



**Rucha v Mwiti & another (Environment and Land Appeal E037 of 2022)
[2023] KEELC 20131 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20131 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E037 OF 2022**

**JA MOGENI, J
SEPTEMBER 21, 2023**

BETWEEN

CHARLES P MBAE RUCHA APPELLANT

AND

ROSE GACHERI MWITI 1ST RESPONDENT

JAPHET MIRITI EUSTACE 2ND RESPONDENT

*(Being an Appeal from the Ruling of Hon. A. N. MAKAU, Principal Magistrate
delivered on 28/04/2022 in Milimani Commercial Suit No. E258 of 2021)*

JUDGMENT

1. By a Plaint dated 6/04/2021, the Respondents (then the Plaintiffs) filed a suit in the lower court against the Appellant (then the defendant) seeking a refund of Kshs. 2,700,000.00 being payment in full of the unpaid balance plus costs and interest at commercial rates. They pleaded that they entered into an agreement for sale with the appellant for purchase of a portion of land plot number “UNS Residential Plot No. A Thika Municipality” Plan TKA/497/13 for a consideration of Kshs. 2,900,000.00. They contend that the Respondents on various occasions received a total of Kshs. 2,900,000.00. Thereafter, pursuant to an agreement dated 20/01/2017 wherein the Appellant allegedly agreed to refund to the Respondents the sum of Kshs. 2,900,000.00 if he had not gotten title over the suit property by April 2017 and as a sign of commitment, the appellant allegedly refunded Kshs. 200,000.00. It is the Respondents’ case that the Appellant failed to refund the balance of Kshs. 2,700,000.00. The Respondents herein filed a Request for Judgment dated 27/08/2021 on account that the Appellant had failed to file a memorandum of appearance or defence. The request was for a liquidated claim together with interest and costs. It is averred that the trial Court entered a default judgment on 4/10/2021. The appellant filed various applications before the trial Court and the trial Court delivered a Ruling on the appellant’s application dated 14/12/2021 seeking to set aside the default judgment and to be allowed to defend the suit.



2. The application was considered by the trial court on the basis of the rival affidavit evidence and written submissions. The trial court by its Ruling dated 28/04/2022 dismissed the application.
3. The Appellant was aggrieved with the trial court's finding hence this Appeal. In his Amended Memorandum of Appeal dated 24/05/2022, the Appellant raised 7 grounds of appeal which I reproduce verbatim hereunder: -
 1. That the learned trial magistrate erred in fact and in law by dismissing the Application dated 14/12/2021 seeking to set aside default judgment entered on 4/10/2021.
 2. That the learned trial magistrate erred in fact and law by failing to appreciate the Statement of Defence filed raised triable issues.
 3. That the Trial magistrate erred in law and fact by allowing the mistake of counsel on filing an unsigned defence be visited upon the Appellant.
 4. That the Trial Magistrate erred in fact and law by failing to exercise discretion towards fair hearing and justice.
 5. That the learned trial magistrate erred in fact and in law by relying on mere allegations by the Plaintiff/Respondent without solid proof by evidence.
 6. That the learned Trial magistrate erred in fact and in law by failing to consider the Appellant's submissions and authorities and hence, arriving at an erroneous decision.
 7. That the learned Trial magistrate's ruling as a whole is not supported by the evidence that was tendered in court by the parties.
4. The Appellant sought for the following prayers:
 1. That this appeal be allowed.
 2. That the Ruling delivered on 28/04/2022 be set aside
 3. That the Appellant's Statement of Defence filed 14/07/2021 be deemed as filed.
 4. That Trial of the matter commence before a different Magistrate.
 5. That the costs of the subordinate court and this appeal be awarded to the Appellant herein.
5. When the Appeal came up for hearing, the parties agreed to have it disposed of by way of written submissions. By the time of writing this Judgment, it is only the Appellant who had filed his submissions on 8/06/2023.
6. This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of the first appellate court which will guide me in the determination of this appeal is now well settled. It is to re-examine and re-evaluate all the evidence and material placed before the trial court to draw its own independent conclusions regarding the validity or otherwise of the decision challenged on appeal. See: *Selle & Another v Associated Motor Boat Company Limited & Others*, [1968] EA 123; *Williamson Diamonds Limited v Brown*, [1970] EA 1.
7. I take note of the fact that this appeal arises from the Ruling of the trial court made on 28/04/2022 dismissing the appellant's application to set aside judgment in default of appearance and defence. It is for this reason that I must reexamine the entire trial court record from the time of institution of suit until the impugned ruling was rendered giving rise to this appeal, in order for this court to determine



whether the default judgment was entered into regularly or irregularly and what orders this court should make in either of the two scenarios.

