REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E098 OF 2023

(Being an appeal from the Ruling and Order of the Hon. Geno L. Okwengu, Senior Resident Magistrate in Kilungu PMCC No. E275 of 2022 delivered on 29th September, 2023)

ERICK MATHEKA ***(Suing as the legal Administrator's ad litem of***

The Estate of DAVID JOHN MWANGANGI) **…………………. APPELLANT**

VERSUS

JOSEPHIN MANG'OKA ……………………………………… RESPONDENT

JUDGMENT

1. The Appellant sued the Respondent at the lower Court vide a Plaint dated 29th September, 2022. The Respondent failed

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to file defense within the stipulated time and the Court entered an interlocutory judgment against her on 20th April, 2023. Subsequently, the Appellant obtained a decree for Kshs.706,768/= and warrant of arrest in execution against the Respondent. The Respondent brought an application dated 23rd August, 2023 and amended on 30th August, 2023 in which she asked the Court to set aside the default judgment. She also asked the Court to give her unconditional leave to defend the case, claiming that she had not been served with any pleadings or notices in the matter.

2. The Court delivered a ruling on 29th September, 2023 in which it ruled in favor of the Respondent. It set aside the interlocutory judgment subject to the Respondent paying throw away costs of Kshs.20,000/= to the Appellant. It also set aside the execution proceedings with no orders as to costs. It also directed the Respondent to deposit Kshs.150,000/= to Court within 21 days as security. Lastly, it gave the Respondent conditional leave to defend the suit

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and directed her to file a defense within 14 days from the date of the ruling.

3. The Appellant was dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 17th October, 2023. He listed the following grounds of Appeal;

    1) ***That the Learned Magistrate erred in law and fact by failing to find that the Respondents were properly served with summons to enter appearance.***

    2) ***That the Learned Magistrate erred in law and fact by ignoring the submissions of the Appellant and giving prominence to the submissions by the Respondent.***

    3) ***That the Learned Magistrate erred in law and fact by failing to find that no proper grounds had been advanced by the Respondent hence no material had been placed before the Court to warrant the exercise of discretion to set aside an ex-parte judgment entered against the Defendants.***

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4) ***That the Learned Magistrate erred in law and fact by failing to find that there existed a special relationship between the 1st Respondent and the 2nd Respondent and thus failing to observe that basic provisions of Order 5 of the Civil Procedure Rules that provides that service upon an adult member of the family is proper service of a court process against the 1st Respondent.***

5) ***That the Learned Magistrate erred in law and fact by failing to give due weight and attention to the express admissions made by the Respondent in the affidavit in support of application to set aside and relying on extraneous matters.***

6) ***That the Learned Magistrate erred in law and fact and acted capriciously, injudiciously, whimsically, and demonstrated open bias by setting aside a proper judgment when there was no material or legal basis or not supported by any facts or evidence.***

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7) ***That the Learned Magistrate erred in law and fact by failing to find that in the presence of an existing judgment against the 2nd Defendant, for whom she is vicariously liable, the Respondent has no defense against the Appellant in a claim under the rule of Ryland versus Fletcher.***

4. He asked the Court to set aside the ruling and the order of the Learned Magistrate delivered on 29th September 2023, and in its place, reinstate the *ex parte* judgment entered against the Respondent.
5. The Appeal was canvassed by way of written submissions.

Appellant's written Submissions

6. The Appellant submitted that the lower Court was wrong in setting aside the *ex parte* judgment. He maintained that the Respondents failed to place material before the Court to warrant the Court to exercise its discretion to set aside the interlocutory judgment. He argued that the Respondents did not give any good reasons for failing to file defense within the time provided in law. He also argued that the

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Respondents did not give any explanation for failing to attend Court for the notice to show cause. He submitted that at all stages the Court was satisfied that proper service of Court processes had been done.

