



Gitau & another v Gathige; Thigiti (Interested Party) (Civil Appeal E331 of 2023) [2025] KEHC 529 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E331 OF 2023

LP KASSAN, J

JANUARY 23, 2025

BETWEEN

FRANCIS NJAU GITAU 1ST APPELLANT

MARY WANJIRU 2ND APPELLANT

AND

SIMON NDUNG’U GATHIGE RESPONDENT

AND

JOSEPH MWANGI THIGITI INTERESTED PARTY

*(Being an appeal from the Ruling of Hon. S.A. Opande. (Mr.) (PM)
delivered on 13th April, 2023 in Nairobi Milimani CMCC No. 631 of 2015)*

JUDGMENT

1. This appeal emanates from the ruling delivered on 13.04.2023 in Nairobi Milimani CMCC No. 631 of 2015. (hereafter the lower Court suit) The proceedings were commenced by way of a plaint filed by Simon Ndung’u Gathige, the Plaintiff before the lower Court (hereafter the Respondent) as against Francis Njau Gitau and Mary Wanjiru, the 1st & 2nd Defendant/Defendants before the lower Court (hereafter the 1st & 2nd Appellant/Appellants) seeking inter alia special damages of Kshs.300,000/-; interest on the above at 10% per month from 07.04.2014 until payment in full; costs of the suit with interest from the date of filing suit; and any other relief that the Court may deem fit to grant.
2. The gist of the Respondent’s averment in his plaint was that on or about the 07.04.2014 he and the Appellants entered into a gentleman’s agreement to lend the Appellants a friendly loan of Kshs. 300,000/-, which amount the Appellants were to return to the Respondent with interest at the rate of 10% per month within a period of one month of the date of the agreement which agreement was



- reduced in writing. That the Appellants in breach of the said agreement defaulted to pay the money due together with interest thereon which breach occasioned the Respondent loss and damage.
3. Despite service of summons to enter appearance and file a defence, the Appellants failed to do so whereupon a request for judgment being lodged by the Respondent, the same was entered and or endorsed against them on 14.05.2015 as prayed in the plaint with a decree being issued thereafter on 09.07.2015.
 4. The Respondent thereafter moved the Court vide the motion dated 04.08.2015 seeking among other orders that a prohibition order do issue prohibiting the 1st Appellant from transferring or charging the property known as Ngong/Ngong/13743 (hereinafter property) in any way and all persons from taking any benefit from such purported transfer or charge until the decree issued by the trial Court is satisfied in full. When the motion came up for hearing on 09.09.2015, the same was unopposed and was consequently allowed as prayed. The latter prompted the Respondent to further move the trial Court vide another motion dated 18.11.2015 seeking inter alia that property be sold by way of public auction by Galaxy Auctioneers at the offices of Galaxy Auctioneers at Pangani Auction Center after Galaxy Auctioneers causing valuation of the said property; and that Galaxy Auctioneers do advertise the auction on the Standard Newspaper after which the auction to take place thirty (30) days from the date of the advertisement. On 17.12.2015, the trial Court upon being satisfied with service allowed the motion as prayed. Eventually, the Respondent filed the motion dated 01.11.2016 seeking that an order do issue confirming the sale of the property to Joseph Mwangi Thigiti (hereinafter the Interested Party) and thereupon the sale do become absolute; that the Chief Executive Officer (E.O) of the subordinate Court do sign any document that may be required to be executed on the part of the Appellants to effect transfer of title to the property purchaser; and that the Court do give directions regarding the balance of the sale price due to the Appellant. Similarly, when the motion came up for hearing on 13.12.2016, the same was allowed with an order that the balance of the sale price be deposited in Court awaiting collection by the Appellants.
 5. It is on the backdrop of the forestated proceedings that the 1st Appellant moved this Court vide the motion dated 30.09.2022 and with the Interested Party thereafter filing the motion dated 24.10.2022. The former motion sought inter alia that the Court be pleased to review, set aside and or vacate the exparte judgment entered in favour of the Respondent and its consequential orders directing inter alia the 1st Appellant pay special damages of Kshs. 300,000/- plus interest; that the Court be pleased to issue an order compelling the Land Registrar Ngong to forthwith and unconditionally revert the title of the property to the 1st Appellant; and that the Court be pleased to grant the 1st Appellant leave to file his defence and other necessary responses out of time.
 6. The gist of the 1st Appellant's deposition was that the affidavit of service of one Michael Njonjo dated 20.03.2015 purporting that he personally received the plaint and summons is a misrepresentation for reason that at the time of purported service he was working in Nanyuki. He went on the depose that the property was undersold given its residual value whereas the surplus of the proceeds of sale of the property had not been surrendered to him to date. He further stated that he had a meritorious defence that raised triable issues therefore it is in the interest of justice that he be accorded an opportunity to file a defence as he is likely to suffer irreparable harm should the Court decline to accord him leave.
 7. On the part of the Interested Party's motion he sought among other orders that he be enjoined as a party to the proceedings; that an order of injunction do issue against the Appellants by themselves, employees, servants and or agents permanently restraining them from entering into, damaging, alienating, disposing and or in any way interfering the property; and that the Appellants do meet the costs of re-establishing the vandalized beacons on the property to the tune of Kshs. 12,000/-. The gist of his deposition was that he had successfully bid for the property at Public Auction conducted by Galaxy



