REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 10 OF 2019

(CORAM: R. E. ABURILI - J.)

GULF FABRICATORS..APPELLANT

VERSUS

COUNTY GOVERNMENT OF SIAYA.............................RESPONDENT

(Being an appeal from the judgment delivered at Principal Magistrate's Court, Siaya dated

7th March 2018 in Siaya Civil Suit No 54 of 2017) before Hon. T.M. Olando, Senior Resident Magistrate)

JUDGMENT VIA SKYPE

1. The Appellant herein **Gulf Fabricators Ltd** was the plaintiff in the Principal Magistrate's court at Siaya, in ***Civil Suit No. 54 of 2017***. The respondent County Government of Siaya was the defendant.

2. In the said suit before the trial court, the appellant vide Plaint dated 13th April 2017 sued the Respondent County Government of Siaya seeking judgment and orders for:

> ***(a) A permanent injunction restraining the Defendant, its employees, servants, workers and or agents from awarding the tender number CGS/SCM/OTIEDU'2015-2016-001 that was awarded to the applicant (plaintiff) to another contractor/company.***
>
> ***(b) An order that an independent valuer be appointed to ascertain the value of amount of work that has so far been done by the Plaintiff pertaining to the tender and the plaintiff to be paid for the same plus interest;***
>
> ***(c) Costs of the suit and interest thereon at court rate.***

3. The suit was instituted through the law firm of Sala and Mudany Advocates. Simultaneous with the filing of the said suit, the appellant/plaintiff also filed a list of documents as well as a notice of motion under Certificate of Urgency seeking for interim (interlocutory orders to preserve the subject matter of the suit pending the final hearing and determination of the main suit on its merits).

4. According to the appellant, all the above documents were served upon the Defendant/Respondent on 20/4/2017 and more specifically, to one Joan J.A. Olwal who acknowledged receipt of the documents by signing on the same but no stamp was appended on the said documents.

5. It was after the Defendant/Respondent allegedly failed to enter an appearance or defence that the Appellant herein applied for leave to obtain exparte judgment against the Defendant/Respondent vide a Notice of Motion dated 11/7/2017 which application was heard and determined on 12/7/2017 and a date for formal proof hearing set. Formal proof was conducted on 8/11/2017 and final judgment was delivered on 7/3/2018.

6. It was after the Respondent/Defendant was served with Notice of Entry of Judgment that they filed an application dated 15/5/2018 seeking to set aside the exparte judgment asserting that the summons to enter appearance were not properly served on them and that they intended to defend the suit. Further, that it was in the interest of justice that they be allowed to defend the suit as they were prejudiced by the exparte judgment noting that the subject contract had been terminated and substantial works undertaken by another contractor.

7. The Appellant/Plaintiff opposed the application for setting aside exparte judgment contending that the Defendant had been duly served with all process as evidenced by the affidavits of services and documents annexed thereto and that the Defendant was aware of the proceedings against it but chose not to participate in the proceedings and that the application was an afterthought, lacked merit and was not brought in good faith hence the same ought to be dismissed with costs.

8. The Plaintiff also prayed that in the event that the trial court found it fit to allow the application for setting aside of exparte judgment then the defendant should be ordered to pay to the plaintiff thrown away costs ***and deposit the decretal sum plus interes***t, and costs in a joint interest earning account wherein both the plaintiff and the defendants are signatories.

9. In his ruling dated 27/3/2018 which is the subject of this appeal, the trial court found that there was no proper service of summons to enter appearance upon the defendant/Respondent. He highlighted that he had examined the application by the plaintiff dated 11/7/2017 requesting for judgment to be entered against the defendant and found that the summons which were served upon the defendant were not annexed to that application, showing that the defendant received the same. The trial magistrate concluded that the plaintiff either deliberately or tactfully avoided to annex the summons to enter appearance.

