Kenya Institute of Curriculum Development (Formerly Kenya Institute of Education) v Mutulu Holdings Limited & another (Civil Appeal 17 of 2017) [2023] KECA 271 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 271 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 17 OF 2017

HM OKWENGU, AK MURGOR & J MOHAMMED, JJA

MARCH 17, 2023

BETWEEN

KENYA INSTITUTE OF CURRICULUM DEVELOPMENT (FORMERLY KENYA INSTITUTE OF EDUCATION) ..... APPELLANT

AND

MUTULU HOLDINGS LIMITED ..... 1ST RESPONDENT

SEVEN FOURTEEN LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Ruling of the High Court at Nairobi (Onyancha, J.) delivered on 22nd August 2013 in Nairobi High Court Case No. 443 of 2011)

JUDGMENT

1 In this appeal, the appellant, Kenya Institute for Curriculum Development (formerly Kenya Institute of Education) seeks to set aside a ruling of the High Court of August 22, 2013 that arose out of two applications namely, i) a Notice of motion dated July 17, 2012 against the issuance of garnishee orders on May 31, 2012 and June 19, 2012 (the garnishee orders), where it sought to have the orders reviewed, discharged or set aside, and ii) a Notice of motion dated June 21, 2012 filed by Seven Fourteen Limited, the 2ndrespondent, where it sought to have an exparte judgment entered against it on December 8, 2011, as well as the garnishee orders set aside.

2 As a brief background to the applications, the 1st respondent, Mutulu Holdings Limited filed a suit against the 2nd respondent claiming that it was owed Kshs 5,922,100 together with costs and interests. When the 2nd respondent failed to enter appearance and file a defence, judgment in default was entered against it on December 8, 2011, and a decree subsequently issued on May 9, 2012.

3 By an application dated May 31, 2012, the 1st respondent sought garnishee orders against the appellant for payment of Kshs 2,573,400 pursuant to the judgment against the 2nd respondent. The appellant had entered into a contract for the installation of ventilation, cooler and deep freezer equipment with the 2nd respondent, and payment by the appellant to the 2nd respondent pursuant to the contract was imminent.

4 The application was heard ex parte on May 31, 2012 and garnishee nisi orders were issued on the same day. The court thereafter ordered that the garnishee and judgment debtor be served with interpartes hearing on June 19, 2012. On that date, the 1st respondent's advocate informed the court that the 2nd respondent/judgment debtor had been served with the application, but had failed to attend court. The appellant who was present in court contended that it had no objection to the application being allowed and prayed for the costs of the garnishee proceedings. Being satisfied that the judgment was properly served together with garnishee proceedings on both the garnishee and judgment debtor, the court proceeded to confirm the order nisi. On June 19, 2012, the garnishee nisi was made absolute with costs awarded to the appellant and the 1st respondent to be borne by the 2nd respondent.

5 Subsequently thereto, the 2nd respondent filed a Notice of motion dated June 21, 2012 seeking amongst other orders, for the exparte judgment entered on November 8, 2011, the decree of May 9, 2012 and for the garnishee orders to be set aside; that execution of the judgment and garnishee orders be stayed pending the hearing and determination of the suit and for the 2nd respondent be granted leave to defend the suit.

6 The 2nd respondent's application was premised on the grounds that it was never served with the pleadings and that the proceedings were carried on without his knowledge; that the 1st respondent had been paid well over Kshs 24,776,789.90 from the 2nd respondent's projects; that there was deliberate non-disclosure of material facts by the 1st respondent and that it was only fair for the 2nd respondent to be granted a chance to defend the suit and enable the court to make a proper determination of the dispute between the parties.

7 The motion was supported by the affidavit of Joshua Mbithi Mwalyo, the 2nd respondent's Managing Director, where he deposed that he was never served with any court summons or the garnishee proceedings; that the offices were not located at Road A, Industrial Area, and neither did they own any building or premises on that road; that he had never seen one, Onesmus Kasyoka Masau in his life, and was willing to be cross examined on this affidavit. He further deponed that the 1st respondent ought to have deducted the amounts advanced and leave a balance of Kshs 3,811,501.50 payable to him; that a second contract was signed during the subsistence of the initial contract, for which the 2nd respondent was advanced Kshs 5,922.100 and the 1st respondent repaid Kshs 2.1 million in cash settling the account between them but the 1st respondent refused to issue receipts and only acknowledged Kshs 1,400,000. He urged the court to set aside the judgment and all the consequential orders and grant the 2nd respondent an opportunity to present its side of the dispute.

