

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT**  
**KERUGOYA**  
**ELCA NO. E012 OF 2023**

**SAMUEL KABUTHI KING'ANG'I ..... 1<sup>ST</sup>**  
**APPELLANT/APPLICANT**

**GERALD GITUKE KING'ANG'I ..... 2<sup>ND</sup>**  
**APPELLANT/APPLICANT**

**STEPHEN KIMENYI KING'ANGI ..... 3<sup>RD</sup>**  
**APPELLANT/APPLICANT**

**VERSUS**

**JOSEPH GATHITU KING'ANG'I ..... 1<sup>ST</sup>**  
**RESPONDENT**

**JULIUS GITUKE KING'ANG'I ..... 2<sup>ND</sup>**  
**RESPONDENT**

**MARGARET WAMBURA GIKUNJI ..... 3<sup>RD</sup>**  
**RESPONDENT**

**CATHERINE WAKUTHI NJANJA ..... 4<sup>TH</sup>**  
**RESPONDENT**

*(Being an appeal against the ruling of Hon. D.M. Ireri, PM,  
delivered on 29<sup>th</sup> August 2023 in Baricho PMCC No. 119 of  
2022)*

**JUDGMENT**

1. Aggrieved by learned trial magistrate's decision delivered on **29<sup>th</sup> August 2023**, the appellants lodged the present

appeal vide a memorandum of appeal dated 31<sup>st</sup> August 2023, raising five grounds, inter alia, of failing to properly analyse the provisions of **Order 5 Rules 1, 15 and 16 of the Civil Procedure Rules, 2010** in light of the evidence contesting service of summons; failing to consider the merits of the appellants' case and submissions; upholding the judgment delivered on 25<sup>th</sup> January 2023 despite the contested service of pleadings; failing to address the issues raised in the respective pleadings; and exercising judicial discretion unfairly in dismissing the appellants' application.

2. On 11<sup>th</sup> February 2025, this Court directed that the appeal be canvassed by way of written submissions. Both parties subsequently filed their respective submissions, which the Court has duly considered. The appellants in their submissions dated 11<sup>th</sup> June 2025, identified one issue for determination, that is, whether the judgment entered in favour of the respondents was obtained irregularly, and if so, whether the same ought to be set aside.

The counsel submitted that the appellants were unaware of the proceedings before the lower court, and only learnt of the matter upon being served with a notice to show cause. It was argued that the discretion of a court to set aside or vary an ex parte judgment entered in default of appearance or defence is wide, and is intended to be exercised to avoid injustice or hardship. However, the

discretion is not to assist a party whose conduct is deliberately aimed at obstructing or delaying the course of justice.

The counsel relied on the decision in the case of **Shah versus Mbogo & Another (1967) EA 116**. Counsel emphasized that both regular and irregular judgments may, in appropriate cases, be set aside to allow a matter to proceed and be heard on its merits. The counsel urged the Court to exercise its discretion to set aside the default judgment upon such terms as are just, noting that this being a dispute between siblings, it would serve the interests of justice and family harmony if the matter was heard, and determined on the merit. Counsel maintained that the appellants had not acted to obstruct justice, and that the respondents had not demonstrated any prejudice incapable of compensation by an award of costs. It was further contended that the appellants were never served with a notice of judgment, which omission rendered the process defective. Counsel also noted that the appellants had deposited a sum of **Kshs. 400,000/=** in good faith, demonstrating their commitment to having the dispute determined on merit.

3. In their submissions dated 29<sup>th</sup> April 2025, the respondents identified one issue for determination, that is, whether the appeal is merited.

The counsel submitted that the applicable provisions of law governing the setting aside of judgments are found under **Order 12 Rule 7 of the Civil Procedure Rules**, which provides that:

***“where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”***

Counsel also cited **Order 51 Rule 15 of the Civil Procedure Rules**, which empowers the court to set aside an order made ex parte. It was further submitted that from the record of proceedings, the appellants were duly served with summons to enter appearance, as evidenced by a duly filed affidavit of service, and that the judgment entered was therefore regular. Counsel further contended that the appellants failed to annex any draft defence to their application to assist the court in determining whether they had any reasonable or triable issues.

On whether the trial court exercised its discretion judiciously, counsel maintained that the magistrate satisfied himself as to proper service and rightly exercised his discretion in dismissing the application. He urged this Court to find that the appeal is devoid of merit and to dismiss it with costs.

