

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCL APPEAL NO. E059 OF 2024

LYDIA NJOKI
MUGO.....APPELLANT
VERSUS
SIMON MWANIKI ESPON.....
RESPONDENT

*(Being an appeal from the Ruling of Hon. C.K
Kisiangani (PM) delivered on 10/12/2024 in Runyenjes
SPMC's ELC Case No. E024 of 2023)*

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court wherein he had sued the Appellant vide a Plaint dated 06/11/2023. In the said Plaint, he claimed that he was the sole registered owner of land parcel Kagaari/Kanja/12347, and that during the period between the year 2016 to 2022, he was extremely sick leading to hospitalization in various hospitals. He further stated that he had all his personal documents in the custody of the Appellant. He averred that, upon recovery, he discovered that the title deed to land parcel 12347 had been altered, and that the said land had

been registered in the joint names of himself and the Appellant without his consent or knowledge.

2. He sought interalia, a declaration that the Appellant's name was irregularly and unlawfully inserted in the title for the suit land; an order striking out the Appellant's name from the title deed of the said land and that the Land Registrar, Embu District Land Registry issue him with a title deed only in his name.
3. The record shows that an Ex-parte judgement was entered on 18/01/2024 and the matter proceeded for formal proof on 20/02/2024. The Appellant filed a notice of motion application dated 13/05/2024 under a certificate of urgency seeking to set aside the ex parte judgement and that the suit be set down for hearing on merit. She also sought leave to file her defence and annexed a draft defence to the application.
4. The grounds for making the application were that the suit proceeded without the knowledge and participation of the Appellant. She averred that she only got wind of the proceedings when the Respondent went boasting to her that he will delete her name from the title deed of their matrimonial home on Kagaari/Kanja/12347 then sell it. She averred that she had greatly contributed to the development of the said land and that their minor's education and best interests had been facilitated by the produce acquired from the suit land. She maintained that she had a good defence

and that it was in the interest of justice that the application be allowed.

5. The trial Court in a ruling delivered on 10/12/2024 dismissed the application with no orders as to costs. The Court found that the fact that setting aside an ex-parte judgment is at the discretion of the court was not disputed, and that the issue was whether the Appellant had demonstrated sufficient cause to warrant the exercise of that discretion. It noted that the Respondent filed an affidavit of service sworn on 15/01/2024 by Moses Maina Muthinji, a process server, who deponed that he served the Appellant with the pleadings at her home on 06/12/23 after she was pointed out by the Respondent. The court further found that the Appellant had not opposed or disputed the contents of the affidavit of service or the pleadings and summons to enter appearance, and concluded that she was duly served but failed to enter appearance and defend the suit. Consequently, the court held that no sufficient cause had been shown.
6. The Appellant was aggrieved with the impugned decision and preferred the present Appeal on the grounds summarized as hereunder:
 1. The learned Magistrate is faulted for failing to find that the Respondent did not effect proper service and that the Appellant was never served with any pleadings relating to the suit.

2. That the learned Magistrate erred in fact and in law in dismissing the Appellants application dated 13/05/2024 without according her a hearing on merit and without considering the repercussions upon her.
3. That the learned Magistrate erred in fact and in law in failing to consider the Appellant's written submissions and authorities.
4. That the learned Magistrate erred in fact and in law by failing to observe sections 1A and 1B of the Civil Procedure Act, Article 50 and Article 159 of the constitution thereby arriving at a wrong decision.
5. That the learned Magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision and by wholly misapplying its judicial discretion in the case before it.
6. That the learned Magistrate erred in fact and in law in finding that land parcel Kagaari/Kanja/12347 was matrimonial property legally owned by the Appellant and the Respondent.
7. The Appellant sought to have the judgement of the trial Court delivered on 18/04/2024 set aside and or vacated; the ruling of the trial Court dated 10/12/2024 set aside and the suit be reopened and heard denovo on merit; an order for retrial of the lower court case before another magistrate other than the trial magistrate who determined

the application dated 13/05/2024 as well as costs of the appeal.

8. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The Appellant filed submissions dated 10/04/2025 through the firm of Brian Njagi Njeru Law and Company Advocates. She submitted that the discretion to set aside an ex-parte judgement is governed by Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules and that section 3A of the Civil Procedure Act preserves the inherent power of the court to make orders necessary for the ends of justice. It was submitted that the Appellant acted promptly once she became aware of the ex-parte judgement and that the trial court erred by failing to set it aside. It was averred that the Appellant was deprived of her right to be heard and that the court failed to properly exercise its discretion.
9. It was submitted further that the Appellant attached a draft defence and counterclaim to her application which raised significant issues concerning ownership of the suit land, the nature of the property being matrimonial and allegations of mismanagement and fraud by the Respondent and which deserved a hearing. It was averred that the Appellant in her application disputed the service of pleadings by the Respondent specifically in paragraph 5 of her supporting affidavit. That, Article 50(1) of the

Constitution guarantees the right to a fair hearing and that Article 159(2)(d) mandates that justice shall be administered without undue regard to procedural technicalities.

