

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E1361 OF 2024

-between-

- 1. SECURITY ALERT SERVICES LIMITED**
- 2. JOSEPH GACHUHI MUTHANJI.....**
APPELLANTS

-versus-

PAUL NDIRANGU KARARI.....
RESPONDENT

[Being an appeal from The Ruling and Order of Hon. C. A. Ogweno SRM in Nairobi Milimani Civil Case No. E1127 of 2009 delivered on the 21st November 2024]

JUDGMENT

Background:

1. A road traffic accident occurred on 24th March 2008, where *Paul Ndirangu Karari*, the Respondent herein, sustained severe bodily injuries. Consequently, he filed *Nairobi Milimani`Chief Magistrates Civil Case No. E1127 of 2009* [hereinafter referred to as ***‘the suit’***] against *Security Alert Services Limited* and *Joseph Gachuhi Muthanji*, the Appellants herein, seeking compensatory damages.
2. An initial *ex-parte* judgment was delivered on 20th September 2010, when the Appellants failed to enter appearance. However, they successfully applied to have the judgment set aside on 31st January 2011. Following further proceedings, a second *ex-parte* judgment was delivered on 7th July 2022. The Appellants subsequently filed an application by way of a Notice of Motion dated 25th July 2024 seeking to set aside the judgment and stay the execution.
3. In its ruling, the trial Court dismissed the application precipitating the current appeal.

The Appeal:

4. Through a Memorandum of Appeal dated 26th November 2024, the Appellants asserted the following grounds of appeal: -
 1. *THAT the Learned Magistrate erred in Law and in fact in failing to wholesomely address and consider itself to the principles guiding on setting aside of ex-parte judgements and hence misdirected itself in the exercise of its discretion.*
 2. *THAT the Learned Trial Magistrate erred in Law and in fact in failing to judiciously exercise its discretion adjudging the application dated 25th July, 2024 seeking to set aside the ex-parte judgment.*
 3. *THAT the Learned Magistrate erred in fact by failing to set aside the ex-parte judgement dated 7th July, 2022.*
 4. *THAT the Trial Learned Magistrate erred in law and in fact in failing to factor that the delay in prosecuting the matter was on the part of the plaintiff and thus erred in failing to set aside the ex-parte judgment on the basis that the appellant took fifteen years to move the court to set aside the ex-parte judgment.*
 5. *THAT the trial Learned Magistrate erred in Law and in fact in failing to consider the issue of the warrants which bore erroneous figures and in essence sanctioned an illegality.*
 6. *THAT the learned Trial Magistrate erred in law and in fact in rendering a contradicting finding in so far as the existence of a draft defence/defence is concerned.*
 7. *THAT the Learned Magistrate erred in law and fact by dismissing the appellant's application despite the weighty issues raised there.*

The Submissions

5. The Appellants urged their case further through written submissions dated 22nd April 2025. It was their case that trial Court failed to act judiciously and misapprehended the legal principles under Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules regarding setting aside *ex-parte*

judgments. The Appellants called to their aid various cases among them *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123, *Peters -vs- Sunday Post Ltd* [1958] EA 424, and *Ndiritu -vs- Ropkoi & Another* [2004] eKLR, to advance the argument that this Court's duty is to re-evaluate the evidence and intervene where the trial Court demonstrably acted on wrong principles or misapprehended the evidence.

6. The Appellants argued that the judgment of 7th July 2022 was irregular and a nullity because the Respondent failed to serve fresh summons after the initial 2010 judgment was set aside in 2011. Relying on the authority in *James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another* [2016] eKLR, the Appellants contended that an irregular judgment obtained without proper service must be set aside *ex debito justitiae* leaving the court with no discretion in the matter. It was the Appellant's case that even in an undefended suit, the burden of proof rests on the plaintiff to prove liability, as enshrined in Sections 107 and 109 of the Evidence Act. To that end, they cited the decision in *Karugi & Another -vs- Kabiya & 3 Others* [1987] KLR 347.
7. Further to the foregoing, it was their contention that the Court's discretion should be exercised to avoid injustice or hardship resulting from excusable mistakes. They drew support from *Shah -vs- Mbogo & Another* [1967] EA 116. It was their case that they demonstrated sufficient cause and should be heard on the merits.
8. In conclusion, it was their argument that the execution warrants contained figures exceeding the decretal amount, constituting an illegality that the trial Court failed to appreciate. They prayed that the impugned ruling be set-aside and their Notice of Motion dated 25th July 2024 be allowed thereby setting aside the *exparte* judgment with costs.