4. The issues arising for determination by the court in this appeal are as follows:

*a. Whether the learned trial magistrate properly exercised his discretion in dismissing the appellants' application to set aside the ex parte judgment entered on 25th January 2023.*

*b. Whether this Court should interfere with that exercise of discretion.*

*c. Who pays the costs?*

5. The court has considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel and come to the following determinations:

a. This appeal arises from the ruling of **Hon. D.M. Ileri in Civil Case No. 119 of 2022**, delivered on 29<sup>th</sup> August 2023, which dismissed the appellant's application of 26<sup>th</sup> June 2023 with costs, and vacated the interim stay of execution. In that application, the appellants sought for inter alia, to set aside the ex parte judgment and consequential orders; have the case re-admitted for hearing on its merits, and be awarded costs. The trial court found that the appellants had not challenged the affidavit of service, as they neither cross-examined the process server

nor filed contrary evidence, and concluded that they were therefore, duly served.

It further held that, having failed to appear or file a defence, the interlocutory judgment was regular, and that, in any event, the appellants had not filed a draft defence demonstrating triable issues for the court to consider.

- b. The background of the suit is that, by a plaint dated 9<sup>th</sup> December 2022, the respondents instituted **Civil Case No. 119 of 2022** against the appellants seeking payment of **Kshs. 451,110.80** /=with interest at court rates from 2<sup>nd</sup> May 2019 until payment in full, together with costs and interest thereon.

The respondents' case was that the parties are siblings, all being children of the late King'angi Kabuthi (deceased), and lawful beneficiaries of his estate, in **Baricho PM's Succession Cause No. 24 of 2016**. Pursuant to a confirmed grant dated 14<sup>th</sup> March 2019, the said deceased's estate, comprising **L.R. Mwerua/Kagio/296** and **Kshs. 1,200,000/=** compensation from Kenya Power & Lighting Company Ltd. (KPLC) for wayleave rights, was to be distributed equally among ten beneficiaries. The respondents contended that although the KPLC compensation had

already been deposited into the appellants' joint account, they failed and refused to remit the respondents' respective shares, save for **Kshs. 185,000/=** utilized for survey fees towards subdivision of the land. They claimed that their total entitlement of **Kshs. 451,110.80/=** had been unlawfully withheld and converted by the appellants in blatant breach of the confirmed grant and ensuing court orders.

- c. Despite the service of summons and pleadings, the appellants neither entered an appearance nor filed a defence. Consequently, the respondents filed an affidavit of service dated 9<sup>th</sup> January 2023 sworn by Godfrey M. Mune, a duly authorized process server, and thereafter lodged a request for judgment dated 24<sup>th</sup> January 2023.

The trial court proceeded to enter ex parte judgment against the appellants on 25<sup>th</sup> January 2023, which is the judgment the appellants later sought to set aside through their application dated 26<sup>th</sup> June 2023, which was determined through the impugned ruling.

- d. This being a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in

**Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the **Court of Appeal** held:

***“This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... 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 witnesses and should make due allowance in this respect.”***

- e. To resolve this appeal, the court finds it is important to confirm inter alia, whether service of summons was proved; whether the learned trial magistrate’s judgment was regular or irregular; whether the appellants have demonstrated sufficient cause and a plausible defence with triable issues; and whether the trial court exercised its discretion judicially and on proper principles.
- f. On proof of service, **Order 5 Rules 15 and 16 of the Civil Procedure Rules, 2010** require that service of summons be proved by an affidavit of service, which affidavit, unless successfully impugned, constitutes prima facie evidence of proper service.

The record before the trial court contained an affidavit of service sworn on 9<sup>th</sup> January 2023 by Godfrey M. Mune, the process server, showing that the appellants were duly served with summons to enter appearance. That affidavit was never challenged through cross-examination or a rebuttal affidavit. In law, once an affidavit of service stands uncontroverted, the court is entitled to rely upon it as proof of service. The learned magistrate did not err in finding that the appellants had been properly served, and that the proceedings culminating in judgment were therefore, regular.

g. On whether the judgment was regular or irregular, it is important to set out the distinction between a regular and an irregular ex parte judgment, as it is well settled. A regular judgment arises where a defendant was duly served but failed to enter appearance or file a defence within the time prescribed under **Order 10 Rules 2 and 4 of the Civil Procedure Rules**. An irregular judgment, on the other hand, arises where judgment is entered without proper service of summons.

