**Naanyu v Metto & another (Suing as the Administrators of the Late Elizabeth Jepchoge Sirma) (Environment and Land Appeal E022 of 2023) [2025] KEELC 7695 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7695 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT AND LAND APPEAL E022 OF 2023**

**CK YANO, J**

**NOVEMBER 6, 2025**

**BETWEEN**

**LIZZY NAANYU ..... APPELLANT**

**AND**

**JOSHUA KIPKEMBOI METTO ..... 1ST RESPONDENT**

**MOSES KIBET METTO ..... 2ND RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE LATE ELIZABETH JEPCHOGE SIRMA**

***(Being an Appeal against the Ruling of Hon. P.N Areri, Senior Principal Magistrate delivered on 28th November, 2023 in Eldoret CMELC No. E094 of 2022)***

## JUDGMENT

1. The Respondents herein filed suit against the Appellant being Eldoret Chief Magistrate's Court ELC Suit No. E094 of 2022 vide Plaint dated 10th June, 2022. They claimed that the Appellant had caused the parcel of land known as Eldoret Municipality Block 14/594 (the suit property) belonging to the late Elizabeth Jepchoge Sirma to be registered in her name through fraud. They asked the court to declare that the land belonged to them and for an order cancelling the Appellant's name as the owner and substitution thereof with their names. They also sought a permanent injunction against the Appellant and an order directing the land registrar to reconstruct the land register for the suit parcel of land, as well as costs of the suit.

2. The Appellant did not enter appearance or file a defence, and the matter proceeded ex-parte on account of an affidavit of service by one Morris Atila, who claimed to have served the Appellant herein. An ex-parte judgment was entered against the Appellant on 2nd September, 2022 in favour of the Respondents

herein and the same has since been executed. However, on 23rd August, 2023 the Appellant herein filed a Notice of Motion Application seeking among other reliefs, to set aside the ex-parte proceedings and judgment in the matter and to be allowed to file her defence to the claim, a draft of which was annexed. She claimed that she had not been served with the Pleadings and asked the court to summon the process server, Morris Atila, to be examined on the contents of his Affidavit of Service sworn on 20th June, 2022.

3. By a Ruling dated and delivered on 28th November, 2023, the trial court dismissed the Appellant's Application. Dissatisfied with that ruling/decision, the Appellant has approached this court vide a Memorandum of Appeal dated 30th November, 2023, setting out the following grounds of Appeal:-

   i. That the learned trial magistrate erred in law and fact in failing to hold that the issue of service was central in the application dated 23rd August, 2023 which sought the setting aside of the ex-parte proceedings and judgment and had to be determined first hence an erroneous decision that is not anchored on the law.

   ii. That the learned trial magistrate erred in law and fact in failing to consider and apply the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010.

   iii. That the learned trial magistrate erred in law and fact in dismissing the Appellant's Application on the basis of the extraneous matters which were not up for determination in the Application without any justification.

   iv. That the learned trial magistrate erred in law and fact in failing to determine whether or not the Appellant was served with the pleadings and whether the defence by the Appellant has any triable issues.

   v. That the learned trial magistrate erred in law and fact in failing to appreciate the provisions of Order 19 of the Civil procedure Rules, 2010 by granting the Appellant's request to cross-examine the process server contrary to the law.

   vi. That the learned trial magistrate erred in law and fact in holding that the Appellant had not satisfactorily explained the reason for not filing a defence yet the Appellant had stated clearly that she had not been served with the pleadings in the matter.

   vii. That the learned trial magistrate erred in law and fact in failing to hold that the issue of service of summons to enter appearance and the pleadings was contested/disputed and/or denied by the Appellant hence the need to specifically determine it first.

   viii. That the learned trial magistrate erred in law and fact in failing to hold that the draft Statement of Defence attached to the application raised weighty legal triable issues to warrant the setting aside of the ex-parte judgment and proceedings to allow the matter go for trial.

   ix. That the learned trial magistrate erred in law and fact in failing to hold that the ex-parte judgment, proceedings and the ultimate judgment were premised on a false affidavit of service contrary to the provisions of Order 5 of the Civil Procedure Rules, 2010 and therefore unsustainable.

   x. That the learned trial magistrate erred in law and fact in failing to hold that dismissing the Appellant's application would amount to condemning the Appellant unheard against the rules of natural justice.

