Gakere v Njuguna (Environment and Land Appeal E005 of 2022)
[2023] KEELC 22306 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22306 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL E005 OF 2022

LN GACHERU, J

DECEMBER 14, 2023

BETWEEN

MARY WAIRIMU GAKERE ..... APPELLANT

AND

MURURI RAPHAEL NJUGUNA ..... RESPONDENT

(Being an Appeal against the Ruling delivered on 17th March 2022, in Murang'a CMC ELC No. 346 of 2010, by Hon. P. N Maina - CM)

JUDGMENT

1. In its ruling dated 17th March 2022, which is the subject of this Appeal, the trial Court (Hon. P.N Maina CM), allowed a Notice of Motion Application dated 26th February 2016, which application had sought to set aside the Judgement and Decree of the Court issued on 8th January 2016, and that the Defendant (Respondent) be given an opportunity to be heard in the said matter. The Appellant herein Mary Wairimu Gakere, was aggrieved by the said Ruling and filed the instant Appeal *vide* a Memo of Appeal dated 6th April 2022.

2. The Appeal is anchored upon the nine grounds which are stated on the face of the said Memo of Appeal; among them are; that the Learned Chief Magistrate erred in Law and fact in sitting on an appeal against the Judgement of Hon. J.J Masiga (RM), dated 8th January 2016, while he had no power to do so.

3. Further that the Learned Chief Magistrate erred in Law and fact in exercising his discretion capriciously, and he also erred in law and fact in setting aside the Judgement of Hon. J J Masiga(RM).

4. Therefore, the Appellant urged the Court to allow the appeal and vacate and/ or set aside the Ruling of the Chief Magistrate dated 17th March 2022, and that the Respondent's Notice of Motion Application

dated 18th January 2016, be dismissed. Further that costs of this Appeal and the suit at the lower Court be borne by the Respondent.

5. The facts founding this Appeal are that;

> One Ben Gakere Nyutho, had instituted a suit against the Defendant(Respondent) – Muiruri Raphael Njuguna, on 27th September 2010, being Murang'a CMC No. 346 of 2010, wherein he had sought for orders that the Defendant(Respondent herein) be directed to execute the necessary application for Land Control Board consent and transfer of land parcel No. Loc. 11/Maragi/2009, and in default of signing, the Executive Officer to sign on his behalf and in the alternative a refund of the purchase price, in terms of the contract, plus costs and interest thereon.

6. After extraction of the Summons to enter appearance, the said Ben Gakere Nyutho, applied to serve the Defendant (Respondent herein) by way of substituted service. The said application was allowed on 11th August 2011.

7. Thereafter, the Defendant (Respondent) Muiruri Raphael Njuguna, Entered Appearance on 28th September 2011, and filed his statement of Defence even dated.

8. He admitted that there was an agreement for him to sell a parcel of land LR No. 11/Maragi/2009, but the sale could not go through since the Plaintiff (Appellant) refused to pay the amount agreed as purchase price.

9. The Defendant (Respondent herein) denied all the other claims made by the Plaintiff (Appellant), and urged the Court to dismiss the said suit with costs. However, Ben Gakere Nyutho passed away on 13th March 2013, and was substituted by Mary Wairimu Gakere, vide a Notice of Motion Application dated 2nd September 2014.

10. After several adjournments, the matter was eventually heard on 2nd November 2015, by Hon.J.J Masiga (RM), wherein the Plaintiff gave evidence for herself and called no witness and Judgement was set for 11th December 2015. The matter proceeded for hearing exparte, since the Defendant (Respondent herein) nor his advocate were not present in Court. The trial Court was satisfied that the Defence Counsel had been served.

11. Eventually Judgement was delivered on 8th January 2016, wherein the court held that the Plaintiff's evidence remained unchallenged and entered Judgment for the Plaintiff (Appellant) against the Defendant (Respondent) as prayed in the Plaint.

12. After the Judgment, the Appellant filed an application dated 18th January, 2016, to effect execution of the Judgment of the Court.

13. The Defendant (Respondent) on the other hand filed an application dated 26th February 2016, seeking to set aside the Judgement of the Court delivered on 8th January 2016.

