China Railway No 10 Engineering Group Company Limited v Juma (Civil Appeal E025 of 2024) [2025] KEHC 6888 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E025 OF 2024

DK KEMEI, J

MAY 22, 2025

BETWEEN

CHINA RAILWAY NO 10 ENGINEERING GROUP COMPANY LIMITED ..... APPELLANT

AND

ARZEENA NASIRBANU GULAMALI ADATIA JUMA ..... RESPONDENT

(Being an appeal form the Ruling delivered by Hon. Benjamin Limo (PM) on 31/5/2024 in Siaya MCCC No. E057/2023)

JUDGMENT

1. The appeal arises from the ruling of Hon. Benjamin Lomo (PM) dated 31/5/2024 in Siaya Chief Magistrate's Court MCCC No. E057/2023 wherein he declined to set aside the exparte judgment thereby dismissed the Appellant's application dated 29/2/2024 with costs to the Respondent.

2. Aggrieved by the said decision the Appellant filed a Memorandum of Appeal dated 26/6/2024 wherein it raised the following grounds of appeal:

    1. That the learned magistrate erred in law and in fact in finding that the exparte judgment entered against the Appellant was a regular one despite overwhelming evidence demonstrating the proper service of summons and pleadings was not effected.

    2. That the learned magistrate erred in law and in fact in failing to completely analyze the service of summons and pleadings upon the Appellant thereby arriving at an erroneous decision that the exparte judgment entered was regular.

    3. That the learned magistrate erred in law and in fact in failing to appreciate that the application was undefended and the averments made therein uncontroverted as such it was not challenged

that proper service of summons and pleadings had not been effected and as such the learned magistrate relied on material not presented before the court.

4. That the learned magistrate erred in law and in fact in finding that the decretal sum had been paid in full the court was functus officio which position is bad in law.

5. That the learned magistrate erred in law and in fact in finding that the court had no jurisdiction to recall a paid up judgment award yet the court had jurisdiction where such payment was illegal to recall the same as the court cannot aid an illegality.

6. That the learned magistrate erred in law and in fact in completely failing to consider the fact that the garnishee application to wit issuance of the order nisi and absolute was not properly followed thus arriving at the erroneous decision that the judgment sum was properly paid out.

7. That the learned magistrate erred in law and in fact in failing to appreciate that the that the legal process of garnishee application to wit issuance of order nisi and absolute, was not properly followed thus arriving at the erroneous decision that the judgment sum was properly paid out.

8. That the learned magistrate erred in law and fact in failing to appreciate the grounds on the face of the application the annexures thereto and the totality of the court's record thereby arriving at an erroneous decision of dismissing the Appellant's application which was merited.

The Appellant therefore prayed that the ruling dated 31/5/2024 be set aside and substituted with an order allowing the Appellant's application dated 29/2/2024 and that the matter be remitted back to the lower court and be heard by a different magistrate other than Hon. Limo. The Appellant also seeks for costs of the appeal.

3. The appeal was canvassed by way of written submissions. Both parties duly complied.

4. This being the first appellate court, its duty is to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. See Selle Vs. Associated Motor Boat Co. Ltd [1968] EA 123.

5. A perusal of the lower court reveals that an interlocutory judgment was entered against the Appellant on 4/10/2023 in default of entry of appearance and filing of defence within the statutory period for the sum of Kshs4,762,469/= as prayed in the plaint. The Respondent later filed his Bill of Costs dated 23/10/2023 which was allowed on 24/10/2023. The Respondent later filed a garnishee application dated 1/11/2023 which was allowed in terms of prayers 2,3, and 4 thereof and that the decree nisi was made absolute. The Appellant later filed an application dated 29/2/2024 which was dismissed on 31/5/2024 which precipitated this appeal.

6. The Appellant herein contends that it was not served with summons to enter appearance or served with the Respondent's application seeking for a garnishee order and that it should be allowed to defend the suit as it has already availed a draft copy of the defence.

