



**Wainaina v Kiguru & another (Environment & Land Case
E023 of 2021) [2023] KEELC 18815 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E023 OF 2021**

**LN GACHERU, J
JULY 13, 2023**

BETWEEN

PETER GICHUHI WAINAINA PLAINTIFF

AND

JANE WAITHERA KIGURU 1ST DEFENDANT

**METHI & SWAMI CO-OPERATIVE SOCIETY LTD (UNDER
RECEIVERSHIP) 2ND DEFENDANT**

RULING

1. The matters for determination are the Notice of Motion Application and a Preliminary Objection dated 3rd March 2023.

The Notice of Motion is the one dated 30th November 2022, filed by the 1st Defendant/Applicant seeking for orders that;

1. That pending the hearing and determination of this application there be a stay of execution of the ex parte judgement made on 28th July 2022, and decree issued on the 31st August 2022;
 2. That the Court be pleased to vary, review and/or set aside the ex parte judgement made on the 28th July 2022;
 3. That upon grant of prayer (c) the 1st Defendant be granted leave to defend the suit; and
 4. That costs of this application be provided for.
2. The Notice of Motion application is premised on the grounds stated thereon and the Supporting affidavit of the 1st Defendant/Applicant - Jane Waithira Kiguru. She averred that she was not served with the Summons to Enter Appearance and Plaint that resulted in the judgement entered on the 28th July 2022. Further that she resides in the United Kingdom, and only became aware of this suit when



- she returned to Kenya for her father-in-law's funeral in September 2022. Further, that if the orders sought are not granted, her property particularly land parcel No. Mitubiri/Wempa Blk 2/2670, (the suit property), would be transferred to the Plaintiff/Respondent which would greatly prejudice her.
3. It was the 1st Defendant/Applicant's contention that the Plaintiff/Respondent was aware that she resided in the United Kingdom, but the Plaintiff/Respondent misled the Court to grant him leave to serve the Applicant through substituted service in the local dailies.
 4. Lastly, it was contended that the 1st Defendant/Applicant was not properly served, and was not aware of the suit at all times. She further contended that her statement of Defence raises triable issues, relating to the ownership of the suit property and that she would be condemned unheard contrary to the rules of natural justice, if her application is not allowed.
 5. The Plaintiff/Respondent filed his Grounds of Opposition dated 3rd March 2023, in response to the application dated 30th November 2023, and averred;
 1. That the application is frivolous, fatally defective, vexatious and ought to be struck out;
 2. That the cited order 7 Rule of the *Civil Procedure Rules* does not talk about setting aside a proper judgement;
 3. That the application is incurably defective as it is brought without leave of the Court by a non-entity, a stranger to these proceedings, clearly an abuse of the Court process;
 4. That the 1st Defendant/Applicant Counsel has no legal basis to bring this application without leave of the Court;
 5. That this Honourable Court has no jurisdiction to sit on its own appeal;
 6. That the Defendant's application is incurably defective as its trying to re-open this suit through the back door where the suit has already been concluded; and
 7. That the 1st Defendant's application is incurably defective and its an abuse of the Court process.
 6. The Plaintiff also filed a Preliminary Objection dated 3rd March 2023, and contended that; -
 1. That the application dated 30th November 2022, is incurably defective for want of form and not being premised on proper legal principles and/or provisions;
 2. That the 1st Defendant/Applicant has no legal basis to bring this application as its after judgement and decree being issued;
 3. That the 1st Defendant/Applicant's application is incurably defective for want of proper form and not being premised on proper legal principles and/or provisions;
 4. That the Notice of Motion dated 30th November 2022, is incurably defective for trying to reopen a suit that has been concluded through the back door;
 5. That the Applicant's counsel is yet to comply with the requirement of the law and therefore the Application herein is still an abuse of the Court process for reason that it has been brought by a Law Firm which is not properly before the Court as they did not seek leave to enter appearance and file a notice of appointment and are thus mere busy bodies; and
 6. That the Application is otherwise incurably defective and an abuse of the Court process.



