



before the court having been filed by a counsel who had not come on record. What the magistrate ought to have done was to strike it out in order to allow the Respondent to file another application following the correct procedure. Dismissing it was the wrong thing to do. However, the use of the wrong term or word did not bar the Respondent's counsel from filing a fresh application when he officially came on record. The question which arises is whether M/s Nyaundi and Tuiyot were properly on record when they filed the 2<sup>nd</sup> application. This issue was raised during the hearing of the second application. It was argued that the said firm was wrong to file a notice of appearance. The magistrate in his ruling failed to address all these issues in his ruling. He gave a three sentence ruling as follows: ***"It will be unfair and against the rules of natural justice to condemn the defendant unheard. The ex-parte judgment is set aside, and all consequential orders. Case be heard interparties."***

The issues were quite pertinent and required to have been addressed. The Appellant referred this court to the Court of Appeal case of ***MBURU GICHINI –VRS- GACHINI TUTI*** where Wambuzi and Law JJA held that where the Respondent ought to have appealed against the ruling of the court or seek for review instead of filing a fresh application. I wish to distinguish this case with the one before me. In this case, the first application was not heard on merit. In the ***MBURU –VRS- GICHINI*** case the first application was heard on merit and determined thus rendering the second one *res judicata*.

The ruling of the magistrate for the application dated 16/05/2001 was the correct finding save that the issues raised in the application were not addressed. It was the correct thing to do to set aside the ex-parte judgment. It is in the interest of justice that both parties be heard. The Respondent's counsel had filed a defence although before filing a notice of appointment. The defence was void *ab initio* because it was improperly on record and it found ex-parte judgment already entered.

This appeal was heard after the Civil Procedure Act section 1 was amended to include the overriding objective. The Appellate Jurisdiction Act was amended and a similar provision inserted in section 3 which reads:

***"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

***(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1)."***

This provision empowers the court to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. This is a needy appeal for this court to invoke the provisions of the law to give effect to the overriding objective of facilitating the just and expeditious disposal of this appeal and the lower court case. For this reason, I overlook all the procedural defects of the various appearances by the Respondent's counsel and the omission by the magistrate to address the issues before him in his ruling. The most important thing in the interests of justice is to have the suit heard between the parties.

I therefore order that the ex-parte judgment stands set aside together with all consequential orders. The appearances of Nyaundi Tuiyot & Co. Advocates for the Respondent is hereby regularized and the defence filed by the firm is hereby deemed properly filed. I find that the appeal has no merit and I dismiss it accordingly. Each party to meet the costs of this appeal. The Deputy Registrar to serve the Respondent's counsel with these orders.

**F. N. MUCHEMI  
JUDGE**

Judgment delivered and dated 1<sup>st</sup> day of December 2010 in the presence of Mr Onyando for kasaman for Appellants.

**F. N. MUCHEMI  
JUDGE**