

**IN THE COURT OF
APPEAL AT MOMBASA
(CORAM: MURGOR, LAIBUTA & NGENYE,
JJ.A.) CIVIL APPEAL NO. E081 OF 2023**

BETWEEN

HAMID MOHAMED ABDULKADIR.....APPELLANT

AND

SHEIKHA MOHAMED ALI

alias **SHUIKHA MOHAMED ALI.....1ST RESPONDENT**

AHMED MOHAMED ALI.....2ND

RESPONDENT

ABDULATIF MOHAMED ALI..... 3RD

RESPONDENT

ALI MOHAMED ALI..... 4TH

RESPONDENT

ZAINAB MOHAMED ALI.....5TH RESPONDENT

*(Being an appeal from the Judgment and Decree of the
Environment and Land Court of Kenya at Mombasa (C. K. Yano,
J.) delivered on 11th May 2017*

in

E.L.C Case No. 86 of 2016)

JUDGMENT OF THE

COURT

1. This is an appeal from the judgment and decree of the Environment and Land Court at Mombasa (C. K. Yano, J.) delivered on 11th May 2017 in ELC Case No. 86 of 2016 in which, by a plaint

dated 4th June 2015, the five respondents herein filed suit against the appellant seeking the following orders:

- a) Vacant possession of the suit property.
- b) Rent arrears from October 1997 until May 2015.
- c) Mesne profits from 1st June 2015 until vacant possession of the suit property is obtained.
- d) Costs and interest thereon.
- e) Any other relief that this court may deem fit to grant.”

2. The respondents’ case was that they were the registered proprietors of Subdivision No. 619/Section I/Mainland North (Original Number 50/2) (the suit property) measuring approximately 12.92 acres; that, in 1996, the respondents and the appellant entered into a lease agreement whereby the appellant leased the suit property from 1st October 1995 to 30th September 2025; and that the appellant was to pay a monthly rent in accordance with the lease, and in the following terms:

- a) 1st October 1995 to 31st December 1995, no rent payable.
- b) 1st January 1996 to 30th September 2000, Kshs. 5,000/= per month.
- c) 1st October 2000 to 30th September 2005, Kshs. 5,500/= per month.
- d) 1st October 2005 to 30th September 2010, Kshs. 6,500/= per month.

e) 1st October 2010 to 30th September 2020, Kshs. 8,900/= per month.

f) 1st October 2020 to 30th September 2025, Kshs. 10,000/= per month.”

3. The respondents further averred that the appellant had failed to pay rent due to them with effect from October 1997 to date; that the appellant was in arrears amounting to Kshs. 1,209,500; that the respondents had on several occasions requested the appellant to pay the arrears aforesaid, but to no avail; that the respondents and their advocates wrote demand letters dated 18th March 2014, 19th March 2014 and 22nd May 2014 to the appellant demanding payment of the accumulated rent arrears; that, despite receipt of the numerous demand letters, the appellant had refused, failed or neglected to pay the monthly rent and the arrears thereof; that the appellant had made it clear that he would not pay any rent arrears; that the respondents issued the appellant with a notice of termination dated 22nd April 2015, which notice took effect on 31st May 2015; that, despite written notice of termination, the appellant continued to illegally occupy the suit property to the detriment of the respondents; and that, by the appellant occupying the suit property without paying

any rent, the respondents had been denied the right to receive rent for the suit premises as well as any access to and use of the suit property.

4. In response to the respondents' claim, the appellant filed a Defence dated 20th July 2015 generally denying the allegations set out in the respondents' plaint. The appellant admitted that the respondents were the registered proprietors of the suit property, but averred that the original suit property had ceased to exist upon subdivision on or about October 2005. He admitted that he signed a lease agreement with the respondents and/or their agents in 1996, but averred that the lease over the original suit property was to commence on 1st January 1997. The appellant further averred that, to date, he had paid to the respondents, their agents and/or representatives, a total sum of Kshs. 500,307 on account of rent; that he had timeously paid all the due rents and was not in arrears as alleged or at all; that all the demand letters addressed to him from the respondents were answered, and that he unequivocally notified the respondents that he had paid all the rent due and was not in

arrears; and that he was served with a purported notice of termination, but that the purported notice was null and void and of no effect because there was no rent arrears owed under the terms of the lease. The appellant prayed that the suit be dismissed with costs.