7. The appeal was canvassed by way of written submissions. Both parties duly complied.

8. The Appellant vide submissions dated 10/2/2025 raised the following issues for determination:

i. Whether the Learned Magistrate erred in fact and in law in the Ruling delivered on 31st May, 2024.

ii. What orders should this Honourable Court make?

9. As regards the 1st issue, as to whether the ex parte judgment was regular, it was submitted that the Appellant was not served with pleadings and summons and that the affidavit of service filed by the Respondent refers to one Mr. Wang who is unknown to the Appellant, and that the pleadings and summons were neither stamped nor signed by the alleged representative. It was submitted that the alleged service upon the Appellant was improper and contrary to the procedure stipulated by law and that reliance was placed on the provisions of Order 5 Rule 3 of the Civil Procedure Rules, 2010, which provide as follows: -

> " Service on a Corporation [Order 5 Rule 3]
>
> Subject to any other written law, where a suit is against a corporation the summons may be served-
>
> a. on the secretary, director or other principal officer of the corporation; or
>
> b. if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—
>
> i. by leaving it at the registered office of the corporation;
>
> (ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
>
> ii. if there is no registered office and no registered office or physical address of the corporation, by leaving it at the place where the corporation carries on business; or
>
> iii. by sending it by registered post to the last known postal address of the corporation.

10. It was submitted that by virtue of the Respondent failing to adhere to the procedure for service upon a corporation laid down in Order 5 Rule 3 of the Civil Procedure Rules, 2010, the Appellant urges this court to find that the pleadings and summons were not properly served upon the Appellant and that the ex parte judgment entered against the Appellant was irregular.

11. It was further submitted that the post judgment proceedings were improper for reasons that; the Request for Judgment filed by the Respondent was not supported by an affidavit of service, the Appellant was not notified of the post-judgment proceedings and it was not served with; the party and party bill of costs, a copy of the Decree, the notice of entry of judgment and the Application for warrants of attachment.

12. As regards the issue of service of notice of entry of judgment, reliance was placed on the provisions of Order 22 Rule 6 of the Civil Procedure Rules, 2010, which state as follows"

> " ...provided that, where judgment in default of appearance or defence has been entered against a Defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

13. In the case of Syrilla A. Barasa & 2 others v Margaret Aseka Barasa [2022] eKLR, the court held that: -

> " The Judgment in Default dated 7th December 2016 was irregular and unenforceable and is set aside. The Warrant of Execution issued on 8th February 2017 are also set aside. Notice of Judgment was not served and therefore, there was no act of default to justify issuing a warrant. In addition, to the Execution being set aside as a consequence of the Appeal succeeding (the domino effect), the Warrant of Execution and the Proclamation are also separately and expressly set aside."

14. It was submitted that the Appellant was not served with the garnishee application despite an order of court directing the same as per page 9 of the Respondent's Supplementary Record of Appeal. That the affidavit of service sworn on 8th November, 2023 reveals that service was only effected on the garnishee, KCB Bank Kenya Limited while the Appellant was left out. Reliance was placed in the case of Mengich T/A Mengich & Co. Advocates & Ano. v Joseph Mabwai & 10 Others [2018] eKLR, where Mativo J. (as he then was) stated that: -

> " The essence of the Order Nisi is to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the Judgment-Creditor of the amount of debt owed to the Judgment-Debtor. It is requirement that a copy of the order Nisi must be served on the Garnishee and Judgment-Debtor at least 7 days before the adjourned date of hearing. The second stage is for the Garnishee Order Absolute, where on the adjourned date, the Garnishee fails to attend court or show good cause why the Garnishee Order Absolute. The Garnishee, where necessary also have an option of disputing liability to pay the debt. The Applicants ignored these procedures".

15. As regards the finding that the trial court has been rendered functus officio and has no jurisdiction to recall a paid-up judgment, the Appellant placed reliance in the case of Kihara Mercy Wairimu & 7 others v Kenya School of Law & 4 others [2020] eKLR, where the court stated that;

> " The doctrine of functus officio is clear. It does not prevent the court from correcting clerical errors nor judicial change of mind even after the court's decision has been communicated to the parties as the proceedings are only fully concluded and court becomes functus officio; when its judgment or order has been perfected as the purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision. That any challenge thereafter can only be referred to a higher court if the right is available."