   xi. That the learned trial magistrate erred in law and fact in delving into extraneous issues that were not before the Honourable Court for determination.

xii. That the learned trial magistrate erred in law and fact in misdirecting himself on the issues to consider while dealing with an application for setting aside ex parte judgment and/or proceedings hence an erroneous decision that has no legal backing.

xiii. That the learned trial magistrate erred in law and fact in holding that the Appellant obtained the suit property fraudulently without affording the Appellant an opportunity to be heard on her defence contrary to the provisions of Article 50 of *the Constitution* of Kenya, 2010 and which matter was not the subject of the application that resulted to the ruling/decision appealed against.

xiv. That the learned trial magistrate erred in law and fact in failing to evaluate, consider and determine all the legal issues raised in the application, supporting affidavit, the documents in support of application and the Appellant's submissions hence an erroneous ruling/decision that does not address pertinent issues of law in the matter.

xv. That the learned trial magistrate erred in law and fact in displaying open biasness in making a decision based on the Respondent's side of the story without applying the law as to setting aside ex-parte proceedings hence an erroneous decision.

4. Flowing from the above, the Appellant asked this court to set aside the aforesaid ruling/decision and replace it with an order setting aside the proceedings undertaken, the judgment entered by the trial court on 23rd August, 2022 and the subsequent proceedings. She further asked that she be allowed to file her defence to the claim, and that the matter be heard inter-parties before another judicial officer.

**Submissions**

5. The matter was mentioned on 19th May, 2025 for directions on the Appeal, and the court directed that the Appeal be canvassed by way of written submissions. When the matter was again mentioned on 6th October, 2025 both Counsel for the Appellant and the Respondents confirmed compliance with the court's directions.

**The Appellant's Submissions**

6. On the part of the Appellant, the submissions filed are dated 11th June, 2025. With regard to the ex-parte proceedings and judgment, Counsel for the Appellant relied on the case of James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another (2016) eKLR on the distinction between a regular and irregular judgment. Counsel submitted that for an ex-parte judgment to stand, the Respondents were required to demonstrate that the summons to enter appearance and pleadings were served on the Appellant. Counsel cited Article 50 on the right to be heard and Order 5 Rule 8 of the Civil Procedure Rules, 2010 (CPR) that service of summons and pleadings should be effected on the Defendant in person.

7. Counsel pointed out that no Summons to enter Appearance were extracted in accordance with Order 6 Rule 1 of the CPR to allow the Respondents apply for interlocutory judgment and for the suit to proceed to formal proof hearing thereafter. In addition, Counsel submitted that in the Affidavit of Service sworn by Morris Attila on 20th June, 2022, he did not say that he was given any summons to enter appearance to serve alongside the Plaint and application. Counsel argued that in the absence of summons, the Appellant had not been afforded an opportunity to be heard through filing her defence as required under Order 7(1).

8. Counsel also faulted the Affidavit of Service for failure to comply with the requirements of Order 5 Rule 8 of the CPR. Counsel further explained that on the date of the alleged service being 16th

June, 2022, the Appellant was not within Eldoret as she was attending a funeral in Lessos. Counsel also submitted that from the record, there is no indication whether an application for interlocutory judgment was made and entered by the court to pave way for hearing. For these reasons, Counsel submitted that the judgment is irregular and ought to be set aside.

9. With regard to the dismissal of the application dated 23rd August, 2023, Counsel cited Order 10 Rule 11 of the CPR, arguing that courts have discretion to set aside an ex-parte judgment on such terms as are just even if it is regular. In this instance, Counsel explained that the reason for the delay in filing her Defence was that the Appellant was never served with the summons to enter appearance, pleadings, notices of court dates or the notice of judgment in CM ELC No. E094 of 2022. That the Appellant became aware of the suit when strangers went to her land claiming to be the registered owners, pursuant to which she visited the land registry and made further inquiries and found out that a suit had been filed against her and judgment had been entered.

10. The Appellant's Advocate submitted that the Appellant had presented the trial court with a draft defence indicating how she had acquired the suit property in 2011 and had been in possession for 12 years without any adverse claim being made over it. Counsel argued that the trial court failed to consider the application under Order 10 Rule 11 or apply the crucial test in determining an application for setting aside, but instead treated it as one for review under Section 80 of the *Civil Procedure Act*. Counsel also faulted the trial court for going into the merits of the case and making a finding on fraud yet no evidence had been tabled before the court in that regard. Counsel accused the trial magistrate of overstretching his mandate and making a finding touching on the appellant's her title without affording her an opportunity to be heard contrary to Article 50(1) of *the Constitution*.

11. Counsel argued that the court did not address itself on the issues raised before it. Counsel also challenged the trial court's pecuniary jurisdiction to handle the claim. Counsel submitted that the draft defence raised triable issues that warrant further interrogation, which can only be achieved by setting aside the judgment and ordering the matter to be heard afresh with the participation of all the parties. In conclusion, Counsel urged that a case had been made to warrant interference with the trial court's finding. She asked the court to allow the Appeal with costs to the Appellant. Counsel relied on Multiscope Consulting Engineers vs University of Nairobi & Another (2014) eKLR, Gulf Fabricators vs County Government of Siaya (2020) eKLR, Phillip Mutiso Mulalya vs Samuel Dominic Muathe & 2 Others (2022) eKLR and Gicharu vs Gachui (Environment and Land Appeal 5 of 2023) (2024) KEELC 812 (KLR).

**The Respondents' Submissions**

12. The Respondents' Submissions in opposition to the Appeal are dated 16th June, 2025. In those submissions, Counsel for the Respondents started by arguing that the firm of Nyairo & Co. Advicateswas not properly on record by virtue of Order 9 Rule 9 of the CPR. It was argued that the said advocate had no locus to approach this court and thus the court is deprived of jurisdiction to entertain the appeal, and that the Memorandum of Appeal filed herein is incompetent.

13. Counsel also submitted that the Appellant had not met the conditions for grant of stay of execution of the judgment and/or decree set out at Order 42 Rule 6(2) of the CPR. That having failed to meet those conditions, that prayer could not be granted. Further, that judgment was delivered on 23rd August, 2022 and the decree having been executed, the prayer for stay of execution fails automatically and is unavailable since the court cannot issue orders in vain. Counsel argued that the trial court was right to dismiss the Appellant's application since the court was functus officio after the decree issued on 2nd September, 2022 had been executed.

14. Counsel further submitted that since the decree had been executed, the application had been overtaken by events and there was nothing left to stay at the time the application was made. He argued that granting the order of stay would be an exercise in futility, and that had the stay been allowed, it would have been incapable of performance. Counsel submitted that the Appeal therefore lacks merit and should be dismissed with costs. Counsel relied on Gitau vs Githinji & Another (Environment and Land Appeal E006 of 2022)(2022) 152 (KLR), Chelule & Another vs Kuria & Another (Appeal E001 of 2022)(2024) KEELC 88 (KLR) and Antoine Ndiaye vs African Virtual University (2015) eKLR.

**Analysis and Determination**

15. I have considered the Memorandum of Appeal, the Record of Appeal as well as the submissions rendered by Counsel on behalf of the parties herein, and the following issues arise for determination by this court:-

    i. Whether the firm of Nyairo & Company Advocates is properly on record for the Appellant

    ii. Whether the trial court had the requisite pecuniary jurisdiction to handle the claim in the lower court

    iii. Whether the Appellant was duly served with the summons to enter appearance and pleadings filed in the lower court

    iv. Whether the trial court erred in dismissing the application for setting aside the ex-parte proceedings and judgment

    v. Whether the orders sought in the Appellant's Application dated 23rd August, 2023 should issue

    vi. Who shall bear the costs of the Appeal?

16. This being a first appeal, it is the duty of this court to re-analyse the case and draw its own independent conclusion as was held in Paramount Bank Limited vs First National Bank Limited & 2 Others (2023) KECA 1424 (KLR), where the court explained that:-

> " ... A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion..."

17. However, two preliminary issues have arisen in the course of this Appeal that were noticeably not brought to the attention of the trial court, with regard to the Appellant's representation and the pecuniary jurisdiction of the trial court. Nevertheless, I believe it is necessary to first deal with the said issues since they have the ability of concluding the matter summarily, before delving into the merits of the instant Appeal.

**a. Whether the firm of Nyairo & Company Advocates is properly on record for the Appellant**

18. With regard to the objection of representation by the firm of Nyairo & Company Advocates, Counsel for the Respondents cited Order 9 Rule 9 of the CPR which provides as follows:-

    9. Change to be effected by order of court or consent of parties [Order 9, rule 9]

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

19. The purpose and/or relevance of Order 9 rule 9 was explained by in the court in S.K. Tarwadi vs Veronica Muehlemann (2019) KEHC 10617 (KLR), where the court held that:-

> " 17. Mutungi, J however treated the failure to comply with Order 9 Rule 9 CPR as a mere technicality and held in Ngitimbe Hudson Nyanumba vs Thomas Ongondo (2018) eKLR that:
>
> "19. ... The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.
>
> 18. In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away."

20. Notably, this provision is only applicable where a party was previously represented by counsel in a suit or where the party was acting in person prior to entry of judgment. In this suit, however, the Appellant appointed her advocates on 23rd August, 2023 after judgment had been entered. There is no other Advocate who was on record for the Appellant who may be prejudiced by the said appointment. Moreover, the appellant's case was that she was not aware of the case until execution stage. As there was no Advocate on record for the Appellant by virtue of the fact that she never participated in the trial court proceedings until after entry of judgment, then the said Order 9 Rule 9 is not applicable. Explaining this position, the High Court in K-Rep Bank Limited vs Segment Distributors Limited (2017) KEHC10093(KLR) held as follows:-

> "...
>
> (6) For the reason that the Defendant did not participate in these proceedings before the default judgment was entered, it is, to my mind, a misnomer for the Defence Counsel to seek leave to come on record, purportedly under Order 9 Rule 9 of the Civil Procedure Rules, as no such leave is required. In this regard, I note that reliance was placed by Counsel on the decision of Radido, J. in Kazungu Ngari Yaa vs. Mistry V. Naran Mulji & Co. [2014] eKLR, but in

essence that decision does not support the Defence position. To the contrary, the Court in that case expressed the view that:

> 'In the present case, the Respondent did not file a Response or participate in the proceedings and therefore there is no previous advocate that the firm which is coming on record, Musinga & Co. Advocates, can seek written consent from. And even if the Respondent proposed to act in person, there is no other entity it could seek consent from. Order 9 rule 9(b) of the Civil Procedure Rules, 2010 is consequently inapplicable...Order 9 rule 9(a) of the Civil Procedure Rules, 2010 is equally inapplicable. To hold otherwise would lead to an absurdity. There was no advocate on record previously engaged for the Respondent and the Respondent is not proposing to act in person, and there would be no logic in the Respondent's advocate giving notice to his client that he proposes to come on record for it and then seeking leave of Court.'

(7) I would be of the same view. Hence, all that was required of the Defence Counsel in the circumstances hereof, was to simply file a Notice of Appointment pursuant to Order 9 Rule 7 of the Civil Procedure Rules, notwithstanding that Default Judgment had been entered; and cause the same to be served on the Plaintiff. Accordingly, Prayer 3 in the Defendant's Notice of Motion dated 5 October 2015 is untenable, if not altogether misconceived."

21. In addition, this being an appeal, it is taken in law to be a separate suit, and even where parties were represented by a different advocate at trial, they are at liberty to issue fresh instructions on appeal to different counsel from one that represented them at trial. Consequently, this court's finding on this issue is that the firm of Nyairo & Company Advocates is properly on record.

**b. Whether the trial court had the requisite pecuniary jurisdiction to handle the claim in the lower court**

22. The next preliminary issue for determination is that of jurisdiction of the trial court. The Appellant challenged the trial court's jurisdiction to handle the claim that had been presented before it.

23. In the lower Court the suit was heard by Hon. N. Wairimu and later by Hon. P.N. Areri. Both Magistrates were of the rank of Senior Principal Magistrate, whose pecuniary jurisdiction is set at Section 7(1)(b) of the Magistrate's Court Act at fifteen million Kenya shillings.

24. From the Agreement for Sale annexed to the Appellant's Application of 23rd August, 2023, she alleged that she purchased the suit property for KShs. 3,300,000/- on 26th August, 2011. I note that it has been 14 years since the agreement for sale was made and no doubt the value of the land must have appreciated. However, there is no current valuation placed before this court that determines the value of the suit property at present, or at the time the suit was first filed in the lower court.

25. There is therefore no evidence placed before this court, or the trial court to conclude that indeed the property is valued over KShs. 15,000,000/- which is the pecuniary jurisdiction limit for that court. In the absence of such evidence, I am not convinced that the land may have appreciated so high as to go beyond the limit of the trial court.

**c. Whether the Appellant was duly served with the summons to enter appearance and pleadings filed in the lower court**

26. The main ground in the Appellant's Application dated 23rd August, 2023 was that she was not served with the Summons and pleadings filed by the Respondent in the lower court, and she was therefore unaware of the suit. There is therefore need for this court to first determine whether service was properly done in the lower court so as to determine whether the judgment was regular or irregular.

27. It is important to distinguish whether or not a judgment is regular because as explained in Patel vs. East Africa Cargo Services Ltd (1974) EA 75, where a judgment is a regular judgment, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. This distinction was well expounded by the Court of Appeal in the case of James Kanyiita Nderitu & another vs Marios Philotas Ghikas & another (2016) KECA 470 (KLR) in the following words:-

> "... 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 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 factors 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other...
>
> 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."

28. Turning to the facts relevant to this Appeal, from the proceedings of the trial court, the matter was first mentioned before Hon. N. Wairimu on 15th June, 2022 for directions on an application dated 10th June, 2022. On 20th June, 2022 when the matter was again mentioned, the application was allowed since it was unopposed and the suit was fixed for mention to confirm compliance with Order 11 on 30th June, 2022. Come that date, Counsel for the Respondents herein, then the Plaintiffs, was present and asked for a date for formal proof hearing.

29. Throughout all these court dates, the trial court did not once make any inquiries into the issue of service of summons on the Appellant, or even indicate that it was satisfied that the Defendant had

been properly served with the summons and pleadings in the matter. The court proceeded to fix the matter for formal proof hearing on 21st July, 2022. On that date, the court indicated that there was no appearance on the part of the Defendant and proceeded to conduct the formal proof hearing. Judgment was then delivered on 23rd August, 2022 in the absence of both parties.

30. According to the record of the lower court, service of the Pleadings was done by one Morris Atila who swore an Affidavit of Service on 20th June, 2022, in that regard. In the said Affidavit, he states that on 16th June, 2022 he received an Application dated 10th June, 2022, and a Plaint of a similar date from the firm of Warigi & Company Advocates.

31. His instructions were to effect service on the Defendant in that suit, who for the record is the Appellant herein. He deponed that on the same day at 11.00am he proceeded to the suit parcel where he met her worker. That it is this worker that allegedly called the Appellant and she was advised to tell the process server to meet her in town. That the Worker accompanied Mr. Morris Atila to Barnge'tuny Plaza where service was effected on the person of the Appellant.

32. The Affidavit of Service did not mention what exactly the suit parcel was or where it is located. Notably also, the Affidavit does not state that the process server knew the location of the suit land or who directed him there. In addition, the affidavit does not indicate the name of the worker who allegedly called the Appellant and what telephone number she used. This is contrary to Order 5 Rule 15 which requires that an Affidavit of Service must contain the following information:-

> 15. Affidavit of service [Order 5, rule 15]
>
> (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.

33. As luck would have it, the Appellant claims that she was nowhere near Eldoret on the mentioned date and time of the alleged service by Morris Atila. In the Supporting Affidavit to the Motion dated 23rd August, 2023, she states at paragraph 19 that she left Eldoret at 9.00am in the company of other mourners to attend the burial of a close friend in Lessos and returned to Eldoret past 6.00pm. She annexed photographs taken at the funeral, and notably they are posted on the WhatsApp Messaging Service. The photographs show what appears to be a funeral and were posted at 1.58pm on 16th June, 2022.

34. From the foregoing, there is a high chance from the evidence annexed to the Appellant's application dated 23rd August, 2023 that the matters contained in the Affidavit of Service by Morris Atila may have been false. What then should have happened once the Appellant alleged that she had not been served as claimed in the Affidavit of Service? This is answered at Order 5 Rule 16 which provides that:-

> 16. Examination of serving officer [Order 5, rule 16]
>
> On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

35. In addition Order 19 Rule 2 of the CPR provides that:

2. Power to order attendance of deponent for cross-examination [Order 19, rule 2]

(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.

36. The trial court did not however even attempt to investigate the issue of service raised by the Appellant herein, and instead went into the merits of the case even before determining whether the Appellant was indeed served. That aside, even if the pleadings were in fact served, the Affidavit of Service was defective in that it did not contain crucial information that by law ought to have been disclosed. It would have been prudent to order fresh service before proceeding to set down the matter for formal proof hearing.