5. At the hearing of the suit on 20th February 2017, there was no appearance for the appellant. Being satisfied that a hearing notice was duly served upon the appellant's advocates, the court ordered the hearing to proceed. The respondents called their sole witness to testify and proceeded to close their case. The court marked the respondents' and the appellant's cases as closed and directed the respondent's counsel to file written submissions. The matter was subsequently mentioned on 28th February 2017 to confirm filing of submissions where only counsel for the respondents was in attendance. Counsel indicated that she had filed submissions and requested for a judgment date whereupon the judgment date was fixed for 11th May 2017.

6. In its Judgment dated 11th May 2017, the ELC (C. K. Yano, J.) noted that despite being served with a hearing notice, the appellant failed to attend the proceedings and did not adduce any evidence to rebut the respondents' claim. The court found that the respondents had produced sufficient documentary evidence, including the lease agreement, demand letters, and notice of termination, thereby demonstrating that the appellant was in rent arrears and continued to be in wrongful possession of the suit property. Accordingly, the court was satisfied that the respondents had proved their case on a balance of probabilities and entered judgment in their favour as follows:

"15. For those reasons, I enter judgment for the plaintiffs against the defendant in the following terms: -

a) The defendants to give vacant possession or be evicted from parcel of land sub-division Number 619 Section 1 Mainland North (optional Number 50/2).

b) Rent arrears of Kshs. 1,209,500.00.

c) Mesne profits at the rate of Kshs. 6,500 per month [from] 1st June 2015 until vacant possession is given.

d) The defendant is ordered to pay costs of this suit."

7. Aggrieved, the appellant filed the instant appeal vide a memorandum of appeal dated 25th May 2023 on the following seven grounds:

“1. The Appellant’s right to a fair trial and access to justice under Article 25(c), 48 and 50(1) of the Constitution of Kenya, 2010 was infringed when the learned judge ordered the case to proceed to hearing *ex-parte* thus denying the Appellant an opportunity to be heard.

2. The learned Judge erred in law and fact when he failed to appreciate and take into account the Respondents admission that Plot Sub-Division No. 619 Section 1 Mainland North had ceased to exist when it was subdivided in 2003 into (1) Plot No. 12102/1/MN, (2) Plot No. 12103/1/MN and (3) Plot No. 12104/1/MN which plots were further sub-divided into 113 sub-plots. The judgment entered by Judge of the Superior Court in respect of Plot No. 619 Section 1 Mainland North was in vain and incapable of execution.

3. The learned Judge erred in law and fact by failing to take into consideration that the Appellant occupied Plot Nos. MN/1/17312, 17313, 17314, 17315 and 17316 which were not the subject matter of the suit filed by the Respondents.

4. The learned Judge had no jurisdiction to entertain the suit in respect of non-existing title and enter judgment in favour of the Respondents.

5. The learned Judge erred in law and fact by failing to appreciate that when the Respondents filed suit in 2015 they knew and were aware that the Appellant was in possession of Plot Nos. MN/I/17312, 17313, 17314, 17315 and 17316 and not of Plot No. 619 Section I Mainland North which the Respondents pleaded in the suit. There was no lease between the Appellant and the Respondents in respect

of Plot Nos. MN/I/17312, 17313, 17314, 17315 and 17316. The learned Judge should have dismissed the suit.

6. The learned Judge erred in fact and law in failing to find that the lease agreement at 12.92 acres between the Appellant and the Respondents determined when land plot number 619/Section 1/Mainland North (Original Number 50/2) was subdivided by the Respondent in 2003.