7. The instant Notice of Motion and Preliminary Objection were canvassed together by way of written submissions and the parties did file their respective written submissions, in support and opposition of the respective positions.
8. The 1st Defendant/Applicant through the Law Firm of Wambui Muiruri & Associates Advocates, filed her written submissions on 4th May 2023, and raised two issues for determination;
 1. The first issue is whether the interlocutory judgement herein should be set-aside, varied and/or reviewed, and the 1st Defendant/Applicant be granted leave to file her defence?
 2. The Applicant submitted that the principles of setting aside an *ex parte* judgement were well determined by the Court of Appeal in the case of *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* [2016]eKLR as follows:
 - “ a) Lack of proper service; and
 - b) Existence of a defence with triable issues.”
9. On the first principle of lack of service, the Applicant submitted that she was a national of the United Kingdom, where she resides and that she only visited Kenya occasionally. She further submitted that service of the Summons through substituted service in the local dailies was irregular and not in conformity with Order 5 Rule 25 of the *Civil Procedure Rules*, which provides for Service of Summons on a Defendant outside Kenya. It states as follows:

“ Every application for leave to serve such summons or notice on a defendant out of Kenya shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is not resident in Kenya or not, and the grounds on which the application is made; and no such leave shall be granted unless it is made sufficiently to appear to the Court that the case is a proper one for service out of Kenya under this *Order*.”
10. The Applicant relied on the case of *Catherine Nyambura v Peter Shikhule & 4 Others* [2020] eKLR, where the Court held as follows;

“ The question which arises is whether the resultant *ex parte* judgment was a regular one or not. My answer to that question is that the resultant judgment in so far as it related to the applicant was not a regular one. I say so because the applicant was a resident of the United States of America. In the absence of compliance with the legal requirements for service of summons outside Kenya, the resultant judgment was an irregular default judgment. Had the fact that the 3rd defendant was a resident of the United States of America been brought to the attention of the Courts, the Court would have directed that the mandatory requirements of the law relating to service of summons on a defendant who is a resident of another country be followed. Regrettably, the Court was not aware of this fact. In light of the foregoing, I am satisfied that the applicant has demonstrated that he was not served with summons to enter appearance. He has also demonstrated that he was not aware of this suit at all material times. Thirdly, he has demonstrated that there is a triable issue relating to ownership of the suit property, calling for determination. In a nutshell, he has satisfied the criteria upon which our Court’s exercise the discretionary jurisdiction to set aside an irregular default judgment.”



11. The second principle as stated in the case of *James Kanyita Nderitu (supra)*, is in relation to whether there exists a Defence with triable issues. The 1st Defendant/Applicant submitted that being the registered owner of the suit property, she had an arguable case which she ought to be permitted to defend as provided for under article 50(1) of the *Constitution*, which states as follows:
- “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”
12. The 1st Defendant/Applicant further relied on the case of Joel Gichana Nyamigwa v SDA (EA) Union Ltd (2017) eKLR, wherein the Court quoted the Supreme Court of India case of Sangram Singh v. Election Tribunal Koteh, AIR 1955 SC 664 at 711, which stated as follows:-
- “There must be ever present to the mind the fact that our laws and 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 backs, 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.”
13. On the second issue as to whether the present application meets the threshold for grant of stay of execution, the 1st Defendant/Applicant submitted that she stands to suffer irreparable damage and loss, as the registered owner of the suit property, should the *ex parte* judgement be executed. She further submitted that she had met the threshold for grant of stay of execution as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, which states as follows:
- “No orders for stay of execution shall be made under Sub Rule (1) unless-
- a) The Court is satisfied that substantial loss may result to the applicant, unless the order is made and that the application has been made without unreasonable delay.
 - b) Such security as the Court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant.”
14. The Plaintiff/Respondent through the Law Firm of Kibathi & Co. Advocates, filed extensive written submissions on 17th May 2023, opposing the instant application and in support of his Preliminary Objection dated 3rd March 2023.
15. The Plaintiff submitted that the law governing setting aside of default judgments is provided for under Order 10 Rule 11 of the Civil Procedure Rules, which provides as follows:
- “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.”
14. The Plaintiff/Respondent further submitted that setting aside an *ex parte* judgement is a matter of discretion of the Court and that the Court ought to consider whether to refuse leave to defend or grant setting aside orders or whether it would likely cause substantial hardship to or substantially prejudice



the rights of any person affected. The Plaintiff/Respondent relied on the case of *Esther Wamaitha Njihia & 2 Others v Safaricom Ltd* [2014] eKLR, where the Court held;

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. (See *Sebei District Administration v Gasyali*). It also goes without saying that the reason for failure to attend should be considered.”

15. Further, the Plaintiff submitted that for the Court to grant an order to set aside an *ex parte* Judgement, it must be satisfied by one of the two things namely; whether the defendant was properly served with summons, and whether the defendant failed to appear in Court at the hearing due to sufficient cause.

