REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. 39 OF 2023

KAILEMIA LYDIA WANJA…… APPELLANT

VERSUS

MICHAEL NGANGA MUCHAMI…… RESPONDENT

(Being an Appeal from the Ruling of Hon. C. K. Kisiangani (PM) delivered on 10th June 2021 in Ruiru SPMCC No. 110 of 2019)

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Ruiru Principal Magistrate in SPMCC No. 110 of 2019 whereby the trial court dismissed the application dated 4th March 2021 seeking for orders of setting aside proceedings as well as *ex parte* judgment by the court on 27th September 2019.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds summarized as follows:-

   a) The learned trial magistrate erred in law and in fact in failing to find that the summons to enter appearance was never served on the appellant.

b) The learned trial magistrate erred in law and in fact for failing to set aside the *ex parte* judgment and failing to allow the defendant to defend the suit on merits.

c) The learned trial magistrate erred in law and in fact for failing to consider the proposed mutual consent by the plaintiff and the defendant to set aside the *ex parte* judgment.

3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant relies on **Order 10 Rule 11 of the Civil Procedure Rules** and the cases of **K-Rep Bank Limited vs Segment Distributors Limited (2017) eKLR**; **Richard Nchapai Leiyangu vs IEBC & 2 Others (2013) eKLR**; **Patel vs East Africa Cargo Services Ltd [1974] EA 75** and **Fidelity Commercial Bank Ltd vs Owen Amos Ndungu & Another HCC No. 241 of 1998 (UR)** and submits that the respondent did not serve her with any summons to enter appearance and as such, the judgment entered was irregular. The appellant argues that unless the default judgment is set aside, she will be subjected to execution yet the respondent has not demonstrated any prejudice he will suffer if the judgment is set aside and the matter heard on its merits.

The Respondent's Submissions

5. The respondent relies on the case of **Karige Kihoro vs Equity Bank Limited & Another 2016 KEELC 1084 KLR** and submits that he

   sought the leave of the court to serve the appellant by way of substituted service via registered post as he discovered her address in the copy of records of motor vehicle registration number KBL 383L, registered in the appellant's name. The respondent submits that he proceeded to serve the summons upon the appellant through her registered post address P.O. Box 34 Nyeri. He further submits that he filed an affidavit of service dated 17th September 2019 indicating evidence of service by attaching the postage receipt. The documents were not returned as having not been collected. Further the appellant in her application dated 4th March 2021 did not deny the postal address used for service thus the learned magistrate was correct to hold that the burden of proof lay on the appellant to prove that the postal address was not hers.

6. The respondent relies on the cases of **Alibhai vs Wandera & 3 Others; Evans & Another (Interested Parties) (Civil Case E628 of 2021) [2025] KEHC 1377 (KLR) (Commercial and Tax) (27 February 2025)** and **Obiero vs Severin & Another (Civil Appeal E201 of 2023) [2025] KEHC 2724 (KLR) (13 March 2025)** and submits that the judgment was regular as service was proper but the appellant failed to enter appearance. The appellant purposely chose not to defend her claim and

only decided to conduct herself by frustrating him from rightfully executing the decree.

7. The respondent submits that the trial magistrate exercised her discretion and dismissed the application despite the parties herein consenting to the application being allowed as the same contravenes

   Article 159(2)(b) of the Constitution. The discretion is meant to prevent injustice and not to perpetuate delay.

8. The main issue for determination is whether the trial court erred in dismissing the appellant's application for setting aside the *ex parte* judgment in default of appearance and defence.

The Law

9. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

"…..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. 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 into

account of particular circumstances or probabilities materially to estimate the evidence."

10. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial 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 witnesses and should make due allowance in this respect.

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit

12. Under **Order 10 Rule 11 of the Civil Procedure Rules** the court can set aside or vary such judgment and any consequential decree or order upon such terms as are just. It provides as follows:-

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.

13. Notably, the above provision shows that a court has the discretion to set aside a default judgment. This principle was enunciated in the

case of **Patel vs EA Cargo Handling Services Ltd (1974) EA 75**, where the court held that:-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court

has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow ay rule of procedure."