14. On 18th July 2019, Hon. M. Wachira – Chief Magistrate, delivered a Ruling wherein she disallowed the application dated 18th January 2016. However, the trial Court did not address the application dated 26th February 2016, which is the subject of this Ruling.

15. Upon the delivery of the Ruling on the Notice of Motion Application, dated 18th January 2016, the Appellant herein was dissatisfied and filed an Appeal on 28th October 2019, vide a Memo of Appeal dated 5th August 2019.

16. The said Appeal was heard before this Court (Hon. J.G. Kemei J), and on 3rd December 2020, and the said Appeal was allowed and the lower court file was returned to the trial Court. Thereafter the Defendant (Respondent) herein filed a Notice of Application dated 14th December 2021, seeking maintenance of the status quo obtaining before the Judgement of the Court on 8th January 2016. This application of 14th December 2021, was opposed by the Appellant herein Mary Wairimu Gakere, vide her Replying Affidavit filed in court on 14th December 2021.

17. This Court has noted that on 2nd December 2021, the trial Court directed that the Notice of Motion Application dated 26th February 2016, be canvassed by way of written submissions. Further, on 3rd February 2022, the trial Court directed that the two Notices of Motion Applications, one dated 26th February 2016, and 14th December 2021, be canvassed together by way of written submissions.

18. The trial Court delivered a Ruling in respect of the two applications on 17th March 2022, and allowed the Notice of Motion Application dated 26th February 2016, but disallowed the one dated 14th December 2021, for lack of merit.

19. It is the above allowed Ruling, that the Appellant herein was aggrieved by, and he filed the instant Appeal. This appeal was canvassed by way of written submissions.

20. The Appellant filed her written submissions on 10th July 2023, through the Law Firm of T M Njoroge & Co. Advocates, and submitted that the Respondent had filed an Appeal which was dismissed by lady Justice J. G Kemei, and he did not appeal against that dismissal. It was her further submissions that litigation should come to an end at one point.

21. It was also submitted that the trial Court set aside the orders of specific performance on clear breach of the law. The Appellant urged the Court to find that the trial Court abrogated itself the power which are capricious in nature.

22. Further that the trial Court purported to overturn the orders without addressing itself to the fact that the matter had been litigated in a higher Court. It was also submitted that the trial Court in its Ruling convoluted this simple matter, thus aggrieving the Appellant. Further that the trial Court breached the cardinal principle of hierarchical of courts by setting aside the orders of a court with similar jurisdiction, instead of advising the Respondent to approach the ELC Court if aggrieved through an Appeal.

23. It was the Appellant's further submissions that this appeal is meritorious and that the court should allow the said appeal as filed and should set aside and/or vacate the Ruling of the trial Court delivered on 17th March 2022.

24. The Respondent on his part filed his written submissions on 26th July 2023, through the Law Firm of Oundo, Muriuki & Co. Advocates.

25. On whether the trial Magistrate erred in Law and fact in faulting the former trial Magistrate, it was submitted that the trial Magistrate was within his mandate to set aside a Judgement passed by the same Court and therefore he did not overstep his mandate.

26. On whether the trial Court sat on appeal against the Judgement of another trial Magistrate, it was submitted that the Chief Magistrate rightfully decided on an application that was before him though long overdue. That being an application to set aside, it is determined by the same Court and that the trial Court was well aware of it.

27. On whether the trial Court erred in law and fact in trashing the Affidavit of Service, it is clear that the said Chief Magistrate was alive to the Rules of Procedure on how to properly effect service and he made a sound reasoning consistent with the Rules of Procedures.

28. On whether the trial Magistrate erred in law and fact in failing to consider that execution of the Judgement had commenced, it was submitted that the power to stay execution of Judgement is discretionary power, and the trial Court exercised that discretion judiciously in granting the stay of execution of the Judgement of 8th January 2016.

29. The Respondent relied on the case of *Michael Ntouthi Mitheu vs Abraham Kivondo Musau*(2021)eKLR, where the court held,

> " it is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question, in other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court on eqd=ual footing and see where the scales of justice lie, considering the fact that it is the business of the Court , so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice"

30. Further that the claim that the Appellant had begun execution is meant to mislead the Court as the suit property is still in the name of the Respondent herein.