The Respondent's case:

9. *Paul Ndirangu Karari* opposed the appeal through written submissions dated 2nd May 2025. It was his case that the

Appellants' claims of non-service are factually incorrect. He asserted that he applied for the re-issuance of summons on 22nd September 2011, which were allowed on 27th October 2011 and subsequently served. It was his case that the Appellants were well aware of the suit, having appeared in Court on 2nd September 2014 to request time to file a Defence. Further, he claimed that their Advocates formally ceased acting on 24th January 2018, only after the Court was satisfied that the application and hearing notices were duly served upon both the Appellants and their insurer.

10. The Respondent further submitted that the Appellants were personally served with hearing notices, supported by affidavits of service. It was his position that setting aside an *ex-parte* judgment is a discretionary relief, and a regular default judgment cannot be set aside without reasonable cause. To that end, it referred to the case of *Ndirangu -vs- Beverly School of Kenya Ltd* [2023] KEELRC 1858 (KLR) to argue that an Applicant must demonstrate reasonable cause to persuade a Court to set aside a regular *ex-parte* judgment. It was further his case that in the case of *CFC Stanbic Limited -vs- John Maina Githaiga & another* [2013] KECA 461 (KLR), the Appellants had the obligation to satisfy three conditions, namely; *raising triable issues, showing the default was due to an excusable mistake, and demonstrating it is in the interest of justice.*
11. The Respondent maintained that the *ex-parte* judgment was regular and that the default was caused by the Appellants' pure indolence rather than an excusable mistake, and it is in the interests of justice that the litigation, which has dragged on for 15 years, comes to an end.

Analysis:

12. Having traced the origin of the dispute, appreciated the grounds in the Memorandum of Appeal as well as the parties' respective submissions, the only issue for determination is the regularity of the *ex-parte* judgment dated 7th July 2022. The role of this Court as a first appellate Court is well cut out. In

the precedent setting authority of **Peters -vs- Sunday Post Ltd** [1958] EA 424, the Court stated thus: -

... It is a strong thing for an appellate Court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...

...But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate Court might have come to a different conclusion.

13. Very recently, the Court of Appeal in **Lumunge -vs- China City Construction Limited China City Construction Limited & 2 others** (Civil Appeal E007 of 2023) [2026] KECA 330 (KLR) referred to its earlier decision on its role as the first appellate Court. It observed thus: -

... This Court in Geoffrey Muthinja & another -vs- Samuel Muguna Henry & 1756 others (2015) KECA304(KLR) elaborated on this mandate as follows:

.... As this is a first appeal, our mandate is a broad one and involves....a fresh and exhaustive examination, re-evaluation and re-analysis of the entire record with a view to drawing our own inferences and making our own independent conclusion, on all the material before us. We pay a measure of deference to the findings of the first instance Court but are free to depart from them in appropriate cases, where they are founded on no evidence, constitute a misapprehension of the law or are plainly wrong. The latitude to depart is wider where, as in this case, there was no trial involving the taking of viva voce evidence in which case the first instance Judge would have had the added advantage of hearing and seeing the witnesses and so would have been better placed to judge their credibility and make a more informed judgment on the veracity of the opposing cases.

14. With the foregoing guidance, a look at the regularity of the *ex parte* judgment now follows. The law on setting aside *ex parte* judgments is provided for in *Order 10 Rule 11* of the *Civil Procedure Rules* 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.

15. Among the founding precedents on the dynamics of setting aside judgments is the Court of Appeal decision in **Pithon**

Waweru Maina -vs- Thuka Mugiria [1983] KECA 117 (KLR)
where the Learned Judges observed thus;

.... The principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are: -

Firstly, 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 conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E b)

Secondly, this 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.

Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93

16. Earlier, in **Shah -vs- Mbogo** (1967) EA 116, *Harris J*, spoke to the discretionary power of the Court to set aside judgment obtained *ex-parte* and need to balance the right to expeditious trial. He observed as follows: -

This 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.

17. With the foregoing, it is apparent that this appeal hinges on the factual matrix surrounding the service of Court processes. To that end, a visit to the very beginning of the suit is paramount. The Respondent instituted the suit through the Complaint dated 20th February 2009. The Summons to enter appearance were dated 3rd March 2009. It required the

Appellant to enter appearance within 15 days thereof. The Affidavit of Service deposed to by Joseph Mutisya on 16th March 2009 indicated that the Plaint and the Summons to Enter Appearance were served upon the Appellants on 16th March 2009. The Appellant therefore had until 1st April to enter appearance and file a defence.

