REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 51 OF 2019

SAMUEL THIONGO JAMES.....1ST APPELLANT

SHADRACK KAMAU.....2ND APPELLANT

VERSUS

BENSON NDERITU KAGIRI.....RESPONDENT

(Being an Appeal from Ruling of Hon.G.Omodho Senior resident Magistrate

on 31st July 2019, vide Chief Magistrate Court at Thika

Civil Suit No. 220 of 2009)

JUDGMENT

The Appellants were the Defendants, while the Respondent was the Plaintiff in **Thika CMCC No. 220 of 2009.**By a Notice of Motion Application dated **8th April 2019,** the 2nd Defendant (Appellant) sought for orders that ;

a) That this Honourable Court be pleased to vary review and or set aside the Judgment made on 5th December 2018 .

b) That cost of this Application be provided for.

The Application was premised on the grounds that there is an unexecuted judgment in default of attendance . That there is prejudice being suffered by the 2nd Defendant as eviction against the 2nd Defendant is eminent unless Judgment is set aside. Further that failure to attend Court during the hearing was unintentional as the 2nd Defendant was never served with a **Hearing Notice.** That it is in the interest of justice that procedural requirements are met before issuance of orders that are final and detrimental to parties in a contest.

In his Supporting Affidavit, **Samuel Thiongo James,** averred that the Judgment was entered on **5th December 2018,** and they became aware of the same in **February 2019,** when he accepted to search the Court file, but it was not presently available in Court. That he was not aware of any hearing as the only time the matter was in Court was on **7th September 2018,** when it was adjourned. That he has perused the Cause List of **15th November 2018,** together with his **Advocates Diary,** which show that although the matter was not listed on the said date , it proceeded without Notice to him or his Advocate . That no service of **Judgment Notice,** was served on them to make them aware that the matter proceeded Ex parte.

That he had on record a Defence and witness statement, which warranted that he ought to have been given an opportunity to be heard and it is only fair that the judgment be set aside.

The Application was opposed and **Benson Nderitu Kagiri,** swore a Replying Affidavit on **18th April 2019,** and averred that the instant suit was filed in **2009,** and though the same proceeded for hearing, the 2nd Defendant through his Advocates appeared in Court on **2nd September 2014,** and sought time to file his requisite documents and further on **13th March 2015,** a **consent order** was entered, allowing the Defendants to put in their Defence within 14 days and upon lapse of **14 days**, there was no Defence. That on **2nd October 2015,** judgment was entered in default and the matter was fixed for hearing severally and could not proceed and on **13th June 2018,** the Defendants Advocate sought for time to put in a Defence .That the matter would thereafter be fixed for hearing on various dates and on **17th September 2018,** the Court gave a date for **26th September 2018,** for Mention and on the said date Counsel for the Defendant was in

Court and the Court gave hearing date for **5th November 2018,** which date was accepted by consent of all parties . That on **5th November 2018,** neither the Defendant nor his Counsel was present and their absence was not explained nor has it been explained. Further that neither the cause list not the diary excerpt has been annexed as claimed.

That the Court's record show that the 2nd Defendant was never interested in defending himself and has all along intentionally delayed the suit .That the judgment was delivered on **5th December 2018**, and there is no Appeal on the same, and neither has there been any explanation given for the delay in filing of the review. That he has been advised by his Advocate, which advice he believes to be true that **a review** must be filed without unreasonable delay . That **a review** must be on discovery of new evidence or mistake apparent o the face of record and should be made to the **Judicial Officer,** who made the orders. The Court was therefore urged to dismiss the Application.

The Application was canvassed by way of written submissions, and on **31st July 2019,** the Court delivered its Ruling and dismissed the Appellants Application and held that;

> ***"…. no good reason has been availed why the Plaintiff must be drawn into the disorganization of an Adverse party from enjoying the fruits of his judgment . In the circumstances I do not find the Application merited and I proceed to dismiss it with costs. "***

Being aggrieved with the said decision, the Appellant filed this Appeal vide a Memorandum of Appeal dated **27th August 2019,** on the grounds that ;

> ***1. The Learned trial magistrate erred in law an in fact by entering Judgment against the appellant after the matter proceeded for Ex Parte hearing despite absence of the 2nd Defendant who was not served***
>
> ***2. The Learned trial Court erred in Law and in fact when it failed to give chance to the Appellant to prosecute his defence at the hearing, despite there being a regularly filed Defence***
>
> ***3. The Learned trial Court erred in Law and in fact by proceeding for hearing despite the matter not being listed and without notice to the Defendant or his Advocate***
>
> ***4. The Trial Court erred in Law and in fact when it failed to work itself against giving Judgment that was per incuriam otherwise rendering the proceedings to become a mistrial.***

The Appeal was canvassed by way of written submissions and the Appellant through the **Law Firm of Muturi Njoroge & Company Advocates** filed their written submissions on **24th November 2020** and submitted that it is a grievous miscarriage of justice that the 1st Appellant was not served with the initial trial, subject of the Appeal. It was their further submissions that for Justice to exist, all parties in a dispute ought to be afforded time to present their respective case, before a neutral adjudicator and the adjudicator needs to give a fair chance for the parties to present themselves . That in the event that a party is denied a chance to defend themselves, the resultant Ruling should be set aside. They relied on various decided cases and urged the Court to allow the Appeal.

