



REPUBLIC OF KENYA



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**Aldermen Limited v Shah & 3 others (Civil Appeal E004 of 2021)
[2022] KEELC 2311 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 2311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E004 OF 2021**

MD MWANGI, J

APRIL 27, 2022

BETWEEN

ALDERMEN LIMITED APPELLANT

AND

ZAVERCHAND RAMJI SHAH 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

LATAL JAYANTILAL SHAH 3RD RESPONDENT

BLOSSOM HILL ESTATE AGENTS CO. LTD 4TH RESPONDENT

(On an appeal from the ruling and order of the Chief Magistrate's Court, City Court, Nairobi {Hon. Mary W. Njagi, (Ms.) SPM} delivered on 3rd February, 2021: Nairobi City County vs. Jayantilal Natal Shah, Latal Jayantilal Shah, Zaverchand Ramji Shah, Manjula Zaverchand Shah, Aldermen Limited & Ideal Auctioneers.)

JUDGMENT

Background

1. This Appeal arises from a ruling and order of the City Court in Nairobi Civil Case No. 16 of 2013 (Nairobi City County vs. Jayantilal Natal Shah, Latal Jayantilal Shah, Zaverchand Ramji Shah, Manjula Zaverchand Shah, Aldermen Limited & Ideal Auctioneers) delivered on the 3rd February, 2021.
2. By way of a Plaint dated the 1st August, 2013, Nairobi City County (the 2nd Respondent in this appeal), sued Jayantilal Natalal Shah & Latal Jayantilal Shah for a sum of Kshs. 14,736,569.00 tabulated as annual rates due and owing from 31st December 1992 until 31st December 2013 and interest (on the rates) from 31st December 1992 to 31st July 2013 at the rate of 3% per month in respect of the parcel of land known as L.R No. BLK 209/6/5 Nairobi (hereinafter referred to as the suit property).



3. Judgement was entered in favour of the Plaintiff against the Defendants in default of appearance, on the 22nd August, 2013.
4. The Plaintiff/Decree holder thereafter proceeded to execute the decree in its favour by way of sale of the suit property by public auction. The public auction was conducted by Ideal Auctioneers on 20th December 2013.
5. The Appellant herein, Aldermen Limited, purchased the suit property at the public auction for a sum of Kshs. 30 Million.
6. It is the sale of the suit property that triggered reactions from the 1st Respondent herein Zaverchand Ramji Shah, and the 4th Respondent, Blossom Hill Estate Agents Co. Ltd, culminating in the filing of this appeal. Both Respondents claim ownership of the suit property.
7. The Application that gave rise to the ruling appealed from in this Appeal was filed by the 1st Respondent. It was dated the 19th August, 2016. The 1st Respondent alongside Manjula Zaverchand Shah was seeking to be joined in the proceedings before the City Court, the setting aside of the default judgement/order of 22nd August 2013, as well as the setting aside of the execution proceedings including the public auction conducted on 20th December 2013.
8. Before the determination of the Application dated 19th August 2016, the 1st Respondent filed another Application dated the 12th February, 2019. In the subsequent Application, the 1st Respondent was seeking orders to compel Ideal Auctioneers and Nairobi City County to render an account of the proceeds of sale realized at the public auction and the deposit of the balance found due with interest at 14% per annum into court.
9. The two Applications were heard contemporaneously and a ruling delivered on 3rd February 2021 allowing both Applications. An Order was extracted on the 12th July, 2021. The terms of the order were that;
 - a. The default judgement entered on 22nd August, 2013 be set aside together with the consequential orders thereto.
 - b. The Applicant (the 1st Respondent herein) together with his wife, Manjula Zaverchand Shah (deceased) are granted leave to defend and file and serve their defence within 15 days from the date of the ruling.
 - c. The Auctioneer to file a statement of accounts in respect of the auction within 45 days.
10. Being aggrieved by the said ruling, the Appellant lodged the current appeal vide the Memorandum of Appeal dated 4th February, 2021. The Appellant raised eight grounds of Appeal.

Court's Directions

11. The Court directed that the Appeal be canvassed by way of written submissions. All parties complied with the directions and filed their respective submissions. The parties had occasion to highlight the submissions orally on 28th January 2022 before the Court. The Court has had the opportunity to read through the detailed submissions of the parties in support of their respective positions as well as the proceedings recorded during the highlighting of the submissions.



Issues For Determination

12. Having considered the trial court record, the grounds of appeal and submissions for and against this appeal and cited cases, this court is of the view that the only issue for determination is whether the learned trial Magistrate erred in setting aside the default judgment and the consequential orders thereto.

