

**IN THE COURT OF
APPEAL AT
ELDORET**

**(CORAM: MATIVO, GACHOKA & KORIR,
JJ.A.) CIVIL APPEAL NO. 85 OF 2017**

BETWEEN

**PAULINE YEBEI.....1ST
APPELLANT SAMUEL KUTTO.....
.....2ND APPELLANT**

AND

**ANDREW W. KIPRONO (representative of the
estate of KIPRONO ARAP LETTING.....RESPONDENT**

*(An appeal against the ruling and order of the Environment
and Land Court of Kenya at Kitale (E. Obaga, J.) delivered on
25th June 2015*

in

ELCC No. 9 of 2014)

JUDGMENT OF THE COURT

1. The appellants have urged this Court to interfere with the exercise of discretion of the trial court in **Kitale ELCC No. 9 of 2014** where *Obaga, J.* dismissed the appellants' Notice of Motion dated 23rd March 2015 on 25th June 2015. In it, the appellants sought to set aside the *ex parte* judgment delivered on 30th April 2014. The appellants further sought leave to file a defence to the suit.
2. A summary of the facts embedded in the application is that the

return of service of Archibald Wekesa Nyukuri was false, as
the

appellants were never served with the summons to enter appearance. That it was against the principles of natural justice to condemn a party unheard, as they had annexed a draft defence that raised triable issues. That they only learned of the matter when they were served with a notice to show cause on 15th March 2015.

3. Opposing the application, the respondent filed a replying affidavit sworn on 30th April 2015 by Andrew Kiprotich Rono. The deponent abridged a brief background of the litigious history the parties previously had. He stated that he filed suit seeking to remove the appellants from the suit land as they continued to cultivate on it irrespective of the fact that they were unsuccessful in suing his late father.
4. The deponent continued that on 6th February 2014, a process server, namely Archibald Nyukuri, was sent to him by his advocates to identify the appellants. He accompanied the said process server to their home, positively identified them and that they were served in his presence. However, they refused to sign the summons. Thus, the deponent stated that the application was marred with falsities. He added that the

application was only

prompted by the Notice to Show Cause. He denied the allegation that Isaac Kimeto Keino was the one who has been occupying the suit land. Finally, it was submitted that the draft defence raised no triable issues.

5. Upon considering the pleadings, the trial judge was not persuaded that the appellants were not served with summons to enter appearance and further, that the draft defence raised triable issues. To fully appreciate the reasons for the dismissal of the application, it is necessary for us to quote the Judge in his own words. He pronounced himself as follows:

“3. I have gone through the applicants application as well as the opposition to the same by the respondents. The applicants contend that they were not served with summons to enter appearance whereas the respondent contends that they were duly served. The issue which emerges for determination is whether the applicants were served with summons to enter appearance or not. The respondent who is the administrator of the estate of his late father Kiprono Arap Leting brought a suit against the applicants seeking a declaration that L.R. No. Chepsiro/Kibuswa Block 1/Kapcheplanget/40 solely belongs to Kiprono Arap Leting. He also sought for a permanent injunction restraining the applicants from cultivating the land. Summons were issued and given to the process server for

service.

4.A process server called Archibald Wekesa Nyukuri went and served the applicants with summons to enter appearance. An affidavit of service was filed on 25th February 2014. In the said affidavit, the process server has described how he went to Kapcheplanget farm where he served the applicants with summons to enter appearance upon being identified by the respondent. The applicants received the summons but they refused to accept service by signing. When judgment was entered against the applicants, the counsel for the respondents taxed the bill and a notice to show cause was issued. Notice to show cause was served upon the applicants by the same process server. This time the applicants went and instructed their lawyer who appeared in court on the date when the notice to show cause had been fixed. This confirms that indeed the applicants were served with summons to enter appearance but they ignored to file defence. When they were served with notice to show cause, they acted because they knew that things had taken a different course. The applicants claim that the notice to show cause was delivered to them in an envelope by a teacher who is their neighbour is not true. The process server who served them with summons is the one who served them with notice to show cause. The said teacher never swore an affidavit to confirm that he is the one who was given an envelope to take to the applicants. I find that the applicants were indeed served with summons to enter appearance but they chose not to enter appearance and file defence.