Respondent's written Submissions

7. The Respondent submitted that the lower Court was right in setting aside the default judgment. She argued that she was not properly served with the Plaint and Summons to enter appearance, and thus the judgment entered against her was irregular. She argued that there was no evidence of service of the Summons to enter appearance. She argued that she had not deliberately sought to evade or otherwise delay or obstruct the course of justice, and thus she should be accorded the right to defend herself. Lastly, she submitted that the Court should not set aside the ruling delivered on 27th September, 2023.

Issues for Determination

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8. Having looked at the grounds of appeal and the submission of the parties, I find that the singular issue for determination is whether the Respondent's application at the lower Court met the threshold for setting aside an interlocutory judgment.
9. The role of this Court as the first appellate court is well-settled. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses.
10. This principle was set out in **Okeno vs. Republic (1972) EA 32,** where the East Africa Court of Appeal stated as follows;

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court***

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must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

11. Based on this authority, this Court is being required to undertake a wholesome review of the Respondent's application (at the lower Court) for setting aside the interlocutory judgment and come up with its conclusion. I shall first set out the grounds of the application, the

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affidavits in support and those opposed to the application, and the evidence provided by the parties.

12. The Application was a Notice of Motion dated 23rd August, 2023 and amended on 30th August, 2023. The grounds of the application were enumerated on its face and supported by an affidavit sworn by Josephine Mang'oka (the Respondent) and dated 30th August, 2023. The Respondent averred that she was not served with any pleadings or notices in the matter. She averred that the affidavit of service dated 13th April, 2023 and filed by the Appellant did not indicate that she had been served. She also stated that the screenshot attached to the affidavit of service did not show the number of the recipient and hence it was not possible to show that the recipient number is registered to any of the Respondents.

13. Having set out the application, I shall now relook at it to determine whether the said application met the legal threshold for setting aside an interlocutory judgment.

14. Courts have generated a robust jurisprudence on the legal threshold for setting aside a default judgment. The

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prevailing jurisprudence is that the Courts apply different thresholds depending on whether the default judgment was regular or irregular. The principles were summarized by the Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**, where the Court made a distinction between irregular and regular default judgments.

15. On setting aside regular default judgments, the Court held as follows;

> ***"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***

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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".

16. On setting aside irregular default judgments, the Court held as follows;

"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

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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".

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17. The same principle had been stated earlier in **<u>Kabutha v. Mucheru, HCCC No. 82 of 2002 (Nakuru)</u>**, where Musinga, J. (as he then was) observed as follows;

> ***"With respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process."***

18. Having outlined the above authorities, I shall relook at the facts to determine whether the default judgment in

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question was regular or irregular, so that this Court can determine the threshold to apply.

19. The issue boils down to whether the Respondents were served with the Plaint and Summons to enter appearance.

20. At the onset, I note that the lower court record states that the Respondents had filed a memorandum of appearance but had failed to file defense within the stipulated time. This statement appears in the typed proceedings and lower Court's ruling dated 20th April, 2023, where the Court noted, and I quote "The Defendants having filed a memorandum of appearance has failed to file defense within the stipulated period."

21. I have perused the entire record to determine whether indeed the Respondents filed the said Memorandum of appearance. I have not found a copy of the said memorandum of appearance in the court file. I have also read all the affidavits by the Appellant and he does not mention that the Respondents had filed a memorandum of appearance. I also noted that on 20th April, 2023, when the Appellant prayed for the default judgment, his advocate told

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the Court that the Respondents had not entered appearance. Thus, I find that the Respondents did not file a Memorandum of appearance as captured in the record.

22. For these reasons, I find that it must have been an oversight on the part of the presiding Magistrate, when she stated in her ruling that the Respondents had filed a Memorandum of appearance.

23. I shall now turn to determine whether the Respondents were served. I have looked at the affidavit of service dated 13th April, 2023 and sworn by one ROSELINE OWINO, in which she avers that she served the Respondents with the Plaint and Summons to enter appearance on 31st March, 2023. She deponed that she served the two Respondents vide WhatsApp through their respective telephone numbers. In the said affidavit, the process server avers that the 1st Respondent (Josephine Mang'oka) did not view the said WhatsApp message.