16. Further, the Appellant relies on the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010 which provide that;

> " Where under this Order judgement has been entered or the suit has been dismissed the court on application, may set aside or vary the judgement or Order such terms as may be just."

17. Further, in the case of Patel –vs E.A Cargo Handling Services Ltd (1974) E.A 75 the court stated;

> " The discretion to set aside 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 has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

18. The Appellant further submitted that it is trite law that the power to set aside a judgment is discretionary upon sufficient cause being shown to warrant the same. Reliance was placed in the case of Wachira Karani v Bildad Wachira [2016] eKLR where Mativo J (as he then was) held:

> "Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

19. It was submitted that the Appellant has shown sufficient cause in proving that not only was it not served with the summons and pleadings but with the garnishee application as well and thus urged this court to find so and proceed to allow the appeal so that the Appellant can get its justice by being allowed to ventilate its case on merit.

20. It was the view of the Appellant that the trial magistrate erred in his ruling delivered on 31st May, 2024 for failing to set aside the ex parte judgment and garnishee order absolute and all consequential pleadings thereafter, despite overwhelming evidence proving that the Appellant was first not served with the pleadings as well as the garnishee order nisi and that the Appellant should be allowed to contest the suit.

21. Finally, the Appellant submitted that his court grants following orders; the Ruling delivered by the Honourable Benjamin Limo (PM) on 31st May 2024 be set aside in its entirety, the said Ruling be substituted with an Order allowing the Appellant's Application dated 29th February, 2024 as prayed, the matter be referred back to the Chief Magistrates Court at Siaya to be heard and determined by a Magistrate other than Hon. Benjamin Limo (PM) and costs of this Appeal be borne by the Respondent, as prayed for in the Memorandum of Appeal date 26th June, 2024.

22. On the issue of costs of this Appeal, it was submitted that it is trite law that costs follow the event, pursuant to the provisions of Section 27 of the *Civil Procedure Act*, 2010. The Appellant therefore urges this court to allow the appeal with costs.

23. The Respondents submissions are dated 4/3/2025.

24. The Respondent vide submissions dated 4/3/2025 gave the history of the matter which was to the effect inter alia; that the Respondent filed suit against the Appellant seeking payment of Kshs.4,762,469.00 at the trial court; that the Appellant failed to enter appearance and a default judgment was entered 4th October 2023 and decree issued on 25th October 2023; that the Respondent executed the Decree through garnishee proceedings upon which the entire decretal sum (cost inclusive) of Kshs.4,953,400.00 was fully realized in December 2023; that the Respondent's position is that proper service had been effected all along; that the Appellant filed Notice of Motion dated 29th February 2024 seeking among other orders to set aside judgment and decree together with garnishee proceeding; that In opposition, the Respondent filed Replying Affidavit dated 13th May 2024 as per the Supplementary Record of Appeal dated 17th December 2024; that On 31st May 2024 the trial court delivered a Ruling to the effect that since its judgment and decree had been fully executed, it became functus officio. That the only available avenue in the circumstance would be an appeal against the Judgment and Decree to a higher court; that the Appellant then sought to Appeal against this Ruling disagreeing that the trial court was not functus officio; that the Appellant filed Memorandum of Appeal dated 26th June 2024 stating 8 grounds of Appeal one of them being that the court erred in finding that it was functus officio;

25. The Respondent identified for issues for determination which are inter alia; Whether the Appeal is competent; whether the trial court became functus officio; whether the trial court could hear and determine the Appellant's notice of motion dated 29th February 2024; whether the Honourable Court can grant reliefs sought in the Appeal.

26. As regards the first issue, the Respondent submitted that this Appeal is incompetent and should be struck out because the Record of Appeal does not contain a certified copy of Order appealed from arising out of the trial court's Ruling and that the Record of Appeal does not contain authority to file the Appeal.