8 Annexed to the application was a defence dated June 21, 2012 which read in pertinent part;

> 2. The defendant admits the contents of paragraph 3,4,5,8 and 9 of the plaint.
>
> 3. The defendant denies paragraph 6,7 and states that the contracts were 2 in number and the plaintiff herein has chosen to rely on one so as to mislead the honourable court.
>
> 4. The defendant avers that on or about February 2, 2009 the plaintiff and defendant entered into a money lending agreement pursuant to which the plaintiff lent the defendant a total sum of

Kshs 12,071,784/= for purpose of supplying tender equipment at the Milimani commercial Courts.

5. It was a term of the project that the plaintiff would be paid the sum lent plus 70% of the profit and payments were done to the plaintiff as follows.

   March 16, 2010 Kshs June 8, 2010 Kshs November 17, 2010 Kshs January 31, 2012 Kshs 5,616,390.00 5,226,729.90 3,292,000.00 10,641,679.00, 24,776,789.90

   Less amount advanced 12,071,784

   12,705,005.90 Profit

   Less 70% of 12,705,005 8,893503.5 30% Due to defendant 3,811,501.5

6. The defendant avers that the 30% profit due and owing to him from the plaintiff has not been paid.

7. The defendant avers that under the contract No 2 dated April 11, 2009 he has paid Kshs 1,400,000/ vide check and a further Kshs 700,000 in cash.

8. The defendant avers that the monies due to the plaintiff if any are very minimal and the plaintiff has never invited him for discussion on the same and has never been demanded from him nor has he refused to pay.

6. The defendant admits paragraph 11, 12,13 of the plaint. Reasons whereof the defendants for pray judgment against the defendant for

   a. Suit be dismissed with costs,

   b. That the defendant be ordered to render account of monies received from the plaintiff.

   c. Any Orders the court may deem fit.'

9 While the 2nd respondent's application was pending hearing, the appellant filed the application dated July 17, 2017, seeking to review or set aside the garnishee orders.

10 The application was brought on the grounds that the garnishee orders were issued on the basis that the 2nd respondent had supplied the appellant with the subject goods which were in working condition; that subsequently, the 2nd respondent breached the contract by vandalizing the deep freezer and taking away screws that held the freezer doors in place thereby rendering it unusable; that as a consequence, the money held by the appellant was not payable to the 1st respondent and the order for payment to it should be reviewed, discharged or set aside as the garnishee.

11 The application was supported by the affidavit of Lydia N Nzomo, the director of the appellant sworn on July 17, 2012 in which she deposed that on June 7, 2012, on behalf of the garnishee, she was served with a court order restraining the appellant from paying Kshs 2,573,400.00 allegedly owed to the 2nd respondent, and an application that was scheduled for hearing on June 19, 2012; that as at the time of service the money in dispute was not yet due to the 2nd respondent, as the contracted goods were yet to be supplied; that, the appellant, agreed to pay to the 1st respondent, since the contract had been performed, provided that the 2nd respondent was properly served with the garnishee proceedings; that when the matter came up for hearing on June 19, 2012, the court was satisfied that service was properly effected on the 2nd respondent.

12 She further deposed that the 2nd respondent had challenged the affidavit of service, stating that it was not served; that further, on July 6, 2012, the 2nd respondent's Managing Director one, Joshua Mbithi

Mwalyo visited the appellant's premises, and left a letter threatening to terminate the contract for non-payment and breach of contract; that at the same time, the 2nd respondent's managing director removed the doors to the deep freezer, putting it into disuse, resulting in loss to the appellant.

13 The 2nd respondent supported the appellant's application in a replying affidavit sworn by Joshua Mbithi Mwalyo, its Managing Director on October 19, 2012 in which he urged court to allow the application as the orders were fraudulently and unprocedurally obtained. He denied switching off the freezer.

14 The 1st respondent on its part opposed the application in a replying affidavit sworn on July 27, 2012 by Prof Paul Musili Wambua, the 1st respondent's Executive Chairman who deposed that on June 7, 2012, the garnishee was served with a court order to restrain the appellant/garnishee from paying Kshs 2,573,400 to the 2nd respondent/judgment debtor; that all parties were served with the garnishee application and at the hearing of June 19, 2012, the appellant confirmed it had no claim against the judgment debtor, whereupon a consent order was recorded ordering the garnishee to pay the sum of Kshs 2,573,400 to the decree holder; that in the absence of mistake, or fraud, there was no basis for setting aside the consent order made on 19th June 2012; that the alleged vandalism committed by the judgment debtor's Managing Director occurred after the sum of Kshs 2,573,400 had been attached and the contract between the garnishee and judgment debtor discharged by way of performance; that the acts of vandalism alleged were criminal acts for which the appellant has both criminal and civil remedies that should not be connected to these proceedings.

15 When the matter came up on September 28, 2012, the two applications were before the trial court for determination. The trial court then issued the following directions;

> 'Hearing of the application dated June 21, 2012 and July 17, 2012 be heard on November 7, 2012; the appellant and respondents to file and serve a supplementary affidavits limited to the replying affidavits within 14 days, the applicants in both applications to file and serve written submissions within 14 days from October 13, 2020, the respondents in both applications likewise file their responses within 14 days of service and interim orders extended to November 7, 2012'.

16 On November 7, 2012, all the parties confirmed having filed their submissions and the court reserved ruling for the February 18, 2013, but the ruling was later deferred to August 22, 2013.

17 By a ruling dated August 22, 2013, the trial judge upon considering both the applications dated June 21, 2012 and July 17, 2012, dismissed the application dated June 21, 2012 for lack of merit, and further proceeded to dismiss the application dated July 17, 2012 for the reason that it arose from the same facts as the application dated June 21, 2012.

18 The appellant was aggrieved by that decision and filed this appeal on grounds that, the trial court failed to review, modify or discharge the ruling and orders, failed to consider the appellant's application as an independent application, and render a ruling on its own merit; in wrongly finding that the appellant's application dated June 21, 2012 to set aside judgment and all consequential orders was the substantive application which incorporated the appellant's application dated July 17, 2012; in failing to find that subsequent to issuance of the garnishee orders to the appellant to pay the decree holder, the 2nd respondent had vandalised the deep freezers, the subject matter of the contract thereby rendering it null and void, and for which no payment was due; in failing to find that, the garnishee order could not be enforced or effected; in failing to appreciate the provisions of, section 3A and 1A of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules* and in arriving at a ruling that was contrary to the weight of the evidence.

19 Also filed was a cross appeal by the 2nd respondent on grounds that; the court did not consider that the affidavits filed in court on November 21, 2011 and June 18, 2011 did not accurately describe the place of service, and therefore service upon the 2nd respondent was irregular and non-conclusive; in failing to find that the description of road in Industrial area, the building, floor, room or even warehouse or go down was vague and did not demonstrate proper service on the 2nd respondent; that the court did not appreciate that the 2nd respondent's business permit showed that it was no longer based at the location described for service; in failing to find that the 2nd respondent's offices were not at any time located at the place where the summons was alleged to have been effected as it had moved from the location indicated; in failing to consider that the 2nd respondent's draft defence raised weighty arguable issues that deserved ventilation but it was dismissed unheard; in failing to appreciate that the 1st respondent's replying affidavit raised issues that were weighty and required to be heard and failing to appreciate that a denial of the order sought was harsh and unreasonable and occasioned hardship and injustice on the 2nd respondent.

20 The parties filed written submissions which were highlighted during a virtual hearing. On their part, learned counsel Mr Muraya Kimani submitted on behalf of the appellant that the appeal was merited on two grounds: first, the ruling arose from two applications namely, the 2nd respondent's application of June 21, 2012 seeking to set aside the exparte judgment and the appellant's application of July 17, 2012 seeking review, discharge or setting aside of the garnishee orders; that the learned judge wrongly conflated the two applications, and then only addressed the 2nd respondent's application to set aside the exparte judgment, which was contrary to section 34 of the *Civil Procedure Act* that provided that all questions required to be determined; that the only avenue left to the appellant was review under section 18 of the *Civil Procedure Act*, and yet the trial court did not determine this issue.

21 Secondly, it was submitted that the review was merited under Order 45 of the rules, as new and important matters were subsequently discovered which was that the 2nd respondent's managing director had vandalised the freezer, and rendered it unusable; that even if the appeal did not meet the test for a discovery of new and important matters or evidence, the appeal still stands on the third requirement of Order 45 rule 1, that being 'or any other sufficient reason'; that the freezer was working at the time the garnishee order was issued, but with the new evidence of the fridge having been vandalised, entitled the appellant to a review of the garnishee order; that the action of the 2nd respondent breached the contract and rescinded it, and the appellant was therefore entitled to a determination of this issue.

22 In their submissions, learned counsel for the 1st respondent, Ms B Bundi opposed the appeal and the cross appeal. Counsel asserted that the appellant had misapprehended the meaning of Order 45 rule 1 and particularly sub-rule 1 (a); that the trial court did not fall into error in dismissing the application since at the time of delivery of the ruling, the new facts did not exist; that the garnishee order issued against the appellant was made absolute by consent of parties on June 26, 2012, after the appellant failed to dispute or protest against the debt claimed after receiving the order nisi; that it had further consented to the garnishee order absolute; that the appellant had not disclosed or proved fraud, or that there was non-disclosure of material facts or mistake to warrant the court to review, vary, and or set aside its order and that the appellant did not prove any of the stated conditions and therefore, could not set aside its orders.