31. On whether the trial court erred in law and fact in failing to find that the Respondent had gone into deep slumber, the Respondent relied on the case of *Wachira Karani vs Bildad Wachira* (2016) eKLR, where the Court held;

> " I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard, the opportunity of prosecuting his case. The court In the above cited case of *Richard Nchapal Leiyangu vs IEBC & 2 Others*{16} proceeded to state as follows:
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> > " The right to hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"

32. On whether the trial Court erred in law and fact in setting aside a Judgement entered more than 6 years ago, it was submitted that the Chief Magistrate ably conducted the matter and dissected all the issues for determiation and gave a proper reasoning of each component in his Ruling. Reliance was placed in the case of Mureithi *Charles & Daniel Kimutai Cheruiyot v Jacob Atina Nyagesuka* (2022) eKLR, where the Court held;

> " In considering whether or not to set aside a judgement, a judge has to consider 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 judgement, if necessary, upon terms to be imposed.

33. It was also submitted that the Respondent case raised triable issues as was held in the case of CMC holdings vs James Mumo Nzioka (2004) eKRL, where the Court held;

> " The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed, or for that matter why the applicant failed to turn up for hearing on the hearing date, but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."
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> The case of Tree Shade Motors Limited VS D.T Dobie & Co(K) ltd & Joseph Rading Wasambo, Civil Appeal No. 38 of 1998, was a case on an application to set aside a default jidgement. However, the legal principles are the same as in the case where an exparte judgement is obtained for non-appearance of a party at the hearing of his case. In that case this court stated as follows;
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> "The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the Plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgement, the court is obliged to consider it to see if it raises a reasonable defence to the Plaintiff's claim. If it does, the defendant should be given leave to enter and defend"

34. On whether the trial Magistrate erred in law and fact in exercising his discretion capriciously, it was submitted that the trial Court promoted the provisions of Article 159(2) (d) of the Constitution of Kenya and upheld substantive justice against technicalities and it is far-fetched to claim that the trial court exercised its discretion capriciously.

35. On whether the trial court erred in law and fact in setting aside the Judgement issued by the other trial Court on 8th January 2016, it was submitted that the trial court was alive to the Rules of procedures and sound jurisprudence and its decision to set aside the said Judgement was influenced by facts before it and principles laid out in similar cases.

36. The Respondent urged the Court to dismiss the instant appeal.

37. Having now considered the Record of Appeal and the rival written submissions, the Court finds that the Appellant avers that the appeal is merited, whereas the Respondent contends that the instant appeal lacks merit and should be dismissed with costs.

38. This being the first Appellate Court in this case, the duty of the Court is to re-evaluate, re-assess and re-analyse the available evidence and then come up with its own conclusion, while bearing in mind that the Court never saw or heard the witness. See Selle vs Associated Motor Boat Co. Ltd (1968) EA 123, 126.

39. Further the Court will give deference to the findings of the trial Court which it held and found while exercising the discretionary power donated to it by *the Constitution* and statutes. The Supreme Court in the case of Sonko v County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022), had this to say:

> " A first appellate court should accord deference to the trial court's conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court had failed to take into account any relevant facts or circumstances or based the conclusions on no

evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions."

40. This Court will only interfere with the said discretion in very clear case that while the trial Court was exercising the said discretion, misdirected itself and arrived at a wrong finding. See the case of Peter M Kariuki vs Attorney General (2014), where the Court held;

> " We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and re-evaluate it, to draw our own independent conclusion and to satisfy ourselves that the conclusion reached by the trial judge are consistent with the evidence."

See also the case of Mbogo & Another vs Shah (1968) EA 93, where the Court held;

> " ... a Court of Appeal should not interfere with the exercise of the discretion of a single 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 ..."