27. The Respondent submitted that the Appellant had more than enough time to put together his record of Appeal and file all crucial documents in this Appeal but failed to file a copy of the certified order appealed from and which is fatal and beyond cure. The Respondent submitted that the procedure for filing Appeals from Orders, like in the instant case, is provided for under Order 43 Rule 2 of the Civil Procedure Rules which provide that the rules of Order 42 shall apply, so far as may be, to appeals from orders. Order 42 Rule 2 of the Civil Procedure Rules provides for the filing of a certified copy of order appealed from. Order 42 Rule 13(4)(f) is couched in mandatory terms that an order appealed from is to be filed.

28. Flowing from the foregoing, the Respondent submitted that the failure to annex the copy of the order appealed against was fatal to the Appellant's case and that the same was not in line with the provisions of Order 42 Rule 2 of the Civil Procedure Rules as read with Section 79 B of the *Civil Procedure Act* which empowers this court to reject the appeal summarily. The Respondent pointed out that the certified copy of the order appealed from was not filed alongside the memorandum of appeal. The Respondent sought reliance in the case of Salama Beach Hotel Limited v Mario Rossi [2015] eKLR where the Court of Appeal held that the Appeal was incompetent and struck it out for reason that the Record of Appeal did not contain a certified copy of the order appealed from. The Respondent further contended that the Appellant failed to file a supplementary record of appeal to bring on record a certified copy of the order appealed from despite being given the opportunity to do so. Again, in the case of Lucas Otieno Masaye v Lucia Olewe Kidi [2022] eKLR the court struck out an appeal where the Appellant failed to attach a decree.

29. The Respondent submitted that the Appellant being a corporation, the Record of Appeal should have had resolutions authorizing institution and prosecution of this Appeal. In the absence of this authority, the Appeal therefore becomes fatally defective and incompetent. A reliance was placed in the case of Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR where the High Court reaffirmed the position that for a suit to be institute on behalf of a Company there should be resolutions to that effect. In that case, the court relied on several decided cases and went ahead to dismiss suit for lack of resolutions. Paragraph 13 of the aforesaid decision, stated:

> "
>
> "13. As regards the necessity for a company Resolution to back the institution of the suit, Odunga J. in his Judgement in the Leo Investments case (supra) referred to the holding of Hewett, J. in Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000 as follows:
>
> "It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles

> of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified." ...

30. Based on the foregoing, the Respondent submitted that this Appeal is incompetent and that it should be struck out at this very stage with costs to the Respondent.

31. As regards the issue of whether the trial court become functus officio, the Respondent submits that the trial court's finding vide Ruling dated 31st May 2024 on the Appellant's Notice of Motion dated 29th February 2024 is that the trial court was functus officio as its judgment and decree had been fully perfected thus it lacked jurisdiction to reopen the case. The Respondent agrees with this finding and urges this Honourable Court to not disturb it as it is indeed the correct position.

32. The Respondent further relies on the doctrine of functus officio in Kihara Mercy Wairimu & 7 others v Kenya School of Law & 4 others [2020] eKLR cited by the Appellant. In that case, the court stated as follows regarding the functus officio doctrine at paragraph *27*:

> "
>
> "27. The issue that needs to be resolved in this application is whether this Honourable Court in determining the present application is functus officio. When is it that the court is said to be functus officio"
>
> In Kwale International Sugar Company Ltd vs Kenya Board of Standards and 5 others (2019) eKLR the court states thus: -
>
> "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. PROCEEDINGS ARE ONLY FULLY CONCLUDED, AND THE COURT FUNCTUS, WHEN IT JUDGMENT OR ORDER HAS BEEN PERFECTED. The purpose of the doctrine is to provide finality. Once proceedings are final concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

33. The Respondent submitted that in view of the foregoing authority the trial court becomes functus officio upon the full execution of the judgment or decree. It was submitted that the Appellant had full certified the decree and therefore it could not come back to court and seek to disturb a regular judgment that had been entered against it and fully certified by the Appellant. The upshot then becomes that the trial court could not reopen the case and that the only forum for reopening the case would be upon Appeal against judgment and decree of the trial court. It was submitted that the present appeal is against the court's orders per the Ruling of 31st May 2024 and not the Judgment and Decree thus it equally does not provide the forum for interfering with the judgment and decree from which no Appeal has been preferred.

