



**Muthome & another v Mathi Nicholas Muumbi t/a Junic Logistics (Civil Appeal E132 of 2021) [2023] KEHC 23049 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E132 OF 2021  
DKN MAGARE, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**PETER MULEI MUTHOME ..... 1<sup>ST</sup> APPELLANT**

**MUPEKI HAULIERS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MATHI NICHOLAS MUUMBI T/A JUNIC LOGISTICS ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Ruling of the court given on 29<sup>th</sup> July 2021. Though the Appellant has suffered a series of losses at interlocutory stages, the fortunes are about to change drastically. This is an appeal from the application to set aside judgment in default of defence and appearance.

**Background**

2. The Respondent filed suit on 25/4/2019. It is a claim over fuel supplied. There was no contract between the 1<sup>st</sup> defendant and the Respondent. The 1<sup>st</sup> defendant was said to be acting as a director of the 2<sup>nd</sup> defendant. The cheques were issued by the 2<sup>nd</sup> defendant. There is said to fuel supplied to the defendants for Ksh. 5,042,639.32 between and 31/12/2014 and 22/1/2016.
3. There is a claim that the first defendant instructed the respondent to process two titles over Mavoko Municipality Block 86(Mlolongo Brothers 372 and 374. The Respondent reportedly spent Ksh.120,000/= in processing the titles. I have trawled the LSK Website and cannot find the Respondent as one of the Advocates registered as at 25/4/2019 or even today. The claim is related to instructions fees to transfer title deeds. This is an exclusive preserve of advocates. No-one can recover instruction fees to carry out conveyance. Payment of monies to the land registry is recoverable. There is no breakdown of what the claim consists of.



4. This claim is of a nature of special damages and ipso facto, not defence is required to be exhibited. This is because special damages must be particularized and specifically proved. This is not particularized and as such was for dismissal whether or not there was a defence annexed. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it.”

5. Consequently, a denial in the affidavits was sufficient to place the respondent to strict proof. However, it is not the issue before the court. The issue was whether there was an error apparent on the face of the record. I note that from the original court filed the Respondent filed one set of summons to enter appearance addressed to: -

Peter mulei kithome  
Mupeki Hualiers ltd  
p.o box 43437-80100  
Mombasa

6. On 20/12/2019, the Respondent filed an application to serve the defendants by registered post through P. O Box 90562 -80100 Mombasa. They had been unable to serve the 1<sup>st</sup> Appellant though in vain and as such should serve them through their last known address of 90562-80100 Mombasa. In the Affidavit sworn by the Advocate for the Respondent, the last known address is 82059-80100 Mombasa. There is no explanation where the address of 90562-80100 Mombasa came from. Further the last known address on the summons is 43437-80100 Mombasa.
7. I note from the Annexure marked EM1b in the application dated 27/5/2020 for judgment, is a copy of the certificate of posting to Mupeki haulers limited. There is no annexure on service on the first Appellant at all. He has never been served to date. I note that the request was made on 28/5/2020. This date will be crucial shortly.
8. Judgment was entered in default of appearance and a decree issued thenceforth. The appellants filed an application dated 20/8/2020 seeking to set aside the ex parte judgment.
9. They stated that the offices OF the 2<sup>nd</sup> Respondent were temporality closed as such mail could not be received. They were not aware of the suit before the court.
10. They question the alleged settlement deed dated 30/10/2018. The first Appellant averred that he never entered an agreement as a guarantor.
11. He said there were triable issues. They stated that the suit was meant to defraud them. They denied owning the address given in the affidavit of non- service. They stated that the Plaintiff used uncouth



tactics to obtain judgment against the Appellants. They annexed a receipt for payment of Auctioneers charges.

12. The Respondent filed a Replying Affidavit, which they disputed the Appellant's version of events. They stated that the debt is not denied and they have 3 undated and unbanked cheques for 990,000/= each totaling to 2,970,000/=.
13. The Appellant filed a further affidavit dated 28/9/2020. It was paid for on 28/09/2020 at 11.28.32 am. The Appellant paid a sum of 85/= being for further affidavit and annexure. This was acknowledged by the court.

### **Appellants' submissions**

14. The appellant rendered oral submissions on the hearing date. Mr Matheka posited that his client was condemned unheard. He stated that the court refused to look at the draft defence which is at page 127(16) of the record. Their view was that the appellants were not served.

