



**Osembe v Kipkai Enterprises Limited (Civil Appeal 499 of 2019)
[2025] KECA 1126 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1126 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 499 OF 2019
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
JUNE 20, 2025**

BETWEEN

MAURINE LOUISE OSEMBE APPELLANT

AND

KIPKAI ENTERPRISES LIMITED RESPONDENT

(Being an appeal against the Ruling of the Environment and Land Court at Nairobi (Eboso, J.) delivered on 26th June 2019 in ELC Case No. 586 of 2016)

JUDGMENT

1. This is an appeal from the Ruling and Order of the Environment and Land Court (ELC) at Nairobi (Eboso, J.) delivered on 26th June 2019, in ELC Case No. 586 of 2016.
2. A brief background is necessary to contextualize this appeal.

The respondent (then the plaintiff), instituted a suit against the appellant (then the defendant), by way of a Plaint filed on 3rd June 2016 seeking, inter alia, payment of rental arrears amounting to Kshs.4,020,000, further rent until the appellant vacated or was evicted from the premises, and an eviction order against the appellant. The respondent subsequently applied for judgment in default of appearance, contending that service of Summons to Enter Appearance had been duly effected on the appellant at Java Restaurant located at Galleria Mall by a process server known as Julius Mutia Muthoka, who was at the time of service accompanied by the respondent's director, Jane Nyaboke Njagi. Upon entry of judgment in default of appearance, the suit proceeded to formal proof, culminating in a judgment delivered on 22nd September 2017 in favour of the respondent for a total sum of Kshs.5,075,500, comprising, inter alia, unpaid rent and the costs of renovations to the demised premises.



3. Several months after the entry of judgment, the appellant moved the trial court by way of an application dated 17th January 2018, seeking to, inter alia, set aside all the proceedings, the judgment entered against her on 22nd September 2017, the subsequent decree issued on 25th September 2017, and all consequential orders. The application was premised on grounds that she had not been served with the summons to enter appearance or any other pleadings leading to the ex-parte judgment. She contended that she only became aware of the proceedings on 11th September 2017, when she received a phone call from an unidentified individual who claimed to be working within the Judiciary, and who informed her of the pending suit that was scheduled for judgment on 22nd September 2017. She further asserted that she was out of the country at the time the call was made. She maintained that she had a meritorious defence, and that she intended to file a counterclaim. She urged the court to set aside the ex-parte judgment on the basis that she had been condemned unheard.
4. The respondent opposed the application through a replying affidavit sworn by Jane Nyaboke Njagi, its director. She averred that she was present on 23rd June 2016 when service of the summons to enter appearance was personally effected upon the appellant by the aforesaid process server. She averred that she was the one who identified the appellant to the process server as the appellant was well known to her. She further contended that the appellant had failed to highlight any inconsistencies in the affidavit of service, and had not denied that she was at Galleria Mall on the date and time of the alleged service. The respondent further stated that the application had been brought after undue delay, and the court was urged to dismiss it with costs.
5. The trial court (Eboso, J.) delivered its ruling on 26th June 2019. It held that service of summons to enter appearance had been properly effected upon the appellant; that although the appellant denied service, she did not dispute that she was at Galleria Mall at the material time; that she failed to disclose the identity of the anonymous caller who allegedly informed her of the suit; that she offered no satisfactory explanation for the delay of over four months between the date of judgment and the filing of the application; and that no evidence had been adduced to prove that she was out of the country during the relevant period. Consequently, the court held that the judgment was regular and that the appellant had not met the requisite threshold for its setting aside. The application was found to be unmeritorious and was accordingly dismissed with costs.
6. Being dissatisfied with that decision, the appellant preferred this appeal. The learned judge is faulted for: failing to consider the principles governing the setting aside of ex-parte judgments; finding that there was proper service of summons to enter appearance; failing to make a decisive determination of the prayer to cross-examine the process server; failing to consider the contents of the draft defence and counterclaim; and giving consideration to irrelevant and extraneous matters.
7. At the hearing of this appeal, learned counsel Ms. Monari held brief for Ms. Nyaboke for the respondent. There was no appearance on behalf of the appellant, despite service of a hearing notice upon her. She had however filed submissions, which we shall consider. The respondent's counsel chose to rely on her client's written submissions.
8. In her written submissions, the appellant contended that the trial court failed to consider the legal principles governing the setting aside of an ex-parte judgment. She argued that the judgment entered against her was irregular because she was never served with summons to enter appearance as required under the Civil Procedure Rules. She relied on the decision of this Court in *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR, where it was held that a judgment entered without proper service is irregular and must be set aside as a matter of right, even suo moto by the court. She reiterated that she was not served with either the summons or the hearing notices for 22nd, 25th, and 26th May 2017, which led to the ex-parte proceedings and the impugned judgment.