34. As regards the question whether the trial court could hear and determine the Appellant's notice of motion dated 29/2/2024, the Respondent submitted that being functus officio, the trial court could not hear and determine the Application since the trial court had performed all its duties in the case and execution had been done and that jurisdiction goes to the appellate court. As the trial court had rendered a judgment which had already been executed, the Appellant ought to have appealed against

it but not to file an application since execution had occurred and that there would be nothing to stay, vary or set aside.

35. The Respondent finally submits that the orders sought cannot be granted since the same seeks the trial court reopen a case it concluded without preferring an appeal against the Judgment and Decree of the trial court.

36. The Respondent in conclusion urged this court to dismiss the appeal with costs.

37. I have considered the record of appeal as well as the rival submissions. The issue for determination is whether the trial court's decision in dismissing the Appellant's application dated 29/2/2024 was merited.

38. It is noted that the Appellant had lodged its application dated 29/2/2024 seeking to set aside the Exparte proceedings which included Garnishee Order as well as an order to set aside and or vary the trial court's judgment delivered on 4/10/2023. The Respondent contends that the Exparte judgment dated 4/10/2023 is a regular judgment that should not be interfered with. Further, the Respondent has also contended that the Appellant's application aforesaid only targeted the Garnishee proceedings and not the exparte judgment proper. This is further from the truth because the Appellant's prayers in its application (No. 7) sought for the setting aside/varying the trial court's exparte judgment aforesaid. Hence, I find that the Appellant had approached the trial court appropriately. As to whether the ex parte judgment was regular, the Appellant has claimed that it was not served with pleadings and summons and that the affidavit of service filed by the Respondent refers to one Mr. Wang who is unknown to the Appellant, and that the pleadings and summons were neither stamped nor signed by the alleged representative. The Appellant therefore contended that the alleged service upon it was improper and contrary to the procedure stipulated by law. Indeed, service of summons and processes upon institutions or bodies is guided by the provisions of Order 5 Rule 3 of the Civil Procedure Rules, 2010, which provide as follows: -

> " Service on a Corporation [Order 5 Rule 3]
>
> Subject to any other written law, where a suit is against a corporation the summons may be served-
>
> c. on the secretary, director or other principal officer of the corporation; or
>
> d. if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—
>
> iv. by leaving it at the registered office of the corporation;
>
> (ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
>
> v. if there is no registered office and no registered office or physical address of the corporation, by leaving it at the place where the corporation carries on business; or
>
> vi. by sending it by registered post to the last known postal address of the corporation.

39. From the foregoing provision, it is clear that the Respondent upon being notified that the service upon the Appellant was improper, was to avail watertight evidence that indeed the Appellant had

been properly served. The affidavit of service relied upon by the Respondent only indicates that the summons and pleadings were left to an individual called Mr Wang. The pleadings returned by the process server does not have a stamp of the Appellant's company. Further, the record shows that even during the Garnishee proceedings, the Appellant who was the judgment debtor was never served in order to enable it to contest those proceedings. The Respondent was only interested in serving the bank with the garnishee application as well as the decree nisi. The Respondent's failure to adhere to the procedure for service upon a corporation laid down in Order 5 Rule 3 of the Civil Procedure Rules, 2010, the Appellant urges this court, I find that the pleadings and summons were not properly served upon the Appellant and that the ex parte judgment entered against the Appellant was irregular.

