



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Appeal 82 of 2002**

**(From the judgment of Civil Case No. 87 of 2000 of the Principal Magistrate's Court  
at NYAHURURU – C. N. SIFUNA, ESQ.)**

**LUCY WANJIRU KABUTHA.....APPELLANT**

**VERSUS**

**JANE MUTHONI MUCHERU.....RESPONDENT**

**JUDGMENT**

This judgment is in respect of an appeal against the ruling of C. N. Sifuna, Resident Magistrate where she held that the appellant was sufficiently and effectively served with summons to enter appearance and thereby refused to set aside interlocutory judgment that had been entered against the appellant.

The facts giving rise to the appeal herein are fairly straight forward. The respondent filed Nyahururu Principal Magistrates Civil Case No. 339 of 1998 against Amos Mathenge and Mathew Chege praying for an order of transfer of a plot known as **L.R. NO. NYANDARUA/OL JORO OROK SALIENT/1810** or refund of the purchase price of Kshs.45,000/- plus costs and interest. The said plot was owned by the respondent and she had appointed the said Mathew Chege as her selling agent.

The respondent was unable to recover the aforesaid sum from Chege and she filed PMCC No. 87 of 2001 against the appellant praying for a declaration that the appellant was liable to satisfy the decree in the former suit on the basis that Mathew Chege was an agent of the appellant. The summons to enter appearance were served upon Amos Mathenge who was said to be the husband of the appellant. The affidavit of service that was filed showed that the same was effected on 15th May, 2000. The process server stated that Amos Mathenge Namaru was the husband to the appellant and he had accepted and acknowledged service by signing on the reverse of the copies of the documents served. The affidavit of service did not show that Amos accepted service for and on behalf of the appellant. The respondent then applied for judgment in default of appearance and interlocutory judgment was entered and formal proof was done and a final judgment was entered in favour of the respondent. when the appellant became aware of the judgment she applied to set it aside on the ground that she had not been served with summons to enter appearance but the application was disallowed thereby giving rise to this appeal.

In arguing the appeal Mr. Kariuki for the appellant submitted that Order V Rule 9(1) requires that whenever practicable, service shall be effected upon the Defendant in person unless he has an agent empowered to accept service on his behalf. It is not in dispute that the appellant was not personally served with summons to enter appearance and plaint but instead service was effected upon Amos Mathenge. The process server did not make any enquiries regarding the whereabouts of the appellant, counsel submitted. I have perused the affidavit of service sworn on 6th June, 2000 and I am in total agreement with the

appellant's counsel on his submissions.

In **WAWERU VS KIROMO [1969] E.A. 172** the Defendant applied to set aside the service on him of a summons. The affidavit of the process server stated that the summons had been left with the Defendant's wife with instructions that she should keep it for her husband as he was not present at the time. It was held that as the process server made no enquiry about the defendant's whereabouts it could not be said that he could not be found so as to allow service on his wife.

The appellant had sworn an affidavit in support of her application to set aside the ex parte judgment in the trial court and deposed that although Amos Mathenge was her husband, they were not living together at the time when service was effected upon him, the appellant having filed divorce proceedings against Mr. Mathenge vide Divorce Cause No. 3 of 1995 at Nyahururu Principal Magistrate's Court. That fact had not been controverted.

In **JOHN AKASIRWA VS ALFRED INAT KIMUSO** Civil Appeal No. 16 of 1999 the Court of Appeal stated that:-

**“Proper service of summons to enter appearance in Litigation is a crucial matter in the process whereby the court satisfies itself that the other party to the litigation has notice of the same and therefore choose to enter appearance or not”.**

If there is no proper service of summons to enter appearance, the court has no option but to set aside ex debito justitiae any default judgment on record, see **GANDHI BROTHERS VS H. K. NJAGE T/A H. K. ENTERPRISES** Milimani commercial Courts (Nairobi) Civil Suit No. 1330 of 2001.

Mr. Chege for the respondent, in opposing the appeal, argued that the trial magistrate, in declining to set aside the ex parte judgment, was exercising her discretion and it had not been shown that her discretion was exercised in an unjudicial manner. He referred the court to **MBOGO & ANOTHER VS SHAH [1968] E.A. 93** where it was stated that an appellate court should not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision was clearly wrong because it had misdirected itself or because it had acted on matters on which it should not have acted.

No doubt that is the correct position in law but with respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance.

Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.

I am satisfied that the appeal must be allowed and I hereby do so and set aside the lower court's ruling delivered on 29th April, 2002 and allow the appellant's application dated 18th February, 2002. The respondent will bear the costs of this appeal as well as all the costs in the court below.

DATED, SIGNED & DELIVERED at Nakuru this 22nd day of October, 2004.

**DANIEL MUSINGA**

**AG. JUDGE**

**22/10/2004**