Odwesso v Nyaga alias Jason Nyaga (Civil Appeal E031 of 2020)
[2024] KEHC 9123 (KLR) (Civ) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL

CIVIL APPEAL E031 OF 2020

DKN MAGARE, J

JULY 18, 2024

BETWEEN

NORAH ODWESSO ..... APPELLANT

AND

JOHNSON NGUU NYAGA ALIAS JASON NYAGA ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Ruling and Order delivered on 21/7/2020 by Hon. D.M Kivuti, Senior Resident Magistrate in Milimani CMCC No. 8283 of 2017.
2. The Appellant filed suit seeking the following orders: -
    a. Rental arrears of Kshs. 1,636,650/=
    b. Outstanding service charge of Kshs. 96,000/=
    c. A declaratory judgement that the defendant is bound to reimburse the plaintiff Kshs. 74,510/= being the expenditure incurred by the plaintiff in paying for the power and water bills.
    d. A declaratory judgement that the defendant is bound to reimburse Kshs. 366,560/= to the plaintiff being the expenditure incurred in renovating the suit premises to their original state thereof.
    e. Interest on a, b, c & d above at commercial rates prevailing from time to time from their respective due dates until payment in full.
    f. Any other just and equitable relief as this Honourable court may deem appropriate.

3. It is clear from the foregoing that the appeal to this court is of doubtful legality. It is in respect of special damages and pecuniary damages arising out of rent arrears.

4. The Appellant filed this appeal and preferred the following grounds in the Memorandum of Appeal dated 17/8/2020.

    a. The trial court erred in law and fact in setting aside the regular judgement.

    b. The trial court erred in law and fact in failing to find that absence of a draft defence was fatal to the defendant.

    c. The trial court erred in law and fact in exercising his discretion capriciously.

    d. The trial court erred in law and fact in ignoring stare decisis.

    e. The trial court erred in allowing the affidavit deponed by advocate.

Pleadings

5. The impugned ruling arose from an application that sought to set aside the default judgment. The Respondent maintained that the default judgement was tantamount to denying the right to a fair hearing.

6. The lower court considered the application and found that the Respondent had met the threshold for setting aside default judgement. The court thus allowed the application.

Submissions

7. The matter had hitherto proceeded for formal proof and a judgement delivered on 6th September 2019 for the Appellant in the sum of Kshs. 2,355,547/=. The Appellant submitted that strangely, despite the explicit findings by the trial magistrate that the Respondent's application was unmerited in law, the trial magistrate proceeded to allow the application nonetheless, necessitating this Appeal.

8. They stated that the learned magistrate rightly found that the reason given by the Respondent for his failure to file a defence was that his previous Counsel on record failed to render proper legal representation and that was not convincing in light of numerous decisions of this court on the excuse of mistake of counsel and fact that the Respondent's application to set aside the ex-parte judgement did not annex a draft defence to allow the magistrate to discern the existence of any triable issues.

9. They relied on case of *Bouchard International (Services) Ltd v. M'mwereria* [1987] KLR 193 in which Platt, JA expressed himself as follows:

> " 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 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 judgement 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 judgement, 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 judgement 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 judgement 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 judgement would be set aside in the exercise of the court's inherent jurisdiction".

10. They submitted that it is long settled law that a failure to attach a draft defence to an application for setting aside a regular judgment on record is fatal to said application. And reliance was placed on the locus classicus case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 Duffins P stated that,: -

> " the main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it in the rules. Where there is a regular judgement the Court will not usually set aside unless it is satisfied that there is a defence on merits."

11. They posited that the in the case of *Thomas Odhiambo Okello v Peter Wanyama* [2019] eKLR, the High Court on appeal held,

> "…..The 2nd issue raised in this appeal is that the trial magistrate declined to set aside the interlocutory judgement on the ground that no draft defence was annexed to the application. The principles of setting aside interlocutory judgement on ground that no defence was annexed were properly stated in *Patel v East Africa Cargo Handling Services Ltd.* (1974) EA 75. In this case there is no evidence that the Appellant demonstrated that he had a defence on merit or a defence at all as no draft defence was annexed to the application. This being so, the learned trial magistrate properly dismissed the application. In the result I find no merit in this appeal which is hereby dismissed with costs.

12. They argued that the principles governing applications for setting aside are well known and the learned magistrate was well minded to cite them in the impugned ruling. However, the moment the learned magistrate fell into the error of exercising his discretion to allow an application that was bad in law he went on a frolic of his own and departed from what he was called upon to consider. It was improper for the court to render a final judgment after a formal proof hearing flowing from a regular interlocutory judgement and while functus officio, proceed to supply a triable issue for the setting aside of the same judgment

13. Aggrieved, the Appellant filed the present appeal which they urged the court to allow.

14. The Appellant relied on the case of *Bouchard International (Services) Ltd v Philip Nzioki M'mwereria* [1987] eKLR, where the court of Appeal (Platt, Apaloo JJA & Masime AG JA) stated as follows: -

> " This opinion was upheld by the Court of Appeal for Eastern Africa in *Mbogo v Shah* [1968] EA 93. It was also held that Harris J had correctly stated the principles as to the actual exercise of the discretion in *Kimani v McConnell* [1966] EA 547. A judge had 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 Porter J. These pronouncements were carried forward in *Patel v EA Cargo Handling Services Ltd*, [1974] EA 75 which compared them with the origin of this approach, the speeches in the House of Lords by Lords Russell, *Atkin and Wright in Evans v Bartlam* [1937], 2 All ER 647. For some reason, practitioners often tend to over-analyse the process of exercising a discretion, perhaps in their anxiety to achieve certainty and uniformity. In Patel's case as in Evans' case, counsel had attempted to tie down the exercise of the discretion on two aspects of the problem, a) that there was some serious defence to the action, and b) that there was some satisfactory explanation for the failure to comply with the rules. The House of Lords and the Court of Appeal refused to tie down the discretion. It was an unconditional unfettered discretion, although it was to be used with reason, and so a regular judgment would not usually be set aside unless the court was satisfied that there was a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The most memorable words employed on this topic were those of Lord Atkin in Evans' case at p 650: -
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> "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."