16. On the issue whether the 1st Defendant/Applicant had provided sufficient cause, the Plaintiff/Respondent relied on the Tanzanian case of *The Registered Trustees of the Archdiocese of Dar es Salaam v the Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2016* (unreported), wherein the term sufficient cause was defined as follows:

“It is difficult to attempt to define the meaning of the words ‘sufficient causes’. It is generally accepted however that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant.”

17. On the issue of setting aside of *ex parte* judgements, the Plaintiff/Respondent submitted that the 1st Defendant/Applicant failed to demonstrate sufficient cause to warrant the Court’s discretion to grant such orders. The Applicant relied on the case of *Transafrika Assurance Co. Ltd v Lincoln Mujuni* (Miscellaneous Application No. 789 of 2014) [2014] UGCOMM 215 (30 October 2014), wherein the High Court of Uganda stated as follows:

“The rationale for this rule lies largely on the premise that an *ex parte* judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard, then that party should indeed be given a hearing.”

18. On the final issue of whether there was proper service, the Plaintiff/Respondent submitted that substituted service was granted and an Affidavit of Service filed, as provided for under Order 5 Rule 7 of the Civil Procedure Rules, which has not been challenged. Order 5 Rule 7 of Rules states as follows:

“(1) Where the Court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the Court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the Courthouse, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Substituted service under an order of the Court shall be as effectual as if it had been made on the defendant personally.



- (3) Where the Court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.
- (4) Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as the circumstances require.”
19. The Plaintiff/Respondent similarly filed submissions in support of his Preliminary Objection on 17th May 2023. It was the Plaintiff’s submissions that the law is clear in relation to stay of execution, especially where there is a proper decree in place.
20. On the objection that the 1st Defendant/Applicant Advocate is improperly on record, the Plaintiff relied on Order 9 Rule 9 of the Civil Procedure Rules, which states as follows:
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
21. The Plaintiff further submitted that Order 9 Rule 9 of the Civil Procedure Rules makes it mandatory that any change of advocates after judgement has been entered must be done following a Court order upon application with notice to all parties. The Plaintiff relied on the case of S. K. Tarwadi v Veronica Muehlmann [2019] eKLR, where it was held;
- “In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until judgement is delivered and then sack the advocates and either replace him ... ”
22. It was further submitted that the 1st Defendant/Applicant advocates failed to adhere to the above provisions of law when coming on record and before filing the instant application to set aside the judgement. That for this reason, the application should fail.
23. The 1st Defendant/Applicant opposed the Preliminary Objection and filed further written submissions on 19th May 2023, and submitted that the Law Firm of Wambui Muiruri & Associates, was properly on record and a Notice of Appointment of Advocate was filed on 3rd October 2022, and served on the Plaintiff’s and 2nd Defendant’s advocates. The 1st Defendant/Applicant relied on Order 9 Rules 7 and 9 of the Civil Procedure Rules, which stipulates how an advocate or a person acting in person should come on record as follows:
- “Rule 7 - Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.
- Rule 9 - When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—



- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

24. The 1st Defendant further submitted that the present suit does not fall under the provision of Order 9 Rule 9 of the Civil Procedure Rules, as the 1st Defendant did not have a previous advocate on record, and had not participated in the proceedings prior. The 1st Defendant relied on the case of Catherine Nyambura v Peter Shikhule & 4 Others [2020] eKLR, where the Court held;

“My understanding of Order 9 Rule 7 is that where a party has previously sued or defended a suit in person and subsequently decides to appoint an advocates, that party shall file and serve a notice to that effect. On the other hand, Order 9 Rule 9 applies to a suit where judgement has been rendered and a party who had an advocate on record wishes to either change the advocate or act in person. In either of the two scenarios, that party is required to either seek and obtain prior leave of the Court or file a consent signifying concurrence of the advocate who was previously on record.

In the present matter, the applicant did not have any previous advocate on record. His present advocates are the first firm of advocates appointed by him. He had not participated in the proceedings herein. His current advocates came on record through the instrument of a notice of appointment of advocates dated 13/5/2018 and filed on 16/5/2019. The present application was similarly filed on 16/5/2019. In my view, Order 9 rule 7 does not apply to the applicant because the applicant had not previously defended this suit in person. The first filing made by the applicant in this suit is the notice of appointment of advocate dated 13/5/2019 and filed on 16/5/2019. That was the proper instrument which the applicant was required to file in the circumstances of this case. My finding on the first issue therefore is that the applicant’s advocates are properly on record.”

