REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL DIVISION

CIVIL APPEAL NO. E165 OF 2024

BEATRICE WANGECI JESSE.....1ST APPELLANT

JOSEPH NGANGA.....2ND APPELLANT

-VERSUS-

JENEPHER OBWANA AMUSUGUT.... .....RESPONDENT

JUDGMENT

1. The appeal before this court arose from the ruling and orders issued on 2nd February, 2024 in Milimani CMCC No. E5573 of 2020. dismissing the Appellants' Application dated 23rd October, 2023, that sought to set aside an interlocutory judgment and Exparte judgment entered on 31st October, 2022 and 16th June, 2023 respectively.

2. The background;

a) The Plaintiff in this suit filed a suit on 4th July, 2020.

b) She had sued the registered owner and/or driver of motor vehicle registration number **KCG 278C.**

c) Summons to enter appearance were extracted on 3rd November, 2020. Thereafter on 12th April, 2022 the summons to enter

appearance were reissued and duly served upon the Defendants.

d) The Defendants did not enter appearance resulting in an entry of an interlocutory judgment against them on 31st October, 2022.

e) The matter had been set down for formal proof on 30thMarch, 2023.

f) The matter proceeded and judgment delivered on 16th June, 2023.

3. The Defendants moved the trial court vide an application dated 23rd October, 2023 seeking to set aside the judgment delivered on 16thJune, 2023.

4. A ruling was subsequently delivered on 2ndFebruary, 2024 dismissing the said application.

5. There after the instant appeal was filed and argued through the following 6 grounds: -

i. The Learned Magistrate erred in law and in fact in failing to set aside the Exparte judgement delivered on 16th June 2023 and all consequential proceedings without any legal and or evidential justification.

ii. The Learned Magistrate erred in law and in fact by not granting the Appellants herein leave to defend the suit for hearing on merits.

iii. The Learned Magistrate erred in law and in fact by failing to consider and appreciate that the Appellant's draft defense raises triable issues to merit setting aside the Exparte judgement.

iv. The Learned Magistrate erred in law and in fact by failing to consider that summons were not served in accordance to the law or at all.

v. The Learned Magistrate erred ill law and in fact by failing to set aside the Exparte Judgement subject to payment of throw away costs to mitigate prejudice suffered by the Respondent, if any.

vi. The Learned Magistrate erred in law and in fact by not considering the Notice of Motion Application dated 23rd October 2023 Submissions dated 15th November 2024 and case law filed by the Appellants.

6. The Appellants herein further filed their Record of Appeal dated 7th June 2024 and a Supplementary Record of Appeal dated 12th June 2024.

The Appellants Case;

7. It is the appellants case that it is evident that the trial Court proceeded to hear the matter Exparte on the understanding that the Appellants herein had been electronically served with Summons to Enter Appearance.

8. It is arguing electronic service of Summons is provided for under Order 5 Rules 22B and 22C, which provides as follows:

“22B. Electronic Mail Services (E-mail) [Order 5, rule 22B] 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 iil the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not 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.

22C. Mobile-enabled messaging Applications [Order 5, rule 22C]

(1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.

(2) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on 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.

(3) Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.

(4) An Officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery. receipt confirming service. (Emphasis supplied by way of bolding and underlining)

9. Reliance is placed in the Environment and Land Court in **Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba [2021] eKLR the court** found as follows: -

"17, [...] In regard to service of documents, the burden bearer is the one who asserts that he effected service. It is not the other way round. That is why the Rule 22B (4) of the Civil Procedure Rules provides that the officer of the Court who effected service should file an Affidavit of Service accompanied with an attachment of "the Electronic Mail Service delivery receipt confirming service." (emphasis added).

18. In terms of Sub-rule 2. it is not enough one to send documents to the last known email address of a party. The sub rule provides that the Sender must receive "a delivery receipt" as a confirmation that service has been effected. In my view, the Sub rule was meant to cure the mischief of parties sending

documents to emails of others, keeping quiet about it and taking advantage of others' lack of knowledge of the activity in their email. It is in the current times that many a people in Kenya are getting used to communicating through email. It is not so common that people will check their emails day and night or on a daily basis as it usually happens in the Western nations.