Analysis and Determination

8. I have considered the record of appeal, the grounds of appeal and appellant's submissions for this appeal and cited cases. I have also read the ruling of the learned magistrate. In my humble view, the main issue for determination is whether the trial magistrate erred in law and fact when, by her Ruling dated 28/04/2022, she dismissed the Appellant's Application for setting aside of the default judgment.
9. Before I delve into the depths of the merits of this appeal, I must make some observations in the procedure for entry of judgment against a party who defaults entering appearance and defence.
10. Order 10 of the *Civil Procedure Rules*, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10 Rule 4 empowers Courts to enter interlocutory judgment in cases 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. On the other hand, Rule 9 gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10 Rule 10 provides that in cases where a defendant has failed to file a defence, *Rules* 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set a side or vary a judgment that has been entered under Order 10.
11. A perusal of the record shows that the Respondents (Plaintiffs) filed a request for Judgment dated 27/08/2021 on account that the Appellant had failed to file a memorandum of appearance or defence. The trial Court later entered a default judgment on 4/10/2021. The Appellant thereafter filed various applications seeking to have the trial court set aside the said default judgment. The first application was dated 7/10/2021. The trial court eventually delivered the impugned ruling on 28/04/2022 essentially refusing to set aside the default judgment. In its ruling, the trial court sought to determine if the appellant had demonstrated any sufficient reasons why he did not file his defence and documents within the stipulated time and if he has a defence on merit.
12. In the impugned ruling, the learned magistrate found that the appellant entered appearance and filed a defence (undated and unsigned). She held that the Appellant was made aware of the proceedings against him. Further, that the Appellant claimed that his advocate failed him by filing unsigned documents but did not state when the advocate or himself mentioned the documents were unsigned or undated and why they did not regularize the position before the Respondents requested for an interlocutory judgment.
13. To her, she found that there is a regular judgment in place and there is no sufficient reasons why the appellant did not discharge his obligations/duties as expected. It was the trial Court's holding that the Appellant did not take any tangible steps in following up his matter. He is said to have waited until the auctioneers went to execute that he threatened to release his fierce dogs and that was an indication of a party who was not willing to cooperate with a lawful or legal procedure of execution of a court decree or warrant.
14. On whether a judgment is regular, the Court in the case of *Mwala v Kenya Bureau of Standards EA LR (2001) 1 EA 148*, held as follows; -

“To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an



irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito iustitiae for a court should never countenance an irregular judgment on its record.” [Emphasis mine]

15. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment.
16. It must be appreciated that service of summons to enter appearance and plaint upon the Defendant in a suit is crucial. In addition, before the court can be asked to proceed and allow the plaintiff to request for interlocutory judgment and before such interlocutory judgment is entered and or issued, the court must be satisfied that summons to enter appearance and plaint were properly served upon the defendant, as stipulated in the law.
17. In this matter, the appellant submitted that the trial court erred by finding that there is a regular judgment on record despite her acknowledging that indeed the appellant had entered and filed a defence. The Appellant acknowledged that he was duly served and he instructed his counsel to put in a response. Further, the trial court did acknowledge that the Appellant had entered appearance and filed their defence. The learned Magistrate held that and I quote; "I find that the defendant entered appearance and filed defence (undated and unsigned)".
18. It is my opinion that the judgment entered in default of defence on 4/10/2021 was entered irregularly. The remedy that was most appropriate in the trial court matter would have been to direct that the matter to proceed for formal proof and not enter a default judgment.
19. To this end, I do not agree with the findings of the trial court and my finding is that the default judgment is irregular. The learned magistrate erred in finding that there is a regular judgment on record despite her acknowledging that indeed the Appellant had entered appearance and filed a defence.
20. Even if there was regular judgment on record which I find nonexistent, the power to set aside exparte judgment entered in default is discretionary. The principles upon which such discretion is to be exercise were set out by the Court of Appeal in *Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende* (1982-1988) KAR 1036 where it was held inter alia, citing with approval the English case of *Evans v Bartam* [1993] AC 473: -

“The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has prima facie defence.

The reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to much the court will have regard, in exercise of its discretion. The principle is that witness 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 the coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

21. However, in *Shah v Mbogo & another* [1967] E.A. It was held that:

“The court’s discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error,



but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused.”

22. Whether a judgment is regular or irregular, in determining whether or not to set it aside, the discretionary power of the Court very wide. However, where the judgment is irregular, the Courts have little discretion: they ought to set it aside *ex debito justitiae*, as will be discussed below. In essence the principles applicable in the two scenarios differ, even though the Court is called upon to exercise discretion. And even then, when exercising the discretion, the Court should do so judiciously.
23. Having found that the judgement is irregular, I have to set it aside *ex debito justitiae*. This means that I set it aside as a matter of right. This is because to permit it to stand would amount to condemning a party unheard. That would run counter to the well-settled and revered principle of natural justice that one should not be condemned unheard. The principles of natural justice override the discretion of a Court.
24. Thus, in *Sangram Singh v Election Tribunal, Kotah*, AIR 1955 SC 664, at 711 the Supreme Court of India emphasized on the importance of the right to be heard as follows:

“ [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

25. There is an acknowledgement by the trial court that the Appellant had entered appearance and filed a defence although undated and unsigned. It is my opinion that is a procedural technicality that could be rectified at any time before trial of the suit. There is nothing on record to indicate that the Appellant deliberately sought to delay the course of justice. The Appellant was served and he entered appearance and filed his defence on 14/07/2021 as demonstrated on the screenshot of the e-filing system. I am persuaded that on the available evidence on the trial court record, the judgment in default of appearance and defence was entered into or pronounced irregularly. That being the case, the question of whether or not to exercise judicial discretion to set aside the said default judgment is settled.
26. Consequently, it is my considered view that the default judgment entered where there was a Memorandum of Appearance and defence were already filed on 14/07/2021, was irregular and should not have been entered. In *Macfoy v United Africa Co Ltd* [1961] 3 All ER at Page 1172(1) Lord Denning stated as follows: -

“ 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 it to 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”

27. I hasten to add that Justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issues, unless it is demonstrably shown that the party in question has sought to merely delay of obstruct the cause of justice.
28. It is therefore my finding that the trial magistrate erred in dismissing the Defendant/Appellant’s application dated 14/12/2021 for setting aside judgment in default of appearance and defence and failing to set aside the default judgment.



29. For the above reasons, it is my humble view that the default judgment entered was irregular. An irregular judgment is amenable for setting aside in limine. In setting aside an irregular judgment or premature judgment, the Court does not enjoy any discretion stipulated in the Mbogo vs Shah [1968] EA 93 case. It is therefore on this ground alone that this Appeal succeeds.

Disposal Orders

30. For the above reason, I am satisfied that there is a basis for interfering with the trial court's discretion. Consequently, I find the appeal meritorious and therefore succeeds. I therefore set aside the judgment of the trial magistrate and allow the appeal in terms of prayers 1, 3, 4, 5 and 6 giving rise to a granting of the following orders: -

1. This appeal is allowed.
2. The Ruling delivered on 28/04/2022 be and is hereby set aside.
3. The Appellant's Defence filed on 14/07/2021 be and is hereby deemed as filed.
4. The suit (Milimani Commercial Suit No. E258 of 2021) shall be heard before any other Magistrate of competent jurisdiction other than Honourable A. N. Makau.
5. The costs of the subordinate court and this appeal are awarded to the Appellant herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023.

.....

MOGENI J

JUDGE

In the virtual presence of:

Mugambi for the Appellant

No appearance for the Defendant

No appearance for Objectors

Ms. Caroline Sagina: Court Assistant

.....

MOGENI J

JUDGE