### **Respondent's submissions**

15. The respondent also adopted their written submissions and urged me to dismiss the appeal. In the written submissions, they relied on the case of Kenya Red Cross Society v Mbondo Katheke Mwanja [2020] eKLR, justice G V Odunga, stated as doth: -

“As I held in my earlier ruling herein, a party cannot rely on an awkward situation created by itself as a ground for seeking favourable orders from the court. The applicant ought to have known exactly what it was expected to do. One does not need the proceedings from the court appealed from to prepare and lodge its memorandum of appeal.”

16. In this case, the respondent argued that the Appellant failed to file the further affidavit within time and as such were to blame. This was thus a matter for Appeal but not review.
17. On the question whether, the appeal has merit, the respondent posits that the appeal is against the court's exercise of discretion. They rely on the case of Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira [2022] eKLR, where justice MUGO KAMAU, stated as follows; -

“Finally, the Application is irregularly in Court since an Applicant in an Application for Review ought to have annexed a formal extracted Decree or order in respect of which the review is sought.

In the case of Suleiman Murunga V Nilestar Holdings Limited & Another (2015) eKLR the court held as follows:

“The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant's application was fatally defective. I agree that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree or order”



18. They question the failure to annex a decree or order appealed from. They say that this is a pre-requisite for grant of orders. I shall revert on this shortly in a more profound way.
19. The respondent submitted that there is no error apparent on the face of the record. He relies on the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR,
 

“The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.”
20. The Respondent urges me to dismiss the appeal with costs. The Respondent stated that costs should be awarded on the basis of the conduct before litigation, length of litigation and during litigation.

### **Duty of the first Appellate court**

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The position is different however, where the Appeal is based on affidavit evidence.
22. It must be remembered that this court has no jurisdiction to decide on grounds not on the memorandum of appeal. It is equally noteworthy, that any respondent aggrieved must raise grounds to that effect. One cannot raise grounds not on the memorandum of appeal or cross appeal. The Appellate court has no original jurisdiction to deal with matters not in the lower court.
23. The Court has to deal with discretion with circumscription. In the case of Mbogo and Another vs. 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 it 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.”
24. The duty of the 1<sup>st</sup> Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs 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.”
25. 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...”

26. 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.
27. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.
28. In the case of *Peters vs 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...”

### **Analysis**

29. I have never seen a case where all parties can be so wrong and then stuck in their wrongness without. It is what I used to call ignorance bliss. Had parties been aware of these circumstances, this judgment will have been unnecessary.
30. Three things that must be addressed are: -
  - a. Whether this was a liquidated claim.
  - b. Whether there can be service by implication.
  - c. The effect of irregular and regular judgment.
31. The Appellant submitted to me that the case herein was a liquidated claim. I disagree. This was a special claim. This was for alleged supply that was not paid. It is not money had and received. As a corollary there has been a series of blunders that have driven parties to this end.
32. It is crucial to remember that there are two sets of *ex parte* judgment, that is irregular judgment and regular judgment. Justice G V Odunga as then he was in the matter of *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, the court stated as doth: -

“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.”
33. The Court of Appeal stated the following in the case of *James Kanyिता Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. 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).

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 justitiae*, 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. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711:

“[T]here 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.”

34. Further, In the case *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [supra], the court stated as follows: -

“The former Court of Appeal for Eastern Africa, in *Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others*, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, *ex debito justitiae*, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. concurred, stated thus:

“On the appeal before us Mr. Khanna relied on *Craig v Kanseen* [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside *ex debito justitiae*, and that in cases of nullity procedure is unimportant, since the Court



has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR.” (Emphasis added).

35. If there is a regular judgment, there is a need for the applicant to show that that are entitled to defend. However, in view of the dictates of Article 159 of *the constitution*, mere lateness is not enough.
36. In respect of this matter this case falls in the former. In the former case, the 1<sup>st</sup> applicant is entitled to defend. He does not need to show he has a good defence. He does not need to make the application within a reasonable time. He must however make the same as soon as he learns of the proceeds. Imagine a scenario where a case may have proceeded for 17 years but the Defendant has not been served. The length of time is irrelevant since it is an irregular judgment.
37. Further, the claim is over sale of goods. There is no pleading on how the debt arose. There is no memorandum covering the amount. Under section 6 of the *sale of goods act*, there is a requirement for a memorandum before the court finds a party liable for such claims. The section provides as doth: -
- “6.
- (1) A contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.
  - (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering them fit for delivery.
  - (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.”
38. The duty of the court herein is to consider the totality of the evidence. For an application for review under section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules, other than sufficient cause, there needs to be either of the following: -
- a. An error Apparent on the face of the record
  - b. Discovery of new facts, which could not with diligence been discovered before the impugned decision was made.
39. Section 80 Of The *Civil Procedure Act* Provides as follows: -
- Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