7. The learned Judge erred in law and fact by failing to appreciate the suit filed by the Respondents in 2015 was seeking rent arrear[s] and/or eviction of the Appellant from Plot No. 619 Section 1 Mainland North which had ceased to exist in 2003. The Superior Court did not have jurisdiction to entertain the suit filed in respect of a non-existing title and one which the Appellant was not in occupation and possession of.”

8. By reason of the matters aforesaid, the appellant prays for orders that the appeal be allowed with costs; that the *ex-parte* judgment and decree delivered on 11th May 2017 be set aside; that ELC Case No. 86 of 2016 filed in the trial court be dismissed with costs; and for any other or further relief that this Court may deem fit and just to grant.

9. In support of the appeal, learned counsel for the appellant, M/s.

Asige Keverenget & Anyanzwa, filed written submissions and a

list of authorities dated 13th June 2025. Counsel cited seven judicial authorities, namely **Malawi Railways Limited v PTK Nyasulu** [1998] MWSC 3; and **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others** [2017] eKLR for the proposition that each party is bound by his own pleadings, and cannot be allowed to raise a different or fresh case without due amendment properly made; and that a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and amounts to a denial of justice; **Anuar Loititip v Independent Electoral & Boundaries Commission & 2 others** [2019] eKLR for the proposition that fair hearing is a tenet of international law and a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms; **Adero Adero & another v Ulinzi Sacco Society Ltd** [2002] eKLR for the proposition that jurisdiction either exists or does not exist *ab initio*; that jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction;

and that jurisdiction is such

an important matter that it can be raised at any stage in the proceedings as well as on appeal; **Macfoy v United Africa Co Ltd** [1961] 3 All ER 1169 for the proposition that, if an act is void, then it is in law a nullity and incurably bad, and that there is no need for an order of the court to set it aside, and that every proceeding which is founded on it is also incurably bad; and **Zablon Mokuva v Solomon M. Choti & 3 others** [2016] eKLR for the proposition that, among the instances upon which orders of review could be obtained include where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury.

10. On their part, learned counsel for the respondent, M/s. N. A. Ali and Company, filed written submissions and a list of authorities dated 13th June 2025. They cited the case of **Ron v Lomsons Enterprises** [2024] KEHC 6249 (KLR) for the proposition that it is trite law that, where a party fails to call evidence in support of its case, the party's pleadings are not to be taken as evidence, but that the same remain mere statements of fact which are of no probative

value since the same remain unsubstantiated pleadings which have not been subjected to the required test of cross-examination; and that a defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case.

11. This Court's mandate on 1st appeal was espoused in **Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others**

[2009] KLR 331 in the following words:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

12. This mandate was also underscored in the case of **Kenya Ports Authority v Kuston (Kenya) Limited** [2009]

2 EA 212 as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

13. However, we are conscious as cautioned by the predecessor to this Court in **Peters v Sunday Post Ltd**

[1958] EA 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

14. In our considered view, the main issues that fall for our determination in this appeal are: (i) whether the ELC had the jurisdiction to hear and determine the respondents' suit; and (ii) whether the learned Judge violated the appellant's right to a fair trial and access to justice when he ordered the respondents' case to proceed *ex-parte*.

15. With regard to the jurisdictional challenge, counsel for the appellant submitted that the trial court had no jurisdiction in law to entertain and determine the respondents' suit; that the suit was a nullity *ab initio* as the appellant was not in possession or use of Plot Subdivision No. 619 Section I Mainland North when the suit before the ELC was filed; and that the pleaded subject matter of the suit and cause of action were non-existent in view of the fact that Plot Subdivision No. 619 Section I Mainland North had been extinguished in 2003 in consequence of further subdivision.

16. Counsel submitted that the respondent's sole witness (PW1) produced a copy of the Certificate of Title, *to wit*, CR No. 8541 for

Subdivision No. 619 Section I Mainland North which, at entry nos. 9 and 10, confirmed subdivision of the said parcel, meaning that, from 14th November 2003, the said parcel ceased to exist; that the appellant was in occupation of Plot Nos. MN/I/17312, 17313, 17314, 17315 and 17316, which were not pleaded in the Plaint before the trial court; that the impugned judgment dated 11th May 2017 and the ruling made on 16th December 2020 were issued in vain, having been founded on a claim that was null and void; that when the trial court became aware that the suit before it was a nullity, it should have vacated and/or set aside and/or reviewed the judgment and decree; that the respondents could not through a nullity invoke the trial court process to enforce the orders and Decree issued in the suit before it; and that to do so amounted to gross abuse of the court process.