10. Aggrieved by that ruling, the Plaintiff/Appellant filed this appeal vide memorandum of Appeal dated 4/4/2019, setting out the following grounds of appeal:

> ***(1) The learned Trial Magistrate erred in law and in fact by allowing the Respondent's application dated 15/5/2018 that sought setting aside of the exparte judgment delivered on 7/3/2018.***
>
> ***(2) The learned Trial Judge (sic) erred in law and in fact by disregarding all the evidence that was adduced by the appellant as proof of service effected upon the Respondent severally by the appellant which evidence is also in the court file.***
>
> ***(3) The learned Trial Magistrate erred in law and in fact in arriving at a ruling that was against the weight of evidence on record.***
>
> ***The appellant prayed that: -***
>
> ***(a) the appeal be allowed by having the order issued on 27th March 2019 in regards (sic) to setting aside the exparte judgment delivered on 7/3/2018 and the defendant given 14 days to file the papers, costs to be in the cause be set aside.***
>
> ***(b) The Appellant be allowed to proceed with execution to enable him (sic) enjoy the fruits of his (sic) judgment.***
>
> ***(c) The Appellant be awarded the costs of his appeal.***

11. The appeal was canvassed by way of oral submissions.

12. The original record of appeal dated 29th May 2019 had no pleadings so this court granted the appellant leave to file supplementary record of appeal. This was on 2/10/2019 when the appeal came up for hearing. On 14/10/2019 the appellant filed a supplementary record of appeal dated 14/10/2019 containing the said pleadings.

13. In the oral submissions, counsel for the appellant Mr. Sala submitted reiterating the grounds of appeal as presented and emphasizing that on their part, they served upon the Defendant/Respondent with every mention and hearing notice during the trial as shown by the trial court proceedings and affidavits of service together with stamps of the Respondent and Annual licences of process servers and judgment. Counsel submitted that he believes that the Respondent through its own error of judgment deliberately failed to attend court hence this court should allow the appeal.

14. Opposing the appeal, Mr. Oduol Advocate holding brief for Mr. Oruenyo Advocate for the Respondent submitted that **Order 10 Rule 11 of the Civil Procedure Rules** gives the court unfettered discretion to set aside interlocutory exparte judgment. He cited the case of ***Philip Kiptoo Chemwolo Vs Mumias Sugar Co. Ltd Vs Augustine Kubende [1982] KAR 1036*** on the principles for setting aside interlocutory judgment emphasizing that discretion is unconditional and when exercising it, the trial Magistrate exercised discretion judicially to avoid injustice or hardship caused by excusable mistake or error not to assist the Respondent to obstruct or delay the cause of justice.

15. Counsel for the respondent contended that service upon the Respondent was irregular and not in conformity with **Order 5 Rule 3 of the Civil Procedure Rules**. He further submitted that in considering whether or not to set aside the interlocutory judgment, the trial court exercised discretion judiciously hence this appeal has no merit and should be dismissed with costs.

16. In a brief rejoinder, counsel for the appellant, Mr. Sala submitted that **Order 10 Rule 11 of the Civil Procedure Rules** does not grant unfettered discretion to set aside judgment because it provides: ***"upon such terms as are just.***" Counsel submitted that the trial court gave no terms yet the Respondent was served numerously. On reference to **Order 5 Rule 3 of the Civil procedure Rules**, counsel for the appellant submitted that service as done confirmed to the said provision of **Order 5 Rule 3(b)(i) of the Civil Procedure Rules**.

17. This being a first appeal, this court is obliged to reassess, reevaluate and reexamine the evidence and extracts adduced before the trial court and arrive at its own independent conclusion as stipulated in **Section 78 of the Civil Procedure Act** and as expounded in the ***Sielle Vs Associated Motor Boat Company Ltd [1968] E.A 123***, bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving an allowance to that.

18. Nonetheless, I take note of the fact that this appeal arises from the Ruling of the trial court made on 27/3/2019 setting aside exparte judgment entered against the Defendant/Respondent in default of appearance and defence. It is for that reason that I must reexamine the entire trial court record from the time of institution of suit until the impugned Ruling was rendered giving rise to this appeal, in order for this court to determine whether the judgment which was impugned by the Ruling of 27/3/2019 was entered into regularly or irregularly and what orders this court should make in either of the two scenarios and circumstances.

19. The main dispute between the parties hereto, as can be discerned from the Plaint dated 13/4/2017 and filed in court the same day on behalf of the appellant, then Plaintiff, is that the plaintiff and defendant entered into a contractual tender for construction of **ECD Blocks in Alego Usonga Sub-county on 13/4/2016 at an agreed price of Kshs. 3,497,766/= per ECD Block.**

20. Later, the Defendant issued the Plaintiff contractor with termination letter and purported, to, according to the plaintiff, engage another contractor to undertake the work which the Plaintiff had allegedly begun and almost completing the same.

