



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 365 OF 2013**

**VERONICAH KANINI MASALAH and**

**VERONICAH KASIKU MWENGI (Suing as the Joint**

**Administrators (Deceased)..... APPELLANT**

**V E R S U S –**

**ERICK KIGOI IRUNGU .....RESPONDENT**

**JUDGEMENT**

1) I have considered the rival submissions over the singular issue as to whether or not the trial magistrate had jurisdiction to hear and determine the question on whether or not issuance of the order for substituted service was justified. I have taken into account the oral submissions presented by learned counsels. I have on my part re-evaluated the arguments presented before Hon. Lorot, Learned Principal Magistrate.

2) There is no doubt that the appellant was granted leave to effect service by substituted service by Hon. Mokaya, learned Senior Principal Magistrate on 29.3.2010. There is also no dispute that the appellant effected service by advertisement in the Standard Newspaper. There is further no dispute that judgement in default of appearance was obtained and the matter proceeded for hearing as a formal proof. The respondent took out the motion dated 22.8.2012 in which he sought for inter alia an order to set aside the exparte judgement. Hon. Lorot heard the motion and allowed the same on 18.6.2013. I have carefully perused the ruling and it is apparent that at page 11, that the Learned Principal Magistrate allowed the motion on the basis that the order permitting the appellant to serve by substituted service should not have been given. With respect, I agree with the submissions of Miss Kamau that the Learned Principal Magistrate fell into error. He could not have set aside an order issued by a court of concurrent jurisdiction. He could only do so, if there was an application for review which was not the case.

3) In the end and on the basis of this singular ground I allow the appeal. Consequently, the ruling and order issued on 18.6.2013 is set aside. The motion dated 22.8.2012 is reinstated to be heard afresh on its merits by another competent magistrate other than Hon. Lorot on priority basis. Costs of this appeal to await the outcome of the motion dated 22.8.2012.

Dated, Signed and Delivered in open court this 7<sup>th</sup> day of September, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

Miss Kamau for the Appellant

Wanjohi for the Respondent