17. In rebuttal, counsel for the respondent submitted that, before examining whether the appeal was merited, it would be important to first ascertain the *status quo* obtaining on the ground with regard to the suit property; that the substratum of the appeal had been eroded

in consequence of the appellant's eviction in 2019; that, since then, the respondents have been in occupation thereof; that, by an application dated 16th July 2019, the appellant sought orders of reinstatement albeit without success; that the evidence in proof of the respondents' claim against the appellant was uncontroverted, and that no evidence was adduced to substantiate the appellant's statement of defence; that subdivision of the suit property into 3 sub-plots in 2003 was inconsequential since the subdivisions were still owned by the respondents; that the appellant continued in occupation of the same property pursuant to the lease agreement, which remained in force despite the change in the plot number; and that the covenants and contractual obligations of the parties remained intact and binding.

18. According to counsel, the appellant could not claim that the demised premises did not exist anymore while he was in occupation thereof. Counsel argued that, having been a lessee, the only interest the appellant had was limited to the right of occupation and use, and not to any interest in the title to the land; that the appellant's leasehold interest was not in any way

affected by changes in the title

number; that the appellant does not have any legal capacity to raise any issues pertaining to the changes made in the title documents relating to the suit property; that, even if the appellant's argument was assumed to be merited, then the appellant's lease agreement was frustrated as a consequence of the subdivision and ceased to exist, and as a result, the appellant would have no basis on which to continue occupation of the subject property as a lessee.

19. In conclusion, counsel contended that the trial court dismissed the appellant's application dated 25th February 2020 in which the issue as to the consequences of the subdivision was considered and determined; that the appellant's application for orders to review or vary the court's judgment was dismissed; and that raising similar arguments is an attempt to re-litigate an issue already determined and not challenged on appeal.

20. The issue as to whether the ELC had jurisdiction to hear and determine the suit on account of the alleged non-existence of the subject matter pleaded by the respondents was the subject of the appellant's Notice of Motion application dated 25th February

2020

seeking to set aside, review and/or vary the impugned judgment and decree of the ELC dated 11th May 2017. In its ruling dated 16th December 2020, the ELC (C. K. Yano, J.) found no merit in the application and dismissed it. In his decision, the learned Judge held that:

*“16. In my view, the matters that the applicant now seeks to raise are not new and important evidence. Going by the averments in the defence filed by the applicant and the documents now relied on, it is quite clear that the defendant was well aware of the subdivision way back in 2015 before the judgment was delivered herein on 11th May 2017. I am not satisfied therefore of the allegations by the defendant that he discovered new and important matter or evidence I find no sufficient cause that has been presented to justify a review of the judgment herein ...
....*

20. The dispute in this case was over vacant possession of the suit property and rent arrears as well as mesne profits. It is my view that the court had the requisite jurisdiction to entertain the matter. I am also not persuaded that the suit was null and void and therefore a nullity. Moreover, the issue of jurisdiction was not raised previously. In the defence filed on 22nd July, 2015, and throughout the proceedings, herein, the applicant submitted to the jurisdiction of this court. It is not clear then what has suddenly changed. Nonetheless I am still persuaded that the suit is not a nullity and the court had and still have jurisdiction to entertain the same.”