40. In an application filed in this appeal I had this to say on the application for review for the security offered: -

“In the case *MNW Vs LNN (2021) eKLR* at paragraph 31, Hon Justice Kariuki held and doth; -

The other ground for review is an error apparent on the face of the record. The error is not an error that has to be searched for, interpreted or even construed.

In *Maina Waithaka Versus Winnie Njoki Kitonyi(2023) eKLR* I had this to say by paraphrasing Thomas Jefferson during the declaration of the independence of the US:

“error like the truth is self-evident. They are by ordinary human and perception and reason seen as errors. If we have to extrapolate, construct or even base it on reason then the errors are not apparent.”

41. The Court of Appeal stated as doth in the case of *M/s Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [supra] eKLR*: -

“Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the Civil Procedure rules gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated this discretion should be exercised judiciously and not capriciously. In *National Bank of Kenya Limited v Ndungu Njau (1997) eKLR* this Court held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter”

42. In this case the error was apparent on the face of the court. However, the court was determined to dismiss the application. The error was that there was a further affidavit filed and paid for. It was on record. If it had not been placed on the court file, it was not the duty of the Appellant to do so. It is the court.

43. The Court, should have addressed the lateness of the further affidavit in the first ruling. Then this could have been a ground for appeal. The court cannot pretend not to see an affidavit on record. The court had granted leave for its filing. This was at the height of covid-19 pandemic. Only a stranger in Mombasa could not have known that court were closed. It is Mombasa law courts that pioneered technology and revived court attendance, hence the mantra, where technology meets justice. It appears that the court was not interested in the overall justice of the case.

44. The issue of lateness was neither raised by Mr Mokaya nor addressed by the court. The court did give any reason for excluding the affidavit. He truth is that contrary to the ruling, the court did not consider the affidavit and submissions. Indeed In its shortly ruling given on 29/1/2020, the court stated that no draft defence was exhibited. He also held that the summons were properly served. This necessitated the



Application for review of the Ruling and order. The court concedes that leave to file a further affidavit was granted on 20/9/2020 and was to be filed within 7 days. From the cannons of interpretation, the first day is excluded and last included. The filing was done by 28/9/2020, well out of time.

45. I have seen the proceedings from the lower court. On 2/9/2020 the appellant sought leave to file a further affidavit. The applicant was granted leave to file within 7 days. On 6/10/2020, the Advocate for the Respondent confirmed he had been served. The mention then was to confirm filing. The Respondent stated that he had equally filed his affidavit. A ruling date was given. The Respondent had argued that this was a liquidated claim. The court held as follows: -

“I directed parties to file submissions but at the time of writing this ruling, it is only the plaintiff advocate(sic) who had placed his submissions on record. I presume that the defendants did not file.”

46. It is apparent on the face of the record that the court did not consider the submissions. Had he looked at the court file, he will have noted, that the advocate for the Respondent, in the proceedings pursuant to which he gave a ruling date, that both parties had filed submissions. Mr Mokaya equally conceded that the further affidavit had been filed. The court cannot then walk back to proceedings it had just recorded.

47. When the application for review was filed, the court turned around and said,

“Clearly, the further affidavit was filed out of time. The defendants have not explained the delay. I shall revisit the issue of the further affidavit having been filed out of time without leave of the court.”

48. The court was saying that it cannot consider the said affidavit. With that application being dismissed, the appellants filed the appeal herein. Parties filed submissions and I gave a date for today for judgment.

49. Other than the late filing, there was no other reason the further affidavit was not considered. Having found the affidavit was excluded in error, it my duty to evaluate the overall effect had the error not been committed. The defence was that the debt is not due. The court stated that the Appellant had a duty to show why they issued cheques. The debt herein is for Ksh. 5,162,630/=. The entire claim is not particularized. There is no pleading the cheques were for.