41. As this Court carries its Appellate role, it has a duty to delve at some length into factual details and revisit the facts and evidence as presented before the trial court and then analyses the same, evaluate it and thereafter make an independent decision. This Court cannot simply interfere with the discretionary powers of the trial court just because this is an Appeal. See the case of Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR, where the Supreme Court had this to say about interfering with the appellate powers;

> " In reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion."

42. This Court has been guided enough by the above decided cases. The Court too has considered the Record of Appeal, the grounds of Appeal as stated in the Memo of Appeal and the rival written submissions and the impugned Ruling of the trial Court and finds that the sole issue for determination is whether the appeal is merited.

(1) Whether the instant appeal is merited?

43. It is not in doubt that the Respondent herein who was the Defendant in Murang'a CMC No. 346 of 2010, had filed a Defence to oppose the Appellant's suit. There is also no doubt that this matter had come for hearing before the trial Court on 24th August 2015, wherein the Defendant and his advocate were absent. Counsel for the Appellant (Plaintiff) submitted that he was ready to proceed and that the Law Firm of P.K. Njoroge & Co. Advocates, for the Defendant had been served. The trial Court observed "I am satisfied that the Defendant advocate was served and case to proceed".

44. With the above observation, the matter proceeded for hearing exparte and an exparte Judgement was entered against the Respondent on 8th January 2016. The above Judgement was therefore a default

Judgement entered due non-attendance of the Defendant as provided for by Order 12 Rule 2(a) of the Civil Procedure Rules which states that if on the date of the hearing only the Plaintiff attends, and if Court is satisfied that the Notice of hearing was duly served, it may proceed ex parte. The trial Court was satisfied that service had been effected and it proceeded exparte.

45. Upon learning of the exparte Judgement, the Respondent on 26th February 2016, filed an application to stay the said Judgement and/or set it aside. This is provided for Order 12 Rue 7 of the Civil Procedure Rules which gives the Court discretion to set aside or vary the Judgement or order upon such term as may be just. It reads;

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just".

46. This application for setting aside was canvassed before and determined by the trial Court and it was allowed. The Appellant has lamented that the trial Court misdirected itself when it allowed the said application. The Court has gone through the Ruling of the trial Court and finds that the trial Court had analyzed the Court record and gave reasons for setting aside the ex parte judgement. Among the reasons cited by the trial court while setting aside the said judgement was that the mode of service did not meet the threshold of service as provided by Order 5 of the Civil Procedure Rules. The trial court indeed discredited the Affidavit of Service as filed by T.M Njoroge Advocates. This is one of the grounds for this appeal.

47. The trial court also held that there was Defence on record with triable issues and cited several provisions of law and decided case law. This being an Appellate Court of first instance, the Court will evaluate and re-analyse the said impugned application and the available evidence and then comes up with its own independent findings, always considering that it will not simply interfere with the trial courts discretion merely because this is an Appeal. see the case of United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898 where the court held as follows:

> " The Court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The Court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

48. It is trite that a decision on whether to set aside or not set aside an exparte Judgement is discretionary, and the said discretion is intended to be exercised so as to avoid injustice, and hardships, resulting from accident, inadvertence or excusable mistake or error, but is not designed to aid a party who had deliberately sought to obstruct justice, and has deliberately delayed the expeditious disposal of a matter. See the case of Shah vs Mbogo & Another (1967) EA 116, where the Court held;

> " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from 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".

49. Further, the Appellant court will not interfere with the trial Court's exercise of discretion unless there has been misdirection leading to a wrong decision.

50. The Appellant has raised several grounds of Appeal, but basically, the appellant lamentation was that the trial Court misdirected itself and arrived at the wrong decision.

51. The Court of Appeal in the case of CMC holdings Ltd vs Nzioka (2021) KLR 173 held as follows;

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously

52. Therefore, the decision on whether to set aside or not an exparte Judgement is discretionary and there is no restriction on the trial court's discretion, except that if the court vary the Judgement, it must be done on such terms as may be just.

53. Further, it is evident that the main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Further, where there is a regular Judgement, the Court will not usually set it aside, unless it is satisfied that there is a Defence on merits (See Patel vs EA Cargo Handling Services Ltd., Civil Appeal No. 2 of 1974), where the Court held;

> " 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 court 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."

