



REPUBLIC OF KENYA



KENYA LAW
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**Mampasoi v Njeru & 2 others (Civil Appeal E009 of 2023)
[2025] KEHC 14511 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E009 OF 2023
AK NDUNG’U, J
OCTOBER 16, 2025**

BETWEEN

MOSES MERINYO MAMPASOI APPELLANT

AND

DAVID NJERU 1ST RESPONDENT

JAMES NJUKI 2ND RESPONDENT

BENSON SIMIYU 3RD RESPONDENT

*(Appeal from the ruling dated 23/05/2023 in Nanyuki
CM Civil Case No. 13 of 2018- Ben Mararo (SPM))*

JUDGMENT

1. This is an appeal against the ruling by the trial magistrate dated 23/05/2023 in which the court set aside the exparte judgment and ordered the Respondents to file a defence afresh on application by the Respondents.
2. Being aggrieved by the said ruling, the Appellant herein preferred this appeal and in a memorandum of appeal dated 12/06/2023 raised the following grounds;
 - i. The learned magistrate erred by setting aside the decree issued on 25/10/2022.
 - ii. The learned magistrate erred by making a ruling that the application to cease acting by late Mr. Wanjohi was not served when the court itself examined the affidavit and allowed the application to cease acting in March 2020.
 - iii. The learned magistrate erred by failing to consider that the Respondent were properly served via substituted service through advertisement on 21/05/2021.



- iv. The learned magistrate erred by setting aside his judgment while forgetting that the Respondents were granted a chance during hearing which they declined.
 - v. The learned magistrate erred by not considering the fact that the 1st Respondent cross examined the witnesses on 31/08/2021 when the Plaintiff closed his case.
 - vi. The learned magistrate erred by failing to consider that it was the Respondent's own wish not to appear and defend despite the fact that the case was listed for defence hearing on 07/12/2021 when the 1st Respondent sought for more time.
 - vii. The learned magistrate erred by failing to consider the glaring evidence presented together with the averments contained in the Appellant's replying affidavit dated 20/01/2023.
 - viii. The learned magistrate erred in directing that the Respondents file fresh statements of defence yet the statements and those of the witnesses had already been filed on 23/04/2018.
 - ix. The learned magistrate erred by failing to consider the submissions tendered by the Appellant.
 - x. That the whole ruling of the learned magistrate is against the weight of evidence presented and is bad in law.
3. The Appellant prays that the ruling made on 23/05/2023 be set aside and the application dated 16/01/2023 be dismissed with costs and the judgment delivered on 24/05/2022 and decree issued on 25/10/2022 be reinstated and cost of the appeal be borne by the Respondents.
 4. The appeal was canvassed by way of written submissions. The Appellant's counsel submitted that the Respondents claimed that they were not aware that their advocate had ceased acting whilst the record shows that one Ms Mwangi, an advocate informed the court that she had filed an application to cease acting which was served upon the Respondents and the court confirmed that proper service was done and the firm of G.M Wanjohi & Co. Advocates ceased acting for them. The Appellant was directed to effect service of the mention notice and made several attempts to serve them but failed necessitating the Appellant to seek leave to serve through substituted service in the daily nation which was allowed and this made the 1st Respondent to attend court on 31/08/2021. That the claim by the Respondents that they were not aware that the former advocate ceased acting is false as when they were served with summons, they sought legal services of an advocate but failed to do a follow up on their case.
 5. He submitted that the 1st Respondent cross examined Plaintiff's witnesses and the case was closed and defence hearing was set on 07/12/2021 and on that date, the 1st Respondent informed the court that he was not ready and he was given another date, 22/03/2022 but on the said date, there was no appearance by defence. That in the application to set aside judgement, no reason was advanced as to why he did not attend court. That the reasons advanced such as lack of service was false as there were affidavits of service and it was upon such service that the trial court granted the request to proceed to delivery of judgment. Hence the trial court applied its discretion wrongly and failed to consider what had transpired before the court. Additionally, the trial court also directed the Respondents to file a defence and witness statements afresh despite the fact that their former advocate had filed a defence and witness statements raising a question on what ground did they instruct an advocate if they had not received service of pleadings.
 6. He submitted that the trial court failed to consider the replying affidavit and submissions showing wilful refusal on part of the Respondents to participate in the proceedings. Further, the application to set aside was filed on 16/01/2023 whilst the judgment was delivered on 24/05/2022 and the application for execution had already been filed when the application to set aside was filed. Therefore,



the trial court erred setting aside the judgment considering the laxity of the Respondents in hearing of the suit. He submitted that the court failed to consider the defence that had been filed to determine if it had triable issues or not that could impact the Respondents positively or negatively. The court failed to consider the fact that the Respondents did not deny dealing with the Appellant in the sale of sheep hence no prejudice would have been suffered by the Respondents.

