Gatuthu & another v Njuguna & Partners Advcoates (Civil Appeal E018 of 2024) [2025] KEHC 15946 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15946 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E018 OF 2024

BM MUSYOKI, J

NOVEMBER 7, 2025

BETWEEN

SAMUEL NJUGUNA GATUTHU ..... 1ST APPELLANT

JOSEPH NJUGUNA GATUTHU ..... 2ND APPELLANT

AND

NJUGUNA & PARTNERS ADVCOATES ..... RESPONDENT

(Being an appeal from ruling and orders of Honourable S. Atambo CM, dated 30-07-2024 in Thika Chief Magistrate's Court civil case number E611 of 2021)

JUDGMENT

1. This is an appeal arising from a ruling of the trial court dated 30th July 2024 in respect of the appellants' application dated 20th April 2023 which sought to set aside an ex-parte judgement entered against them for failure to enter appearance and/or file defence. In the ruling, the trial court found that the application lacked merits but exercised its discretion and granted the appellants thirty days to ensure that the decretal sum was deposited in a joint interest earning account in the names of the parties' advocates failure to which the respondent would go ahead and execute. In the relevant paragraph of the ruling, the trial court stated as follows;

> 'This court finds the application thus lacks merit but in the interest of justice the applicants are granted 30 days in which to ensure the decretal sum is deposited in a joint interest earning account in the names of the parties' advocates and the same time for them to file their statement of defence. Failure to comply with the above orders, the plaintiff/respondent shall go ahead and execute.'

2. It is against the above ruling that the appellants have approached this court with a memorandum of appeal dated 5th August 2024 which raises the following grounds;

1. That the learned Magistrate erred in law and facts in dismissing the appellants' application when the matter was yet to go to full hearing and thus disregarded the natural principle of litigation and the law on the fact that no man should be condemned before being heard.

2. That the learned Magistrate erred in law and facts in disregarding the principles of setting aside judgment and thus exercised her discretion wrongly.

3. That learned trial Magistrate erred in law in not appreciating sufficiently or at all that the appellants were deprived an opportunity to be heard.

4. That the learned trial Magistrate erred in law in not appreciating sufficiently or at all the jurisdiction conferred upon the court on an application seeking to set aside an ex parte judgment.

5. That the learned trial Magistrate erred in law in ordering the appellants to deposit the amount of Kshs. 8 million claimed in the plaint as a condition precedence to being allowed to file their statement of defence thus contravened Article 18 of *the Constitution* on access to justice.

6. That the learned trial Magistrate erred in law and particularly, when she unfairly and without reasonable cause required the appellants to deposit Ksh. 8,000,000 before being heard in a court of law.

7. That the learned Magistrate's ruling and orders were against the weight of need to dispense justice with fairness and thus were in bad law.

3. In essence, the appellants' application was allowed on condition which does not seem to have been satisfied. I understand the appellants as complaining that the Hnourable Magistrate did not apply her discretion judiciously and that they were denied an opportunity to be heard. This dictates that I go to the application dated 20th April 2023 which prayed for the following orders;

    1. That this matter be certified urgent and be deemed to be fit to be heard ex parte at the first instance.

    2. That there be a stay of execution herein until the inter parte hearing of this application.

    3. That there be a stay of execution herein until the hearing and determination of this application and the suit against the defendant by the plaintiff/respondent.

    4. That the judgment entered herein on 7th October 2021 be set aside.

    5. That the defendants be granted an unconditional leave to file their statement of defence.

    6. That the cost of this application be provided for.

4. The respondent's claim against the appellants was for a sum of Kshs 8,532,228.38 being balance of legal fees agreed between the parties in respect of Thika ELC case number 378 of 2017 which was formerly Nairobi ELC case number 867 of 2014. In two affidavits sworn by each appellant in support of the application, the appellants admitted having instructed the respondent to represent them in the land case at agreed fees of Kshs 2 million and paid a deposit of Kshs 800,000.00.

5. The appellants claimed that the respondent executed their instructions and they remitted the agreed legal fees but the respondent changed mind on the legal fees after the property in dispute in the ELC matter was valued at Kshs 75,000,000.00 upon which they reluctantly agreed and executed the agreement which formed the basis of this matter. The appellants added that the ELC case was concluded in 2020 upon which they instructed the respondent to prefer an appeal on their behalf.

According to the appellants, the demand for fees came as a surprise as they used to pay for court attendances and other disbursements.

6. The appellants denied having been served with summons to enter appearance and claimed that they came to learn of existence of the suit on 28-02-2023 when the 1st appellant attended the respondent's offices for updates on the pending appeal on which date, he was served with a mention notice for 25th April 2023. The appellants denied receiving service through emails and wondered why the respondent could not call them as they used to communicate on regular basis regarding the ELC case.

7. In reply to the application, the respondent through Charles M. Njuguna averred that the agreement between it and the appellants was entered into freely and voluntarily. He added that the agreed fees was to be paid before delivery of the judgment in the ELC matter. He insisted that the respondent had raised the issue of unpaid legal fees with the appellants on several occasions in vain and produced letters to that effect. It was his averment that the appellants had been served on 10-11-2021 through their known email addresses gatuthu100@live.com and karanjajoseph023@gmail.com which the addresses they shared when they engaged the respondent. The deponent exhibited copies of correspondences exchanged through the same addresses.