10. It was submitted that the actions and omissions of the trial Court violated the Appellants constitutional right to a fair hearing. It was further submitted that the court is empowered under section 78(1) of the Civil Procedure Act to order a retrial where the interests of justice so demand. The case of John Mukuha Mburu versus Charles Mwenga Mburu (2019) Eklr among others were cited in support of the submissions.
11. The Respondent filed submissions dated 20/04/2025 through the firm of Okero Ombachi Advocates. He submitted that the power of the trial Magistrate to set aside the ex parte judgement was discretionary as provided for under Order 10 Rule 11 of the Civil Procedure Rules. He submitted that he had demonstrated through an affidavit of service that service of pleadings was done on the Appellant in person and that it was upon the Appellant to prove that service was not done for the ex parte judgement to be set aside. He averred that the Appellant had an opportunity to call the process server for cross examination on the veracity of the affidavit of service but she did not do so. He averred that evidence showed that the Appellant was well aware of the suit but deliberately

failed to defend it and therefore the trial Court correctly found that service of pleadings was properly done.

12. He submitted further, that the Appellant had annexed an incomplete draft defence in the record of appeal and therefore the Court could not adequately look at to determine if it raises any triable issues. He averred that the Appellant had also pleaded factual evidence in the memorandum of appeal and prayed for alternative orders which cannot be granted at the appellate stage as the prayers sought could only have been granted by the trial Court after the parties tendered their evidence. He maintained that the appeal lacked merit and prayed for it to be dismissed with costs.

13. Having considered the record of appeal and the parties submissions, I find that the issue for determination is whether the trial Court erred in failing to set aside the ex-parte judgement and granting leave to the Appellant to file a defence.

14. In the case of *Kyelu v Mulwa* [2025] KEHC 12036 (KLR) the Court observed as follows:

“A default judgment can either be regular or irregular. It is regular where there is proof that the defendant was served with summons to enter appearance but failed to do so for one reason or another. It is irregular where service was not affected upon the defendant and in that case, it should be set aside as a matter of right. If the

default judgment is regular, the court has discretion to determine whether or not to set it aside depending on various considerations. The difference between the two was elaborated in detail by the Court of Appeal in *James Kanyita Nderitu (supra)*. In *Yooshin Engineering Corporation -vs- Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment)*, the Court of Appeal observed that;

“What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.”

15. In this case, the suit was instituted on 21/11/2023. The Appellant denied having been served with the pleadings. However, the record contains an affidavit of service sworn on 15/01/2024 by one Moses Maina Muthinji, a court process server, who deponed that he was accompanied by the Respondent at the time of service and that the Appellant was personally pointed out to him and duly served at her home compound with the summons to enter

appearance and the pleadings. The trial court considered the said affidavit of service and found that it had not been controverted. Indeed, the Appellant did not challenge the mode, fact, or validity of service, nor did she seek to cross-examine the process server on the contents of the affidavit. It is a settled principle of law that an affidavit of service constitutes prima facie evidence of service unless successfully challenged or rebutted. See the case of Shadrack Arap Baiywo versus Bodi Bach [1987] eKLR, where the Court of Appeal stated;

“There is a presumption of services as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”

16. In the circumstances of this case, the Appellant’s bare denial of service, without more, was insufficient to displace the presumption of proper service arising from the affidavit of service on record. The trial court cannot therefore be faulted for finding that service was duly

effected and that the Appellant failed to enter appearance or defend the suit.

17. However, it is settled that a trial court has discretion to set aside a regular judgment where it is demonstrated that there are triable issues. See *Bouchard International (Services) Ltd versus M'mwereria* [1987] KLR, where the court stated that;

“If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

18. In the present case, the draft defence and counterclaim attached to the Appellant's application for setting aside the ex parte judgment raises substantive issues for determination. The Appellant alleges that the suit property constitutes matrimonial property jointly owned by the parties as husband and wife, and that her

registration as co-owner was effected with the consent of the Respondent. She further contends that she became a lawful co-owner of the suit land following the combination of land parcels Kagaari/Kanja/7009 and 7010, which she avers was undertaken with the consent of both parties. These averments on their face, raise triable issues touching on the nature of ownership of the suit property, the circumstances under which the Appellant was registered as a co-owner which issues can only be properly interrogated through a full hearing.

19. However, it is notable that in dismissing the Appellant's application to set aside the ex parte judgment, the trial court did not address or evaluate whether the draft defence disclosed any triable issues. The court primarily focused on the question of service and did not consider whether notwithstanding service, the Appellant had demonstrated a defence deserving of hearing on merit. This in my view amounted to an improper exercise of discretion. Accordingly, there existed sufficient basis for the setting aside of the ex parte judgment and the reopening of the suit for hearing on merit.
20. In the circumstances I find that the appeal has merit. The ruling of the trial court is set aside. The default Judgment is set aside.

21. The matter be and is hereby remitted back to Runyenjes Law Courts for hearing and determination on merit by a different Magistrate.

22. Each party to bear their own costs of the appeal.

DATED SIGNED AND DELIVERED AT EMBU THIS 16TH DAY OF APRIL, 2026.

**HON. E.C. CHERONO
ELC JUDGE, EMBU**

In the presence of;

1. Mr. Njeru for the Appellant
2. Respondent/Advocate-absent
3. Diana Kemboi C/A