54. It is also trite that a Defence on merit does not mean a defence that must succeed. It means "triable issues" that is issues which raise prima facie Defence, and which should be allowed to go for adjudication (See the case of the Shade Motors Ltd vs D.T. Dobie & Company (K) Ltd & Joseph Rading Wasombo Civil Appeal No. 38 of 1998.

55. It has been held time and again that court will not interfere with a regular judgement, unless it is satisfied that there is a Defence on merit which discloses triable issues. In the case of Shanzu Investment Ltd vs The Commissioner of lands, Civil Appeal No. 100 of 1993, the Court of Appeal held that;

> " The Court has wide discretion to set aside Judgement and there are no limits and restrictions on the discretion of the Judge except, that if the Judgement is varied, it must be done on terms that are just ...

56. The Jurisdiction to vary judicial decision must be exercised judicially and depends on a particular case. The test for setting aside an ex-parte Judgement are;

    1) Defence on the Merit.

    2) Prejudice and

    3) Explanation for the delay.

57. Having been guided as above, the Court will first determine whether the impugned Judgment was a regular one or not.

58. The matter proceeded exparte because it was alleged that the Defendant's Advocate was served but Defendant (Respondent) and his Advocate failed to attend Court. However, the Respondent in his application dated 26th February 2016, averred that his Advocate P. K Njoroge & Co. Advocates, were never served with a hearing Notice, and he was also not invited to take a hearing date.

59. If the Defendant (Respondent) had not been served with a hearing Notice, then the Judgement entered was an irregular one and should have been set aside as of right.

60. See the case of Kanji Narali vs Velji Ramji (1954) 21 EACA 20, where the Court held that the Court has no option but to set aside Judgement entered where there has been no proper service.

61. Though the Appellant, through his Advocate had alleged that the Respondent's Advocate had been properly served, the trial Court did fault the mode of service. This Court has considered the said averment by T .M Njoroge Advocate, on his Affidavit of service of the hearing Notice to P. K Njoroge & Co. Advocates, for the Respondent (Applicant at the trial Court) and the analysis by the trial Court, and this court indeed finds that the mode of service was suspect. There was no evidence that the Respondent was properly served. Therefore, the Judgement entered was an irregular Judgement, and should have been set aside as of right.

62. Given that the hearing proceeded in the absence of the Respondent because he was not served with the hearing notice, then the Respondent was condemned unheard and this went against the provisions of *the constitution* and the Rule of natural justice which provides "that no man should be condemned unheard."

63. In the case of Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR at page 7 the Court at the time referred to The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No.18 of 2010, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

> " It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

64. In the case of Gerita Nasipondi Bukunya & 2 Others vs AG (2019) eKRL, which cited the case of Sangram Singh vs Election Tribunal Kotel AIR 1955 SC 664 at 711, a decision of the Supreme Court of India held as follows;

> " There 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 back. 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"

65. It is clear that when the matter proceeded for hearing exparte, there was a Defence already on record and this Defence raises triable issues, and the trial Court did not err in law and fact when it held that the Defence on record raised triable issues.

66. The Court has also considered the explanation that was given by the Respondent for failure to attend Court. His explanation was that his advocate was not served with a hearing notice and without such service, he was not aware of the hearing date. The Respondent had gone to an extend of attaching the status of his Advocate in respect to practicing certificate. It was clear that P.K. Njoroge Advocate had not taken a practicing certificate. Thus, mistake of the Respondent's advocate should not be visited on him. See the case of Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR, where the court stated as follows;

> " It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by costs .... However, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court."

67. In this case, the failure of the Respondent (Defendant) to appear in Court for the hearing was attributed to lack of notification of the hearing, through a hearing notice by the Appellant's Counsel. This was indeed a mistake which should be blamed on the Counsel for the Appellant. In the case of Philip Chemwolo & Another vs Augustine Kubende (1982-88) KAR 103 104, the Court held;

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

68. Indeed, the Courts do appreciate that mistakes do occur in the process of litigation. This was held so by the Court of Appeal, in the case of Murai vs. Wainaina (No. 4) [1982] KLR 38, where it was held that:

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

69. Having considered this Appeal and having re-evaluated the evidence on record and the Ruling by the trial Court, did the Appellant herein prove that indeed the trial Court erred both in law and in fact in finding as it did in its Ruling of 17th March 2022?

