and determination. This makes the defense weak as the Appellants have admitted to the debt and are in fact settling the same. The court would have otherwise allowed the Appellants to defend the suit if the debt was not admitted and some repayments made. The decree includes 2% interest from 8/5/2015 that was specifically pleaded in the prayers in the Plaint. While contesting interest the principal amount was not repaid. I therefore find that the defense cannot be meritorious at this point.

56. Thirdly, is whether there is a reasonable explanation for the delay, the Appellants were aware of the judgment as at 15th of March 2017 when the Notice of Entry of judgment was served upon the Defendants through registered post. (copies and postage receipts at Pg 81-84 of Record of Appeal) The appellants filed Application Notice of Motion to set aside Interlocutory judgment on 19/6/2017 Three (3) months after the judgement was entered.

57. The Court in *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR, held that:

> "It's an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of the *Constitution* of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the Court in the expeditious disposal of cases."

58. Vide registered post are notices of entry of judgment both dated 15th March 2017 informing them of the entry of judgment against them and the Respondent's intention to make an application for execution of the decree but the Appellants denies being served with the same. The court issued a decree on 8th May 2017 for Kshs 4,167,345.18 followed by execution through execution through auctioneers.

59. The Appellants were aware of the judgment for three months preceding filing of the Application but from a perusal of the record, no explanation has been given for the delay in filing the Application. It appears that at this particular instance, they were not pleased with the manner of execution as there have been previous executions done through auctioneers and the Appellants have complied and made certain payments. Without an explanation for the delay, the court is inclined to find that the Application is not meritorious.

60. Lastly, would there be prejudice if the orders sought are granted? From the record, the Appellants advocates, Messrs.A.M. Kilonzo & Co advocates on 15.11.2017 wrote to the Respondents and enclosed a bankers cheques of Kshs 300,000/- being part payment of the decretal sum and indicated that their client will remit Kshs 300,000/- every fortnight. He also indicates that their client is in the process of disposing some properties and once the deal is through, a substantial amount will be released. The Appellants seem to be displaying double standards wherein on one part they seek to have the orders set aside but on the other settling the decretal sum.

61. In the case of *Abdalla Mohamed & Another v Mbaraka Shoka* [1990] eKLR, wherein the Appellants applied for the setting aside of default judgment on the grounds, inter alia, that though they were actually served with summons the proper formalities in respect thereof were not followed, the Court of Appeal held thus:

> " ...this contradiction is a pointer that the appellants were aware of the action filed against them by the respondent long before the interlocutory and final judgments were entered against them. This was notwithstanding that the aforesaid returns of service were drawn in a manner that was irregular. It was for the appellants to establish on a balance of probabilities that even with the irregular returns of service, they were never served with the summons. This they did not do as they rested their application on these returns of service. That per se, as the learned judge rightly observed, would not have been sufficient ground upon which the interlocutory and final judgments could be set aside considering that the said judgments were not clearly shown to have been entered irregularly..."

Disposition

Having considered the principles for setting aside the judgement, I find no reason to interfere with the judgement of the Trial Court.

In the circumstances, I find the Appeal to be without merit and the same is dismissed with costs to the Respondent.

The Appeal is dismissed.

DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 26TH SEPTEMBER 2022 (PHYSICAL ONLINE CONFERENCE)

M.W. MUIGAI

JUDGE