The Respondent filed his written submissions through the **Law Firm of Njoroge Kugwa & Company Advocates dated 26th February 2021,** and submitted that the Appellants have all along been authors of their own misfortunes from numerous chances extended by the Court to file their Defence and failing to appear for hearing on the date given by the Court . That in the doctrines of Equity, "**Law aids the vigilant and not the indolent".** That the Appellant have always been laid back in prosecuting their Defence and should not drag their indolence into Court.

It was further submitted that there is no apparent reason for the Appellants to seek for a retrial as the trial was conducted within the law as the trial Court adhered to the Oxygen Principle . That the Respondent has always been diligent in prosecuting the matter and should be allowed to enjoy the fruits of his Judgment .The Court was therefore urged to dismiss the Appeal.

This being a first Appeal, it is the duty of the first appellate court to re-evaluate the evidence led before the trial court both on points of law and facts, and come up with its own findings and conclusions. See the case of **Kamau …Vs…Mungai [2006] 1 KLR 15,** where the Court held that;

> ***"Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that."***

Further in the case of **Selle -vs- Associated Motor Boat Co. [1968] EA 123, it was expressed:**

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."***

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is

shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Co. Ltd….Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995,** where the Court held that:-

> ***"This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong".***

Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the rival written submissions by the parties and lower Court's Ruling, this Court finds that the issues for determination are;

> ***1. Whether the Appellants have established the threshold for setting aside of the Ex Parte Judgment.***
>
> ***2. Whether the Appeal is merited***

(i)Whether the Appellants have established the threshold for setting aside of the Ex Parte Judgment .

In their Application, the Appellants sought for the setting aside of the Ex Parte Judgment, on the account of non attendance. In deciding whether or not the Appellants were entitled to the discretionary orders of setting aside, the Court is guided by the provisions of **Order 12 Rule 7 of the Civil Procedure Rules** that provides:-

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

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

> ***"The court may set aside an order made ex parte"***

The jurisdiction of the Court to review and set aside its decisions is wide and unfettered. In **Shah ….Vs… 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)***

The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In **Wachira Karani …Vs… Bildad Wachira [2016] eKLR,** the Court 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..."***

Did the Appellants herein show sufficient cause to warrant the Court exercise its discretion in their favour? It is the Appellants contention that failure to attend the hearing was unintentional as they were never served with the hearing **Notice** . Further that the 1st Appellant was not aware of the hearing and having perused the Cause List of **15th November 2018**, together with his Advocates diary, the matter was not listed on the said date.

The Court has perused through the proceedings in the trial Court. The Court notes that the matter proceeded for hearing on **5th November 2018.** Further the Court notes that the hearing date was given on **26th September 2018**, and on the said date **Githinji** was holding brief for **Kugwa** for the Plaintiff , **Njoroge** was present for the 1st & 2nd Defendants, the Appellants herein, while the Court noted that the 3rd Defendant who was acting in person was present. **Mr. Githinji** did indicate that the matter was coming up to fix a hearing date and **Mr. Njoroge** confirmed that the same was the position and the hearing date was fixed. It is important to note that the proceedings have been presented by the Appellants in their Record of Appeal. The Appellants have not disputed nor controvert the said proceedings. The Appellants contends that they were never served with the hearing date. If a date was given by consent, by all means there would be no reason as to why the Appellants would again be served with the said date.

For the Court to exercise its discretion and grant orders in favour of a party seeking to set aside **Ex Parte Judgment,** the party is required to give sufficient reasons for non attendance. In this instant, it is the Court's considered view that it is not satisfied with the reasons granted by the Appellants for non attendance, and hence finds that the same is not sufficient. Having found that no sufficient reason has been advanced, the Court further finds that the Appellants have not satisfied the Court on reasons as to why it should exercise its discretion and grant the orders in favour of the Appellants. Consequently the Appellants have not met the threshold for grant of orders of setting aside the Ex parte Judgment.

1. <u>Whether the Appeal is merited.</u>

The Appellants had in their **Memorandum of Appeal** sought for setting aside of the entire Ruling of the trial Court and further order for a fresh trial. This Court exercising its Appellate jurisdiction has re-evaluated and re-assessed the mater and has come to the same conclusion as the trail Court, that the Appellants did not show sufficient cause and therefore are undeserving of the discretionary orders of setting aside the **ex Parte Judgment.** Consequently, the Court finds that the Appeal is not merited.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal, together with the written submissions, the Court finds that the trial Magistrate exercised her discretion properly and arrived at a proper determination and this Court finds no reason to upset the same.

The upshot of the foregoing is that the Appellant's Appeal is not merited and consequently the said Appeal herein is disallowed and dismissed entirely and the **Ruling** and **Order** of the trial Court are upheld. The Appellants will bear the costs of the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Lucy