50. I have perused the file and note that the claim of 120,000/= is related to some kind of legal fees by an unqualified person. There is no written memorandum over the same. Under contracts act, no one can be liable unless there is a memorandum in writing evidencing the debt. I am doubtful that the claim is properly pleaded.

51. The claim for fuel is equally not particularized. In *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR, The Court of Appeal Makhandia, Ouko & M’noti, JJ., stated as doth: -

“special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See *National Social Security Fund Board of Trustees vs Sifa International Limited* (2016) eKLR, *Macharia & Waiguru vs Muranga Municipal Council & Another* (2014) eKLR and *Provincial Insurance Co. EA Ltd vs*



Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.

The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.”

52. Consequently, the trial court was wrong in treating special damages as a claim for money had and received. This was a claim for supply of fuel and title deeds. This was not that cheques were given and bounced. The beauty with special damages is that after request for judgment, and interlocutory judgment is entered, there must be formal proof. The claim was not a liquidated claim.
53. Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M’etirikia [2021] eKLR, the Court, Edward M. Muriithi held as doth; -

“ 35. This Court finds that the failure by the Respondent to file a defence did not amount to an admission of the negligence claim in the Plaintiff. It only meant that the matter could proceed to formal proof as undefended cause. This Court further finds that the provision of assessment of damages pursuant to entry of interlocutory judgment with respect to a claim for pecuniary damages under Order 10 Rule 6 of the Civil Procedure Rules did not absolve the Appellants from their duty to prove liability. A reading of Order 10 Rule 9 reveals that a Plaintiff is required to set down his matter for hearing with respect to all other claims even when the Defendant has failed to file a defence or to enter appearance. The claim by the Appellants was twofold. The first part was on liability for negligence and the second part was on quantum of damages. The claim on liability qualifies in the category of ‘all other claims’ required to have been set down for hearing as per Order 10 Rule 9 of the Civil Procedure Rules.”

54. The defence raises triable issues. This however, is not relevant to the first defendant. There was no service upon him. In fact no summons were issued in respect of him. They were appended to the second appellant’s summons. If there are 10 parties, there must be issued 10 summons for each of them.
55. I agree with the appellant that the Respondent intended to get the appellant that the respondent got the judgment by stealth, craft and subterfuge. The judgment was inchoate as no formal proof had been done. Even if the court had not set aside the judgment, an order for formal proof was necessary. The court must at all times differentiate liquidated claims from claim of special damages. This is within the dictates of order 10 rule 9, which provides as follows: -

“ Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

56. There is a simple test, if the party claiming has not parted with money he is claiming, then it is special damages. Special damages arise from breach of either contract or some duty. Even where cheques are



- issued, there purpose must be pleaded and proved. In this case, a request was made followed by a decree and execution. A duty to specifically prove special damages is never taken away by failure to file defence.
57. The Court then proceeded to say that this was a regular judgment. This was an irregular judgment. The Respondent had conceded in the affidavit of non-service that the offices were closed. Serving to that point is cavalier. Secondly, it is clear beyond any peradventure that the 1<sup>st</sup> Appellant's last known address as per the title deeds, is P.o box 411 Arthi River. There was however no appeal by the seconds respondent on the finding that service was proper. Though not true, it stands. There was however no service for formal proof. The resulting judgment is still irregular.
  58. Further, in the purported deed of settlement, no address is indicated. All details by the Respondent are given while the details of the 1<sup>st</sup> respondent are simply wrong. No one trades as a limited liability company. No address is given. The agreement is not signed in the right place by the 1<sup>st</sup> Respondent. The affidavit in support clearly indicated that the Appellants were not accepting to have signed the agreement. The court failed to consider defence on record since he could not see it.
  59. In the end I am satisfied that the judgment was irregular. There was no service. There was no basis for serving, during covid-19, to an address admitted to be closed. The three addresses submitted that is 90562-80100, 82050-80100 Mombasa and 43437-80100 Mombasa raise legitimate doubt on service.
  60. I note that the closed address is the same being used by the Appellants, but it does not change the fact that it was closed during the time in issue. A request made in May 2020 during the height of Covid-19 was no legitimate in view of the earlier directive by the National council on administration of justice while the world was dealing with a global pandemic.
  61. In view of the foregoing, I find the judgment entered in Mombasa cmcc 604 of 2019 is irregular and must as a corollary be set aside ex debito justiceae. I set aside the entire judgment and decree of the lower court. I substitute it with an order allowing both applications dated 1/12/2021 and 20/8/2020. Costs follow the event.
  62. Given that the Respondent used a short cut and obtained a decree before formal proof, did not serve the parties in particular the first Appellant they shall bear the costs.
  63. The 2<sup>nd</sup> Appellant is granted leave to unconditionally enter appearance within 15 days of this ruling and file defence within 15 days of entry of appearance.
  64. The Respondent to seek leave to extend summons against the 1<sup>st</sup> Respondent since there was not attempt to serve him. Upon extension of summons, the 1<sup>st</sup> Respondent be at liberty to enter appearance within 15 days of service of summons and file defence within 15 days of filing entry of appearance. If the application for extension of summons is not made within 14 days from today, the suit against the first Appellant shall stand dismissed with costs. Whichever the case, the deposit of the title deeds must be made within 30 days.
  65. The Respondent shall bear the costs of the Appeal of Ksh. 205,000/=.
  66. I also note that the original titles in relation to Mavoko Municipality Block 86(Mlolongo Brothers 372 and 374 are in issue in this matter, and they are in custody of the Respondent in circumstances that the *Advocates Act* may frown upon. In exercise of my inherent powers, I direct that the two title deeds, that is, Mavoko Municipality Block 86(Mlolongo Brothers 372 and Mavoko Municipality Block 86(Mlolongo Brothers 374 be deposited in court within 30 days, failing which the entire suit shall stand struck out with costs.