40. As noted above, the post judgment proceedings were hurriedly conducted and which caught the Appellant by surprise. This can be seen by the documents filed by the Respondent such as Request for Judgment which was not supported by an affidavit of service, the post-judgment proceedings were not served upon the Appellant and likewise party and party bill of costs, a copy of the Decree, the notice of entry of judgment and the Application for warrants of attachment. The Appellant maintains that it was not served with the garnishee application despite an order of court directing the same as confirmed by the court record. The affidavit of service sworn on 8th November, 2023 reveals that service was only effected on the garnishee, KCB Bank Kenya Limited while the Appellant was left out. In the case of Mengich T/A Mengich & Co. Advocates & Ano. v Joseph Mabwai & 10 Others [2018] eKLR, Mativo J. (As he then was) stated that: -

> " The essence of the Order Nisi is to direct the Garnishee to appear in court on a specified date to show cause why an order should not be made upon him for the payment to the Judgment-Creditor of the amount of debt owed to the Judgment-Debtor. It is requirement that a copy of the order Nisi must be served on the Garnishee and Judgment-Debtor at least 7 days before the adjourned date of hearing. The second stage is for the Garnishee Order Absolute, where on the adjourned date, the Garnishee fails to attend court or show good cause why the Garnishee Order Absolute. The Garnishee, where necessary also have an option of disputing liability to pay the debt. The Applicants ignored these procedures".

41. In all those situations, the Appellant was not in the know until the execution commenced. I find this was irregular and meant to steal a match from the Appellant.

42. The Appellant has faulted the Respondent regarding the issue of service of notice of entry of judgment. It maintained that even though the Exparte judgment had been entered and the Respondent was under obligation to serve it with the requisite Notice of Entry of Judgment as provided for under Order 22 Rule 6 of the Civil Procedure Rules, 2010, which provides as follows:

> "...provided that, where judgment in default of appearance or defence has been entered against a Defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

43. The importance of service of entry of judgment is to alert or put on notice the person against whom judgment has been entered so as to enable that party to organize to address the said judgment. This

system helps to prevent unwarranted ambushes. In the case of Syrilla A. Barasa & 2 others v Margaret Aseka Barasa [2022] eKLR, the court held that: -

> " The Judgment in Default dated 7th December 2016 was irregular and unenforceable and is set aside. The Warrant of Execution issued on 8th February 2017 are also set aside. Notice of Judgment was not served and therefore, there was no act of default to justify issuing a warrant. In addition, to the Execution being set aside as a consequence of the Appeal succeeding (the domino effect), the Warrant of Execution and the Proclamation are also separately and expressly set aside."

44. Setting aside of exparte judgments is an exercise of discretion by the trial court and which must be exercised judiciously and not capriciously. A party who approaches the court with such a request is under obligation to present sufficient reasons why it was not able to file his/her/its response to a pleading that has been filed by the opposite party. The trial court is then called upon to exercise its discretion and consider the request for setting aside of the particular judgment or order. In the case of Patel –vs E.A Cargo Handling Services Ltd (1974) E.A 75 the court stated;

> " The discretion to set aside 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 has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

45. Further, it is trite law that the power to set aside a judgment is discretionary upon sufficient cause being shown to warrant the same. In the case of Wachira Karani v Bildad Wachira [2016] eKLR where Mativo J (as he then was) held:

> " Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

46. The Appellant has maintained that it was not served with the summons and pleadings as well as the garnishee application and thus it has urged this court to allow this appeal in order to enable the Appellant to ventilate its case on merits before the lower court.

47. The Respondent has stood its ground and maintained that the trial court could not entertain the Appellant's application dated 29/2/2024 because the court had become functus officio as its judgment and decree had already been fully perfected and therefore the court lacked jurisdiction to reopen the case. The learned counsel for the Respondent cited the case of Kihara Mercy Wairimu & 7 others v Kenya School of Law & 4 others [2020] eKLR, where the court held;

> " The doctrine of functus officio is clear. It does not prevent the court from correcting clerical errors nor judicial change of mind even after the court's decision has been communicated to the parties as the proceedings are only fully concluded and court becomes functus officio; when its judgment or order has been perfected as the purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision. That any challenge thereafter can only be referred to a higher court if the right is available."
>
> Further, the Respondent's counsel relied on the case of Kwale International Sugar Company Ltd vs Kenya Board of Standards and 5 others (2019) eKLR the court states thus: -

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind Even When A Decision Has Been Communicated To The Parties. Proceedings Are Only Fully Concluded, And The Court Functus, When It Judgment Or Order Has Been Perfected. The purpose of the doctrine is to provide finality. Once proceedings are final concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