8. The respondent relied on affidavit of service of one Isaac Kabera Chege sworn on 10-11-2021 which shows that the appellants were served through the above stated email addresses. Attached to the affidavit of service were delivery reports showing that the emails were delivered to the addressees. The deponent of the replying affidavit concluded by stating that the appellants were always aware of the proceedings and that notice of entry of judgement was also served on 22-08-2022.

9. The appeal herein was disposed of by way of written submissions. I have read the appellants' submissions dated 21-06-2025 as well those of the respondent dated 15-08-2025. The principles which the court would consider in deciding whether or not to allow an application to set aside an ex-parte judgement are well settled. Decision on whether to set aside ex-parte judgement is always at the discretion of the trial court which must be exercised judiciously.

10. A court will set aside an ex-parte judgment as a matter for right if it finds that the judgment was irregular. A judgment would be irregular where some pertinent steps in securing the same were not followed or where proper service of summons and pleadings had not been done. A court would also set aside an ex-parte judgment where it is shown that the applicant has a good defence to the claim. In James Kanyiita Nderitu & another v Marios Philotas Ghikas & another (2016) KECA 470 (KLR) the Court of Appeal held that;

> '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.'

11. The appellants have claimed that they were not served with summons and pleadings. To satisfy itself of service, this court will go back to the affidavit of service by Isaac. I note from the affidavit that it has captured the date and time service on the appellants was done. The process server had also shown that the emails to the appellants were delivered. Exhibited in the replying affidavit are several emails sent to the appellants by the respondent updating them of the ELC case between 15th June 2015 and 22nd July 2017. These email messages are through the same addresses as the ones in the service of summons. The appellants did not deny these correspondences.

12. The appellants have claimed that the emails were no longer active. They have not stated when the same ceased to be active and in which way; whether they no longer accessed them or they abandoned the accounts or the accounts were deactivated. Having provided the emails addresses to their advocates, it was the appellants' duty to inform their advocates of the change of their addresses or the inactivity of the emails. In any event, I don't think that the emails would have been delivered if the accounts were no longer active. In the premises, I am satisfied that the appellants were served with summons and the trial court was right in finding so.

13. The appellants have claimed that the service through emails was not the best of mode of service and the service upon them should have been personal. Whereas personal service may be the best, it does not make it the only service acceptable or recognized in law. The Civil Procedure Rules allows service of summons through emails which is considered as effective as the personal service. Rule 22B of Order 5 of the Civil Procedure Rules states that;

    1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.

    2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.

    3. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.

    4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

14. After citing the same Rule, Honourable Justice D.S. Majanja (may his Lordship's soul continue resting in peace) held as follows in Mathews v Masika (2022) KEHC 12194 (KLR);

> 'From the aforesaid provision, the plaintiff is entitled to serve summons upon the defendant at his last confirmed and used E-mail address. Contrary to the defendant's suggestion, electronic service is not an alternative or substituted mode of service hence the plaintiff need not to make any attempt to serve the defendant personally.'

15. The appellants submit that they were denied the chance to be heard which should be the last resort. The right to be heard does not extend to the right to ignore court processes. Denial of chance to be heard can only arise where there is clear demonstration that the appellants were not served and had no opportunity to participate in the proceedings. Once a party has been accorded a chance to present their case which chance they squander, they cannot claim entitlement to reversal of the court proceedings on the pedestal of the right to be heard.

16. Where it is found that the applicant was properly served, the court may set aside the ex-parte judgement if it is satisfied that there is a good defence or there are good reasons for the defendant's failure to file

defence in time. In this matter, the only reason given for failure to enter appearance or file defence was that there was no proper service. I have already found that there was service upon the appellants. In that case, the only limb left is for me to consider is whether the appellants had a good defence to the respondent's claim.

17. It is notable that the appellants did not deny entering into a fees agreement with the respondent. All that they allege is that they did so reluctantly and that the same was unconscionable. I do not think that reluctance would be a factor for vitiating a contract. The appellants did not plead any duress or undue influence neither did they demonstrate what was unconscionable in the agreement. This court does not see any illegality in the contract or any factor that would invalidate the agreement.

18. The second document in the respondent's list of documents was statement of account which the appellants have not challenged. They have not shown that they paid some moneys which are not factored in the statement of account. In the circumstances, I do not see any good defence to the respondent's claim which would convince me to exercise discretion in favour of the appellants.

19. In view of my findings above, it is my position that the application to set aside judgement was an afterthought. The appellants had been properly served and chose not to participate in the proceedings until they were faced with imminent execution. An application to set aside judgment should not be used as a tool to delay expeditious disposal of cases or help a party who deliberately elected to slow down the wheels of justice. In Mureithi Charles & another v Jacob Atina Nyagesuka (2022) KEHC 1805 (KLR) the court held that;

> 'That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and 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.'

20. In conclusion, I find the appeal lacking in merits and the same is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Gakaria for the appellants and in absence of the respondent.