Auctioneers and was thereafter issued with an Auctioneers Certificate of Sale dated 22.04.2016. That he then caused the property to be transferred and registered in his name through the Court therefore as it stands he is an innocent purchaser for value without notice having acquired good title to the property. He went to depose upon a discreet inquiry from neighbors to the property, he was informed that the Appellants vandalized the fence and beacons on the property in question thus necessitating the said motion.

8. The Respondent and Interested Party filed responses dated 01.11.2022 and 24.10.2022 respectively in opposition to the 1st Appellant's motion.
9. The Appellants and Interested Party's motions were canvassed of by way of written submissions. The lower Court in its ruling proceeded to dismiss both motions. The 1st Appellant being aggrieved with dismissal of his motion was provoked into filing the instant appeal, which is premised on the following grounds: -
 1. That the honorable Magistrate erred in law and in fact by dismissing the entire application by the 1st Appellant dated the 30th September 2022 seeking to review, set aside and or vacate an ex parte judgment entered on 17th April 2015 and that the 1st Appellant be granted leave to file his defence and other necessary responses.
 2. That the honorable trial Magistrate erred in law and in fact by erroneously applying his discretion in the determination of the 1st Appellant's application dated 30th September 2022 and finding that the 1st Appellant was duly served with the pleadings and summons to enter appearance in Civil Suit No. 631 of 2015 filed at Milimani Commercial Court's.
 3. That the honorable trial Magistrate erred in law and in fact by dismissing the 1st Appellant's application dated the 30th September, 2022 as thus allowing the Respondent to enjoy the fruits of an ex parte judgment that was made to the exclusion of the Appellant and in violation of his rights to a fair trial, right to property, right to access to justice and the right to a fair hearing as enshrined under Article 25, 40, 48 and 50 of the Constitution respectively.
 4. That the honorable trial Magistrate erred gravely in law and in fact by making a rushed determination that the advertisement for sale of the 1st Appellant's property known as Title Number Ngong/Ngong/13743 on the Standard Newspaper of 18th April, 2016 was sufficient proof of service of summons to enter appearance and service of pleadings upon the 1st Appellant in Civil Suit No. 631 of 2015 filed at Milimani Commercial Courts.
 5. That the honorable trial Magistrate erred in law and in fact by unreasonably trivializing the 1st Appellant's propriety rights enshrined under Article 40 of the Constitution.
 6. That the honorable trial Magistrate erred gravely in law and contravened the principle of proportionality by allowing the 1st Appellant's land known as Title Number Ngong/Ngong/13743 worth approximately Kshs. 8,000,000 (eight million) be sold in execution of an ex parte judgement obtained in recovery of a debt of Kshs. 300,000." (sic)
10. The appeal was disposed of by way of written submissions of which this Court has duly considered together with the record of appeal and pleadings before the trial Court. The duty of this Court as a first appellate court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123; and



11. The Appellant’s motion leading up to the impugned ruling was expressed to be brought inter alia pursuant to Section 1A, 1B & 3A of the CPA, Order 10 Rule 11 and Order 22 Rule 22(1) of the CPR. And as earlier noted in this judgment, it sought among other orders that the subordinate Court be pleased to review, set aside and or vacate the exparte judgment entered in favour of the Respondent. The trial Court in dismissing the said motion in its ruling, stated in part that -:

“7. I have considered the applications herein. I have considered the responses.....

8. On the application dated 30th September 2022, I note that though the Plaintiff was served he filed no response. I would equally don the same given the circumstances. If I got what I wanted in the suit and justice was served in my favour of what need would I want to be involved in issues closed and which no appeal has been preferred.

9. Supposing the 1st defendant was not served at all, there is evidence that before the sale took place, there was an advertisement place in the Standard Newspaper of 18th April 2015. The intended Interested Party contends that it is pursuant to the advertisement that he bided for the property. The advertisement clearly published the case number the subject upon which the auction was to take place. It cannot therefore be that the Defendant was not aware.

10. The auction proceeded as advertised and buyer paid pursuant to a certificate of sale of 22nd April, 2016. In essence, the decree of this Court was legally executed rendering this Court functus officio. The process is irreversible as the same has run its full cause.

11. The application herein has no merit and the same shall be dismissed. However, any further/subsequent execution against the defendant shall be stayed unless the plaintiff takes out a notice to show cause against the defendant.” (sic)

12. Evidently, the Appellant’s motion before the lower Court invoked the relevant provisions of the CPR providing for the setting aside of the default judgment among others. Nevertheless, specific to the above is Order 10 Rule 11 of the CPR which 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.”

13. It is trite that the grant or refusal of an application to set aside or vary such judgment or any consequential decree or order, is discretionary. The discretion is wide and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. Therefore, in considering this appeal, the Court is guided by the principles on discretion enunciated by Court of Appeal in Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR. The object of the discretion conferred by Order 10 Rule 11 of the CPR was judiciously addressed in the case of Shah –vs- Mbogo & Another [1967] E.A 116:

“The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not



designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

14. Platt JA (as he then was) in *Bouchard International (Services) Ltd vs. M’Mwereria* [1987] KLR 193 as cited with approval in *Miarage Co Ltd v Mwichuri Co Ltd* [2016] eKLR had this to say regarding the exercise of the discretion of the kind invoked here by the Appellant: -

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to be set aside *ex debito justitiae*. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so 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 has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. 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, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court’s inherent jurisdiction”.

15. With the foregoing in reserve, what falls to be determined on this appeal is whether the trial Court properly exercised its discretion or misdirected itself and as a result arrived at a wrong decision, by dismissing the Appellant’s motion before it. The key sticking point before the trial Court touched upon the regularity of the judgment and whether it was liable for setting aside “*ex debito justitiae*” or otherwise. As earlier captured in this judgment, the Appellant’s affidavit material in support of the motion principally assails service of the pleadings and summons on the premise of the return of service of one Michael Njonjo dated 20.03.2015. The trial Court in its ruling observed that no response was tendered by the Respondent. However, a cursory review of the lower Court record reveals that a response was tendered by the Respondent. That said, the gist of the said response was that service was duly effected and acknowledged by the Appellants meanwhile the latter was subsequently served with all processes leading up to the sale of the property therefore at all material times the 1st Appellant was alive to the Court proceedings.