48. Whereas the above doctrine of functus officio has been invoked by the Respondent, it is instructive that the trial court upon conclusion of a matter is still seized with jurisdiction and power to entertain applications from parties seeking orders for setting aside and/or varying certain orders. All courts are not bound by strictu sensu doctrines which tend to cause injustice in certain circumstances. The setting aside orders are equitable remedies and that courts being courts of equity are imbued with milk of kindness and that they consider sufficient reasons presented by the parties. This can be seen by the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010 which provide that;

> " Where under this Order judgement has been entered or the suit has been dismissed the court on application, may set aside or vary the judgement or Order such terms as may be just."

49. flowing from the foregoing, it is clear that the trial court did not become functus officio in view of the fact that the Appellant in its application dated 29/2/2024 had sought for the setting aside of the exparte judgment. Indeed, the trial magistrate appears to have misinterpreted the Appellant's application when he held that the Appellant had only prosecuted the application based on the garnishee proceedings and failed to lodge an appeal against the judgment of the trial court. Under the circumstances prevailing, the Appellant was entitled to come up with a two pronged approach wherein it sought stay of the garnishee proceedings as well as an order to set aside the exparte judgment. It was not possible for the Appellant to proceed and lodge an appeal against the Exparte judgment without first approaching the trial court to set it aside. Had the trial court set aside the judgment, the issue on an appeal would not have arisen at the time until the conclusion of the matter by the trial court in which case the Appellant would still exercise its right of appeal if it lost the case in the lower court. it was therefore erroneous for the learned trial magistrate to find that the judgment and decree had been fully perfected. The trial court was still seized of the matter and had not become functus officio.

50. The Respondent has raised the issue that the Appellant did not attach the copy of the decree with the Memorandum of Appeal and further failed to include it in the record of appeal and therefore urged the court to reject the appeal summarily. It also claimed that the Appellant failed to file the supplementary record of appeal. It is instructive that in most cases the Appellant is under obligation to file and serve the record of appeal and that where it is established by the Respondent that certain pleadings have not been captured in the record of appeal, the Appellant is usually given an opportunity to file a supplementary record. However, if the Appellant fails to file a supplementary record, the Respondent is always called upon to file the same. Even though the Respondent has blamed the Appellant for failing to file the supplementary record, the Respondent on her part has not filed any. In the circumstances, I am inclined not to strike out the appeal as urged by the Respondent.

51. The Respondent has also challenged the appeal on the ground that the Appellant while filing the application before the trial court failed to obtain the requisite in the form of company resolution authorizing institution and prosecution of this appeal. It is noted that the Respondent had the opportunity to challenge the Appellant's capacity when it approached the trial court for redress but she did not do so. The Respondent still has the opportunity to challenge the Appellant's pleadings in the lower court once this appeal is determined.

52. The totality of the foregoing observations leads me to come to the conclusion that the Appellant has shown sufficient cause in proving that not only was it not served with the summons and pleadings but with the garnishee application. There is therefore merit in this appeal as the Appellant is entitled to access justice by being allowed to ventilate its case on merit. It is my considered view that the trial magistrate erred in his ruling delivered on 31st May, 2024 for failing to set aside the ex parte judgment and garnishee order absolute and all consequential pleadings thereafter, despite overwhelming evidence proving that the Appellant was first not served with the pleadings as well as the garnishee order nisi and that the Appellant should be allowed to contest the suit.

53. In the result, I find the Appellant's appeal has merit. The same is allowed. The Ruling delivered by the Honourable Benjamin Limo (PM) on 31st May 2024 is hereby set aside in its entirety and substituted with an order allowing the Appellant's application dated 29th February, 2024 as prayed. The Appellant is awarded costs of the appeal.

DATED AND DELIVERED THIS 22ND DAY OF MAY, 2025.

D. KEMEI

JUDGE

In the presence of

M/s Wairimu for Okullo.....for Appellant

N/A Ochieng.....for Respondent

Okumu.....Court Assistant