19. The Court takes judicial notice that constant access to and use of emails is not as common in Kenya for individual users as mobile-enabled text messaging and WhatsApp or other Applications through which users get quick notifications real time as long as the phone is on. Thus, although it is not a legal requirement, it then must require that a person who serves process through email should do more than just sending the email: He may need to notify or draw the attention: of the recipient of the fact that an email has been sent to his address.

20, Again, if Rule 22C (3) requires evidence of delivery receipt where service is effected via mobile-enabled messaging Applications, less cannot be required where an Email (address) is used to serve. Otherwise, failure to require that would give two standards of treatment of the same thing - proof of service - and would amount to an injustice on the part of users of emails. Therefore, the drafters of Sub-rule 4 of Order 5 Rule 22B decided in their wisdom to include the requirement that "a deliver receipt" has to be filed with the

Affidavit of Service by the authorized process server. I reiterate that a sent email is not the same as a delivery receipt.

21. The Sub-rule4 abovementioned provides that a sent email must be accompanied by evidence that the email was duly received. The Respondent did not attach the delivery receipt herein. It therefore leaves doubt as to whether or not the Applicant actually received the email that was sent on 28/9/2021 to his email at 11.46 am.

[. . .1 " (Emphasis supplied by way of bolding and underlining)

10. Further reliance is placed in the case of **Oyunge Barnabus & 3 others (Suing as Administrators of the estate of Mathayo Ratemo Mayaka (deceased)) v Charles Oteki Rioba [2021] eKLR** where it was held as follows: -

"39. *The above new provisions are only concerned with the sender receiving a delivery receipt. Therefore, once it is confirmed that the platforms used are the defendant's last known and used platforms, the challenge will only be ensuring he she (the Plaintiff) gets a delivery receipt. However, I take judicial notice that a delivery receipt in case an email is used can only be obtained When the Defendant acknowledges receipt of the email which did not happen in this case and thus it Cannot be said the Applicant was properly served via email when there was 10 acknowledgements of receipt. However, in WhatsApp messaging platform I believe the mode of confirming delivery is different.*

40. It is common knowledge that delivery in most cases is confirmed be double ticks which turn blue immediately the recipient views the Message sent. The Respondents have attached a document showing a screenshot message sent to the number that the Applicant has acknowledged to be his that shows two blue ticks signifying that the documents were indeed delivered to the afore said number belonging to Applicant. " (Emphasis supplied by way of bolding and underlining).

11. It is the appellant's case that from the Affidavit of Service accompanying the Request for Judgement: -

i. The process server avers that he effected service upon the Appellant herein via e-mail, and upon the 2nd Appellant herein via WhatsApp.

ii. However, no averments were made to the effect that the contact details provided in the Affidavit of Service were the last known and used email address of the Appellant herein and/or the last known and used telephone number of the 2nd Appellant herein.

iii. Further, no averments are made in the Affidavit of Service to the effect that the process server, as the sender of the summons, received a delivery receipt of either the email purportedly sent to the 1st Appellant, or the WhatsApp message purportedly sent to the 2nd Appellant.

12. The annexures to the Affidavit of Service show that: -

i. All messages contained in the screenshot of the WhatsApp message purportedly sent by the process server to the 2nd Appellant bears only single ticks.

ii. The email purportedly sent by the process server to the 1st Appellant has no acknowledgement of receipt, and the email itself does not have an automated delivery receipt response accompanying the email.

13. It is submitted that the Magistrate erred in fact and in law in finding that the "the defendants were duly served with process but they failed to enter appearance. It is further submitted that in absence of a confirmation of "delivery receipt" when the Summons were purportedly served upon the Appellants herein, the said service of process was irregular and unlawful.

14. The submit that in absence of evidence of proper and lawful service of the summons upon the Appellants herein, both the interlocutory judgement and Exparte Judgement delivered on 31st October 2022 and 16th June 2023 were irregular and all consequential proceedings were a nullity.

15. They buttress this argument on the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** wherein the Court of Appeal stated as follows in respect of irregular judgements:

> *"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 defense, resulting in default judgement.