37. In any event, from the foregoing, I find no evidence that Summons to Enter Appearance were extracted as required in the first place. As pointed out by the Appellant, the Process Server did not mention that he received Summons to Enter Appearance to serve on the Appellant alongside the Pleadings filed in the lower court. I have also taken time to peruse the lower court file which has been included in the Appeal file and confirmed that there is nothing on the record to show that Summons to Enter Appearance were ever extracted for service on the Appellant pursuant to Order 5 Rule 1 which provides as follows on the issue of summons:-

1. Issue of summons [Order 5, rule 1]

(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.

(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.

38. With regard to service of summons, in Maua Methodist Hospital Sacco vs Commissioner Kenya Revenue Authority [2011] eKLR, Kasango J. in her Ruling of 17th March, 2011 held that:-

> " The courts have unlimited discretion to vary or to set aside judgment entered in default of appearance of defence. The main concern of the court in exercising that discretion is to do justice to the parties. As I have stated, the judgment entered here was irregular. The court therefore is of the view that that irregular judgment should be set aside ex debito justitiae and without conditions. As correctly argued by the learned counsel for the defendant, the affidavit of service filed before this court by the plaintiff's counsel on 13th September 2010 indicates that what was served on the defendant was the plaint, the Chamber Summons

application dated 29th April 2010 and the ex parte order of this court of the same date. When the learned Deputy Registrar entertained the application for interlocutory judgment, there was no evidence before court that summons had been served upon the defendant. Summons are defined in the Black's Law Dictionary as:-

> 'A writ or process commencing the plaintiff's action and requiring the defendant to appear and answer.'

From that definition, it becomes clear that it is the summons when served on a defendant which invites the defendant to enter an appearance. The importance of summons in an action are clearly seen by the provisions of order V of the Civil Procedure Rules. It is clear from that order that if summons are expired the action essentially terminates. That action is only reactivated if the summons are extended. In this case, the plaintiff did not serve the summons. There was therefore no document that invited the defendant to enter an appearance or to file a defence. Even if judgment could rightly have been entered against defendant without leave, such judgment could not be entered because the plaintiff did not serve the defendant with summons. That being so, the defendant's application to set aside ex parte judgment is merited."

39. For the above reasons, I am convinced that the Summons and the pleadings filed on the lower court were not properly served on the Appellant at the very least, and at worst Morris Atila never served the Appellant at all. Accordingly, the judgment entered by the trial court was not a regular judgment. It was an irregular judgment.

**d. Whether the trial court erred in dismissing the application for setting aside the ex-parte proceedings and judgment**

40. I now turn to the question whether the trial court erred in dismissing the Appellant's Application. On the face of it, the subject application dated 23rd August, 2023 was brought under various provisions, one of them being Order 10 Rule 11 of the Civil Procedure Rules which states:-

> Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

41. The court faced with an application to set aside ex parte judgment under Order 10 Rule 11 is afforded wide discretion. This discretion is confirmed in CMC Holdings Ltd vs James Mumo Nzioki (2004) KECA 143 (KLR), where the court of Appeal held as follows:-

> "...We are fully aware that in an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate Court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition. One such authority is that of Magunga General Stores vs Pepco Distributors [1987] 2 KAR 89 to which we were referred and in which this Court stated as follows:-
>
> > 'The Court on an appeal will not interfere with the exercise of a discretion on an application for summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts'."

42. The factors to be considered when determining an application for setting aside an ex-parte judgment were explained by Odunga J. (as he then was) in Mureithi Charles & Another vs Jacob Atina Nyagesuka (2022) KEHC 1805 (KLR), where it was held that:-

> " 28. In considering whether or not to set aside a judgement, a judge has to consider 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 and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an 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 invoke 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. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See Bouchard International (Services) Ltd vs M'mwereria (1987) KLR 193; Evans vs Bartlam (1937) 2 All ER 647."

43. This court has already made the finding that the alleged service of summons and pleadings on the Appellant was wanting at best, and possibly even lacking, making the judgment of the trial court irregular. Aside from this, the Appellant claims that the failure to serve her with the Pleadings and the summons in the suit was a contravention of her right to be heard in defence of her interest in the suit property.

44. Markedly, in this case, the Appellant annexed to her application a Draft Statement of Defence. The trial magistrate was to consider the matters raised in the draft defence and determine whether it raised triable issues that warranted the setting aside of the judgment to allow the Appellant to be heard on the merits of her defence.