24. In **Oyunge Barnabus & 3 others (Suing as Administrators of the estate of Mathayo Ratemo Mayaka (deceased)) v Charles Oteki Rioba [2021]**

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eKLR, the Court gave guidance on how service vide WhatsApp should be effected and interpreted. It observed as follows;

> ***"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."***

25. In applying the above principle to the 1st Respondent, I find that the Appellant did not provide proof of service to the 1st Respondent. I find so because the process server

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admitted that the 1st Respondent did not view the WhatsApp text.

26. With regards to the 2nd Respondent, the process server stated that the 2nd Respondent duly received the WhatsApp message. She attached a screenshot indicating two blue ticks. However, in my view, the said service did not meet the rule established in **Oyunge Barnabus (Supra),** because the screenshot does not indicate the telephone number of the recipient. It only indicates the recipient as 'Kasimu' and does not have any other evidence to link the said recipient to the 2nd Respondent's telephone number. Accordingly, I find that there was no proper service on the 2nd Respondent, as well.

27. For these reasons, I find that the default judgment was an irregular judgment and that the Respondent's application for setting it aside was merited. As such, I find that the lower Court was right in setting it aside. Consequently, the Appeal fails.

28. I have also considered the Respondents' submissions at length. The Respondents asked this Court to uphold the

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ruling and order of the learned Magistrate delivered on 29th September, 2023. The said ruling is hereby upheld.

Costs

29. Regarding costs, the Court in **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] KEHC 7064 (KLR)** held as follows;

"I find useful guidance in the following passage from the Halsbury's Laws of England;[4] "The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice" (Emphasis added).

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30. I also associate with the observations of the court in **<u>Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others HC EP No. 6 of 2013</u>**, where the Court held as follows;

> ***"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. ……But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without <u>the exercise of good grounds for doing so</u>."***

31. Lastly, the court in **<u>Cecilia Karuru Ngayu (Supra)</u>** enlisted the factors to consider when determining the issue of costs. It held as follows;

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"To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) <u>the conduct of the parties</u>, (ii) the subject of litigation, (iii) <u>the circumstances which led to the institution of the proceedings</u>, (iv) the events which eventually led to their termination,(v) <u>the stage at which the proceedings were terminated</u>, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.[11] In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs". [12]

32. I note that the Appellant stated that he faced real difficulties in effecting physical service on the Respondents,

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on account that they had moved out of their residence and had become elusive and evasive. He sought the intervention of the court and was granted leave to serve through WhatsApp. I also note that the 1st Respondent admitted that she was served with a notice to show cause and a decree on 21st June, 2023. The 1st Respondent was also served with the same set of documents on 4th August, 2023 as evidenced by an affidavit of service sworn by Bernard Okoyo and dated 7th August, 2023.

33. The two services were effected physically at her place of work. However, she did not respond to these court documents and did not take action until when it was late in the day when warrants of arrests were issued against her. The Court directed the O.C.S. Emali Police Station to execute the warrant. Although she was first served with the N.T.S.C on 21st June, 2023, she only reacted on 23rd August, 2023, when she instructed the firm of M/s Betty Wamukore & Owiti Company Advocates to act for them in the matter. For the said delay in responding to the N.T.S.C, I shall not award them costs for this appeal.

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Disposition

34. The Appeal fails and it is hereby dismissed with no order as to costs.

35. The ruling and order of the learned Magistrate delivered on 29th September, 2023 is hereby upheld.

36. It is hereby ordered.

DATED, DELIVERED and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **17TH** day of **FEBRUARY, 2026.**

……………………..

C. KENDAGOR

JUDGE

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In the presence of:

Mr Olonde Advocate for the Appellant

No attendance for respondent

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