70. In answering the above question, the court will have determined whether the instant Appeal is merited or not. The court will now consider each and every ground of Appeal as enumerated by the Appellant herein.

71. Grounds No1 and 2, will be considered together. Did the trial court err in law and fact, in faulting the decision of Hon J.J Masiga (RM), who delivered the judgment that was set aside? Or did the trial court sit as an Appeal court against the said Judgement?

72. It is evident that the trial court had been asked to set aside the impugned judgement on the ground that the Respondent herein, who had filed a Defence, which the trial court found had triable issues, had not been served with a Hearing Notice and was not aware of the hearing date.

73. It is clear that Order 12 Rule 7, of Civil Procedure Rules, grants the court that delivered a judgement discretion to set aside an ex parte judgement on such terms. There is no doubt that the impugned judgement was delivered by HON J J Masiga(RM). However, by the time the said Application for setting aside the judgement was slotted for hearing, the said HON JJ Masiga(RM) was no longer stationed at Murang'a Law Courts. The only logical thing then was for the said Application to be heard by the Magistrate available at the station. Thus, the Chief Magistrate did not sit as an Appellate court while hearing the said Application for setting aside, but heard the Application as the available trial court. Although the order sought was for setting aside a judgement, the provisions of Order 45 Rule 2(1)&(2), of Civil Procedure Rules apply herein, which states as follows;

> " 1) an application for review of decree or order of the court.....shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
>
> 2) if the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing."

74. Therefore, it is evident that since Hon JJ Masiga(RM), who passed the judgement was no longer attached to Murang'a CM Court, then the Chief Magistrate, who is attached to the court had jurisdiction to hear the application and in hearing and determining the same, he did not over step his mandate or sat on appeal against the Judgement of Hon J.J Masiga, who no longer had conduct of the matter. Consequently, the Appeal fails on these two grounds.

75. On ground No 4, that the Chief Magistrate erred in law and fact in trashing the Affidavit of service, which the trial court had found was a proper service, this court has considered the analysis by the trial court and the said court had found that the provisions of Order 5 of the Civil Procedure Rules, were not adhered to. The Respondent borne of contention in his Application of 26th February 2016, was that he was never served with a Hearing Notice. Service of any intended court action to a party is one of the tenents of fair hearing. The trial court had a duty to interrogate whether such service was properly done. The trial court returned a verdict of no proper service and this court finds no reasons to fault the trial court on its findings as it was alive to the rules and procedures of proper service as provided by Order 5 of the Civil Procedure Rules.

76. Further Order 12 rule 2 of the Civil Procedure Rules, provides that court has to be satisfied that hearing notice, was duly serviced before a matter can proceed for hearing exparte. The Respondent in the said application had punctured or faulted the Appellant's assertion that she had properly served the hearing notice and the Appellant did not avail any evidence to controvert the said allegations by the Respondent of non-service. Service of court processes is very crucial. In the case of Gulf Fabricators Vs County Government of Siaya(2020) eKLR, the court held as follows;

> " it must be appreciated that service of summons to enter appearance and plaint upon the defendant in a suit is crucial..."

77. From the above holding of the court, which persuades this court, it is clear that service of court processes is very crucial and important and there should be no doubt over the said service. Since the

Appellant did not avail evidence of proper service, this Court finds that the trial court was right to hold as it did. The court finds that the Appeal also fails on this ground!.

78. On ground No.4 that the trial court erred in failing to find that execution had commenced in earnest, this court is alive to the fact that the trial court had discretion to stay execution of an exparte judgement and set it aside upon being satisfied that there were sufficient reasons to do so, whether execution had begun or not. Since service of hearing notice was doubtful, and the fact that there was a reasonable defence with triable issues already on record, the trial court was within its discretionary power to set aside the impugned ex parte judgement, whether at the execution stage or any other stage, as the said court considered the weight of the case and found that there was sufficient cause to allow the said application. Consequently, this court finds no reasons to fault the trial court and the Appeal too fails on this ground.