21. It is noteworthy that the Notice of Appeal on which the instant appeal is founded is dated 16th December 2020. It

indicates that the

appellant intended to appeal against both the impugned judgement and decree delivered on 11th May 2017 as well as the ruling dated 16th December 2020. However, the Memorandum of Appeal on record clearly indicates that it relates solely to the impugned Judgment and decree dated 11th May 2017. The orders sought in this appeal pertain exclusively to that judgment and decree, and have no bearing on the subsequent ruling. The grounds of appeal and orders sought cannot be reasonably construed as having intended to also touch on the subsequent ruling. Accordingly, it is misleading for the appellant's counsel to frame their submissions in such a manner as to suggests that the instant appeal challenges both the impugned Judgment and the subsequent ruling dated 16th December 2020. It does not.

22. In principle, having opted to seek review of the impugned judgment, it was not open to the appellant to subsequently lodge an appeal against the same judgment. While the appellant may have intended to also appeal against the ruling dated 16th December 2020, which dismissed his application seeking review of the judgement, his Memorandum of Appeal restricted this appeal to the impugned

judgment. From the foregoing, it is evident that the instant appeal amounts to an abuse of court process.

23. In **Gerald Kithu Muchanje v Catherine Muthoni Ngare**

& another [2020] KECA 511 (KLR), Asike-Makhandia, J.A held

that:

“The applicant was aggrieved by the judgment of the trial court. Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of Martha Wambui v Irene Wanjiru Mwangi & Another (2015) eKLR, the court stated that ‘From the above provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that

the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review,

she lost the right of appeal against the same order ...' See also the case of Multichoice (K) Ltd V Wananchi Group (K) Ltd &

2 Others (2020) eKLR. This is exactly what happened here. Contrary therefore to the submissions by the applicant, the law on the issue is purely settled."

24. In **Ndithya v Total Kenya** [2022] KEHC 10080 (KLR), Odunga,

J. (as he then was) correctly held that:

"28. Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the Civil Procedure Act under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow a party who has unsuccessfully attempted to review a decision, to attack the very decision the subject of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants who intends to review a decision to do so and not to assist parties who set out to turn judicial process into a roulette. In my considered view the wording of the provisions of Order 45 rule 1 is meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of "any person considering himself aggrieved". An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties

who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for

litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the Civil Procedure Act whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court's seal of approval to persons who wish to play lottery with judicial process."

25. The abuse of court process aside, the jurisdictional challenge that the appellant continues to advance before us cannot stand. In our considered view, the subdivision of the suit property in 2003 did not of itself adversely affect the appellant's rights under the lease agreement in view of the fact that the respondents continued as the registered proprietors of the subdivisions while the appellant remained in occupation thereof. Moreover, the conduct of the parties not to repudiate the lease agreement altogether after subdivision merely amounted to mutual variation of the terms of the lease so as to substitute the original title for the sub-divisions of the suit property.

26. It is worth noting that, the correspondence on record exchanged between counsel for the parties before the respondents' suit was filed show that the subdivisions of the suit property comprising the demised premises was well known to the parties; that all the parties were aware that the said subdivisions emanated from the suit property described as Subdivision No. 619/Section I/Mainland North (Original Number 50/2); that the imprecise description of the suit property did not by any means cause any prejudice or confusion to any of the parties; and that this change could not be a ground to impeach the jurisdiction of the ELC.

27. In a comparable case involving misdescription of a party, Crabbe, JA. in **J B Kohli and Others v Bachulal Popatlal** [1964] 1 EA 219 held that:

“In my view the question is not whom the plaintiff intended to sue but whether a reasonable man reading all the documents in the proceedings before the resident magistrate and having regard to all the circumstances would entertain no doubt that “Haji Essa Adam & Sons” were the defendants intended to be sued by the plaintiff. If he would have no doubt as to the person to be sued it would be a case of misnomer. In Davies v. Elsby

Brothers Ltd. (3), Devlin, L.J proposed the following tests ([1960] 3 All E.R. at p.676):

‘The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: ‘Of course it must mean me, but they have got my name wrong’, then there is a case of mere misnomer. If, on the other hand, he would say: ‘I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries’, then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer.’”

28. This Court in **Bhudia Builders and Erectors v Ima Agencies Limited** [2014] KECA 479 (KLR) observed that the prime objective of the court in such cases is to “to focus on substance rather than form in considering matters before it, the concern of the court being to dispense substantive justice to those who seek the same.”