7. In rejoinder, the 1st Respondent submitted that he used to attend court without fail until 22/03/2022 when the matter was to proceed for defence hearing. That since then, there was no further communication with regards to the stage of the proceedings as he was not served with any court documents informing him of the date or otherwise. That he perused the court file early 2023 and realised entering of the judgment against them. That rendering a judgment without hearing them would lead to a grave injustice since they have a right to be heard and he has been desirous of presenting his case and was attending court until 22/03/2023 when communication was an issue. He submitted that the application to cease acting was not served upon them and the Appellant has not provided any evidence in the record of appeal to prove the same which shows that there was no proper service. The court exercised its unfettered discretion since it was just, reasonable and in the interest of justice.
8. The 2nd Respondent did not file written submissions. A judgment had been entered against the 3rd Respondent for failing to file a defence.
9. I have duly considered the rival arguments by the parties herein. I have read through the trial record and the ruling of the trial court.
10. As seen earlier, the 1st and 2nd Respondents filed an application dated 16/01/2023 seeking that the judgment of the trial court dated 24/05/2022 and the subsequent decree be set aside. The application was based on the ground that the Respondents had not been served with the court documents and that they were not aware that their advocate had ceased acting.
11. It is to be noted that the 1st Respondent participated in the Plaintiff's case by cross examining the Plaintiff's witnesses. The Plaintiff's case was closed and defence hearing was set on 07/12/2021. On the said date, the 1st Respondent informed the court that he was not ready and defence was slated for 22/03/2022 and on that date, the 1st Respondent was absent and the trial magistrate closed the defence's case. Matter was slated for mention on 26/04/2022 and there was no indication whether the mention notice was served or not. During the said date, the court gave a judgment date which was set on 24/05/2022.
12. In allowing the application, the trial magistrate found that there was no proof of service of the notice of motion dated 18/02/2020 upon the 1st and 2nd Respondent and proceeded to allow the application for setting aside judgment and ordered the 1st and 2nd Respondents to file their defence afresh.
13. The power to set aside an ex parte judgment is discretionally. In *Mbogo & Another v Shah* [1968] E.A 93, the court had this to say:

“I think it is well settled that this Court will not interfere with the exercise of 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 has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
14. The court in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76] stated that this discretion is intended to be exercised in order to avoid hardship resulting from accident, inadvertence, or excusable



mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

15. In *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193 in which Platt, JA expressed himself as follows:

“A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. ..It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgement would be set aside in the exercise of the court's inherent jurisdiction”.

16. And in *Patel v East Africa Cargo Handling Services Ltd* (supra), it was stated thus;

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

17. As seen earlier, the 1st Respondent participated in the Plaintiff's case and even cross examined the witnesses. A date for defence hearing was given in his presence and on the said date, he informed the court that he was not ready to proceed. Another date was given for defence hearing but on the said date, he did not appear and the court proceeded to close the defence case. The reason advanced in his application for setting aside was that he was not served with any court documents and that he was not aware that their advocate had ceased acting. The 1st Respondent could not have claimed that they were not aware that their advocate had ceased acting since the 1st Respondent participated in the trial without his advocate. It therefore appears that the 1st Respondent deliberately failed to participate during the defence case. The trial court also found that the service of application to cease acting was not proved and concentrated on this to set aside its judgment. This was done notwithstanding the fact that the 1st Respondent participated during the Plaintiff's case without his advocate.
18. From the record, it is clear that the erstwhile Advocate for the Respondents had ceased acting through an application before the court that was allowed. It was not open for the trial court to revisit this issue and make any finding thereon without participation of the erstwhile Advocate for the Respondents.
19. The first Respondent participated in the trial and cross examined witnesses. A date for the hearing of his defence was set. He failed to appear for hearing. No attempt whatsoever has been made to explain



this failure. The exercise of discretion by the trial court in favour of the 1st Respondent was clearly wrong and that is enough a basis for this court to interfere with the exercise of the discretion.

20. The words of the court in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76] which have guided the courts for eons on this area come into play and bear repeating; that this discretion is intended to be exercised in order to avoid hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
21. The court also acted on matters on which it should not have acted. The parties had already filed their pleadings and witness statements. How then would the court order the filing of fresh defences? To that extent there was a clear abuse of discretion.
22. On the whole the trial court's exercise of discretion in favour of the Respondents was clearly wrong. The appeal herein thus succeeds and is allowed and I make the following orders;
 - a. The ruling and orders made by the trial court on 23/5/23 are hereby set aside.
 - b. The application dated 16/1/23 is dismissed with costs to the Appellant.
 - c. The judgement of the trial court delivered on 24/5/22 and the decree issued on 25/10/22 be and is hereby reinstated.
 - d. The appellant shall have the costs of this appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF OCTOBER, 2025.

A.K. NDUNG'U

JUDGE