67. The respondents shall bear the costs of the two applications in the court below at Ksh 12,500/= each totaling to Ksh. 25,000/=.
68. The lower court matter shall be mentioned in the lower court on 24/10/2023 to confirm compliance.
69. I note that none of the parties dealt with the issue of auctioneers' costs. It is important in matters of this nature, that that issue be dealt with to insulate auctioneers from having to re-establish their footing.
70. Given that the judgment was highly irregular, then it is the Respondent, as the instructing party who shall bear any auctioneers charges incurred so far. If the Appellant have paid any such auctioneers charges, they shall be refunded by the Respondents within 30 days from today.

### **Determination**

71. The upshot of the foregoing is that the appeal herein is merited and is as such allowed with costs in the following terms: -
  - a. There was an error apparent on the face of the record and as such the application dated 1/2/2021 was erroneously dismissed.
  - b. The judgment entered in the lower court was highly irregular.
  - c. I set aside the entire judgment and decree of the lower court. I substitute it with an order allowing both applications dated 1/12/2021 and 20/8/2020.
  - d. Given that the Respondent used a short cut and obtained a decree before formal proof, did not serve the parties in particular the first Appellant they shall bear the costs.
  - e. The original titles in relation to Mavoko Municipality Block 86(Mlolongo Brothers 372 and 374 are in issue in this matter, and they are in custody of the Respondent in circumstances that the *Advocates Act* may frown upon, in exercise of my inherent powers, I direct that they be deposited in court within 30 days, failing which the entire suit stands struck out with costs.
  - f. The 2<sup>nd</sup> Appellant is granted leave to unconditionally enter appearance within 15 days of this ruling and file defence within 15 days of entry of appearance.
  - g. The Respondent to seek leave to extend summons against the 1<sup>st</sup> Respondent since there was not attempt to serve him. Upon extension of summons, the 1<sup>st</sup> Respondent be at liberty to enter appearance within 15 days of service of summons and file defence within 15 days of filing entry of appearance. If the application for extension of summons is not made within 14 days from today, OR if the court below declines to extend summons, the suit against the first Appellant shall stand dismissed with costs. Whichever the case, the deposit of the title deeds must be made within 30 days.
  - h. The Respondent shall bear the costs of the Appeal of Ksh. 205,000/=.
  - i. The respondents shall bear the costs of the two applications dated 1/12/2021 and 20/8/2020 filed in the court below at Ksh 12,500/= each.
  - j. The lower court, in Mombasa cmcc 604 of 2019 shall be mentioned in the lower court on 24/10/2023 to confirm compliance.
  - k. Given that the judgment was highly irregular, then it is the Respondent, as the instructing party who shall bear any auctioneers charges incurred so far. If the Appellant have paid any such auctioneers charges, they shall be refunded by the Respondents within 30 days from today.



1. This file is closed

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Mr Matheka for the Appellant

Mr Mokaya for the Respondent

Court Assistant - Brian