5. When it comes to setting aside an ex-parte

judgment the proposed defence should also be considered even if the court has found that there was service. In the present case, the applicants have annexed their

proposed defence to the supporting affidavit. In the said defence, they deny that they are cultivating the land as claimed by the respondent. They state that the land is being cultivated by one Isaac Kimeto Keino. They further contend that L.R. No. Chepsiro/Kibuswa Block 1/Kapcheplanget/40 belonged to Kimugat Arap Yebei and Isaac Kimeto Keino and that Isaac Kimeto Keino has been living on the land for 20 years and that he has acquired prospective rights over the same. Kimugat Arap Yebei is (sic) husband of first applicant and father of second applicant. He has since died. The applicants have no interest in the land. The land is already registered in the name of the father of the respondent. Paul Arap Yebei has filed suit against the plaintiffs' father seeking some acres from the plaintiff. This suit was dismissed for want of prosecution. It is on the basis of Paul Arap Yebei's claims that his family is still cultivating the land of the late Kiprono Arap Leting. The applicants have already stated that they are not the ones cultivating on the land. I find that this is just a mere denial. The proposed defence does not raise any triable issues. If the said Isaac Kimeto Keino has acquired prescriptive rights over the land, it is not for the applicants to litigate on his behalf. The said Keino has to do that by himself. The respondent lives in the same area with the applicants. He could not have been wrong as to the persons who are cultivating his late father's land. The applicants have no interest in the land. They have no defence with triable issues. I therefore find that their application lacks merit. The same is dismissed with costs to

respondent.”

6. The appellants filed their notice of appeal dated 7th July 2015. The appellants' memorandum of appeal dated 18th July 2017 raised four grounds disputing the findings of the learned judge. In summary, that the decision of the trial judge was a travesty against the principles of natural justice as they were condemned unheard; that the trial court ought to have examined the appellants' evidence before electing to dismiss them at the interlocutory stage; and that the exercise of discretion was unjust and oppressive as regard was not had to the circumstances of the case and the overriding objectives. For those reasons, the appellants urged this Court to allow the prayers sought in their Notice of Motion.
7. The appeal was canvassed by way of written submissions that were orally highlighted on 2nd March 2026. Mr. Teti Advocate appeared for the appellant while the respondent was represented by Mr. Kiarie Advocate.
8. The appellants, in their written submissions dated 1st February 2026, submitted that from the facts set out in their application, the trial court ought to have applied **order 10, rule 11** of the Civil Procedure Rules given the unfettered discretion donated

to it.

Learned counsel submitted that the application was meritorious as they were never served with the summons to enter appearance. Further, that the defence raised triable issues. He explained that the appellants' right to be heard is enshrined in **Article 50** of the Constitution. That they moved swiftly to file the application upon being aware of the suit. For those reasons, the appellants prayed that their appeal be allowed.

9. The respondent opposed the appeal. Learned counsel filed written submissions and a list and bundle of authorities, all dated 26th February 2026, to submit that the trial judge exercised his discretion judiciously. It was argued that the evidence placed before the Judge demonstrated that the appellants were properly served with the summons to enter appearance but elected not to. In the same fashion, the appellants were also served with the Notice to Show Cause. On the draft defence, it was submitted that it did not raise any triable issues. For those reasons, the respondent prayed that the appeal be dismissed.

- 10.** The role of this Court in determining the exercise of discretion

by a trial judge in setting aside an *ex parte* judgment was succinctly set out by this Court in the case of **Philip Keipto Chemwolo &**

another vs. Augustine Kubende [1986] KECA 87 (KLR) as

follows:

“It is right to commence a consideration of the issues which arise, by setting out the proper approach which this Court must adopt. Order 9A Rule 10 of the Rules confers upon the Court an unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just. In Patel v EA Cargo Handling Services Limited [1974] EA 75 (supra), the Court of Appeal, following its previous decision in Mbogo v Shah [1968] EA 93 adopted the opinion of Harris J in Kimani v McConnell [1966] EA 547 where he said:

“In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

But the court went on to explain (on page 76), that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the Rules. On the other hand, where a regular judgment had been entered, the Court would not usually set aside the judgment, unless it was satisfied that there were triable issues which raised a prima facie defence which should go for trial. The Court adopted the views expressed by the House of Lords in the case of Evans v Bartlam, [1937] AC 473, and

while the quotations from Lord Russell's speech were relevant to Mr Inamdar's particular argument, the

views expressed by Lord Atkin at page 480 are of greater relevance to the present appeal - Lord Atkin observed:

“The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. I would draw special attention to the principle as stated by Lord Atkin in the last sentence. It is primarily important to

ascertain whether there are merits which ought to be tried. At the same

time this Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice. (See Mbogo v Shah [1968] E A 93(supra)."

