



**Ngata v Ouko & another (Civil Appeal 131 of 2019)
[2024] KEHC 5166 (KLR) (Civ) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5166 (KLR)

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

CIVIL

CIVIL APPEAL 131 OF 2019

CW MEOLI, J

MAY 13, 2024

BETWEEN

MOSES NG'ANG'A NGATA APPELLANT

AND

CHRISTINE OUKO 1ST RESPONDENT

PETER MUGO MWANGI 2ND RESPONDENT

*(Being an appeal from the ruling of A.M Obura. (Mrs.) SPM. delivered
on 31st May, 2017 in Nairobi Milimani CMCC No. 7630 of 2015)*

JUDGMENT

1. This appeal emanates from the ruling delivered on 31.05.2017 in Nairobi Milimani CMCC No. 7630 of 2015. The proceedings were commenced by way of a plaint filed by Christine Ouko the Plaintiff before the lower Court (hereafter the 1st Respondent) as against Peter Mugo Mwangi the 1st Defendant before the lower Court (hereafter the 2nd Respondent) and Mose Ng'ang'a Ngata, the 2nd Defendant before the lower Court (hereafter the Appellant) seeking inter alia special damages, arising from the accident that occurred on 27.12.2012.
2. The gist of the 1st Respondent averments in her plaint was that at all material times relevant to the suit, the Appellant was the registered owner of the motor vehicle registration number KYQ xxx while the 2nd Respondent was his authorized driver, agent, servant and or employee. It was further averred that the 1st Respondent was an insured of Mercantile Insurance Company Limited now known as Sanlam Assurance Company Kenya Limited (hereafter the insurer) and was issued with a comprehensive policy of insurance number M6L/07/070/0011828/2011 against inter alia third-party risk in respect of motor vehicle registration number KBL xxxM, and in consideration of premium duly paid by the



- 1st Respondent and received by the insurer. Therefore, the 1st Respondent brought the cause of action on behalf of its insured under the insurers' right of subrogation duly reserved under the subject policy.
3. That on the material date, the 1st Respondent was lawfully driving her motor vehicle registration number KBL xxxM along Muhoho Avenue, South C Nairobi, when the 2nd Respondent negligently and carelessly drove motor vehicle registration number KYQ xxx thereby causing the same to violently collide into the 1st Respondent's motor vehicle resulting in extensive loss and damage which the 1st Respondent claims.
 4. Despite service of summons to enter appearance and file a defence to the 1st Respondent's suit, the Appellant and 2nd Respondent failed to do so. And upon a Request for Judgment being lodged by the 1st Respondent on 30.08.2016, judgment was entered against both the Appellant and 2nd Respondent on 06.09.2016 as prayed in the plaint with a decree being issued thereafter on 18.12.2016.
 5. On 10.02.2017, the Appellant moved the trial Court via a motion expressed to be brought under Sections 3A of the *Civil Procedure Act* (CPA), Order 10 Rule 4, 10 & 11, Order 22 Rule 22 Rule and Order 51 Rule 1 of the *Civil Procedure Rules* (CPR) seeking inter alia that the judgment in default of defence entered by lower Court on the 31.08.2016 against the Appellant be set aside and the Appellant be allowed to file appearance and defence in the case. The grounds on the face of the motion were amplified in the supporting affidavit sworn by the Appellant.
 6. The gist of his deposition was that he sold motor vehicle registration number KYQ xxx back in 13.04.2001 to one Stephen Ndirangu Kamau, and on receiving payment of the purchase price of Kshs. 430,000/-, released to the purchaser the original log book and a photocopy of his identity card to facilitate the transfer of the said motor vehicle to himself. That in 2015 a process server had approached him with summons to enter appearance alongside a plaint and attempted to serve him, but he informed him that he had sold motor vehicle registration number KYQ xxx to a third party and asked him to return after a few days to view documentation in proof of the sale.
 7. He went on to depose that the process server returned and saw the fore-mentioned documents evincing sale of the motor vehicle in question and receiving a copy of the thereof and taking with him, the summons upon understanding the Appellant's explanation and promising to appraise the instructing counsel on the new developments.
 8. He further deposed that he never saw the process server again and only came to learn of the suit when he was served with a proclamation notice in execution of the lower Court decree. Thus instructed counsel to peruse the lower Court file, which revealed that the 1st Respondent had filed an investigation report which clearly indicated that at the time of the alleged accident motor vehicle registration number KYQ xxx was insured with Xplico Insurance under Policy Number 080/015272/12/02/010/TPO and the policy holder was one Tabitha Nyawira Warugongo who therefore must have had an insurable interest in the vehicle in question. He maintained that the 2nd Respondent was not his employee, denying the service of summons to enter appearance as alleged in his affidavit of service. That had he been served, he would have entered appearance and filed a defence to the 1st Respondent's suit.
 9. The 1st Respondent opposed the motion through a replying affidavit dated 20.02.2017 whose gist was that she conducted a search with the Registrar of Motor Vehicles Record which showed the legal owner of motor vehicle registration number KYQ xxx to be the Appellant whose results therein formed the basis of her pleadings. Therefore, she is a stranger to the averments on sale of the said motor vehicle as due procedure entailed that once a sale is made, a transfer of ownership of the same be effected. She further deposed that she believed the process server's deposition on service to be true, hence the judgment in default of defence entered by the lower Court followed due procedure.