25. On the issue of whether the application dated 30th November 2022, was incurably defective for want of form and the failure to premise the application on proper legal principles, the 1st Defendant/Applicant submitted that the Court in the administration of justice has its focus on substantive justice, rather than procedural technicalities, and the just, efficient, and expeditious disposal of cases. The 1st Defendant/Applicant relied on Article 159 (2)(d) of the Constitution and Section 1A and 1B of the Civil Procedure Act which provide as follows:

“ Article 159 (2)(d) of the Constitution

In exercising judicial authority, the Courts and tribunals shall be guided by the following principles— justice shall be administered without undue regard to procedural technicalities;

26. The Applicant further relied on Sections 1A and 1B of the Civil Procedure Act which provides;

- (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).



- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
- (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”

27. The 1st Defendant further submitted that invoking the wrong provisions of the law does not necessarily spell doom to an otherwise meritorious application. Reliance was placed on the case of *TKR v JMM* [2021] eKLR, wherein it was held as follows:

“The instant application has been brought under Articles 50(2) and 159(2) (a) and (d) of the *Constitution* of Kenya 2010; Sections 1A (1) (2) and 1B (1) (a) of the *Civil Procedure Act*; and Order 45 and order 51, Rule 1 of the Civil Procedure Rules, 2010. The respondent submits that Order 45 of the Civil Procedure Rules provides for review yet the instant application seeks to set aside ex-parte proceedings and grant leave to the applicant to file his response to the respondent’s Originating Summons out of time. Does that render this application incompetent?

The applicant relied on Order 51, Rule 15 of the Civil Procedure Rules which provides that the Court may set aside an order made ex parte.

The application also relied on Article 159(2) (d) which provides that justice shall be administered without undue regard to procedural technicalities.

The Supreme Court of Kenya in the case of *Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 Others* [2014] eKLR while commenting on the strict observance of the mandatory provisions of the *Constitution*, the Election Act, and the Rules, stated thus:-

“Article 159 (2) (d) of the *Constitution* simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

28. In conclusion, the 1st Defendant submitted that the Preliminary Objection, did not deserve to see the light of day and thus is an abuse of the Court process. She urged the Court to dismiss the Plaintiff’s Preliminary Objection.



29. The Court has carefully considered the instant Notice of Motion Application, the Preliminary Objection, the annexures thereto, the rival written submissions, authorities cited and the relevant provisions of law, and finds that the main issue for determination are:

1. whether the Preliminary Objection is warranted?
2. Whether to grant the orders for setting aside of the ex parte judgement?

i. Whether the Preliminary Objection is warranted?

30. The Preliminary Objections filed by the Plaintiff/Respondent is to the effect that the 1st Defendant’s application is fatally defective as it offends Order 9 Rule 9 of the Civil Procedure Rules, to the extent that the Law Firm of Wambui Muiruri & Associates, was not properly on record at the time of filing the application. The Plaintiff further averred that the application lacked form and failed to follow any proper legal principles.

31. It is well settled that a Preliminary Objection must raise pure points of law as was settled in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, where the Court was held as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

32. The Plaintiff/Respondent’s major contention in the Preliminary Objection is that the 1st Defendant/Applicant’s Advocate was not properly on record. This Court notes that the trial that preceded the ex parte judgement was carried out in the absence of the 1st Defendant/Applicant. Simply put, the 1st Defendant did not enter appearance in the suit nor file Defence. Therefore, the 1st Defendant was without an Advocate when judgement was delivered.

33. From the Court record, it is evident that the 1st Defendant/Applicant’s current advocates came on record through a Notice of Appointment of Advocates dated 29th September 2022, and filed in Court on 3rd October 2022, prior to filing the application dated 29th September 2022. This Court being persuaded by the finding of the Court in the case of Catherine Nyambura (supra), finds that Order 9 Rule 9 of the Civil Procedure Rules does not apply to the 1st Defendant/Applicant herein, because she had not previously defended this suit in person or through any advocate. The Notice of Appointment of Advocates remains the proper instrument which the Applicant was required to file in the circumstances of this case as provided for under Order 9 Rule 7 of the Civil Procedure Rules. It states:

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”



34. Furthermore, contrary to the Plaintiff's contention, the provisions of Order 9 Rule 9 of the Civil Procedure Rules, are not applicable in the present case, since the 1st Defendant/Applicant did not change their advocate after judgement was passed, but rather appointed an advocate after an *ex parte* judgement, to file the present application. This Court hereby finds that 1st Defendant/Applicant's advocates are properly on record.
35. Considering that a Preliminary Objection suffices on pure points of law, and does not require the Court to carry out any ascertainment of facts on for it to stand, this Court having carried out an investigation as to the facts on whether the 1st Defendant/Applicant's advocate properly came on record, has broken the first principle on what amounts to a Preliminary Objection. Therefore, this Court finds that the Preliminary Objection failed to meet the threshold set out in Mukisa Biscuit Manufacturing Case (*supra*).
36. The upshot of the above is that this Court finds and holds that the Preliminary Objection dated 3rd March 2023, does not meet the criteria of what amounts to a proper Preliminary Objection. The said Objection is thus found not merited and is dismissed entirely.

ii. Whether to grant the orders for setting aside of *ex parte* Judgement?