21. The Plaintiff therefore filed suit seeking for a permanent injunction restraining the defendant from awarding the subject tender No. **CGS/SCM/OTIEDU 2015-2016-001** that was awarded to the plaintiff to another contractor company; an order that an independent valuer be appointed to ascertain the value of amount of work that has so far been done by the plaintiff pertaining to the tender; and the plaintiff to be paid the same plus interest; costs of the suit and interest thereon at court rates.

22. The contract was allegedly terminated vide a letter dated **23/8/2016** signed by the Secretary, County Government of Siaya.

23. Simultaneous with the filing of the plaint, the appellant/plaintiff also filed a Notice of Motion under certificate of urgency and did obtain conservatory orders in terms of the prayer for an interim injunction against the Defendant/Respondent.

24. Interpartes hearing of the interlocutory application was scheduled for 26/4/2014 but on the latter date, the trial Magistrate Hon. C.A. Okore SRM observed that although the plaintiff's counsel alleged that the Defendant had been served, there was no receiving stamp. She therefore directed that the application be heard on 17/5/2017 and the Defendant to be served with Notice.

25. On **17/5/2017,** the matter was before Hon. T.M. Olando SRM who allowed the plaintiff's application dated 13/4/2017 as prayed on account that the same was not opposed. This time round, albeit there was no receiving stamp on the 'served' hearing Notice, the trial Magistrate allowed the application as unopposed, based on the affidavit of service sworn by Dennis Malova A. on 5th May, 2017, attaching copy of hearing Notice dated 4th May, 2017. Subsequently, an order was extracted and served upon the Defendant through Rowena Ndeda on 29/5/2017, as per the affidavit of service dated 29/5/2017 sworn by Dennis Malova A. The latter affidavit of service says that the process server asked for an official stamp which was stamped on the order in acknowledgement of service unlike in the previous service effected on 5/5/2017 when service was allegedly effected on Joan J.A Olwal. It was after the application for leave to enter interlocutory judgment in default of appearance and defence was granted that the Hon. T.M. Olando, SRM, fixed the suit for formal proof on 27/9/2017 with an order for hearing Notice to issue.

26. However, nothing transpired on 27/9/2017. The trial court record shows that the matter was instead mentioned on 29/9/2017 in the Registry when a hearing date was fixed for **8th November 2017.**

27. On the latter date, Miss Kagoya Advocate for the appellant herein told the trial court that she was ready with two witnesses albeit only one witness testified and she closed the plaintiff's case. The court then closed the defence case and set the matter for submissions and later judgment was delivered **on 7/3/2018. This** is the judgment which was set aside by the trial court, giving rise to this appeal being filed by the aggrieved plaintiff insisting that having served the defendant with all notices including summons to enter appearance, the trial court should not have set aside the judgment in default of appearance and defence.

DETERMINATION

28. Having considered the trial court record, the grounds of appeal and submissions for and against this appeal and cited cases, in my humble view, the main issue for determination is whether the trial magistrate erred in law and fact when, by his ruling dated 27/3/2018 he allowed the Defendant/Respondent's application for setting aside exparte judgment in default of appearance and defence, and without any terms attendant thereto.

29. Before I delve into the depths of the merits of this appeal, I must make some observations in the procedure for entry of judgment against a party who defaults entering appearance and defence.

30. The relevant provision in this case which is between the appellant company and the Respondent County Government is Order 10 Rule 8 of the Civil Procedure Rules which stipulates that:

> ***"No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return date."***

31. I note that the application dated 11/7/2017 filed on 12/7/2017 sought for leave of court to be granted to the plaintiff for judgment to be entered against the defendant in default of entering appearance and filing a defence. I further note that t*he applicant never sought any prayer to the effect that interlocutory judgment be entered against the defendant, which judgment would then have given room for formal proof hearing followed by a final judgment.*

32. In other words, albeit leave of the court was granted, such leave was not and did not operate as interlocutory judgment. The plaintiff was expected to use the leave granted to request for judgement in default of appearance and defence, which was not done in the present case.

33. That being the case, it is my humble view that the formal proof hearing leading to the judgment of 7/3/2019 was in itself premature and irregular. An irregular judgment is amenable for setting aside *in limine.* In setting aside an irregular or premature judgment, the court does not enjoy any discretion stipulated in the **Mbogo v Shah [1968] EA 93 case**. I would therefore on this ground alone dismiss this appeal.