Analysis and Determination

13. As noted earlier, the ruling delivered on 3rd February 2021 by the Learned Magistrate was in respect of the Applications dated 19th August 2016 and 12th February 2019. I will refer to the Application of 19th August 2016 as the main Application for purposes of this judgement.
14. The main Application sought the setting aside of the ex parte judgement entered in default of appearance together with the consequential orders thereto. The Application was filed pursuant to the provisions of Order 10 rule 11 of the *Civil Procedure Rules* by M/S Zaverchand Ramji Shah who claim to be the registered owner of the suit property together with his wife (now deceased) since 1995. Therefore, even at the time the suit was filed, they were the registered owners of the suit property.
15. Order 10 Rule 11 of the *Civil Procedure Rules*, 2010 empowers the Court to set aside or vary a default judgement entered under Order 10 (in default of Appearance or Defence) and any consequential decree or Order upon such terms as are just. It provides that:-

“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.”
16. This being a first appeal, this court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either way. That was the pronouncement of the court in the case of *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR. The court held that a first appellate court has a duty to re-evaluate, re-assess and re-analyse the record and make its own conclusions.
17. The Appellant submitted at length before this court and before the Magistrate’s court on the effects of the alleged agreement signed between itself and one Zaverchand Ramji Shah on the 22nd October 2018. It was the Appellant’s submissions that the intention of the parties in signing that agreement was to settle all matters/claims between the Appellant and the Respondents in respect of the suit property L.R No. 209/6/5 and the case before the Magistrate’s Court.
18. The 1st Respondent vigorously opposed the Appellant’s submissions in that aspect arguing that the said agreement was not adopted as a consent of the court. Further that the agreement was allegedly signed by one proprietor of the suit property while the other one was deceased hence the estate of the said deceased proprietor was not bound by such an arrangement.
19. I agree with the submissions of the 1st Respondent in respect to the alleged settlement agreement. The said agreement was not presented to the Magistrate’s Court for adoption as an order of the Court. Secondly, since it was not signed by the 2nd proprietor of the land, it was not binding upon her estate. In any event, the Application that had been filed seeking the setting aside of the default judgement was not withdraw and the Learned Magistrate was therefore justified to note as she did that the Application was available for determination.



20. The well-established principles of setting aside interlocutory judgments were laid out in the case of *Patel v East Africa Cargo Handling Services Ltd*(1974) EA 75 as per Duffus P. who stated as follows:

“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. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

21. It is now well settled from numerous precedents that a distinction exists between a default judgment that is regularly entered and one which is irregularly entered. The difference between the two was elaborated in detail by the Court of Appeal in CA No. 6 of 2015 *James Kanyita Nderitu vs. Marios Philotas Gbika & Another* [2016] eKLR, where it was held that:-

“...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 in the whole it is in the interest of justice to set aside the default judgement, among others.”

22. The considerations are however different in case of an irregular judgement. The Court stated as follows:-

“In an irregular 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. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment.

The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986 – 1989] EA 456).”

23. At this juncture, I pose to ask myself whether the judgement entered in the matter before the Magistrate’s Court was regular or irregular.



24. The original file in the Magistrate’s Court case is before me. From the record of the proceedings, the request for judgement was made by the Plaintiff’s Advocates on 21st August 2013. The request for judgement was accompanied by an Affidavit of Service sworn by Ezekiel Masai, a process server who deponed that he served the summons of appearance on ‘8th August 2013 at about 3.43 pm in the company of Mr. Omondi who was the Plaintiff’s representative’. The Process server stated that he served the summons upon the Defendants by “affixing the same at the outer door of their place of residence, plot number L.R 209/6/5 situated at Parklands 2nd Avenue, Nairobi.”
25. It was on the basis of that request that judgement was entered against the Defendants in default of Appearance.
26. Order 5, rule 8 requires that summons be personally served upon a defendant wherever it is practical, unless the Defendant has an agent empowered to accept service on his behalf in which case, service upon the agent shall be sufficient.
27. Rule 14 of Order 5, allows, when the Defendant cannot be found, after exercise of reasonable and due diligence, service by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the Defendant ordinarily resides or carries on business or personally works for gain.
28. Rule 14 requires the serving officer to exercise reasonable and due diligence to find the Defendant personally. In my understanding, the serving officer must make effort to find the Defendant. The effort made should be demonstrated in the affidavit of service filed. The serving officer must indicate the number of times he attempted to find the Defendant. He should demonstrate that he laboured to search the whereabouts of this defendant to justify service in the mode provided for under Rule 14 of Order 5.
29. In this case, the Process server went straight to apply the mode under rule 14 before exhausting or even attempting the mode provided under rule 8. He does not even state whether he knocked the door of the house to establish whether the Defendants were inside the house before affixing the summons on the door. This mode of service was improper and irregular.
30. Further, the Summons in this matter were issued on the 8th day of August 2013. The Summons required the Defendants to appear in person or by an Advocate duly instructed on the 22nd August 2013 at 8.30 O’clock in the forenoon to answer the claim. As noted earlier, the request for judgement was filed in court on 21st August 2013; before the time given to the Defendants had lapsed. Judgement was promptly entered on 22nd August 2013, the last day available to the Defendants to enter Appearance. This is a glaring procedural impropriety.
31. The judgement entered herein was therefore irregular. Going by the binding decision in *James Kanyita Nderitu vs. Marios Philotas Gbika & Another* (*Supra*), the judgement ought to be 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. Additionally, the court will not venture into considerations of whether the intended defence raises triable issues, or whether there has been inordinate delay in applying to set aside the irregular judgment.
32. Such a judgement is not set in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.