29. In conclusion, we form the view that the ELC had jurisdiction to hear and determine the respondents’ suit; and that the inaccurate

description of the demised premises did not of itself render the suit fatally defective.

30. Turning to the 2nd issue as to whether the learned Judge infringed the appellant's right to a fair trial and access to justice when he ordered the suit to proceed to hearing *ex-parte*, counsel for the appellant submitted that, despite the appellant having filed a Defence in response to the respondents' claim, the hearing in the trial court proceeded *ex-parte* and Judgment rendered in favour of the respondents; that, in his defence, the appellant had pleaded the non- existence of Plot Subdivision No. 619 Section I Mainland North pleaded by the respondents in the plaint; that, after delivery of the impugned judgment, the appellant made several applications culminating in his Notice of Motion dated 25th February 2020 seeking orders to review, vary and/or set aside the impugned judgment and an opportunity to be heard, which prayers were declined vide the ruling dated 16th December 2020; that the trial court erred in failing to exercise its residual jurisdiction, allow the application and avert miscarriage of justice; that the appellant's right to a fair trial and

access to justice was infringed when the learned Judge ordered the case to proceed to *ex-parte* hearing on 20th February 2017, thereby denying the appellant an opportunity to be heard; and that the foundations of the Civil Procedure Act and Rules, as provided in section 1A and 1B of the Civil Procedure Act, were ignored and thrown to the wind, a grave error on the part of the trial court.

31. In rebuttal, counsel for the respondents submitted that, on 20th February 2017 when the matter proceeded to hearing, the trial court was satisfied that the appellant's advocates had been duly served with the hearing notice, but failed to appear in court; that service was proved vide an affidavit of service sworn on 8th February 2017; that, based on the evidence of due service, the matter proceeded in the absence of the appellant; that, after the judgment was rendered, the appellant filed an application dated 28th April 2017 seeking, *inter alia*, to have the judgment set aside; that the trial court dismissed the application vide a ruling dated 6th February 2018, which the appellant did not challenge on appeal, and which remains undisturbed; that the appellant

cannot purport to circumvent those

orders by attempting to re-litigate the same issues on appeal to this Court; that, in any event, the instant appeal challenges the impugned judgment.

32. Order 12 rule 2 of the Civil Procedure Rules provides guidance to the action the court may take when only the plaintiff is in attendance at the hearing of a suit and provides:

2. When only plaintiff attends [Order 12, rule 2]

If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—

(a) that notice of hearing was duly served, it may proceed ex parte;

(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.

33. When the suit came up for hearing on 20th February 2017, it was noted that there was no appearance for the appellant. Counsel for the respondents indicated that the appellant had been duly served with the hearing notice as evidenced by the

affidavit of service dated

8th February 2017. The learned Judge pronounced herself on the way forward as follows:

“I have perused the affidavit of service dated 8.2.17. I am satisfied that the defendant’s advocates were duly served with today’s date. There is no reason given why they are not before the court. The hearing shall proceed.”

34. In view of the foregoing, we find no reason to fault the learned Judge’s order to proceed with the hearing *ex-parte*. The basis of her decision was sound as there was undisputed evidence of service of the hearing notice upon the appellant’s advocates. We also take to mind the fact that, following the impugned Judgment, the appellant filed a Notice of Motion dated 28th April 2017 seeking orders to set aside the *ex parte* judgment and allow the appellant to prosecute his defence the application was dismissed vide a ruling dated 6th February 2018. There is no appeal before us against that ruling. As these are not matters that are properly before us, they are without foundation and we decline the invitation to determine them.

35. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion

that the appeal

fails and is hereby dismissed with costs to the respondents. Consequently, the judgment and decree of the ELC at Mombasa (C. K. Yano, J.) delivered on 11th May 2017 in ELC Case No. 86 of 2016 is hereby upheld. Orders accordingly.

Dated and delivered at Mombasa this 30th day of January 2026

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR