Gicharu v Gachui (Environment and Land Appeal 5 of 2023)
[2024] KEELC 812 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELC 812 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL 5 OF 2023

LN GACHERU, J

FEBRUARY 15, 2024

BETWEEN

NELSON NJOROGE GICHARU ..... APPELLANT

AND

JOHN IRUNGU NDUNGU GACHUI ..... RESPONDENT

(Being an Appeal from the whole of Ruling delivered at Kigumo SPM Court in MELC NO. 121 of 2021, by Hon. J. Irura (PM) on 24th March 2022)

JUDGMENT

1. The Appellant herein Nelson Njoroge Gicharu was the Defendant in Kigumo SPMCC No. 121 of 2021, wherein the Plaintiff (Respondent herein), had alleged that pursuant to Sale Agreement dated 25th June 2016, for sale of land parcel No. LR No. 477/17, measuring approximate 1.612 Ha, wherein the purchase price was Ksh.10,400,000/=, the Defendant (Appellant) paid the said purchase price to the Plaintiff(Respondent), less ksh 918,000/=, which was still owing at the time of filing the suit.

2. The Plaintiff (Respondent) averred that he duly executed the transfer Forms together with the Land Control Board Forms, in favour of the Defendant (Appellant), but the Defendant (Appellant), had not paid the balance. Therefore, the Plaintiff's (Respondent) claim was for Ksh. 918, 000/= plus costs and interest at Court rate on 13th September 2019.

3. The Defendant (Appellant) did not Enter Appearance nor file his Defence. As a consequence thereof, the Plaintiff (Respondent) requested for Interlocutory Judgement on 29th June 2021, which request was allowed and the matter proceeded for formal proof hearing on 16th September 2021, and on the same day, the trial Court entered a final Judgement for and in favour of the Plaintiff (Respondent herein), as against the Defendant (Appellant herein), for the liquidated sum of Ksh. 918,000/=, with costs and interest from the date of filing the suit.

4. However, on 20th September 2021, the Defendant (Appellant) filed a Notice of Motion Application, and sought for review and/or setting aside of the proceedings of 16th September 2021, and that the Judgement entered on the said date be set aside and the matter be re-opened for denovo hearing.

5. The Defendant (Appellant) also sought for leave to defend the suit and that he be allowed to file his defence out of time and the annexed Defence be deemed as duly filed upon payment of the requisite fees. The said application was opposed and the trial court directed the same to be canvassed by way of written submissions.

6. On 24th March 2023, the trial Court delivered a Ruling wherein, it found that the (Appellant) Defendant/Applicant's Application was not merited and the said Application was dismissed entirely for lack of merit, with costs to the Plaintiff (Respondent).

7. The Appellant who was the Defendant/Applicant was aggrieved by the said Ruling of the trial Court, and he preferred this Appeal vide a Memo of Appeal dated 16th January 2023, wherein he sought for the following orders;

    i. The appeal be allowed with costs.

    ii. The Ruling delivered on 24th March 2022, by the trial court (Hon. J. Irura PM), be set aside and be substituted by an order allowing the appellant's application dated 20th September 2021.

    iii. That costs of the appeal be borne by the Respondent (Plaintiff) herein before the trial court.

8. The Appellant filed grounds of Appeal as follows;

    i. That hearing proceeded ex-parte on 16th September, 2021, when final judgement was entered against the Defendant.

    ii. That the Defendant has never been served with summons to enter appearance in the matter.

    iii. That the Defendant has a meritorious defence against the Plaintiff's claim as the Defendant paid the entire purchase price to the Plaintiff and is therefore not indebted to the Plaintiff.

    iv. That there is no evidence whatsoever to support the alleged indebted of the Defendant to the Plaintiff.

    v. That it is just and equitable that the orders sought be granted.

9. It was the Appellant's (Defendant's) claim that the matter had proceeded ex-parte on 16th September 2021, when the final Judgement was entered against the Appellant. The Appellant alleged that he was never served with Summons to Enter Appearance in the matter. He also averred that he had a meritorious defence against the Plaintiff's (Respondent's) claim, as the Defendant (Appellant), had paid the entire purchase price to the Plaintiff (Respondent), and is therefore not indebted to the Plaintiff.

10. He further averred that there was no evidence whatsoever to support the alleged indebtedness of the Appellant (Defendant), to the Plaintiff(Respondent). That it was just and equitable that the orders sought be granted.

11. The said application was supported by the Affidavit of Nelson Njoroge Gicharu (Applicant/ Appellant), who averred that pursuant to Sale agreement dated 26th June 2016, entered between the Plaintiff (John Irungu Ndungu) and the Defendant (Appellant herein), the Plaintiff was to sell a property known as LR No. 477/17 for Ksh. 10,400,000/= as the purchase price.

12. He further averred that the Defendant/Appellant duly paid the full purchase price to Plaintiff and on 15th December 2017, the Plaintiff transferred to him the said property as was evident from annexture NN1.

13. Further, that it was agreed that the Defendant would pay the agent's commission, which commission he fully paid as part of the purchase price, which fact dissatisfied the Plaintiff (Respondent) herein, and consequently, he filed the case at the trial court, being Kigumo MELC NO 121 of 2021.

14. It was his allegations that having paid the full purchase price, the Defendant fulfilled all his obligations pursuant to the Sale Agreement and therefore the Plaintiff is non-suited against the Defendant (Appellant).

15. The Appellant (Defendant/Applicant) denied having been served with Summons to Enter Appearance, in the said suit, and that the purported service of the Summons to Enter Appearance upon Patricia Munjui, was never brought to his attention.

16. It was his contention that he had a good Defence on merit, and he urged the trial Court to set aside the ex-parte Judgment entered on 16th September 2021, and all consequential orders and that his draft defence be deemed as duly filed and served upon the Plaintiff (Respondent herein).

17. The said application was opposed by John Irungu Gachui (the Plaintiff/ Respondent) via his Replying Affidavit dated 6th October 2021, wherein he alleged that the Defendant (Appellant) had misrepresented facts since the Respondent had kept him abreast of all the matters and even the Court process.

18. It was his contention that the Defendant (Applicant) had no meritorious Defence and that the sum claimed is liquidated amount, which could be proved vide the receipts issued as was evident for JING 1.

19. It was his further allegation that the draft Defence did not raise any triable issues, and he urged the Court to dismiss the Defendant's application with costs. The Plaintiff also averred that the Defendant had been served with Summons to Enter Appearance, but he failed to enter such appearance as stipulated by the law, and that the Defendant was just buying time to delay Justice and he urged the trial Court to dismiss the said Application.

20. Indeed, the trial Court found in favour of the Plaintiff/Respondent and dismissed the said Application. In dismissing the said application, the trial Court held as follows; -

> " In my humble view, the Applicant is hell bent to connive and collude to obstruct the Course of justice for the Plaintiff/Respondent..... It was further held;
>
> "..... I am not satisfied that the Defendant/Applicant's application merits the exercise of discretion in his favour. While it is true the objective of the Court is to do justice, such justice must cut both ways. In conclusion, I find that application before me not merited..... the Defendant/Applicant's Notice of Motion dated 20th September 2021, lacks merit and is hereby dismissed with costs to the Plaintiff/Respondent"

21. The Defendant/Applicant who is the Appellant was dissatisfied with the above Ruling of the trial Court and consequently filed this Appeal.

22. This Appeal was canvassed by way of written submissions. The Applicant filed his written submissions through Githinji Mwangi & Associates Advocates on 26th July 2023.

23. The Appellant relied on various decided cases among them the Court of Appeal decision in CMC Holdings Ltd vs Nzioki (2004) KLR 173, where the Court held;

> " The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."

24. It was his further submissions that the Defendant/Appellant was desirous of having the matter heard on merit and he has demonstrated so by filing the said application, before the trial court, and later this Appeal. He relied on the case of Kenya National Private Services Worker's Union vs Security Guards Services Ltd (2019) eKRL, and he urged the Court to allow the instant Appeal, and his Application before the trial court.

25. The Respondent filed his submissions dated 31st July 2023, through Muturi Njoroge & Co. Advocates and urged the Court to dismiss the instant Appeal with costs. It was further submitted that the Appellant had been duly served, with Summons to Enter Appearance, but he deliberately failed to defend the suit. He relied on the case of James Kanyita Nderitu and Another vs Marios Philotas Ghikas & Another (2016) eklr, where the Court held;

> " If there are no preps or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular judgement liable to be set aside by the Court ex debito justiae. Such a judgement 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."

26. It was further submitted that the Appellant demonstrated casualness in the conduct of the matter which was calculated to delay justice and the court was urged to dismiss the instant appeal entirely with costs.

27. The Respondent also submitted that setting aside the ex-parte Judgement is at the discretion of the court, which discretion must be exercised judiciously. Reliance was placed on the case of Esther Wamaitha Njihia & 2 Others vs Safaricom Ltd(2014) eKLR, where the Court held;

> " The discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. (See Sebei District Administration vs Gasyali). It also goes without saying that the reason for failure to attend should be considered."

28. The Respondent urge the Court to dismiss the instant appeal with costs to the Respondent.

29. The Court has carefully considered the instant Appeal, the rival written submissions and the authorities cited thereon and renders itself as follows;

30. This is a first Appeal, and as provided by Section 78 of the *Civil Procedure Act*, the Court is mandated to re-evaluate, re-assess, re-consider and re-analyse the evidence afresh, and then comes up with its own

independent determination, while considering that it did not have advantage of seeing the witnesses, and therefore, it should give deference to the trial court's discretion.

31. Consequently, this Court has taken into account the fact that it never saw nor heard the witnesses as the trial Court did, and it will therefore give due allowance for that. In the case of Gitobu Imanyara & 2 Others vs AG (2016) eKLR, the Court of Appeal held;

> " An Appeal to this Court from the 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.
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> Briefly put, they are that; - this Court must reconsider the evidence, evaluate 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 allowances in this respect".

32. Similarly, in the case of Abok James Odera t/a A. J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKRL, the Court held;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

33. It is also evident that the discretionary power of the trial court just like this Court is donated by *the Constitution* as well as the statutes and as such, this Court cannot unnecessarily interfere with the said discretion. See the case of Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others [2019] eklr where the Court held:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious."

34. Being alive to the above holdings of the Superior Courts, having perused the Record of Appeal, further having considered the rival written submissions and the impugned ruling of the trial court, the court finds the single issue for determination is whether the Appeal herein is merited?

    i. Whether the appeal is merited?

35. From the available evidence as contained in the Record of Appeal, it is evident that the Appellant did not Enter Appearance nor file a Defence in Kigumo SPMCC No. 121 of 2021. As a consequence, thereof, an interlocutory Judgement was entered and later a final Judgment was entered on 16th September 2021.

36. When the Appellant as the Applicant filed an application dated 20th September 2021, to set aside the ex-parte Judgement, the said application was dismissed with costs to the Plaintiff/Respondent. The said application had been filed under Sections 1A, 1B, 3 & 3A and 63(e) of the *Civil Procedure Act*, and Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules.

37. Sections 1A & 1B, are on the overriding objective of the *Civil Procedure Act*, which implores the Court to facilitate and deal with the Civil matters before it, in an expeditious, just and proportionate manner.

38. Further Section 3A grants the Court power to issue orders that are necessary for the end of justice and to prevent abuse of the Court process. Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure

Rules grant Court discretion to set aside interlocutory judgement in default of Appearance and also an ex-part Judgement.

39. Order 10 Rule 11 of the Civil Procedure Rules empowers the Court to set aside or vary a default Judgement and any consequential decree or order entered under Order 10 Rules 6 & 10 of Civil Procedure Rules in default of Appearance or in failure to file Defence, upon such terms. The said Order provides; where a judgement has been entered under this Order, the court may set it aside or vary such judgement and any consequential decree or order.

40. Before the trial court, the Appellant had submitted at length that he was not served with Summons to Enter Appearance, and therefore the final ex-parte judgement entered by the trial court was irregular.

41. The principles for setting aside an interlocutory or ex-parte Judgement were well set out in the case of Patel v East Africa Cargo Handling Services Ltd (1974) EA 75 where the Court stated;

> " 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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

42. There is a distinction between a default Judgment, that is regularly entered and the one that is irregularly entered. The difference between these two was set out by the Court of Appeal in the case of James Kanyita Nderitu vs Marios Philotas Ghikas(supra) (2016) eKLR, where the Court held as follows:

> " In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.

43. However, in an irregular Judgement, the considerations are different. The Court further stated;

> " In an irregular default 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 justiae, 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 issue 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."

44. As the Court considers this Appeal, it will have to answer the question on whether the Judgment entered before the trial court was regular or irregular one. If the Judgement entered was regular, then the Court will further determine whether the trial Court erred in disallowing the Appellant's application.

45. However, if the Judgement entered is irregular, then the Court will have to set it aside as a matter of course. An irregular Judgement is one that is entered against a Defendant who has not been served or properly served with Summons to Enter Appearance and in such a situation, the Default, but irregular Judgement is set aside ex debito justiciae, as a matter of right; See the case of Alderman Ltd vs Shah & 3 Others Civil Appeal No. E004 of 2021 (2022) KEELC 2311(KRL) Judgement.

46. In the case of Frigonken Ltd vs Value Pak Food Ltd Hcc No. 424 of 2010, the Court held;

> " If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.

47. This Court has considered the Record of Appeal and has noted that in the request for ex-parte Judgement dated 29th June 2021, the Plaintiff (Respondent) had attached an Affidavit of Service sworn by Beatrice Muthoni Kanja, sworn on 20th May 2021. The said Process Server had averred that on 19th May 2021, she went to the office of the Defendant (Nelson Njoroge Gicharu) at Thika, and she found one Patricia Munjui, who was the Secretary to Nelson, and who received the Summons to Enter Appearance together with the Plaint after consulting her employer, through the phone 0722621455, and she was allowed to receive the said Summons.

48. In his Replying Affidavit to the Notice of Motion Application dated 20th September 2021, the Plaintiff (Respondent), annexed Summons to Enter Appearance that were received by Patricia Munjui, Secretary on 19th May 2021 at 1.05 pm.

49. Service of Summons is very crucial because it is the trite that no party should be condemned unheard, and one can only know about a claim against him/her by being served with the court processes, and evidence of such service is very important. See the case of Stephen Ndichu vs Montys Wines and Spirits(2005) eklr, where the court held; that to deny a party the right to be heard should be the last resort of a Court.

50. Though the Appellant herein, who was the Defendant/ Applicant before the trial Court denied that he was ever served with Summons to Enter Appearance, he acknowledged that he is known to Patricia though he alleged the said Patricia connived with the Respondent by not bringing to his attention the said Summons.

51. However, the Process Server, Beatrice Muthoni, averred that the Appellant was called using a given mobile number. The appellant did not deny that the said mobile number was owned by him. The Process Server was not called for cross-examination nor the said Patricia Munjui, to confirm and/ or dispute the averments made by the said Process Server on how and to whom the Summons were served.

52. This Court believes that Summons to Enter Appearance were duly served upon the Appellant herein, which Summons were received by his secretary, Patricia Munjui, after he authorized her to receive the said Summons on his behalf. The Appellant failed to Enter Appearance and as provided by Order 10 Rule 6 of the Civil Procedure Rules, an Interlocutory Judgement was entered against him.

53. Thereafter, there was formal proof hearing wherein a final Judgement was entered against the Appellant herein, in default of entering Appearance and filing a Defence. Therefore, the Judgment entered herein is a regular Judgment.

54. Even where a regular Judgement has been entered, the court has discretion under Order 12 Rule 7 of the Civil Procedure Rules to set aside such an ex-parte regular Judgement on such terms that are just. See the case of Patel vs E.A Cargo- Handling Services ltd(1974) E.A 75, where the court held;-there are no limits or restrictions on the judges discretion, except that if he does vary the judgement, 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 to it by the rules.

55. However, a decision on whether to set aside or not to set aside, an ex-parte Judgement is discretional one, and is intended to be exercised judiciously so as to avoid injustice or hardships, resulting from accidents, inadvertence or excusable mistake or error, but is not supposed to aid a party who deliberately sought to obstruct justice. See the case of Shah vs Mbogo & Another (1967) EA 116 where the Court held;

> " this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

56. Courts in this country have variously held that they will not interfere with regular Judgement unless the Court is satisfied that's there is a Defence on merit which disclose triable issues. see the case of Sebei District Administration vs Gasyali & others (1968) EA 300, where Sheridan J. observed that

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court".

57. Further, it is trite that jurisdiction to set aside judicial decision must be exercised judiciously, and each case is considered depending on its own particular circumstances. See the case of Shanzu Investment Ltd vs The Commission of lands, Civil Appeal No. 100 of 1993, the Court of Appeal held that;

> " The Court has wide discretion to set aside Judgement and there are no limits and restrictions on the discretion of the Judge except, that if the Judgement is varied, it must be done on terms that are just.....

58. The principles to be considered while determining whether to set aside the ex-parte regular judgement entered herein are;

    i. Whether there is a defence on merit?

    ii. Prejudice

iii. Explanation for the delay.

59. Being guided by the above principles, did the trial magistrate err in law and in fact, in dismissing the Appellant's application dated 20th September 2021?

60. It is evident that the matter before the trial court proceeded ex-parte, because it was alleged that the Appellant herein was served with Summons, but he failed to Enter Appearance nor file a Defence. Though the Appellant alleged that he was not served with Summons to Enter Appearance, this court has found and held that he was indeed served and the said Summons were received by his Secretary, Patricia Munjui on 19th May 2021.

61. The ex-parte Judgement was entered on 16th September 2021, and on 20th September 2021, the Appellant filed an Application for setting aside and therefore, there was no delay in filing the said Application.

62. In the said Application for setting aside, the Appellant annexed a draft Defence wherein he denied the allegations made by the Plaintiff (Respondent), and averred that he had paid all the purchase price. That the alleged balance was the agent's fees which he duly paid together with the purchase price.

63. This denial by the Appellant in his draft defence and his allegation that he had paid the full purchase price and that was the reasons why the transfer was effected in his name, raises triable issues. It is trite that a defence with triable issues is not one that must succeed, but one worth being considered and consists sufficient cause to set aside an ex-parte Judgement/Decree.

64. In the case of Job Kiloch vs Nation Media Group ltd, Salaba Agencies ltd & Michael Rioro (2015) eklr, the court held: - what then is a defence that raises triable issues? A bonafide triable issues is any matter raised by the defendant that would require further interrogation by the court during a full trial.....it is therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court"

65. It is clear that Order 12 Rule 7 of the Civil Procedure Rules set out the guiding principles for consideration in setting aside Judgement. It provides;

> " 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.

66. Further Order 51 Rule 15 of the Civil Procedure Rules provides that;

> The Court may set aside an order made ex-parte".

67. It is the rule of natural justice that no one should be condemned unheard. The suit before the trial court was heard ex-parte, the Appellant filed a Defence that raised triable issues. The necessary order that was appropriate was to allow the Notice of Motion Application, by the Appellant herein dated 20th September 2021. The trial Magistrate erred both in law and fact when she held and found that the said application lacked merit and dismissed it with costs.

68. In arriving at the above finding, the court has considered the grounds of Appeal as stated in the Memo of Appeal.

69. In ground No. 1, the trial magistrate indeed erred in fact and in law in holding that the Notice of Motion Application dated 20th September 2021, was unmerited. This court has considered the draft Defence, wherein the Appellant had alleged that he paid all the purchase price and he owed the Respondent no money. With that denial, the trial court should have granted the Appellant an

opportunity to advance his defence, of course on such terms that the court would have deemed just to grant. See the case of Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubende (1982-1988) KAR, where the Court held:

> " The Court has unlimited discretion to set aside or vary a Judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties".

70. On ground No. 2, the Appellant had given reasons for failure to attend Court. However, the Court finds that the Appellant was indeed served but he failed to attend court. The explanation was not satisfactory, but the court will also rely on the findings of the Court in the case of; Philip Chemwolo & Anor. v Augustine Kubende (supra) where the court held: -

> " I think a distinguished equity Judge has said:
>
> 'Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits'.
>
> I think the broad equity approach to this matter, is that unless there is fraud of intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.

71. Further in the case of Ngome -vs- Plantex Company Limited [1984] KLR 792, Chesoni Ag. J.A. (as he then was), in allowing an Appeal against an order for refusing to set aside an ex-parte order of dismissal of a suit held as follows:

'By dismissing the appellant's application as incompetent in that it could not be preferred under rule 8, both the magistrate and learned judge, did not consider its merits and consequently, they failed to take into account matters they ought to have taken into account, which is an essential consideration in the exercise of a discretion:

72. On ground No. 3, the trial magistrate indeed erred in law and fact when she failed to consider that the annexed draft Defence raises triable issues worth of consideration by the Court. See the case of the Tree Shade Motors Ltd vs D.T. Dobie & Co. (K) Ltd & Joseph Rading Wasambo Civil Appeal No. 38 of 1998 where the court held;

> " The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend.

73. In the impugned Ruling, there is no mention of the draft Defence and whether it raises triable issues or not. The trial magistrate did not consider the said draft judgement, and that was an error.

74. Grounds No. 4 and 5 are considered together and this Court concurs with the Appellant's submissions that the trial magistrate erred in law and fact in dismissing the Appellant's application for setting aside an ex-parte judgment and by holding that the said application was meant to frustrate the Respondent's quest to assessing justice. The Appellant should not have been condemned unheard, which is a rule of natural justice. See the case of Msagha vs Chief Justice & 7 others Nairobi HCMA, NO 1062 of 2004,

where the Court held; - firstly the rules of natural justice" audi alteram partem" hear the other party, and no man/ woman may be condemned unheard are deeply rooted in the English common law....and decision makers must observe the principles of natural justice"

75. Ultimately, this Court finds and holds that the trial Magistrate misdirected herself both in law and fact, and as a consequence thereof, entered a wrong finding. See the case of Mbogo vs Shah (1968) EA at Page 93, where the Court held that: -

> " I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court, unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

76. The upshot of the foregoing is that this Appeal is found merited, and Consequently, this court has no option, but proceeds to interfere with the trial court's ruling of 24th March 2022. Therefore, this court proceeds to set aside the Ruling and the consequential Orders of the trial court delivered on 24th March 2022.

77. For the above reasons, the said Ruling is overturned and substituted with an Order of allowing the Appellant's application dated 20th September 2021. The ex-parte Judgement delivered on 16th September 2021, is set aside and the Appellant is granted leave to Enter Appearance and also file his Defence out of time.

78. The trial court file in Kigumo SPMCC No. 121 of 2021 is re-opened for interparties hearing at Kigumo Law Courts, before any magistrate other than Hon. Joan Irura (SPM), who delivered the impugned ruling.

79. The appeal is allowed accordingly.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 15TH DAY OF FEBRUARY, 2024.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Githinji for the Appellant

Absent – Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

15/2/2024