45. The decision of the Court of Appeal in the case of CMC Holdings Limited (Supra) is once again instructive on this front. The court explained that:-

> " What we feel the Trial Court should have done when hearing application to set aside ex parte judgment, was to ignore her judgment on record and look at the matter afresh considering the pleadings before her (i.e. plaint, defence and counterclaim) and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If

the same was raised then, whether the reason for the applicant's appearance were weak, she was in law bound to exercise her discretion and set aside ex parte judgment so as to allow the appellant to put forward its defence."

46. I have perused the Draft Statement of Defence annexed to the Appellant's Supporting Affidavit in the Application dated 23rd August, 2023. She has set out the manner and procedure through which she acquired the suit property through purchase for valuable consideration. She claims to have purchased the land through a named individual who in turn is alleged to have bought it from the late Elizabeth Jepchoge Sirma, whose estate the Respondents herein represent. She further claims to have conducted due diligence which included conducting a search as well as visiting the property and confirmed that it belonged to the Vendor.

47. This in my view constitutes a prima facie defence which should have been allowed to go to trial and to allow the Appellant to adduce evidence in support of her assertions. However, instead of allowing the application, the trial magistrate dove straight into considering the draft defence on its merits without it even being formally filed and admitted into the court record. The trial magistrate further made a finding that the Appellant's title was acquired through fraud since her vendor could not have held title yet the original owner still held a title to the land in her name, instead of waiting to hear the evidence to establish why there were two titles in existence relating to the same parcel of land.

48. I once again rely on the decision of the Court of Appeal in CMC Holdings Limited Case (Supra) where it was further held as follows:-

> " ...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues. The case of Tree Shade Motors Limited vs D T Dobie & Company (K) Limited & Joseph Rading Wasambo, Civil Appeal No 38 of 1998 was a case on an application to set aside a default judgment. However, the legal principles are the same as in a case where an ex parte judgment is obtained for nonappearance of a party at the hearing of his case. In that case this Court stated as follows:-
>
> > 'The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff claim. Where a draft defence is tendered with the application to set aside the default judgment, the Court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend.'
>
> The decision in the case of Patel vs Cargo Handling Services Ltd, [1974] EA 75 though is on judgment entered under order 9A is also on the same principles. Court has wide discretion in such cases to set aside ex parte judgment. In this case before us, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial Magistrate stated that she considered the same and dismissed it. We do not appreciate how she could have dismissed the same defence and counterclaim when the appellant was not in Court to put

forward its case. Further, it appears to us that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input."

49. The trial magistrate failed to consider whether the Appellant's Draft Statement of Defence that had been presented to it was reasonable or raised triable issues as held by the Superior court in the above case. In doing so, the trial magistrate indeed contravened the Appellants rights under Article 50(1) of *the Constitution*. Secondly, the trial Magistrate did not in any way address himself to the principles that govern setting aside of ex-parte judgements and instead overstepped his mandate and dove straight to the merits of the case.

50. As to the Respondents' claim that the judgment has already been executed, in my opinion, the power to set aside the judgment does not cease to apply because a decree has been extracted and/or executed (see Fort Hall Bakery Supply Company vs Frederick Muigon Wargoe [1958] EA 118). Besides, the court has a very wide discretion to set aside ex parte judgments under Rule 10, with no limitations and restrictions, except that if the setting aside of the ex-parte judgment is varied it must be done on terms that are just.

51. I therefore agree with the Appellant that the trial magistrate erred and misdirected himself in the exercise of his discretion, which led to an erroneous decision in dismissing the Appellant's application.

**e. Whether the orders sought in the Appellants' Application dated 23rd August, 2023 should issue**

52. The next step is to determine whether the orders in the Appellant's Application dated 23rd August, 2023 should issue. The application sought the following orders:

    i. Spent

    ii. Spent

    iii. That this Honourable Court be pleased to direct and/or order the County Land registrar to register a restriction on the title number Eldoret Municipality Block 14/594 pending the hearing and determination of this application and thereafter the suit.

    iv. That this Honourable Court be pleased to suspend the Certificate of Lease issued on 26th June, 2023 in the names of Moses Kibet Metto and Joshua Kipkemboi Metto pursuant to this Court's decree pending the hearing and determination of this application and thereafter the suit.

    v. That the ex-parte proceedings undertaken, the judgment entered in this matter and the subsequent proceedings and/or orders if any be set aside Ex debito justiciea (sic).

    vi. That the process server Mr. Morris Atila be summoned for cross- examination on the contents of the Affidavit of service sworn on 20th June, 2022.

    vii. That the Defendant/Applicant be granted leave to file her defence to the claim together with the supporting documents and statements and the draft defence attached herein be deemed properly filed and served subject to payment of court fees only.

    viii. That the costs of this application be borne by the Plaintiffs/Respondents.