14. Similarly in **Shah vs Mbogo & Another [1967] EA** it was held that:-

The court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should therefore be refused.

15. Thus the principle that emerges from the above cited cases is that the discretion of the court to set aside or vary *ex parte* judgment entered in default of appearance or defence is a free one. Further, it is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

16. The Court of Appeal in the case of **Thorn PLC vs MacDonald [1999] CPLR 660** stipulated the following guiding principles to consider when setting aside an *ex parte* judgment;-

a) **While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;**

b) **Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;**

c) **The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and**

d) **Prejudice (or the absence of it) to the claimant also has to be taken into account.**

17. The appellant argues that she was never served with the pleadings and as such, the default judgment entered is irregular and ought to be set aside.

18. The Court of Appeal in **James Kanyita Nderitu vs Maries Philotas Ghika & Another [2016] eKLR** held:-

From the onset, it cannot be gainsaid that a distinction has always existed between the 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….

In an irregular 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 justiciae*, 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 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….Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.

19. The facts of this appeal are that the respondent instituted the suit in the lower court vide plaint on 27th May 2019. The respondent thereafter filed an application dated 2nd August 2019 seeking leave of the court to serve the appellant by way of substituted service through registered post using her known address from the copy of records being P.O. Box 34 Nyeri. The lower court allowed the application on 22nd August 2019 and directed that the appellant be served vide registered post within 7 days from the date of the ruling. On 19th September 2019 counsel for the respondent confirmed that he served the appellant on 26th August 2019 through registered post but the appellant had not entered appearance. Upon the lower court directing that the respondent file a proper affidavit of service as proof of service, the respondent complied and filed an affidavit of service on 17th September 2019. On 27th September 2019 the respondent informed the court that he had filed for request for judgment and

prayed for interlocutory judgment to be entered. The lower court upon satisfying itself that the appellant was served it entered interlocutory judgment.

20. On perusal of the affidavit of service sworn on 17th September 2019, it is evident that the appellant was served with the pleadings via registered post on 26th August 2019 through P.O. Box 34 Nyeri and attached a receipt of postage. The said address was indicated in the

copy of records which showed that the appellant was the registered owner of motor vehicle registration number KBL 383L. Notably, the appellant did not deny that the said address was in use by her herself. Her claim was that she was never served. The onus to proof that the postal address was not hers was upon the appellant. However, she failed to discharge the same. Thus, from the record it is evident that the appellant was duly served with the summons to enter appearance and plaint but she chose not to enter appearance in the suit. Upon proving that the appellant was served, it follows that the judgment entered was regular. The appellant has not attached a draft statement of defence to determine whether the defence raises triable issues.

21. It is trite law that a regular judgment will not be set aside unless the court is satisfied that there is a defence which raises triable issues. In **Kenya Trade Combine Ltd vs M. Shah (Civil Appeal No. 193 of 1999) (unreported)** the court held:-

In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence must succeed.

22. That notwithstanding it would be prejudicial to the respondent to set aside the *ex parte* judgment as he served the appellant with the summons to enter appearance and the plaint but the appellant failed to enter appearance or file a defence.

23. I reach a finding that the appellant was duly served with the summons to enter appearance but chose not to defend the suit. The judgment in default of appearance was therefore regular.

24. The 3rd ground of appeal related to the court's refusal to record a consent between the parties to the effect that the application seeking for setting aside default judgment which formed part of the subject of this appeal. I have perused the proceedings of the court of 29th March 2021 where the said oral application was made by the respondent's counsel. The court declined to allow the said application on grounds that a consent could not be recorded in an application seeking to set aside defaulter's judgment since the court had to make a determination on the said issue. In my view, the magistrate had the

discretion to make her ruling to that effect. The application was made by the counsel for the respondent orally in court after submissions had already ben filed by the claimant who is the appellant herein. Notwithstanding the pronouncement of the magistrate, this ground of appeal is in my view, misplaced in that this appeal is against the magistrate's ruling dated 10th June 2021. It has nothing to do with the proceedings of 29th March 2021. The said ground has no relevance herein and it is hereby struck out.

25. I find no merit in this appeal, and I hereby dismiss it with costs to the respondent.

26. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH 2026.

F. MUCHEMI

JUDGE