34. However, as the appellant claims that there was proper service of summons to enter appearance and all processes upon the Respondent and that there was deliberate failure to enter appearance and file defence, I must delve into the merits of the appeal by analysis and reassessing the trial court record as I have done above, as against the established legal principles.

35. It must be appreciated that service of summons to enter appearance and plaint upon the Defendant in a suit is crucial. In addition, before the court can be asked to proceed and grant leave to the plaintiff to apply for interlocutory judgment and before such interlocutory judgment leading to formal proof hearing in unliquidated claims is entered and or issued, the court must be satisfied that summons to enter appearance and plaint were properly served upon the defendant, as stipulated in the law.

36. As earlier stated, and in this particular case, the defendant/Respondent being a County Government, the process of obtaining leave of court to apply for interlocutory judgment must be complied with and once such interlocutory judgment is entered in an unliquidated claim like the instant claim, then a party can set down the suit for formal proof hearing. Even then the defendant Government must be served with notice of the hearing date.

37. **Order 10 Rule (2) of the Civil Procedure Rules** provide for Affidavit of Service upon non-appearance as follows: -

> ***"Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court."***

38. **Order 10 Rule 11** provides for setting aside of judgment entered under **Order 10**. In ***Ali Bin Khamis V. Salim Khamis Korobe & 2 Others*, [1956] 23 EACA 195**, it was held inter alia that an order made without service of summons to Enter Appearance is a nullity which must be set aside ***ex debito justiciae***.

39. This position was confirmed by the Court of Appeal in ***CA No. 6 of 2015 James Kanyita Nderitu V Maries Philotas Ghika & Another [2016]eKLR*** where it was held:

> ***"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 this case. From the onset, it cannot be gainsaid that a distinction has always existed between the 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 appearances 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 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 (see Mbogo & Another V Shah (supra); Patel V EA Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another V Kubende [1986] KLR 492 and CMC Holdings Vs Nzioki [2004]1 KLR 173).***
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> ***In an irregular 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 justiciae, 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 underline the importance of the right to be heard as follows in Sangram Singh V Election Tribunal, Kotch, AIR 1955 SC 664, at 711:***
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> ***"There must be never present to the mind the fact that ours 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 precluded from participating in them."***

40. The approach of the courts, from the ***James Kanyita Nderitu V Maries Philotas Ghika & Another case (supra)***, where an irregular default judgment has been entered is demonstrated in the following cases: In ***Frigonken Ltd V. Value Park Food Ltd, HCC No. 424 of 2010***, the High Court stated:

> ***"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justiciae. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process".***

41. Earlier in ***Kabutha V. Mucheru HCC No. 82 of 2002*** **Nakuru** (Musinga J, (as he then was) had expressed the principle thus:

> ***"[with] respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an exparte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the***

judicial process."

42. See also ***Bouchard International (Services) Ltd v M'Mwereia [1987] KLR 193, REMCO Ltd V Mistry Jadua Parbat & Co. Ltd and 2 Others [2002]1 EA 233 and Baiywo v Bach [1987]KLR 89.***

43. In my humble view, if the Plaint and summons to enter appearance in the present case were served upon the Respondent on 20/4/2017 as deposed by the process server, and there was no Memorandum of appearance entered or defence filed within the stipulated time frames given, it was expected that as the suit was against the County Government and not just any other ordinary person or company, the Plaintiff should have filed a formal application under **Order 10 Rule 8 of the Civil Procedure Rules**, seeking for leave to enter judgment against the Respondent and such application was to be served upon the Respondent/Defendant giving it not less than 7 days before the return day.

44. I have perused the entire trial court record and I find no such service of the application for leave to enter judgment against the Respondent/Defendant in default of appearance and defence. This is because the said application dated 11//7/2017 and filed in court on 12/7/2017 was heard and orders granted on the same latter date, when it was mentioned before Hon. T.M. Olando, SRM and in the presence of Miss Sakol Advocate holding brief for Miss Kaya for the Plaintiff, when the said advocate asked for judgment against the Defendant who had neither entered appearance nor filed a defence within the provided time and the court stated:

> ***"Court:***
>
> ***I have considered the application dated 11/7/2017 and the request for judgment by the defendant (sic) (should be Plaintiff against the Defendants). I have also considered the affidavit of service and judgment is hereby entered against the defendant in default of appearance. The matter to be set down for formal proof.***
>
> ***Signed.***
>
> ***T.M. Olando, SR,***
>
> ***Hearing 23/8/2017.***
>
> ***Signed,***
>
> ***T.M. Olando, SRM***

