



**Mwangangi v Nzioka & another (Civil Appeal 120 of 2019)
[2024] KEHC 4455 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 4455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 120 OF 2019
FR OLEL, J
FEBRUARY 7, 2024**

BETWEEN

JACKSON MBALUKA MWANGANGI APPELLANT

AND

ONESMUS NZIOKA 1ST RESPONDENT

LAWRENCE KIVINDYO 2ND RESPONDENT

RULING

A. Introduction.

1. The application before this court is the Notice of Motion application dated 19th June 2023 brought pursuant to provisions of Section 3A of the *Civil Procedure Act*, Order 42 Rule 23; Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (1),(2) and (3) of the said application are basically spent and the main prayer sought is prayer (4) & (5) where the plaintiff/Applicant seeks for orders that;
 - a. That the honourable court be pleased to quash, set aside and/or vary its ex parte judgement entered on 10th November 2021 together with any consequential orders arising therefrom.
 - b. That upon grant of prayer (4) above, the Honorable court be pleased to grant the Respondent herein unconditional leave to file responses/submissions to the subject Appeal.
 - c. That costs of this Application be provided for
2. The application is supported by the supported by the grounds on the face of the said application and the supporting affidavit of the 2nd Respondent/applicant one Lawrence Kivindo dated 19th June 2023. The 2nd respondent/applicant avers that in June 2023, he was surprised when Crater view Auctioneers, proclaimed/attached his household goods and motor vehicle towards execution of this



- court's judgement and decree dated 10th November 2021 and he instructed his advocates to take up this matter.
3. The court record did reveal that he had been served by one process server known as "Mr Andrew K Mwanzia", who filed a return of service sworn on 26th June 2021. The applicant denied being served by the said process server and claimed that all the averments of the said process server as narrated in the said affidavit of service were false. Further the affidavit of service only talked of him being served with a mention notice and not the record of Appeal/pleadings. It is as against this back drop that the 2nd Respondent/Applicant submitted that he was condemned unheard and the impugned Judgement of this court should be set aside as it was irregularly obtained.
 4. The applicant further averred that he was highly aggrieved by the ex parte judgement and believed that if he had been heard and his input considered, the outcome could have been different. He thus prayed that this application be allowed unconditionally and he be accorded an opportunity to be heard.
 5. This application was opposed by the plaintiff/Respondent who filed a replying affidavit sworn by his advocate Bernard Musembi Kitindio dated 24th July 2023. The respondent stated that the application was frivolous, vexatious and inept as the 2nd respondent/applicant was on 4th June 2021, duly served with the record of appeal, memorandum of Appeal and mention notice, by the process server one "Mr. Andrew K Mwanzia". The 2nd respondent/applicant did not dispute the fact that he spoke with the said process server on his mobile phone number 0722XXX296, before they met and he was physically served, though he refused to sign the served documents.
 6. The 2nd respondent/applicant had admitted that the said mobile phone number was his, and therefore the averments in the affidavit of service remained uncontroverted. On 28th June 2021, the 2nd respondent did not attend court and/or send a representative and the court directed that the appeal be disposed of, by way of written submissions and eventually ex parte judgement was entered as against the 2nd respondent/applicant on 10th November 2021 in the sum of Ksh 600,000/=.
 7. After judgement had been entered in his favour, the 2nd respondent/applicant was served with Judgement notice dated 11th November 2021 and choose not to settle the decree herein. This forced the plaintiff/respondent to extract the decree in April 2023 and proceeded to execute the same. The applicant was therefore wholly to blame for willingly choosing to ignore and/or disregard the pleading served on him and had only himself to blame for the obtaining position. The plaintiff/respondent urged the court to note that he had been kept from enjoying the fruits of his judgement and unnecessarily prolonging this appeal was not in the interest of justice.
 8. The plaintiff/respondent thus urged this court to dismiss the application under consideration, with costs to the plaintiff/respondent.
 9. Both parties did not file any submissions in support and/or opposition to the application under consideration by this court.

Analysis & Determination

10. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether this court should set aside the Judgment/Decree dated 2nd November 2021 issued herein.
11. The 2nd/respondent applicant did apply to call the process server " Mr Andrew Kyalo Mwanzia" for him to be cross examined on the content of his affidavit of service dated 26th June 2021. The said process server did indeed attend court and confirmed that he is a registered/licensed process server . On 4th June



2021 he called the applicant on his phone number 0722XXX296 and informed him of the reason as to why he wanted to meet him. They agree to meet at city Market along Lusaka road near Kamkunji police station.

12. The process server stated that he personally knew the 2nd respondent/applicant as he had previously served him with court process. He travelled to Nairobi and meet the applicant at the agreed place where he served him with a copy of the memorandum of Appeal, Record of Appeal and mention notice. The applicant received the same but refused to sign, but stated that he would forward the same to his insurer. The process server said he personally knew the applicant and proceeded to point him out from the persons seated within the court. He was a person known to him and he was sure that he was the person he served with court documents.
13. In cross examination the said process server reiterated that he effected service upon the applicant on 04.06.2021 at about 2.30 pm to 3,00 pm and nobody else was present. He was a person he knew from previous service of the lower court matter. The 2nd respondent received the documents but did not sign, but remarked that he would take the same to his insurer.
14. This court did examine the demeanor of the process server, and he came across as a person who was candid and honest in examination in chief and cross examination. His evidence was consistent and did not have any doubtful gaps. The applicant did admit that phone number 0722XXX296 was his personal phone number and further he did not deny that the process server had previously served him with court process and was a person who knew him. On a balance of probability, I do find that indeed the 2nd respondent/applicant was personally served with the Record of Appeal, memorandum of appeal and mention notice on 04.06.2021 to attend court on 28th June 2021.
15. The application under consideration is premised on Order 42 rule 23 of the [Civil Procedure Rules](#), which provides that;

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“where an Appeal is heard Ex parte and Judgement is pronounced against the Respondent, he may apply to the court to which the Appeal is preferred to re-hear the Appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called out for hearing, the court shall re hear the Appeal on such terms as to costs or otherwise as it deems fit.”

16. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) 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.” (emphasis added)



17. The Court's power to set aside a judgment is exercised with a view of doing justice between the parties as stated in the case of, *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR, where the Court held:
- “The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”
18. What the court considers is the legal threshold before exercising the said discretion; that is whether the applicant has demonstrated sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:
- “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. The Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal vs Veena Bharti* (2011) observed that:
- “Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently ...’
20. The other issue the court is to look to is whether the judgement sought to be set aside was regular judgment or irregular judgment. This issue was addressed in the case *Mwala -v- Kenya Bureau of Standards* EA LR (2001) 1 EA 148, where the court stated;
- “to all that I should add my own views that a distinction is to be drawn between a regular and irregular *ex-parte* judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”
21. The applicant was properly served with the mention notice, memorandum of Appeal and Record of Appeal on 4th June 2021 and failed to attend court on 28th June 2021, when the matter came up for direction, which were subsequently given on the said date, that the appeal be disposed off by way of written submission and a judgement date issued for 10.11.2021. Eventually on the said date judgement was entered in favour of the Appellant/respondent in the sum of Kshs.600,000/= as General Damages plus costs and interest.
22. Be that as it may, I do further find that based on the adversarial nature of proceedings before court, it would have been necessary for the Appellant/respondent to once again serve the 2nd respondent/applicant with a Judgement notice after directions had been taken. This was not done to the 2nd respondent/applicant detriment. Further after judgement it was mandatory for the Appellant/



respondent to once again serve the 2nd respondent/applicant with notice of entry of Judgement before execution as provided for under as provided for under Order 22 rule 6 of the Civil Procedure Rules, which provides that;

Order 22 Rule 6 of the Civil Procedure Rules;

“provided that, where judgement 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 judgement 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 of execution.”

23. While the Appellant/Applicant did allege that they served the Judgement notice vide their letter dated 11.11.2021 annexed to their replying affidavit, there was no proof of certificate of postage. The net result effect of failure to effect service was that the 2nd respondent/applicant was partially condemned unheard in violation of Articles 27(1) & (2) & 50(1) of the constitution of Kenya 2010.
24. According to the current jurisprudential trend, the right of a party to be heard is now constitutionally entrenched. The parameters for according this right to a deserving party have also been crystallized by case law. See Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR; Mbaki & Others vs. Macharia & Another [2005] 2 EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; in which it was variously held, *inter alia*, that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

Disposition

25. The upshot is that the application dated 19th June 2023 has merit and the same is allowed in terms of (4) and (5) thereof.
26. The 2nd Respondent is granted leave to file their submissions in opposition to the said appeal within the next 30 days and the Appellant/Respondent to is granted leave to file further submissions within seven (7) days of service of the 2nd Respondent/Applicant submissions. The further submissions will be limited only to address new issues raised.
27. The costs of this Application will be borne by the 2nd Respondent/Applicant and the same is assessed at Kshs 30,000/= payable to the Appellant/Respondent within the next 30 days of delivery of this Ruling. Failure of which execution to issue.
28. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 7TH DAY OF FEBRUARY, 2024

In the presence of: -



Mr. K Musembi Appellant
No appearance for Respondent
Sam - Court Assistant