Analysis

15. The issue that falls for this Court's determination is whether the lower court erred in its exercise of discretion to set aside default judgement.

16. This being a first appeal, the court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.

    1. In the case of *Mbogo and Another v. Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

18. The duty of the first appellate Court by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow

the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

19. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

20. Therefore, the trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Where the findings of the lower court are consistent with the evidence generally, this Court should not interfere with the same.

21. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. In Matters which proceeded by way of affidavit evidence, the court has a wider latitude as held in the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the *Court of Appeal Rules* 2010; *Selle v Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

23. I agree with the holding of the Supreme Court of India which stated in *Sangram Singh v. Election Tribunal, Koteh*, AIR 1955 SC 664, at 711 cited in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR that:

> " There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that

decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

24. The way I understand default judgements is that they may be set aside so as to give the defendant an opportunity to be heard. That was the essence of the Respondent's application. In *Wachira Karani v. Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that:-

> "The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

25. Setting aside a default judgment is an exercise of judicial discretion. Judicial discretion is unfettered. However, it must be exercised in accordance with the law. I am fortified by the passage constituting the reasoning of the Court of Appeal in *CMC Holdings Ltd v. Nzioki* [2004] KLR 173 as follows:

> "In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgment."

26. The rules of procedure bespeak the path to substantive justice. The matter relates to rent arrears and repair of a rental premises. It is a question covered under section 13 of the Environment and *Land Act*. The Appeal is thus improperly before the court.

27. Secondly, an appeal from exercise of discretion must be shown that the decision is capricious and irrational. The court does not need to have a draft defence. However, there must be a defence to set

aside a regular judgment. I have perused the affidavit in support of the application to set aside and note that it raises triable issues. The Respondent is entitled to defend. Lenaola J (as he then was) posited as follows in the case of *Mandeep Chauhan v Kenyatta National Hospital & 2 others* (2013) eKLR:

> " It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rule enjoys superiority over all laws made by humankind and that any law that contrives or offends against any rules of natural justice, is null and void and of no effect. The rule as captured in the Latin phrase 'audi alteram partem' literally translates into "hear the parties in turn", and has been appropriately paraphrased as, 'do not condemn anyone unheard'. This means that a person against whom there is a complaint must be given a just and fair hearing."

28. The Court of Appeal in the case of *Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others* [2019] eKLR stated that:

> " The power of the court to set aside an interlocutory judgment under that provision is discretionary. See *CMC Holdings Limited v. Nzioki* [2004] 1KLR173. For us to interfere with the exercise of discretion by the Judge, it must be shown that his decision is clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted or because the he failed to take into consideration matters which he should have taken into consideration."

29. It is not enough that I could have come to a different conclusion had I been sitting in the lower court. Discretion is discretionary and cannot be set aside on basis of strict interpretation.

30. Thus the appeal relates to land. In Owners of the *Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
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> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics."

31. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [*2012] eKLR, The supreme court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

32. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.

33. Consequently, this Appeal is not properly before this court. In any case, I find no basis to interfere with the exercise of discretion as did lower court. I equally do not agree with the Appellant that the absence of a draft defence would completely incapacitate the Application to set aside the default judgement since it was not the merit or otherwise of the defence that was entirely at test. The defence can be set out in the affidavit or otherwise in the application in support as was in this case.

34. Overall, I am unable to disturb the reasoning of the learned magistrate. It exercised discretion and I find no manner in which the learned magistrate misdirected himself to arrive at a wrong decision. The learned magistrate thus correctly exercised his discretion. In *Pindoria Construction Ltd v. Ironmongers Sanytaryware* Civil Appeal No. 16 of 1976 it was held that:

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the *Civil Procedure Rules*. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

35. Odunga J, (as he then was) in as *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR 28. In considering whether or not to set aside a judgement, a judge has to consider 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 judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement 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 judgement upon the merits or by consent it is to have the power to invoke 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. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See *Bouchard International (Services) Ltd v. M'mwereria [1987] KLR 193; Evans v. Bartlam* [1937] 2 All ER 647.

36. Court of Appeal in the case of *James Kanyiita Nderitu & Another* [2016] eKLR, stated that :

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another - v- Shah* (1968) EA 98, *Patel - v- E.A. Cargo Handling services Ltd* (1975) E.A. 75, *Chemwolo & Another - v- Kubende* (1986) KLR 492 and *CMC Holdings - v- Nzioka* [2004] I KLR 173.
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> In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

37. The court has said enough to show that there is no merit in the Appeal. The same is accordingly dismissed. The Respondent did not defend the Appeal. Therefore, each party shall bear its own costs.

Determination

38. In the upshot, I make the following orders:

    i. The Appeal is dismissed.

    ii. Each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 18TH DAY OF JULY, 2024.

KIZITO MAGARE

JUDGE

Judgement delivered through Microsoft Teams Online Platform.

In the presence of: -

No appearance for parties

Court Assistant – Jedidah