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 ifs notice that the judgment is irregular; it can set aside the default judgment on its own notion. In addition, the court will not venture into considerations on whether the intended defense 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. 'P: (Emphasis supplied by way of bolding and underlining).

16. The Magistrate made the following finding: “The defendants have not advanced any good reason why the regularly entered judgement

should be set aside. They were afforded an opportunity to defend their suit but they chose not to. I have looked at their draft defense vis a vis the evidence the plaintiff tendered in court and I find the defense to be a mere sham that does not warrant the setting aside of the judgement."

17. From the outset, we reiterate the findings of the Court of Appeal in the Kanyiita Nderitu case (supra) 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 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 set aside the irregular judgment. " (Emphasis supplied)*

18. It is their case that the Magistrate erred in fact and in law in venturing to exercise her discretion and consider whether the defence raised triable issues with respect to the Appellants Application to set aside the Judgements.

19. Grounds (a), (b), (c), (e), and (f) of the appeal should be allowed. The applicants submit that the respondent should bear the cost of the appeal.

The Respondent's Case;

20. The respondent argues that main suit herein was filed on 4th July, 2020 by the 1st Respondent.

21. She had sued the registered owner and/or driver of motor vehicle registration number KCG 278C the Respondents.

22. Summons to enter appearance were extracted and on 4th April, 2022.

23. On 12th April, 2022 summons to enter appearance were reissued and duly served upon the Defendants.

24. Interlocutory judgment was entered against them on 31st October, 2022.

25. It is his case that the Defendants were informed of the developments and issued with a hearing notice informing them that interlocutory judgment had been entered and that the matter had been set down for formal proof on 30thMarch, 2023 after which the matter proceeded and judgment delivered on 16thJune, 2023.

26. The appellants were jolted into action by the execution proceedings leading to the filing of the application dated 23rd October, 2023 seeking to set aside the judgment delivered on 16th June, 2023.

27. A ruling was then delivered on 2nd February 2024 dismissing the application confirming that the interlocutory and ex-parte judgment were regular.

28. It is its case that the Appellants were duly served with summons to enter appearance as per Order 5 Rule 3 of the Civil Procedure Rules and Order 5 Rule 22B of the Civil procedure (Amendment) Rules, 2020.

29. It is his case that it was not disputed that the email address and phone number used to effect service are theirs.

30. They were notified of the progress of the matter and of the entry of the regular judgment.

31. They take issue with the averment at paragraph 1, of the supporting affidavit where the deponent deponed to be a legal Assistance at Britam General Insurance Co. Limited who was not a party to these proceeding and as such and he cannot purport to act on behalf of the Appellants and the content is hearsay and of no probative value.

32. **35.** In their further submission, reliance is placed in the Court of Appeal in **Moijo Matanya ole Keiwua V Chief Justice of Kenya & 6 Others, [2008] eKLR** it was held that;

> *"Affidavits which are sworn by persons who are not parties to the proceedings before the court are incompetent and ought to be expunged from the court record"*

33. In the case of **Haile Selassie Avenue Development Co. Ltd –vs-Josephat Muriithi & Another HCCC No. 2012 of 2001** similar situation was envisaged by Justice J.B Ojwang when dismissing applicant's application for setting aside interlocutory judgment observed that.

> *"All the facts from the affidavit evidence, as well as my own assessment of conviction and candour in the submission by counsel, lead to conclusion that the defendants had no reasonable excuse for not filing and serving entry of appearance and statement of Defence. The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting the trials and facilitate judicial decision making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular are the defendants ought to have complied with these rules of procedure. They did not in dismissing the applicant's application to set aside ex-parte orders".*

34. It is their case that the Defendants were unable to advance any good reason why the regularly entered judgment should be set aside.

35. It is their case that the draft defence put forth is a mere sham that does not warrant the setting aside of the judgment.