16. An examination of the record of appeal and original record, in order to establish whether the summons to enter appearance were duly served, it can be garnered therefrom that the lower Court proceedings were instituted on 12.02.2015 whereafter summons were extracted in respect of the Appellants. It further appears that upon effecting service of the summons, the Respondent lodged a request for judgment on 09.04.2015 of which was supported and or accompanied by the affidavit of service of a process server deposited by one Michael Njonjo dated 20.03.2015. In his affidavit of service, the process server deposed at paragraph 3 that: -
- “ 3. That on the same day 20th March 2015 about 4.21pm in the company of the plaintiff and one Samuel Ndung’u Kung’u Kinyari, I proceeded to the residence of the defendants Francis Njau Gitau & Mary Wanjiru Njau who are husband and wife situate at Rongai, Kajiado County within the Rongai Town along Nairobi/Rongai Road, which residence was pointed out to me by the plaintiff and Samuel Ndung’u Kinyari where I met the 1st defendant who was introduced to me by the plaintiff and the said Samuel Ndung’u Kinyari. I introduced myself to the 1st defendant and informed him the purpose for my mission and enquired for the whereabouts of the 2nd defendant. The 1st defendant informed me that the 2nd defendant is his wife and was not in the house at the time and that he has authority to accept service on her behalf upon which I handed to the 1st defendant the summons and the plaint in respect of both the 1st & 2nd defendant which he accepted and signed on my copy of the summons acknowledging service which copies of the plaint and summons I return to this honorable Court duly served.” (sic)
17. The Appellant through his deposition paints the picture that at the time of purported service he was working and or stationed in Nanyuki, therefore it was implausible that the process server personally effected service of summons. To shore up the following deposition, the Appellants motion was further supported by the affidavit of Benson Musyoka, who deposed that between 2010 and 2017 the 1st Appellant was his workmate at Nick & Lynn Swanepoel Aim International - Nanyuki wherein his was the latter’s supervisor. He went on to depose that on the date the summons were purported served, 20.03.2015, the 1st Appellant was at work and not in Rongai as alleged by the process server.
18. The Appellants from their grounds of appeal and submissions before this Court has made heavy weather of the fact the trial Court gravely erred when it arrived at the conclusion that the newspaper advertisement on the auction was sufficient service given that the same did not prove that summons to enter appearance was served upon the Appellants. That in any event, if the Respondent opted for substituted service he ought to have formerly approached the Court with the requisite application for substituted service of which he did not. It was further contended that the burden on proof of service was on the Respondent, in light of the affidavit in support of the motion disputing service of summons whereas the trial Court failed to sufficiently address itself to the return of service proving that summons were actually served. In agitating the totality of the forestated, the Appellant cited the provisions of Order 5 Rule 1, 2 & 17 of the CPR, the decisions in *Frenze Investments Limited v Kenya Way Limited* [2001] eKLR, *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526, *Edward Muriga through Stanley Muriga v Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* as cited with approval in *Janet Kaphiphe Ouma & Another v Maries Stopes International (Kenya)*, Kisumu HCCC No. 68 of 2007 (unreported).
19. The Respondent on his part challenged the delay in filing of the motion before the trial Court given that the Appellants had appointed counsel in 2017 yet its motion seeking to set aside judgment was



filed in 2022. It was further submitted that the service of summons was proper whereas the Appellants challenge of the newspaper advertisement is immaterial to the question of service. The Respondent equally called to aid the decision in *Shadrack Arap Baiwo v Bodi Bach* [1987] eKLR to assert that the position in law on service of summons is that the burden rests upon the person denying service to disprove service. Alongside the latter decision the Respondent cited the decisions in *Board of Management St Augustine Secondary School v Chambalili Trading Co. Ltd* [2021] eKLR, *Gupta-v- Continental Builders Ltd* (1978) KLR 83, *William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR, *Malde Pleating Industries Limited v Bank of Baroda Limited & another* (Civil Case E828 of 2021) [2022] KEHC 273 (KLR), [*Natural World Mombasa Safaris Ltd v Karuri \(Civil Appeal E045 of 2022\)*](#) [2022] KEHC and *Okesa v Deposit Protection Fund Board* (Civil Case E001 of 2021) [2024] KEHC 1915 (KLR) to assert that no triable issues have been advanced by the Appellants and that it would be moot for this Court to exercise its discretion in favour of the Appellants in light of the fact that the property attached in execution has since been sold to the Interested Party.

