



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Civil Case 32 of 2003**

**MATHEW KIPNGENO ARAP CHELULE .....  
PLAINTIFF**

**VERSUS**

**STEPHEN LOGOS ..... 1<sup>ST</sup> DEFENDANT**

**BOMET DISTRICT LAND REGISTRAR..... 2<sup>ND</sup> DEFENDANT**

**RULING**

This is an application made by the 1<sup>st</sup> defendant, Stephen Logos **under order XXI rule 22** and order **IXA rule 9 and 10 of the Civil Procedure Rules** and **section 3A of the Civil Procedure Act** seeking to have the judgment of this court which was delivered on the 10<sup>th</sup> December, 2004 together with all the consequential orders set aside and the suit be set down for hearing *de novo*. The grounds in support of the application are that the 1<sup>st</sup> defendant contends that he was not served with the summons to enter appearance. He states that he would suffer irreparable loss and would be condemned unheard if the application is not granted. He further states that the plaintiff had no claim against him. The application is supported by the annexed affidavit of the 1<sup>st</sup> defendant. The application is opposed. The plaintiff, Mathew Kipngeno Arap Chelule has sworn a lengthy replying affidavit in opposition to the said application. The summary of what he has deponed is that the 1<sup>st</sup> defendant was properly served with summons to enter appearance and further that since the entry of the said judgment, the judgment of this court had been given effect to and no useful purpose would be served if the case is re-opened.

At the hearing of the application, Mr. Kirui, learned counsel for the 1<sup>st</sup> defendant reiterated the contents of the application and the affidavit sworn by the 1<sup>st</sup> defendant. He submitted that the 1<sup>st</sup> defendant was not served with summons to enter appearance and was therefore not aware of the suit, where it was heard and determined. He submitted that the 1<sup>st</sup> defendant only became aware of the suit when he was arrested and brought to the Principal Magistrate's Court on allegations that he owed costs which were awarded to the plaintiff in this suit. The 1<sup>st</sup> defendant denied that he had entered appearance because the memorandum of appearance which was filed had not been signed. It was submitted that all the notices which were purportedly served on the 1<sup>st</sup> defendant were not served since there is no evidence that he had signed any of the said notices acknowledging receipt. Mr. Kirui submitted that since the 1<sup>st</sup> defendant had proved that he had not been served, this court should set aside the said *exparte* judgment and grant leave to the 1<sup>st</sup> defendant to file his defence to enable his side of the case to be heard.

Mr. Siele, learned counsel for the plaintiff opposed the application. He submitted that the 1<sup>st</sup> defendant had brought the application under the wrong provision of the law. Instead of filing the application under the provisions of **order IXB rule 8 of the Civil Procedure Rules**, the 1<sup>st</sup> defendant had filed the application under the provisions of **order IXA** of the rules. He submitted that the 1<sup>st</sup> defendant had not challenged the affidavit of service which was filed by process server and which indicated that the 1<sup>st</sup> defendant was properly served. He argued that the 1<sup>st</sup> defendant had not made an application before court to have the process server cross examined on the said affidavit of service. He reiterated that the 1<sup>st</sup>

defendant was properly served through his wife called Grace Logos. The 1<sup>st</sup> defendant had duly entered appearance after being served. The fact that the 1<sup>st</sup> defendant had not signed the memorandum of appearance was immaterial. He submitted that the 1<sup>st</sup> defendant was aware of the proceedings against him but chose not to participate in them. The 1<sup>st</sup> defendant only woke up and sought to defend the plaintiff's claim when it was already too late as the plaintiff had already executed against him on costs. He urged this court to disallow the application because the 1<sup>st</sup> defendant had not satisfied the principles laid down for setting aside of *ex parte* judgments.

I have read the pleadings filed by the parties in support of their respective positions in this case. I have also carefully considered the rival submissions that were made before me by the learned counsel to the parties to this application. The issue for determination by this court is whether the 1<sup>st</sup> defendant has established a case to enable this court set aside the *ex parte* judgment. The principles to be considered by this court in deciding whether or not to grant the application filed by the 1<sup>st</sup> defendant are well settled. In **Chemwolo & anor vs Kubende [1986] KLR 492** at page 497, Platt J. A held that;

***“But the court went on to explain (at page 76), that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given to it by the rules. On the other hand, where a regular judgment has been entered, the court would not usually set aside the judgment, unless it was satisfied that there were triable issues which raised a prima facie defence which should go to trial. The court adopted the views expressed by the House of Lords in the case of Evans vs Bartlam [1937] AC 473, and while the quotation from Lord Russell’s speech were relevant to Mr. Inamdar’s particular argument, the views expressed by Lord Atkin at page 480 are of greater relevance to the present appeal – Lord Atkin observed:***

***‘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 they must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless 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 its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.’ ”***

In essence, what the Court of Appeal was saying is that in considering an application to set aside *ex parte* judgments, this court has unfettered discretion. However, this discretion must be exercised within certain legal parameters which have been alluded to in the judgment quoted above.

In the present case, it is the 1<sup>st</sup> defendant’s contention that he was not served with summons to enter appearance. He has argued that the subsequent interlocutory judgment entered against him was therefore unlawful. On the other hand, the plaintiff argues that the 1<sup>st</sup> defendant was properly served and was aware of the proceedings herein but chose not to participate in them. I have perused the affidavit of service which was filed in court by a process server called Geoffrey Sang on the 10<sup>th</sup> June, 2003. He deponed in the said affidavit that he had served the wife of the 1<sup>st</sup> defendant called Grace Logos on the 14<sup>th</sup> May, 2003 at the 1<sup>st</sup> defendant’s residence at Tagaruto village, Bomet District. On the 26<sup>th</sup> May, 2003 the 1<sup>st</sup> defendant entered appearance. Although he did not sign the memorandum of appearance, this court has no doubt that the 1<sup>st</sup> defendant entered appearance after he was properly served by the said process server. The 1<sup>st</sup> defendant spurned the opportunity availed to him by the rules to have the process server summoned to court so that he could be examined on the contents of the said affidavit of service. During earlier proceedings in this case, the 1<sup>st</sup> defendant admitted on oath that his wife was called Grace

Logos. In the circumstances of this case, it is the finding of this court that the 1<sup>st</sup> defendant was properly served and therefore he cannot claim that he was not served.

This court can however still set aside the exparte judgment if it is satisfied that the interest of justice would be served. In the present case, the plaintiff has deponed that the judgment of this court has already been given effect to by the 2<sup>nd</sup> defendant and any effort to have the said judgment set aside would be counter productive. I agree. This case relates to a boundary of a public road. What the plaintiff was contending is that the boundary of the public road on the ground should reflect what appears on the registered indented map of the area (R.I.M). Since this adjustment has been done on the ground, it would serve no useful purpose to have the dispute herein re-opened. The 1<sup>st</sup> defendant was indolent. He failed to file his defence within the requisite period. He was aware of the suit against him. He only took action when the plaintiff sought to execute against him for the costs of the suit. Unfortunately, the 1<sup>st</sup> defendant took action when it was already too late. This court cannot exercise its unfettered discretion in favour of such a litigant.

The upshot of the above reasons is that the 1<sup>st</sup> defendant's application for setting aside fails. It is hereby dismissed with costs.

**DATED AT KERICHO THIS 8TH DAY OF JUNE, 2006**

**L. KIMARU**

**JUDGE**