9. She also submitted that the process server who swore the affidavit of service was not availed for cross-examination, despite a specific prayer in the application seeking his attendance. She asserted that the court erred by failing to address this prayer in the impugned ruling; that under the provisions of section 107(2) and 109 of the *Evidence Act*, the burden lay on the respondent to prove that service had in fact been effected upon her, which the respondent failed to discharge.
10. The appellant further submitted that the impugned ruling was manifestly unjust as it upheld the claim of Kshs.5,075,500 without giving her a chance to be heard; that the respondent's lengthy replying affidavit clearly revealed there were contested issues of fact which should have been determined through a full hearing and cross-examination; and that denying her the opportunity to present her defence amounted to an infringement on her constitutional right to a fair trial.
11. On whether the trial court considered the contents of the draft Defence and Counterclaim, she submitted that it did not, otherwise if it did, it could have found that there were triable issues. She relied on this Court's decision in *Patel v E.A. Cargo Handling Services Ltd (1974) EA 75*, where the Court emphasized that a defence on merits need not guarantee success, but only demonstrate a triable issue worthy of adjudication. The appellant cited several paragraphs of the draft defence and counterclaim, which she said raised substantive issues that merited a full trial.
12. As to whether the trial court considered the arguments advanced by the appellant, she posited that her arguments before the trial court were spirited and supported by legal principles, including her assertion that the judgment was irregular. She made reference to the decision of the Court of Appeal for Eastern Africa in *Khamis v Kirobe (1956) 23 EACA 195*, where it was held that an order made without serving a known affected party must be set aside *ex debito justitiae*. Additionally, she relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010, which empower courts to set aside judgments and consequential decrees upon such terms as are just.
13. On the exercise of judicial discretion by the learned judge, the appellant invoked the classic case of *Shah v Mbogo [1967] E.A.116* which established that discretion should prevent injustice caused by inadvertence or error.
14. In conclusion, the appellant invoked the provisions of Article 50(1) of *the Constitution* which guarantees the right to a fair hearing and argued that the trial court's denial of her application contravened that constitutional guarantee.
15. The respondent submitted that the appellant's claim that the trial court failed to sufficiently consider the principles governing the setting aside of *ex-parte* judgments is not supported by particulars showing the principles that were ignored or misapplied.
16. The respondent further submitted that the trial court's finding that there was service was well-reasoned, hence rendering the appellant's demand for cross-examination of the process server unnecessary.
17. As to how the appellant became aware of the court proceedings, the respondent challenged the credibility of the appellant's account that she was informed of the suit and the impending judgment via a phone call from an individual purportedly working in the judiciary, approximately eleven days prior to the delivery of the judgment against her, and that she was outside the country at the time. She neither disclosed the name of the alleged judicial officer, nor produced her passport.
18. On whether the draft defence and counterclaim contained any triable issues; the respondent maintained that none exist. She submitted that the lease agreement reflects the parties' financial positions and shows that the appellant was in arrears, a position that was further supported by, inter



alia, a letter from the appellant acknowledging the rent arrears and by the judgment of Kemei, J. of 22nd September 2017, which refers to a bill of quantities detailing the condition of the premises.

However, despite contractual obligations and repeated requests, the appellant had never provided proof of any repairs, thereby undermining her counterclaim.

19. Lastly, the respondent contested the appellant's reliance on Article 50(1) of *the Constitution*, maintaining that the appellant was duly served but willfully chose not to participate in the proceedings, and delayed in filing her application even after allegedly becoming aware of the suit.
20. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. See *Selle -vs- Associated Motor Boat Co.* [1968] EA 123.
21. We have considered the record of appeal, the submissions filed, and the applicable law. The sole issue for our determination is whether the learned judge properly exercised his discretion in declining to set aside the ex-parte judgment.
22. In evaluating and assessing the evidence before the trial court, this Court is enjoined to apply the principles laid down in *Shah v Mbogo & Another* (supra) regarding the circumstances under which an appellate court may interfere with a decision of the trial court, where it was held:

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

23. Setting aside a default judgment is an exercise of judicial discretion. Judicial discretion is unfettered. However, it must be exercised in accordance with the law. The guiding principles in an application for setting aside of an exparte judgment are now well settled. In *Kimani Kigano & Co. Advocates Vs Jimba Credit Corporation Limited* [1991] KLR 503, the Court held thus:

“The power to set aside exparte judgment in default is discretionary. The discretion is unfettered provided it is properly exercised. That discretion is a judicial one and therefore it must be exercised on the basis of evidence and sound legal principles.

The Court has power under the provisions of Order 1XA Rule 10 of the (old) Civil Procedure Rules on terms as are just. The Court is obliged to look at the defence that the applicant defendant may have to the claim;

and if a party establishes that he has a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the Court ought to be inclined toward setting aside.”

24. Similarly, in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, this Court expressed itself thus:

“We agree with the noble principles which go further to establish that the Court's discretion to set aside an exparte Judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error but not to assist a person who deliberately seeks to obstruct the course of justice.”



25. The central issue in this appeal is whether the appellant had knowledge of the proceedings before the trial court which culminated in the judgment delivered on 22nd September 2017. As per the affidavit of service sworn by Julius Mutia Muthoka, he received the pleadings from the firm of Njagi Nyaboke & Co. Advocates on 23rd June 2016 and on the same day, he proceeded to serve them upon the appellant at Galleria Mall along Langata Road at around 6.00 p.m. He deponed that he was accompanied by Jane Nyaboke Njagi, a director of the respondent. He further averred that the appellant declined to acknowledge receipt by signing the documents.
26. In her application dated 17th January 2018, the appellant denied service of the summons and all the pleadings. Interestingly though, she did not dispute that she was at Galleria Mall on the material date and time. That omission, in our view, lends credence to the process server's account that he indeed effected service upon the appellant. The averments by the process server were corroborated by the replying affidavit of Jane Nyaboke Njagi, who confirmed that she was present during service and personally identified the appellant to the process server. We note that the appellant, in her application, did not deny interacting with Jane Nyaboke Njagi on the material date and time. She merely denied service without challenging the specifics as to the time, date, and place of service. These facts, in our view, sufficiently establish that service of summons was duly effected upon the appellant, and the affidavit of service sworn by the said Julius Mutia Muthoka duly complied with the provisions of Order 5 rule 15 of the Civil Procedure Rules, 2010.
27. In addition, the appellant alleged that she only learnt of the court proceedings on 11th September 2017 when she was telephoned by an unnamed individual, purportedly working in the Judiciary. However, she did not provide details of the caller, nor did she provide any evidence to substantiate the allegation, such as call logs or witness statements. Moreover, while the appellant claimed to have been outside the country at the time the call was made to her, she failed to produce her passport or any travel documentation to verify that assertion. This onus lay squarely on her. In the circumstances, the allegation by the appellant that she only became aware of the trial court's proceedings on 11th September 2017 remained unsubstantiated.
28. Regarding the allegation that the trial court disregarded the appellant's request to cross-examine Julius Mutia Muthoka, we concur with the views advanced by the respondent that the examination of a serving officer under Order 5 rule 16 of the Civil Procedure Rules, 2010 is a matter of judicial discretion, not a mandatory requirement. The said rule provides as follows:
- “On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”
29. The request for cross-examination of the process server was not mandatory, as the court retained discretion under Order 5 rule 16 of the Civil Procedure Rules, 2010 to allow such examination if doubt as to service existed. In the present circumstances, the trial court was satisfied that service had been properly effected, based on the affidavit of service sworn by Julius Mutia Muthoka, which was corroborated by the replying affidavit of Jane Nyaboke Njagi. In our view, the cross-examination of the process server could not have altered the trial court's findings on the issue of service.
30. On whether the application to set aside the ex-parte judgment was brought timeously, we note that the impugned judgment was delivered on 22nd September 2017, while the application was filed on 17th January 2018. Having rejected the appellant's allegation that she was out of the country on account



of lack of evidence in support thereof, it is our view that the time gap of about four months was not sufficiently explained.

31. Lastly, on the question of whether the draft defence and counterclaim raised any triable issues, it is clear from the record that there was a valid lease agreement between the parties which outlined the appellant's obligation to pay rent. The appellant herself acknowledged the existence of rent arrears in her correspondence with the respondent. However, despite raising a counterclaim based on alleged repairs to the premises, she did not produce any evidence to support that claim. The trial court duly considered this issue, finding that "She has also not tendered any evidence that she at any time during the tenancy paid the rent arrears claimed in the suit and awarded in the impugned judgment." In the circumstances, we are not persuaded that the trial court overlooked the issue of whether the draft defence and counterclaim disclosed any triable issue.
32. In light of the foregoing, we are satisfied that the appellant had proper notice of the proceedings before the trial court. There is no evidence to show that the learned judge exercised his discretion incorrectly and/or capriciously to warrant the setting aside of the impugned ruling. Accordingly, this appeal is devoid of any merit and is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

D. K. MUSINGA (PRESIDENT)

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