37. The instant Application is made on the grounds that the 1st Defendant/Applicant is a resident of United Kingdom, and was not served properly with Summons to Enter appearance and the Plaintiff.
38. The 1st Defendant/Applicant stated that there was no effective service of the Summons to enter Appearance and Plaintiff as she resides in the United Kingdom, and that substituted service as ordered by the Court was not sufficient.
39. The provisions for service outside Kenya are provided for under Order 5 Rule 27 of the Civil Procedure Rules which provides as follows:

“Where leave to serve a summons or notice of summons out of Kenya has been granted under rule 21, and the defendant is a Commonwealth citizen as defined in subsections (1) and (2) of section 95 of the *Constitution* or resides in any of the countries for the time being mentioned in subsection (3) of that section, the summons shall be served in such manner as the Court may direct.”
40. The 1st Defendant/Applicant avers that she resides in the United Kingdom. She took the further step to demonstrate to the Court that she is a British national. This Court hereby finds substituted service through the local dailies, would not have been sufficient to alert the 1st Defendant/Applicant of the present suit and that the correct mode of service ought to have been guided by Order 5 Rule 27 of the Civil Procedure Rules. This Court casts doubt as to the Plaintiff/Respondent's truthfulness as to his awareness of the 1st Defendant/Applicant's whereabouts during his application for substituted service through the local dailies. Regardless of whether he was aware or not, he clearly selected the wrong approach to proceed with the matter. This Court hereby finds that there was no proper service of the Summons to Enter Appearance and Plaintiff upon the 1st Defendant.
41. Having found that there was failure to serve, therefore the judgement was in default, and this Court is hereby guided by Order 10 Rule 11 of the Civil Procedure Rules which states as follows:

“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.”



42. The Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, had this to say about setting aside of a default judgement:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another v Shah* [1968] EA 98, *Patel v E.A. Cargo Handling Services Ltd* [1975] E.A. 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioka* [2004] I KLR 173.

In an irregular default 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 justiae*, 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 issue 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.”

43. Having come to the conclusion that there was failure of service and that the 1st Defendant/Applicant did not attend Court due to the fact that she resides in the United Kingdom, this Court finds that the judgment delivered on 28th July 2022, was irregular.
44. The Court will now turn its attention on how a default judgment should be set aside. While it is a right for a party to be heard in any matter, where he has been given opportunity that he has squandered he must give a satisfactory explanation for his failure to avail himself of the opportunity. He also must demonstrate that he has a good Defence. The defence does not have to be one that must necessarily succeed at the hearing, but it must raise triable issues. As the Court of Appeal guided in the case of James Kanyiita Nderitu (Supra) that while the Court should exercise its discretion to set aside any judgment or order, it must do so judiciously.
45. Having taken into account the reasons given by the 1st Defendant/Applicant for failure to enter her appearance and file Defence, the Court finds the said reasons truthful and convincing. Furthermore, the intended Defence raises triable issues, considering that the 1st Defendant/Applicant claims to be the registered owner of the suit property, and she has provided documentation corroborating her claim.
46. On the issue of whether to grant the 1st Defendant/Applicant leave to file her Defence, this Court notes that the judgement dated 28th July 2022, was in default. The prayer for leave for the 1st Defendant/



Applicant to file a Defence can be carried out where judgement was set aside under Order 10 Rule 11 of the Civil Procedure Rules, as is the present case. This was held in the case of Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui & 2 others [2022] eKLR, where the Court stated as follows:

“As to whether leave to file defence should be granted, I am unable to grant the order for two reasons. One, the order could only be granted if the judgment delivered on 25/05/2021 was set aside under Order 10 Rule 11 or reviewed and set aside under Order 45. To the extent that the two have not materialized, the prayer dies at infancy.”

47. Having carefully considered the instant Notice of Motion Application dated 30th November 2022, the Court finds and holds it merited and the same is allowed entirely in terms of prayers No. 3 & 4. Costs shall be in the cause.

48. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 13TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Kibathi for the Plaintiff/ Respondent

M/s Muiruri for the 1st Defendant/Applicant

2nd Defendant/Respondent - Absent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

13/7/2023