33. Musinga J (as he then was), in the case of *Frigonken Ltd vs Value Pak Food Ltd* expressed the position in the following terms:-

“If there is no proper or any service of summons to enter appearance, the resulting judgement is an irregular judgement liable to be set aside by the court *ex debito justitiae*.”

34. The 2nd issue I should consider, just in case I am wrong on the irregularity of the judgement, are the reasons advanced by the Applicant to set aside the judgement.

35. The Applicant alleged that he and his late wife were the owners of the suit property. He exhibited documents to prove that averment.

36. In my opinion, the reasons presented by the Applicant were valid, reasonable and sufficient to move the court to exercise its discretion and set aside the default judgement even if it had been regularly entered. A claim of proprietorship is qualifies as a reasonable defence for all intents and purposes.

37. The proceedings before the Magistrate’s Court were filed against the previous land owners leaving out the actual and current owners of the suit property. This was clearly against the cardinal rule of natural justice.

38. As Lenaola J (as he then was) observed in the case of *Mandeep Chauhan vs Kenyatta National Hospital & 2 others* (2013) eKLR,

“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 rule enjoys superiority over all laws made by humankind and that any law that contrives or offends against any 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 that a person against whom there is a complaint must be given a just and fair hearing.”

39. In exercising her discretion and setting aside the default judgement, the trial magistrate stated that 1st Respondent and his deceased wife had an interest in the suit property hence granted them leave to file their defence. Notably, at the time the determination to set-aside the default Judgement was being made, the 1st Respondent and his wife were already parties to the proceedings at the trial court.

40. The 1st Respondent and his deceased wife being the apparent registered owners and occupiers of the suit property, rendered them necessary parties to the action for purposes of effectually and completely adjudicating upon all questions in the suit in accordance with Rule 10(2) of Order 1 of the *Civil Procedure Rules*, 2010 which provides that:

“(2) “The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”



41. Once a party is joined to the proceedings, either as a Defendant or an interested party, they are entitled to file any document either in defence or in support of the claim to protect their interest(s).
42. There is nothing on record to indicate that the 1st Respondent herein deliberately sought by way of evasion or otherwise to delay or obstruct the course of justice. He is therefore entitled to be heard. Justice is better served when all 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 or obstruct the cause of justice.
43. The Court of Appeal in the case of *Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others* [2019] eKLR stated that:
- “The power of the court to set aside an interlocutory judgment under that provision is discretionary. See *CMC Holdings Limited vs. Nzioki* [2004] 1KLR173. For us to interfere with the exercise of discretion by the Judge, it must be shown that his decision is clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted or because he failed to take into consideration matters which he should have taken into consideration. [*See Mbogo and another vs. Shah* [1968] EA 93.]”
44. Guided by the above cited authorities and the analysis of the matter before the Magistrate’s court, I find no fault on the part of the trial magistrate in setting aside the default judgement and the consequential orders thereto. I would have arrived at the same decision.
45. I therefore dismiss the Appeal in its entirety with costs.
- It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Masore Nyang’au for the Appellant

Ms. Sheunda h/b for Osundwa for the 1st Respondent &

Gathara for the 4th Respondent

N/A for the 2nd & 3rd Respondents

Court Assistant: Hilda

M.D. MWANGI

JUDGE