79. On ground No. 5 that the trial court erred in law and fact when it failed to consider that the Respondent had gone into deep slumber since judgement was entered, the court has perused the Record of Appeal and noted that the judgement was entered on 8th Jan 2016, and the Application to set aside the said Judgement was filed on 26th Feb 2016, and that was within a reasonable time.

80. However, when the two applications came up for determination, the court only dealt with one of them, the Application dated 18th Jan 2016, but did not determine the application dated 26th Feb 2016.

81. The trial court in its determination held. "It is clear from the court record that though there was mention of the application dated 26th Feb 2016, by Hon. M. Wachira(CM), in the ruling of 18th January 2019, there was no determination made on the same. That the ruling on the notice of motion dated 18th January, 2016, was appealed against. The application dated 26th February 2016, is the one now for consideration herein. It is therefore not the correct position to state that the application to set aside the judgement has been brought five years later"

82. From the above holding of the trial court, it is clear that the Respondent application was filed on time, but the trial court then failed to determine it on time and the matter went on appeal for a different determination. The Respondent herein could certainly not have been blamed for the delay and cannot be accused of having gone into deep slumber. This Court concurs with the Respondent that this ground lacks merit and thus the Appeal also fails on that ground.

83. On ground No 7, that the trial court erred in law and fact in setting aside a judgement entered 6 years ago, this court finds that the application to set aside was filed on time, that is on 26th Feb 2016. The matter took longer at the appeal stage and was returned back to the trial court after the Appeal was determined. Further, it was not the fault of the Respondent when the court failed to determine the application for setting aside the judgement on 18th January 2019. The trial court found that the Respondent was not guilty of laches and allowed his application. This court finds no fault in that finding of the trial court and concurs with the Respondent's submissions that the trial court meticulously determined each facet of the application. The appeal too fails on ground No 7.

84. Finally, on grounds No 8 and 9, that the trial court erred in law and fact in exercising its discretion capriciously, and thus setting aside the ex parte judgement of 8th Jan 2016, this court finds that the trial court considered all the circumstances and facts both prior and subsequent and of the respective merits and arrived at a finding that was just and reasonable. See the case of Mureithi Charles &Another VS Jacob Atina Nyagesuka(2022) eKLR.

85. it is clear to this court that the trial court had discretion to set aside an ex parte judgement, and it did so after considering all the relevant circumstance and evidence. This court finds no reasons to find

that the exercise of that discretion by the trial court was capricious in any way, and that the trial court misdirected itself. Thus, the Appeal too fails on the two last grounds.

86. Further , this court bearing in mind the relevant provisions of the law and *the Constitution*, specifically Article 159 (2) (d), which provides that substantive justice should be upheld against procedural technicalities and Sections 1A, 1B & 3A of the *Civil Procedure Act* on the Overriding Objective of the Act and the inherent power of the Court to make necessary orders for the end of justice to be met, the Court finds and holds that the trial Court did not err at all either in law or fact as alleged and submitted by the Appellant, This court as an Appellate court, further finds and holds that the trial Court arrived at a sound Ruling, upholding substantive justice and therefore this court finds no reasons to interfere with the said Ruling of the trial Court.

87. Consequently, the Ruling of the trial Court delivered on 17th March 2022, is upheld. The Judgement of the trial Court dated 8th January 2016, stands set aside and/or vacated. The original lower court file will be remitted back to the Chief Magistrate's Court at Murang'a, for expeditious hearing of the suit inter- parties.

88. The Court further directs that this suit should be set down for hearing and concluded within the next 120 days from the date hereof, given that it is an old matter and thus a backlog. This case has been in the judicial system for more than 13 years!

89. The upshot of the foregoing is that the Appeal herein is not merited and the same is dismissed entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF DECEMBER,2023.

L. GACHERU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered online in the presence of

Mr. Mwangi H/B for T. M Njoroge for the Appellant

N/A for the Respondent

Court Assistant – Joel Njonjo