



**Mududa v Raluodo (Environment and Land Appeal E015 of 2023)
[2023] KEELC 21714 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E015 OF 2023
AY KOROSS, J
NOVEMBER 23, 2023**

BETWEEN

ELIUD OMONDI MUDUDA APPELLANT

AND

JOHN OKUMU RALUODO ALIAS JOANNES ODIANGA RESPONDENT

(Being an appeal from the ruling and orders of the CM Hon. M. O. Wambani delivered on 20/04/2023 in Siaya ELC Case no. 62 of 2021)

JUDGMENT

Background

1. The subject of this appeal emanates from a ruling rendered by the trial court in respect of a notice of motion dated 10/02/2023 by the respondent who was then the defendant. In it, the respondent sought to set aside the *ex parte* judgment that was rendered against him by the trial court on 12/07/2022. In the *ex parte* judgement, the trial court declared the respondent a trespasser, issued eviction orders and granted the appellant costs.
2. In the motion, the respondent contended he had never been served with summons to enter appearance, hearing or mention notices or notified that he was expected to enter appearance within certain timelines. It was only upon inquiring progress of the suit from the court registry that he discovered judgment had been entered against him. He asserted he had a good defence that raised triable issues.
3. In opposition to the motion, the appellant filed a replying affidavit dated 1/03/2023 and asserted the respondent was privy of the suit and had been served with summons to enter appearance and pleadings as evidenced by the return of service on record deposed by a process server who on several other occasions, had served the respondent.



4. The appellant contended the proceedings of Siaya Criminal Case No E571/2021 which involved the same parties affirmed the respondent was alive of the pending ELC case that is the subject of this determination.
5. The matter was canvassed by written submissions and the trial court in a ruling rendered on 20/04/2023, allowed the respondent's application on grounds that parties had unfettered right to be heard and ordered the appellant to pay throw away costs.

Appeal to this court

6. Aggrieved by the said ruling, the appellant preferred an appeal to this court and in this appeal, the appellant took issue with the exercise of the trial court's discretion in allowing the motion and sought for the impugned ruling to be set aside.
7. Learned counsel, Mr. Ochanyo appeared for the appellant while learned counsel, Mr. Oduol, appeared for the respondent. Both counsels relied on their respective submissions.

Appellant's submissions.

8. The appellant framed one issue for determination; whether the learned trial magistrate erred in law and fact by allowing the respondent's motion that sought to set aside the *ex parte* judgment in default of appearance and defence.
9. It was submitted that by Order 7 Rule 1 of the [Civil Procedure Rules](#), the respondent ought to have filed his defence within 14 days of entering appearance and that Order 10 Rules 9, 10 and 11 thereof underpinned the legal framework for setting aside an *ex parte* judgment. To buttress his position, the appellant relied on the case of *Mbogo v Shah* [1968] EA 93.

Respondent's submissions.

10. According to the respondent, the trial court correctly exercised its discretion and it was incumbent upon the trial court to afford the respondent his day in court since he had never been served with summons and the *ex parte* judgement was irregular. Similarly, the respondent relied on *Mbogo v Shah* (*supra*) and [Wachira Karani v Bildad Wachira](#) [2016] eKLR which was cited in [David Gicheru v Gicheba Farms Limited & another](#) [2020] eKLR where 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...”

Issue for determination

11. Having considered the record and submissions, the single issue for determination is whether the learned trial court erred in law and fact in setting aside the *ex parte* judgment rendered on 12/07/2022.

Analysis and determination

12. For this court to interfere with the exercise of discretion by the trial court, it must be demonstrated its decision is clearly wrong because it misdirected itself or because the court acted on matters which it should not have acted upon or because it failed to take into consideration matters which it should have taken into consideration. See *Mbogo and Shah* (*Supra*).



13. The law encompassing the power of the court to set aside an *ex parte* judgment is found in Order 10 Rule 11 of the [Civil Procedure Rules](#) which states: -

“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.”

14. The Court of Appeal’s decision of [James Kanyiita Nderitu & another v Marios Philotas Ghikas & another](#) [2016] eKLR which I hereby adopt, made a distinction between a regular default judgment and an irregular judgment as follows: -

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the [Civil Procedure Rules](#), to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & another v Shah* (supra), *Patel v E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion.”

15. In finding the motion merited, the trial court stated the respondent had every right to be heard. The question that suffices is whether the *ex parte* judgment was a regular default judgment or an irregular judgment.
16. This was not disclosed, nonetheless, taking into consideration this appeal emanates from a ruling on setting aside an *ex parte* judgment entered against the respondent, I am called upon to revisit the entire record from the date of instituting suit to the date of entry of the impugned ruling.
17. It is only by examining the record that this court will render an informed decision and more so, the issue of whether the *ex parte* judgment was a regular default judgment or an irregular judgment and consider circumstances under which either could be set aside.
18. In doing so, this court will bear in mind it shall not lightly differ with the decision of the trial court. This court adopts the position taken by the Court of Appeal decision in [Pithon Waweru Maina v Thuka Mugiria](#) [1983] eKLR which stated:-

“... 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 his 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 that as a result there has been misjustice.” See per Newbold P in *Mbogo v Shah* [1968] EA 93 at 96 G.

19. Now turning to the record, after filing his plaint on 19/08/2021, the appellant allegedly served the respondent in accordance with Order 5 Rule 6 of the [Civil Procedure Rules](#) and filed a return of service deposited on 26/10/2023.
20. A scrutiny of this return of service demonstrates that though it complies in many respects with Order 5 Rule 13 of the [Civil Procedure Rules](#) and Form 4 thereof, it does not disclose how the respondent was known to the process server or who identified him to the process server or the time of service or whether the process server explained to the respondent the purpose of service.
21. All these lends credence the respondent was not served and notwithstanding the respondent was aware of the suit through the criminal proceedings that involved the parties, the *ex parte* judgment was without doubt irregular.
22. In the absence of service of summons and pleadings, I need not belabour much on the other returns of service but in particular, I will single out a return of service deposited on 11/03/2023 wherein the process server allegedly served the respondent at his shop but the appended hearing notice shows he was served through the office of the local assistant chief.
23. Obviously and accordingly, the defendant was not served with a hearing notice in accordance with the provisions of Order 12 Rule 2(a) of the [Civil Procedure Rules](#). This non service culminated into his absence on the hearing date and the case proceeded without him hence the impugned *ex parte* judgment.
24. In all, in the absence of proper service of summons and the judgment being irregular, the trial court had no discretion but to set aside the *ex parte* judgment as a matter of right. Therefore, this court finds the trial court did not err in arriving at the impugned ruling.
25. Consequently, having carefully considered this appeal in its entirety, I must conclude the trial court did not err in setting aside the default judgment and all its consequential orders.
26. Ultimately, I find and hold that this appeal is devoid of merit. I hereby dismiss the appeal and uphold the ruling of the trial court delivered on 20/04/2023. Accordingly, the appeal fails and is hereby dismissed with no orders as to costs. It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 23RD DAY OF NOVEMBER 2023.

HON. A. Y. KOROSS

JUDGE

23/11/2023

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

N/A for the appellant

N/A for the respondent

Court assistant: Ishmael Orwa