45. Again on the **23/8/2017** with the same Coram as 12/7/2017, Miss Akol holding brief for Mr. Sala, she again stated that the matter is for hearing of the application dated 11/7/2017 and she prayed that the application be granted as it was unopposed and the Hon. Magistrate ordered:

> ***"The application is granted. The case be fixed for formal proof. Hearing Notice to issue 27/9/2019."***

46. The main hearing finally took place on **8/11/2017**.

47. My examination of the trial court record reveals that the case proceeded to formal hearing on 8/11/2017 and judgment was delivered on 7/3/2018.

48. Secondly, the application dated 12/7/2017 was heard on the same day and orders granted as prayed hence it was never served upon the Defendant as required by order 10 to Rule 8 of the Civil Procedure Rules. It follows that the affidavit of service which the trial magistrate was referring to in his ruling on the application dated 12/7/2017 seeking leave of court to apply for entry of judgment against the Defendant/Respondent was non-existent. Neither have I traced such affidavit of service on the trial court record. And even if there was any such affidavit then clearly it would show that the application dated 11th July 2017 is the one that was being considered for hearing on 12/7/2017 which means the defendant was never given the seven days required prior to the hearing of such application before leave to enter judgment against it could be granted in favour of the plaintiff.

49. Accordingly, I find and hold that the application for leave to enter judgment against the Defendant/Respondent was never served upon the Defendant/Respondent and therefore the entry of judgment against the Defendant/Respondent was by all means irregular and must be set aside and vacated as it violated Order 10 Rules 8 of the Civil Procedure Rules which require that such application for leave to apply for judgment against the Government in default of appearance or defence must be served upon the Defendant giving them at least 7 days prior to the date of hearing.

50. On that ground alone I would allow the application by the Defendant/Respondent dated 15th May 2018 seeking to set aside the judgment entered in favour of the Plaintiff/Appellant.

51. There is however, much more to say.

52. The Defendant/Respondent in their supporting affidavit sworn by Ms. Rowena Stella Ndeda deposed that the defendant discovered after entry of judgment that the documents in respect of the suit had been served on the Defendant but in a different department and that they only knew of the matter when a Notice of Entry of judgment was served upon it on 25/4/2018. It was contended and deposed that the Defendant was served with a hearing notice on 5/5/2017 slated for hearing on 17/5/2017 and that they were not properly served with the plaint and court

documents from the commencement of the suit hence the matter went undefended.

53. In a replying Affidavit, undated and sworn by Gordon Kaoko Process Server but filed on 27/8/2018, it was deposed that after institution of suit on 13/4/2017 together with Notice of Motion application which was heard exparte in the first instance, he was instructed and he did proceed to effect service of the plaint, summons to enter appearance and verifying affidavit, witness statement, list of witnesses, list of documents, Notice of Motion application, court order and all the above were served by Julius Otieno Raminya as per the annexed Affidavit of service dated 20/4/2017. That the said documents were received by Joan J.A. Olwal as per the endorsement on the front page of the copy of Summons to enter appearance dated 13/4/2017.

54. However, my examination of the original affidavit of service sworn and filed in court on 26/4/2017 shows that although the trial court relied on the said affidavit of service to allow the application for leave of entry of judgment against the defendant, there was no single document filed accompanying that affidavit of Julius Otieno Raminya indicative or pointing or showing the acknowledgement of service of summons to enter appearance upon the Defendant/Respondent herein.

55. There is however an original summons to enter appearance dated 13/4/2017 which at the backside shows an acknowledgement on 13/4/2017 by Kyamasiwa. That could not have been the service referred to since service is alleged to have been effected on 20/4/2017. I therefore take it that the acknowledgment of 13/4/2017 by Kyamasiwa was by the person who was taking the summons for purposes of service.

56. The law requires the process server to return to court an affidavit of service and evidence of such service of summons to enter appearance which was not done in this case. An affidavit of service alone is not evidence of service of process. There is no reason why the Plaintiff only filed into Court affidavit of service and not evidence of service which it now purported to annex to the affidavit in reply to the application by the Defendant seeking to set aside the exparte judgment.