36. Reliance in is placed in the case of **Grace Wambui Gachau v John Gachau Muchiri [2017] eKLR, Civil Suit 35 of 2008 (Os)**, **Hon. W. Musyoka** held that;

"When matters are fixed for hearing parties should understand that they have a duty to attend court. The court should not be moved to have a matter listed for the sole purpose of it being taken out because some party has chosen to stay away. There is responsibility for both counsel and party to take matters seriously. In this case there was clear lack of seriousness in the way the matter was handled."

Analysis and Determination;

37. The issue for determination is whether or not their Appeal has merit.

38. In **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA** the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

39. In order to reconsider and evaluate whether the trial court fell into error to the magnitude as raised in the grounds of appeal, the court has addressed its mind to the following issues;

i. Whether the Learned Magistrate erred in fact and in law in finding that the Summons had been properly served upon the Appellants herein and that the exparte Judgement was a regular judgement— Grounds (a) and (d) of the Appeal.

ii. Whether the Learned Magistrate erred in fact and in law in failing to properly exercise his discretion in favour of the

Appellants herein and declining to grant the Appellants leave to defend the suit — Grounds (a), (b), (c), (e), and (D.

iii. Who should bear the costs of this Appeal?

40. In determining re-evaluating the case, this court is guided by the case of **Wachira Karani vs. Bildad Wachira (2016) eKLR as was quoted in the case of David Gicheru v Gicheha Farms Limited & another [2020] eKLR** the Court held that: -

> *"The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."*

41. The court has also sough guidance in the finding in Court of Appeal Case **Mbogo VS Shah (1968) EA 93** where it was held *"the 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay justice"*

42. In order determine whether or not to set aside the judgment of the trial magistrate, this court has to exercise its discretion within the framework and the principles as enunciated in the case of Shah vs Mbogoh case (Supra).

43. This court has noted that the email address of the appellant in the affidavit of service is different from the one in the copy of the certificate of ownership of motor vehicle.

44. The certificate of ownership that email address is as follows BEATRICECHEGE@gmail.com which is partly in uppercase.

45. The email address in the Affidavit of service is gmail in lower case.

46. The email address in the KRA PIN is BEATRICEJESEE@GMAIL.COM.

47. These addresses are different casting a doubt on the allegation of the service of the summons.

48. Further the court notes that the email was dispatched at 6.57 a.m. which is not within the allowed Civil Procedure rules timelines. The trial court said nothing about this.

49. Faced with such a doubt, this court a concludes that the service of summons was not properly affected.

50. The court has looked at a WhatsApp message that was also adopted as a mode of service for the summons.

51. The court notes that there is only one tick on the message as opposed to two blues ticks that would signify receipt of the WhatsApp.

52. In so holding this court is guided by in the case of **Oyunge Barnabus & 3 others (Suing as Administrators of the estate**

of Mathayo Ratemo Mayaka (deceased)) v Charles Oteki Rioba [2021] eKLR where it was held as follows: -

> "*40. It is common knowledge that delivery in most cases is confirmed be double ticks which turn blue immediately the recipient views the Message sent. The Respondents have attached a document showing a screenshot message sent to the number that the Applicant has acknowledged to be his that shows two blue ticks signifying that the documents were indeed delivered to the afore said number belonging to Applicant. " (Emphasis supplied by way of bolding and underlining).*

53. It is this court's finding that the trial magistrate erred in dismissing the application since there was an illegality in the manner in which the service effected. Ultimately the judgment was irregularly obtained.

54. Having found the judgment to be irregular it is this court, further finding that the court fell into error when it considered the draft defense. The interlocutory and the final judgments are hereby set aside.

Costs

55. On the issue of costs, the Civil Procedure Act (Cap. 21, Laws of Kenya) is the primary guiding law of judicial procedure in civil matters.

56. Section 27(1)) stipulates;

"Subject to such conditions and limitations' as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order" [emphases supplied].

57. In Justice Kuloba's words [*Judicial Hints on Civil Procedure,* at p.94]:

"[T]he objects of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure…Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

58. The Appellants are entitled to costs.

Disposition:

59. The application has merit.

Order;

1) The appeal is allowed.

2) Costs to the appellants.

Dated, Signed and Delivered at Nairobi this 10th Day of November 2025.

.....

J. CHIGITI (SC)

JUDGE