20. Undoubtedly, it is trite the service of summons on a defendant ought to be in person and from the Process Server's deposition the same appears to have been adhered to in respect of both Appellants. Further, Order 5 Rule 15(1) provides that:- "The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require." A review of the return service on record shows compliance with the rules of procedure as the serving time, manner and place where the summons was served. Concerning proof of service, as rightly argued by the Respondent, since the Appellants disputed service, they bore the burden disproving service and or proper service of the summons as required by law and not vice versa. Given that service was adamantly disputed, the Appellants were at liberty to invoke Order 5 Rule 16 of the CPR to seek the cross examination of the Process Server, but they eschewed doing so.
21. That said, as to whether the lower Court properly exercised its discretion or misdirected itself on the issue of service, the learned Magistrate must be faulted on his approach and analysis of the question of service given no co-relations between the newspaper advertisement and the question of service of summons. The advertisement related to the auction of the property and was an event after judgment and decree had already been entered and issued as against the Appellants. The learned Magistrate glaringly failed to address himself to the process server's affidavit of service however despite his approach still arrived at the correct conclusion that the Appellants motion lacked merit given this Court's earlier discussion. Here, the procedure relating to service of the summons in question appears to have been complied with and the Appellants contention does not convince this Court otherwise. At the risk of repetition, despite the approach by the trial Court it did not err in when it arrived at the conclusion that the Appellants motion lacked merit.
22. The fore stated notwithstanding, it is not lost on the Court as held in *Miarage Co Ltd* (supra) where there is a regular judgment the Court would not usually set aside the same unless it is satisfied that there is a defence on merit, namely a prima facie defence which should go to trial or adjudication. Recently, the Court of Appeal in *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR set out the parameters to be considered when setting aside a regular judgment as follows:

"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 on the whole it is in the interest of justice to set aside the default judgment, among other.

See *Mbogo & Another v. Shah (supra)*, *Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986] KLR 492* and *CMC Holdings v. Nzioki [2004] 1 KLR 173*.”

23. Firstly, concerning the explanation proffered by the Appellants on failure to file a defence, the same has been addressed earlier in this judgment, and its merit wanting. Secondly, in respect of delay, the request for judgment was endorsed on 14.05.2015 with the Appellants motion seeking to set aside being filed on or about 30.09.2022. The delay therein has not been explained. Thirdly, the Appellants have in their motion before the trial Court sought leave to file a defence out of time. However, a perusal of the affidavit in support of the motion, no draft defence has been annexed thereto in order to demonstrate there indeed exists an intended defence that raises triable issues. Finally, aside from the likely prejudice that would be occasioned to the Respondent and Interested Party if the default judgment was to be set aside, the Appellant’s have further not demonstrated that it would be in the interest of justice to set aside the default judgment.
24. Order 10 unlike Order 36 of the CPR does not provide for a defence being raised through depositions in the affidavit material. The 1st Appellant appear to seek refuge in his depositions in that regard. However, recently the Court of Appeal in *Nature Pharmacy Ltd & another v Gichuhi (Civil Appeal 245 of 2016) [2022] KECA 827 (KLR)* stated that; -
 - “ 21. Should the appellants have annexed a draft defence in their application to set aside the ex parte judgment? The answer is pretty obvious. We say so bearing in mind the holding of this Court in the case of *Nairobi City Council Vs. Thabiti Enterprises Limited Civil Appeal No. 264 of 1996 (UR)* thus:

“ The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial court and which the court will have to determine at the trial.”
 22. To say that the trial court should have allowed an application where no intended defence had been annexed is far from the desired truth as the court



would not be in a position to tell whether a party had an arguable defence or one that was not frivolous. As the old adage holds, ignorance of the law is no defence. The excuse proffered by the 2nd appellant for the failure being that he was a layman does not arise. The law in any event has no different provisions for laymen, educated people, those represented by advocates and those representing themselves. The choice having been made by the appellants to act in person and file the application, they were bound by rules of procedure encapsulated in the Civil Procedure Act and the rules made thereunder. The requirement to annex a draft defence to an application to set aside a judgment is to enable the trial court to exercise its discretion properly.” [emphasis added]

See also;- CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR.

25. Having failed to annex a draft defence, it is difficult to see how discretion to allow the Appellants to defend the suit could be exercised by the trial Court. It has been repeatedly held that the discretion to set aside such judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, as stated in *Shah v Mbogo* (supra). While the right to be heard is a matter of justice and an integral part of the rule of law and should not be treated lightly, it also follows that onus was on the Appellants to satisfy the considerations pertinent to the exercise of the discretion to set aside. This discretion is exercised judicially and based on known principles, rather than whimsically. A party seeking to set aside interlocutory judgment must not be seen to presume on the Court’s discretion.
26. Consequently, the trial Court was not in error in dismissing the Appellants motion notwithstanding the route it took in doing so. In the end the instant appeal lacks merit too and ought to suffer the unfortunate providence of dismissal with the attendant costs issuing in favor of the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

No appearance for the Applicant

Chege for Respondent

Guyo - Court Assistant