57. I am not persuaded that the Defendant/Respondent herein was properly served and or that it chose to ignore the summons to enter appearances as well as the suit papers upon them.

58. The County Government of Siaya is a constitutionally established devolved unit. It is a government at the devolved level as stipulated in Article 6(1) of the Constitution and the First Schedule to the Constitution. There is absolutely no reason why a Government that draws its funding from the taxpayers should ignore such suit against it, which has financial implications.

59. In the said Replying affidavit, there is no deposition or evidence that the application dated 12/7/2017 which paved way for formal proof hearing and the subsequent judgment was ever served upon the Defendant/Respondent hence the irregularity of the formal proof hearing and the consequential judgment.

60. As stated earlier, the application dated 11/7/2017 was filed on 12/7/2017 and granted on the same latter date as per the trial court record hence, an annexture G.K 4 which is only page 1 thereof purported to have been received under protest on 2/8/2017 by R.S. Ndeda is, in my view, not genuine or at all as it purports to fix the application for hearing on 23/8/2017 yet the court record for 12/7/2017 is the one that shows that the formal proof hearing was to be on 23/8/2017 and by the latter date, the trial court had already allowed the application dated 11/7/2017 hence the purported order of 23/8/2017 allowing for the second time, the application dated 11/7/2017 was superfluous and non-consequential.

61. Furthermore, it was expected that at the formal proof hearing, the Plaintiff demonstrates to the trial court that it had served the Defendant with a hearing Notice. The trial court record shows that despite the court ordering for a hearing Notice to issue on 23/8/2017 and 29/9/2017, when the suit came up for formal proof hearing on 8/11/2017, the Plaintiff's counsel simply said she had two witnesses and that she was ready, then the matter proceeded for formal proof hearing after a call -over with one witness testifying and the plaintiff's case was closed, then the court also closed the defendant's case and fixed a date for submissions on 22/11/2017.

62. With the above flaws noted, the question is whether this court should allow this appeal or dismiss it and sustain the Ruling and order of Hon. T.M. Olando, SRM made on 27/3/2019 setting aside the exparte judgment entered against the Defendant/Respondent and allowing the Defendant to file its defence to the suit within 14 days of the date of the Ruling, which defence was filed on 9/4/2019.

63. Even if there was regular judgment on record which I find nonexistent, the power to set aside exparte judgment entered in default is discretionary. The principles upon which such discretion is to be exercise were set out by the Court of Appeal in ***Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd Vs Augustine Kubende (1982-1988) KAR 1036*** where it was held inter alia, citing with approval the English case of **Evans V Bartam [1993] AC 473**: -

> ***"The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has prima facie defence.***
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> ***The reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to much the court will have regard, in exercise of its discretion. The principle is that witness 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 the coercive power where that has only been obtained by a failure to follow any of the rules of procedure."***

64. However, in **Shah v Mbogo & another [1967] E.A**. It was held that:

> ***"The court's discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from***

accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused.”

65. There is nothing on record to indicate that the respondent defendant herein deliberately sought by way of evasion or otherwise to delay or obstruct the course of justice, as there was no evidence of service of the summons to enter appearance or the application for leave to enter judgment against the Defendant/Respondent. Iam persuaded that on the available evidence on the trial court record, the exparte judgment in default of appearance and defence was entered into or pronounced irregularly as there were several flaws which I have pointed out in my detailed analysis above. That being the case, the question of whether or not to exercise judicial discretion to set aside the said default judgment is settled.

66. I hasten to add that Justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issues, unless it is demonstrably shown that the party in question has sought to merely delay of obstruct the cause of justice.

67. For all the above reasons, I find and hold that this appeal is devoid of merit. I dismiss this appeal and uphold the Ruling of the trial court delivered on 27/3/2019 setting aside the exparte judgment and allowing the Defendant/Respondent to file a defence to the suit. The defence as filed is hereby validated.

68. The trial court file is to be returned to the lower court for compliance with the requisite procedures under the Civil Procedure Rules and appropriate directions for readying the suit for hearing on its merits.

69. Costs are in the discretion of the court and in any event, in favour of the party who is successful. However, in the instant case, I exercise discretion and order that each party shall bear their own costs of this appeal.

70. Orders accordingly.

Dated, signed and Delivered at Siaya, this 6th Day of May, 2020 via skype owing to covid-19 situation.

R.E. ABURILI

JUDGE