18. From the record, there is the Respondent's request for Judgment dated 24th April 2009. It was done three weeks and three days after the official deadline when the Appellants failed to enter appearance. On 11th November 2009, the trial Court proceeded on formal proof of the Respondent's case. Eventually, judgment was rendered on 20th January 2010. Nine months and five days after the delivery of the judgment, the Appellants, through a Chamber Summons dated 25th October 2010 moved the Court to have it set aside.
19. This Court has had the occasion to assess the reasons the Court deemed the judgment irregular. It observed that one 'Dorcas', a secretary of the first appellant, whom *Joseph Mutisya*, served the Plaint and the Summons to enter appearance, was neither a secretary, Director or other principal officer of the 1st Appellant. It was also the trial Court's position that there was no evidence that the 2nd Appellant was an employee of the 1st Appellant. Eventually, the judgment was set-aside.
20. Subsequently, through an application dated 22nd September 2011, the Appellants urged the Court to have the validity of the Summons to Enter Appearance extended for purposes of defending the suit. The record indicates that the application was allowed by *Hon. Akato* (PM) as prayed on 27th October 2011. For clarity, the Court stamp on the Summons to Enter Appearance reads thus;

*Summons extended for 12 months W.E.F 27th
October 2011 to 27th October 2012.*

21. The Appellants having filed no defence, the Respondent yet again requested for judgment on 3rd November 2015. Annexed to the request is the Affidavit of Service deposed to by *Michael*

Rotich on the same date. It indicates that he served the Plaint and Summons to Enter Appearance dated 3rd October 2013 on 20th August 2014. On 2nd September 2014, the record indicates that the Appellants conceded that they had not filed a defence. They sought 14 days to do so. On his part, the Respondent prayed for Kshs. 10,000/- as costs for having availed two witnesses for hearing of the case. In allowing the Appellants more time and costs to the Appellant, the Court remarked thus;

... Adjournment allowed. Since Defendant has not filed defence for 4 years, I will allow costs of Kshs. 10,000/-.....

22. Fast forward to September of 2017, the Appellants Advocates sought leave to cease acting. As accurately captured in the impugned Ruling, the trial Magistrate found that the Appellants Advocates ceased to act since UAP insurance had expressed its willingness to take over the matter. It is on that basis that the Application (dated 21st September 2017) to cease acting was allowed on 24th January 2018. There is on record the hearing notice dated 15th January 2017 bearing the stamp of UAP Insurance indicating the acknowledgement of receipt of hearing notice of the application to cease acting. On the foregoing, formal proof proceeded on 23rd May 2022 which yielded the judgment of 7th July 2022.
23. The Appellants' case was that no fresh summons were served after 2011 and that they were unrepresented and unaware of the proceedings. However, the evidence, as re-appraised above contradict the Appellants' position overwhelmingly. There is robust factual rebuttal, pointing to specific Court records and affidavits of service indicating that fresh summons were indeed re-issued and served. Further, the Appellants attended Court in 2014. It is also on record that the cessation to act by their advocates in 2018 was properly served as evidenced by the hearing notices.
24. This Court finds no shred of evidence corroborating the Appellants' grounds of appeal. The trial Court's judgment of 7th July 2022 is hereby found to be regular. The Appellants' failure

to defend the suit for over a decade is not an excusable mistake. Indeed, the trial Court indulged the Appellants on every occasion and even acknowledged the period of four years the Appellants had taken to file a defence. It is noteworthy that in the impugned ruling, the learned trial Magistrate traced with pinpoint accuracy the proceedings and correctly found that the *ex-parte* judgment was regularly procured. As regards issue of inflated execution warrants, such irregularity generally affects the execution process rather than the validity of the underlying judgment itself.

25. In sum, the Appellants' contention, and the appeal as a whole, are unsustainable and are for rejection.

Disposition:

26. As I come to the end of this ruling, I wish to apologize to the parties for the late delivery of this decision which was to be in February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.
27. The upshot of this appeal is as follows: -

[a] The appeal is hereby wholly dismissed.

[b] The Appellants shall jointly and separately bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 30th day of April, 2026.

**A.C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

Ms Buyanzi, holding brief for **Ms Midera** for the Respondent.

Mr. Ahenda holding brief for **Mr. Karanja** for the Appellants.

Michael/Amina – Court Assistants.