h. Having found that service was duly effected, the trial court correctly categorised the judgment as regular, and cannot be faulted in that respect. In such a case,

the applicant seeking to set aside such a judgement must satisfy the requirements of **Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules**, which empower the court to ***“set aside or vary the judgment or order upon such terms as may be just.”***

- i. On whether the Appellants showed sufficient cause and existence of triable defence, one needs to appreciate that the discretion to set aside a regular judgment is intended to avoid injustice resulting from accident, inadvertence, or excusable mistake. However, it is not meant to assist a party that has deliberately sought to obstruct or delay the cause of justice. This principle was laid down in **Shah versus Mbogo & Another [1967] EA 116**, and has been reaffirmed in several superior court decisions including the case of **Patel versus East African Cargo Handling Services Ltd [1974] EA 75**.

For an applicant to succeed under **Order 12 Rule 7 of the Civil Procedure Rules**, they must present inter alia a satisfactory explanation for the default; show promptness in bringing the application, and present through a draft defence or affidavit that they have a bona fide triable issue(s).

j. In the present case, judgment was entered on 25<sup>th</sup> January 2023, while the application to set it aside was filed on 26<sup>th</sup> June 2023, a delay of approximately five months. The appellants attributed their failure to appear in the suit to a lack of knowledge of its existence, saying it was not until they were served with a notice to show cause that they got to know about it. However, they neither provided independent evidence substantiating that claim, nor did they seek to cross-examine the process server.

Equally, the appellants did not annex any draft defence to their supporting affidavit. The importance of exhibiting a draft defence is to enable the court to discern whether the applicant has an arguable case. Without such a draft defence, the court is left without material on which to exercise its discretion in the applicant's favour.

k. On whether the trial court exercised its discretion judicially, the starting point is to appreciate that the appellate court will only interfere with the exercise of discretion by a lower court, if satisfied that the trial court misdirected itself in law, considered irrelevant factors, failed to consider relevant factors, or that the decision is plainly wrong, ***see Mbogo & Another versus Shah [1968] EA 93***. In this case, the

learned trial magistrate considered the affidavit of service and the absence of a draft defence before arriving at his decision. Those are the proper considerations under **Order 12 Rule 7 of the Civil Procedure Rules**, and the applicable principles in the case of ***Shah versus Mbogo (supra)***. There is no indication that the learned trial magistrate acted on any wrong principle or that he exercised his discretion capriciously.

- I. The appellants' argument that they deposited **Kshs.400,000/=** to demonstrate good faith cannot substitute for the requirement of a draft defence or sufficient cause. The **Civil Procedure Rules** do not treat a monetary deposit as a ground for setting aside a regular judgment. The deposit of **Kshs.400,000/=** was a condition/term for stay of execution order granted vide the ruling delivered on 24<sup>th</sup> April 2024.

Similarly, the contention that they were not served with a separate "*notice of judgment*" does not vitiate the proceedings, where initial service of summons was properly effected in accordance with **Order 5 of the Civil Procedure Rules**.

- m. Having considered the record and the rival submissions, this Court finds that the trial court

properly exercised its discretion, and the judgment entered on 25<sup>th</sup> January 2023 was regular, as service was duly proved. The the appellants failed to demonstrate any reasonable cause or triable issues in their defence warranting the setting aside of that judgment. The appeal is therefore devoid of merit.

- n. **Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya** provides that costs shall ordinarily follow the event unless the court, for good reason, orders otherwise. The court in the case of **re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal 15 of 2023) [2024] KEHC 14780 (KLR)** held that:

***“Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously.”***

The court finds no reasonable cause to deviate from that edict and awards the respondents the costs in the appeal.

6. Having come to the above determinations on this appeal, the court finds and orders as follows:
- a. That the appeal is without merit and is dismissed in its entirety.***

***b. That the learned trial magistrate's ruling delivered on the 19<sup>th</sup> August 2023 in Baricho PMCC No. 119 of 2022 is confirmed.***

***c. The respondents' costs in the appeal to be borne by the appellants.***

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 11<sup>TH</sup> DAY OF MARCH 2026.**

**Kibunja**

**S. M.**

**ELC**

**JUDGE**

**In the presence of:**

Appellants - Present

Respondents - No appearance

Kinyua - Court Assistant.

**S. M.**

**Kibunja**

**ELC**

**JUDGE**