10. The Appellant’s motion was thus canvassed by way of written submissions. The lower Court’s ruling dismissing the Appellant’s motion provoked the instant appeal, which is based on the following grounds: -

- “ 1. That learned Magistrate erred in law and in fact in holding that the Appellant had not sought leave to file a defence when it was evidently pleaded on the face of the Notice of Motion application.
2. The learned Magistrate erred in failing to consider the Appellant’s grounds in support of the Application, submissions and the authorities submitted on his behalf.
3. The learned Magistrate erred in law and facts in holding that there was proper service on the Appellant.
4. The learned Magistrate failed to exercise her judicial discretion judicially by failing to consider that the grounds and evidence before court raised triable issues and a plausible defence.
5. The learned Magistrate erred in law and in fact in dismissing the Appellant’s application against the weight of the evidence on record.” (sic)

11. The appeal herein was canvassed by way of written submissions. Counsel for the Appellant addressed the respective grounds of appeal while anchoring his submissions on the decision in *Peters v Sunday Post Ltd* (1958) EA 424 on the duty of this Court to re-assess the entire evidence tendered at trial and make its own independent findings as the first appellate Court. Submitting Ground 1 & 4 of the appeal, he argued that the trial Court’s finding that there was no prayer for leave to file any defence in the Appellant’s motion was incorrect as the same was expressly stated in prayer 3 of the motion. With respect to the learned Magistrate’s holding that there was no draft defence annexed, counsel conceded that the Appellant had not annexed a draft defence whereas failure to do so was a mistake of erstwhile counsel and the same ought not to be visited on the Appellant. The decisions in *Belinda Muras & 6 Others v Amos Wainaina* [1978] KLR, *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103 and *Shah v Mbogo & Another* [1967] EA 116 were relied on in the latter regard. It was further submitted that notwithstanding the mistake of erstwhile counsel, the averments in the Appellant’s affidavit in support of the motion clearly establish that the latter had defence that raised triable issues.

12. Submitting on Grounds 2 and 5 of the appeal, while calling to aid the decisions in *Kisya Investments Ltd and Another v Kenya Finance Corporation Ltd* HCC No. 3504 of 1993 and *Ishmael Kagunyi Thande v Housing Finance Company of Kenya Ltd* HCC No. 896 of 2000, counsel contended that the affidavit in opposition of the Applicant’s motion was deposed by the counsel on record for the 1st Respondent on contentious matters whereas there was no affidavit of the process server who purportedly served the Appellant, rendering the deposition of counsel in that regard as hearsay.

13. Concerning Ground 3, counsel relied on Order 5 Rule 8 & 15 of the *CPR*, the decisions in *Rapando v Constatine Ouma & 6 Others* [2004] eKLR and *Mbogo & Another v Shah* [1968] EA 93 to submit that the trial Magistrate failed to lay down the basis for holding that the Appellant had been properly served whereas the 1st Respondent failed to attach to her affidavit material the Affidavit of Service of the process server who alleged to have served the Appellant. It was equally contended that the mandatory constituent requirements of an Affidavit of Service were not complied with and it was not enough for the 1st Respondent’s affidavit material to state she was advised by the process server that there was proper service. Counsel thus argued that the trial Magistrate in dismissing the Appellant’s motion did



not exercise her discretion rightly and therefore arrived at the wrong decision. In conclusion, this Court was implored upon to allow the appeal as lodged.

14. The 1st Respondent defended the trial Court's findings. While restating the events leading up to the instant appeal, counsel argued that from the Appellant's affidavit material before the trial Court, it can be gathered that the latter was duly served and fully aware of the matter against him as evinced by the affidavit of the process server. Reiterating the latter, counsel asserted that if indeed there was doubt as to the authenticity of the contents of the Affidavit of Service, there was need to cross-examine the process server on the contents on the affidavit, which right the Appellant eschewed. The decision in *Paul Odido v Abdul Hakim Abeid & 2 Others* [2021] eKLR was called to aid. While placing reliance on the decisions in *John Kundu Khisa v Kennedy Khisa Kundu* [2013] eKLR and *David Kiptanui Yego & 134 v Benjamin Rono & 3 Others* [2021] eKLR counsel posited that the Appellant neither sought leave to file his defence out of time nor file a defence on record. Hence the learned Magistrate was not able to ascertain whether the Appellant's defence raised triable issues worth pursuing. In summation, it was asserted that the learned Magistrate delivered a well-reasoned decision which cannot be faulted therefore the appeal lacks merit and ought to be dismissed with costs.
15. The 2nd Respondent opted and or failed to participate in the instant proceedings before the lower Court and this Court.
16. The Court has considered the record of appeal, the pleadings before the lower Court as well as the submissions by the respective parties. 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; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278. *Abok, James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR
17. The Appellant's motion before the lower Court was expressed to be brought inter alia pursuant to Section 3A of the *CPA* and Order 10 Rule 4, 10 & 11 of the *CPR*. The trial Court in dismissing the Appellant's motion stated inter alia that :-

“I have carefully considered the application and the opposing views. I have equally considered the written submissions. According to the 2nd Defendant the process server ‘tried’ to serve him with the Court documents in the year 2015 but he informed him that he had since sold the vehicle. He goes further to state that a few days later he showed the same process server his documents showing that he had sold the vehicle.

The 2nd Defendant disputes the contents of the process server's affidavit sworn on 22/8/16 and filed on 30/8/16. However, he does not seek orders to cross-examine the process server. My view is that the 2nd Defendant/Applicant must have been properly served and was fully aware of the existence of this suit. However, rather than enter appearance and file his defence, he ignored this matter until he was woken up by the auctioneers.

I find that there was a regular and valid judgment on record which should not be set aside.

As to whether there are triable issues, I note that there is no prayer for leave to file any defence and no draft defence annexed to the application. It raises questions as to whether the 2nd Defendant/Applicant is genuine. Once the judgment is set aside, then what?



I have considered the case of *Shah v Mbogo and another* (1967) EA 116. I find that the applicant has not established a proper case for the Court to exercise its discretion in his favour.

The application dated 10/2/17 is therefore dismissed with costs.” (sic)

18. 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. Nevertheless, specific to the above is Order 10 Rule 11 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.”

19. 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 enunciated by Court of Appeal in [Mashreq Bank P.S.C v Kuguru Food Complex Limited](#) [2018] eKLR stated:

“This Court ought not to interfere with the exercise of a Judges’ discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (*supra*):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”.

See; [United India Insurance Co. Ltd v East African Underwriters \(K\) Ltd](#) [1985] EA 898”.

20. The object of the discretion conferred by Order 10 Rule 11 of the [Civil Procedure Rules](#) was addressed in the case of *Shah v Mbogo and Another* [1967] EA 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.”

21. Platt JA (as he then was) in [Bouchard International \(Services\) Ltd v 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”.

22. 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. The Appellant had in his affidavit in support of the motion before the lower Court given an interesting narration of events in that regard. On one hand, acknowledging meeting with the process server whom he purportedly conversed with on the issues surrounding the ownership of motor vehicle registration number KYQ xxx and on the other hand strongly disputing service of summons by the said process server. The 1st Respondent in response maintained that she believed the process server's deposition on service of summons to be true. And as such the judgment in default of defence entered by the lower Court was regular.
23. This Court has examined the record of appeal and original record to establish whether the summons to enter appearance were duly served. A review of the aforementioned reveals that the request for judgment against the Appellant and 2nd Respondent was lodged on 30.08.2016 and endorsed on 06.09.2016. The 1st Respondent's request for judgment was supported by an affidavit of service of a process server, one Hudson Chanzu, concerning service of summons upon the 2nd Respondent and Appellant on 25.07.2016 and 26.07.2016 respectively. In his affidavit of service, the process server deposed at paragraph 3 , 4 ,5, 6, 7, 9, 10 & 11 that: -
 - “ 3. That on the same day at around 11.00am, I proceeded to Githunguri Shopping Centre where the First Defendant resides and using the map given by the advocates for the Plaintiff a copy attached, I proceeded to his residence and I was informed that he will be back in due course.



4. That after about 25 minutes he arrived at the house and informed me that he knows about the accident and he had reported the case to the insurance and he will contract the Second Defendant to see if they will contact the insurance company because they had reported the matter to them.
 5. That the said Moses Ng'ang'a Ngata accepted service but declined to sign my copy until he talks to the Second Defendant.
 6. That the following day at around 9.00am I proceeded to the Second Defendant on his cell phone number 07XXXXXX75 and talked to him about the same issue of which he told me that the First Defendant had talked to him about it and we agreed to meet at town.
 7. That at around 2.39pm I called him again and he told me that we can meet at Supreme Court at 3.pm.
 8.
 9. That I met him there and he told me that he knows about the matter and they were going to meet with the Frist Defendant so that they can proceed to their insurer.
 10. That I served him with the copy of the summons and plaint herein of which he went through and informed me that he could not sign my copy because he has to consult other directors.
 11. That the aforesaid First and Second Defendant whom I served became personally known to me at the time of service and as such facts stated herein are true and within my personal knowledge and belief.” (sic)
24. At the outset there appears to be a mix up in the process server’s deposition at paragraph 5 5}} therein wherein he states having served Moses Ng’ang’a Ngata (the Appellant herein) whereas he was probably referring to the 2nd Respondent. In the subsequent paragraphs he proceeded in detail to describe the process of service as against the 2nd Defendant who is the Appellant herein. Nevertheless, an issue arising from the foregoing depositions by both the Appellant and process server is that they seem to tell two (2) different accounts as to how they met in respect service of the summons to which the former denies services.
25. The Appellant through his deposition paints the picture that he and the Process Server met twice and upon his explanation surrounding motor vehicle registration number KYQ xxx, the Process Server opted and or failed to serve him with the summons out of a purported mutual understanding. The Process server on the other hand narrates that he met the Appellant once when he served him with the summons. The Appellant from his grounds of appeal and submissions before this Court has made heavy weather of the fact that the 1st Respondent failed to evince proof of service by way of a return of service in his response to the motion whereas the return of service was not compliant with Order 5 Rule 8 & 15 of the CPR.
26. In respect of the latter 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 Defendants before the trial Court. 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.

27. Concerning proof of service, notwithstanding the varied narrations as to how service was effected, it undisputed that the Appellant at least met the process server. It is highly unlikely that the latter left with the service documents premised on the Appellant’s alleged explanations. Evidently, upon the Appellant being served with plaint and summons, the process server filed an affidavit of service in respect of the process. The same was considered by the Court and judgment in default of appearance and defence was entered by the lower Court. Since the Appellant disputed service, he bore the burden disproving service and or proper service of the summons as required by law and not vice. Therefore, there was no requirement on the part of the 1st Respondent to tender the return of service, already on record, in his response.
28. As to whether the lower Court properly exercised its discretion or misdirected itself on the issue of service, it is not in dispute that Appellant and the Process Server met in respect of service of the summons. The Appellant however contends that the Process Service failed to serve him with summons with the latter asserting the contrary. Given that service was adamantly disputed, the Appellant was at liberty to invoke Order 5 Rule 16 of the *CPR* to seek the cross examination of the Process Server, but he eschewed doing so. As rightly observed by the trial Court the Appellant rather than accepting the summons and raising a defence in respect of ownership of motor vehicle registration number KYQxxx, appears to shift blame elsewhere in disregard of his omissions. Here, the procedure relating to service of the summons in question appears to have been complied with and the Appellant’s contention appears a red herring. Ultimately the lower Court did not err in finding that the was a regular judgment before it.
29. Therefore, 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.”



30. Firstly, concerning the explanation proffered by the Appellant 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 06.09.2016 with the Appellant's motion seeking to set aside being filed on 10.02.2017 upon service of proclamation and warrants of attachment. The delay therein was not properly explained. Thirdly, concerning the draft defence, the lower Court doubted the bona fides of the application, observing that "there is no prayer for leave to file any defence and no draft defence annexed to the application". Counsel for the Appellant, conceded to the fact that the Appellant had not annexed a draft defence whereas failure to do so was on account of mistake of erstwhile counsel but pointed to the averments in the affidavit in support of the motion showing that the Appellant has a defence that raises triable issues. It was further contended that leave was explicitly sought in the motion to file a defence.
31. As rightly argued by the Appellant, leave was explicitly sought to file appearance and defence in the matter and the lower Court's finding to the contrary was erroneous. That said, the Appellant admitted to the omission to attach a draft defence to his motion and referencing the averments in support of the motion as raising a triable defence. Order 10 of the [CPR](#) unlike Order 36 does not provide for a defence being raised through depositions in the affidavit material. The Appellant seeks refuge in his depositions in that regard.
32. Ordinarily form will not be allowed to trump substance. 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 v 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.

33. The trial Court correctly noted that no draft defence was annexed to the application, taking guidance from the dicta in *Shah v Mbogo* (supra) and correctly arrived at the determination that the Appellant had not established a proper case for the Court to exercise its discretion in his favour. It is evident from a reading of the lower Court’s ruling that the court considered the material and submissions filed. The Appellant’s complaint that the learned Magistrate failed to consider the grounds in support of the Application, submissions, and the authorities and or counsel’s deposition in opposition to the Appellant’s motion therefore has no basis.
34. 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 Appellant 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. That too is a matter of rule of law. A party seeking to set aside interlocutory judgment must not be seen to presume on the Court’s discretion. His motion was properly dismissed, and his appeal must equally fail.
35. That said, it would be remiss of the Court not to address a significant procedural lapse that has piqued its attention while considering the appeal. Although none of the parties addressed it in their submissions, the lapse relates to an important matter of law that a court of law should not gloss over, or ignore. The lower Court record reveals the fact that upon the request for judgment, a final judgment was entered on 06.09.2016 and a decree was thereafter issued on 18.11.2016, soon followed by execution. The 1st Respondent’s claim as presented in the plaint, was one for material damage, founded on the tort of negligence. Thus, even though a specific sum was pleaded therein, the claim was not a liquidated claim as envisaged under Order 10 Rules 4 and 5 of the *CPR* and in respect of which a final default judgment could properly be entered, as happened. A reading of Rules 4 to 9 of Order 10 of the *CPR* to my mind leaves no doubt that final judgment can only be properly entered in respect of liquidated claims.
36. Paragraph 1109 of *Halsbury’s Laws of England*, 4th Edition Vol. 12 states that: -
- “In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated...
- A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic.”
37. In this connection, Ringera J (as he then was) defined a liquidated claim as anticipated in Rules 4 and 5 of Order 10 *CPR* in *Trust Bank Limited v Anglo African Property Holdings Limited & 2 Others* HCCC No. 2118 of 2000 in the following terms:
- “A claim does not become a liquidated demand simply because it has been quantified. To qualify as a liquidated demand, the amount of a claim must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic. I adopt the following definition of a debt or liquidated demand from The Supreme Court Practice Rules[1985] Volume1, at page 33; ‘A liquidated demand is in the nature of a debt, i.e.



a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a “debt or liquidated demand”, but constitutes “damages”....” The words “debt” or “liquidated demand” do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure”.

38. The applicable Rules in this instance were Rules 6 and 7 of Order 10 of the [CPR](#) which are in the following terms: -

6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.
7. Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders. (Emphasis Added).

39. Herein, upon judgment of a final nature being entered, a decree issued and was followed thereafter by warrants of attachment. This was irregular; only an interlocutory judgment could properly have been entered in this instance, and the suit thereafter set down for formal proof. The Court of Appeal stated in [Giro Commercial Bank Ltd v Ali Swaleh Mwangula](#) [2016] eKLR that:-

“Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party’s intention to defend. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff’s claim.” (Emphasis added).

See also [Gemstaviv Limited v Kamakei Ole Karia & 5 others](#) [2015] eKLR.

40. An irregular default judgment, arising not from want of service but from the fact of defect in its nature and form runs afoul of the above, and cannot be allowed to stand. Accordingly, the erroneous final judgment entered in the lower court on 06.09.2016, and decree resulting therefrom are hereby set aside *ex debito justitiae*. Although the Appellant failed to demonstrate his asserted case on this appeal, it is the court’s view that all considered, the justice of the matter lies in allowing the Appellant, now that the judgment in the lower court has been set aside, to file his defence statement within 14 (fourteen) days of this judgment and to pay costs thrown away to the 1st Respondent in any event. The parties will bear their own costs in the appeal.



DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024.

C.MEOLI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

For the Appellant: N/A

For the 1st Respondent: Ms. Omwoha

For the 2nd Respondent:

C/A: Erick