11. Guided by the above yardstick, was the exercise of discretion by the trial judge a misdirection in some manner? Was he wrong in the exercise of his discretion, leading to a miscarriage of justice? These are not rhetorical questions but a demonstration that a question on the setting aside requires a careful consideration to avoid denying a party a chance to ventilate its case, while at the same time not allowing a party, who was properly served, from slowing down or reversing the wheels of justice for no good reason.
12. From the record, on 30th April 2014, the Deputy Registrar of the court ordered:

"The defendants Pauline Yabei (sic) and Samuel Kutto having been served with plaint, summons and other accompanying documents and having failed to jointly file memo of appearance and defence within the prescribed time frame and the court having been

satisfied with service thereon.

I hereby enter judgement against both the defendants jointly and severally for the plaintiff. The case may be fixed for formal proof.”

13. The case proceeded for formal proof. In his impugned judgment, the learned judge observed that in spite of being duly served, the appellants failed to enter appearance or file defence. The basis upon which the learned judge and learned magistrate were satisfied with service of the summons to enter appearance was the return of service of one Archibald Wekesa Nyukuri, sworn on 7th February 2014. It stated pertinently as follows:

- 1. “THAT on 6th February 2014, I received summons to enter appearance, plaint, affidavit document, statement and list of witnesses from the firm of M/S Kiarie & Co. Advocates with firm instructions to effect service upon the defendants herein.***
- 2. THAT on 6th day of February 2014 at 9:00 a.m. I proceeded to the home of the defendants in Kapcheplanget farm within Trans Nzoia County where I met the defendants in person and I informed them of my mission.***
- 3. THAT after introduction I served them with court process they accepted service by retaining their copies and decline to sign on the principle copies.***
- 4. THAT they were all pointed out to me by the plaintiff.”***

14. This process was disputed by the appellants. However, one wonders why they did not summon the process server for cross-examination if indeed they disputed service. As it stood, their allegations fell on the wayside as they did not back them up with evidence. The best way to dispute service, in a case where an affidavit of service has been filed, and is placed on record, is to cross-examine the process server or, in the alternative, by evidence, demonstrate that service could not have been effected for reasons to be adduced; say, a party was not residing at the place stated in the affidavit of service, was out of the country or in hospital, and the list is endless. Mere allegations, like in this appeal, will just be a futile exercise of clutching at straws. For those reasons, we agree with the learned judge that service was proper. Accordingly, a regular judgment was on record.

15. The next issue for determination is whether regardless of the regular judgment, the appellants ought to have been given an opportunity to defend their case since they had a defence that raised triable issues. We have had the benefit of looking at the draft defence that was annexed to the appellants' Notice of

Motion. A cursory perusal of the same reveals several denials.

Withal, they

averred that the land was cultivated by one Isaac Kimeto Keino. They contended that the suit land belonged to Kimugat Arap Yebei and Isaac Kimeto Keino, with the latter living on it for 20 years. That accordingly, he had acquired prescriptive rights over it. Further, they stated that they were not cultivating the land.

16. Gathered from the averments set out therein, we are in agreement with the trial judge that the defence does not raise any triable issues. Indeed, if Isaac Kimeto Keino had acquired rights over the suit land, the onus was on him and not the appellants to claim.

17. This Court in **Job Kilach vs. Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono** [2015] KECA 846

(KLR) defined a triable issue in the following terms:

“What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The

Black's Law Dictionary defines the term “triable” as, or liable to “subject examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

18. Looking at the defence, we find that it fails to meet the threshold set out therein. None of the averments set out called for an

intervention or further interrogation by the court as explained in this judgment. For those reasons, we come to the conclusion that the trial judge properly exercised his discretion in arriving at the conclusion to dismiss the appellants' Notice of Motion. We also note that the appellants were only galvanized to move the court when they were served with the Notice to Show Cause. They clearly demonstrated no interest in defending the suit.

19. We therefore find that the present appeal lacks merit. It is dismissed with costs to the respondent.

Dated and Delivered at Nakuru this 8th day of May, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

*I certify that this is a true
copy of the original*

Signed
DEPUTY REGISTRAR