53. Prayer No. 3 is based on the fact that the Respondents herein have executed the judgement to the effect that the Appellant's title was cancelled and a new one issued in their names. The Respondents were issued with a Certificate of Lease in their names dated 22nd June, 2023. In the circumstances, I agree with Hon. Obaga J. in his ruling of 29th April, 2024 in this Appeal that there is need to preserve

any improper dealings on the suit property by the Respondents. The Judge reached this decision after noting the Appellant's allegations that she has been on the suit property since 2011 with no apparent action taken by the Respondents any time earlier than 2022. Prayer No. 3 of the Application therefore is merited.

54. The Appellant also asked the court to suspend the Certificate of Lease issued to the Respondents on 26th June, 2023 pending the hearing and determination of the suit. For the record, the Certificate of Lease was issued to the Respondents on 22nd June, 2023 as shown on the Certificate of Official Search dated 18th August, 2022. For the reason set out in the preceding paragraph, I do find that the said prayer is equally merited.

55. At prayer (v) and (vii), the Appellant further seeks to have the ex-parte proceedings and judgment set aside and that she be granted leave to file a defence, supporting documents and statements. Having found that the ex-parte judgment was irregular for want of service, the direct consequence is that the same must be set aside as a matter of right. In order to ensure that the Appellant is granted a fair hearing, she ought to be allowed to file her defence, which this court notes raises reasonable and triable issues.

56. The Appellant had also asked the trial court to summon the process server, Mr. Morris Atila so that he may be cross-examined on the contents of his Affidavit of service sworn on 20th June, 2022. Seeing that this court has already found service effected by Morris Atila to be wanting and set aside the ex-parte proceedings and judgment, I see no need to grant this prayer at this time.

**f. Who shall bear the costs of the Appeal?**

57. Both parties herein asked for costs of the Appeal. Although costs of an action or proceeding are at the discretion of the court, the general principle under section 27 of the *Civil Procedure Act* is that costs follow the event. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

58. The Appellant herein has succeeded in the Appeal. This court finds no good reason to depart from the general rule to deny the Appellant her costs. Consequently, the Appellant shall be awarded costs of this Appeal.

**Orders:-**

59. Having carefully considered this appeal, I find that it is merited. Accordingly, the appeal succeeds, in the following terms:

    a. The Ruling delivered on 28th November, 2023 in Eldoret CM ELC Case No. E094 of 2022 be and is hereby set aside, and is replaced with an order allowing the Appellant's application therein dated 23rd August, 202.

    b. The ex-parte proceedings undertaken and ex-parte judgement dated 23rd August, 2022 being the subject of the aforementioned Application be and are hereby set aside.

    c. The Appellant be and is hereby granted leave to file her Defence to the claim together with the supporting documents and statements upon payment of the requisite court filing fees, and thereafter the matter proceed for hearing afresh and on its merits before any Magistrate with the requisite jurisdiction other than Hon. P.N. Areri.

    d. The restriction placed on title number Eldoret Municipality Block 14/594 vide ruling of 29th April, 2024 in this Appeal shall remain in force pending the hearing and determination of the suit before the trial court.

e. The Certificate of Lease issued on 26th June, 2023 in the names of Moses Kibet Metto and Joshua Kipkemboi Metto pursuant to the decree of the trial court in CM ELC No. E094 of 2022 be and is hereby suspended pending the hearing and determination of the suit in the lower court.

f. The Appellant shall have the costs of this Appeal to be borne by the Respondents.

60. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 6TH DAY OF NOVEMBER, 2025 VIDE MICROSOFT TEAMS.**

**HON. C. K. YANO**

**ELC, JUDGE**

In the presence of;

Ms Kemboi holding brief for Ms Odwa for the Appellant.

Mr. Warigi for the Respondents.

Court Assistant - Laban.