23 Counsel submitted that at the time the garnishee order was issued, it was not in dispute that indeed the appellant was indebted to the judgment debtor. It was further argued that the appellant has wrongly interpreted the meaning of discovery of new and important matter which after the exercise of due diligence, was not within its knowledge or could not be produced at the time the decree was passed.

24 Counsel further submitted that the service of the court orders on the 1st respondent was not challenged; that further, the 2nd respondent did not apply to cross examine the process server; that the evidence of the location did not have any merit; that the 2nd respondent relied on a business permit of March to December 2012 while the affidavit of service was sworn in 2011; that nothing demonstrated improper service; that the trial court rightly determined that the process server knew the 2nd respondent's director and had served him.

25 With regard to whether the defence raised triable issues, counsel contended that the trial court had sampled the defence, and came to the conclusion that the 2nd respondent had acknowledged its indebtedness to the 1st respondent and also failed to pay the agreed instalments of Kshs 100,000.

26 Learned counsel Mr Mutisya appeared for the 2nd respondent who supported the appeal and also filed a cross appeal. Counsel submitted that the learned judge did not consider the 2nd respondent's explanation that the 1st respondent did not properly serve the 2nd respondent, and therefore the default judgment was irregular and the 2nd respondent ought to have been given a chance to defend the suit. Counsel further submitted that, the learned judge did not consider that in dismissing the application against the exparte judgment, the 2nd appellant suffered prejudice, irreparable harm and loss, since it was condemned unheard, despite demonstrating that, it was not served and had filed a draft defence that raised triable issues.

27 We have considered the pleadings as well as the parties' submissions. And in an appeal of this nature, it is well settled that this Court will not interfere with the discretion of a judge unless it is satisfied that the trial court was in error in the way it exercised its discretion. See *Hillary Rotich vs Wilson Kipkore [2008] eKLR*. And in the case of *United India Insurance Co Ltd vs East African Underwriters (Kenya)Ltd [1985] EA 898*, Madan, JA (as he then was), stated that the Court is only entitled to interfere with a decision where it was observed that;

> 'First the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.'

28 In our view we consider that two issues arise out of the appeal and cross appeal, for determination. The first is whether the learned judge rightly declined to set aside the exparte judgment of November 8, 2011. In addressing this issue, it will be necessary to ascertain whether the learned judge rightly found that the 2nd respondent was properly served, and whether the court duly considered the 2nd respondent's defence. The second issue is whether the learned judge rendered a decision in respect of the appellant's application for review, discharge or setting aside of the garnishee orders.

29 While discussing the criteria for allowing an application for setting aside a default judgment, this Court held in the case of *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another[2016] eKLR* that;

> 'In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment 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 the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v Shah (supra), Patel v EA Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v Kubende [1986/ KLR 492 and CMC Holdings v Nzioki [2004] 1 KLR 173).'

30 To begin with, the 2nd respondent sought to have the exparte judgment set aside for the reason that it was not served with the summons or the applications for garnishee orders. Upon considering the pleadings and the parties' averments the trial court stated thus;

> 'The court, having examined the documents on the record and perused the affidavit of service, plus the affidavit upon which this application is based, has come to the conclusion that the Applicant's Managing Director, Mr Joshua Mbithi Mwalyo, was properly served with the summons to enter appearance in this case. These denials of not having been served with the summons, as well as the demand letter or notice of intention. To file this case, are not credible and are hereby rejected with the contempt they deserve.'

31 The provisions on Service of Summons are governed by Order 5, rules 6 and 7 of the Civil Procedure Rules, where it is explicitly provided that service of summons shall be made by delivering or tendering the duplicate of the document that is intended to be served upon the other party. Rule 3 in particular envisages service on a corporation thus;

> 'Subject to any other written law, where the suit is against a corporation the summons may be served
>
> a. On the secretary, director or other principal officer of the corporation; or
>
> b. If the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a)
>
> i. By leaving it at the registered office of the corporation;
>
> ii. By sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
>
> iii. If there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
>
> iv. By sending it by registered post to the last known postal address of the corporation.'

32 In the case of *Shadrack Arap Baiywo vs Bodi Bach [1987]eKLR*, this Court held that;

> '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'

See also *Chitaley and Annaji Rao; The Code of Civil Procedure Volume II* page 1670.

33 In addressing the issue, the 2nd respondent argued that in the return of service, the process-server did not specifically indicate the location of the appellant's offices in Industrial Area where service was allegedly effected; that its Managing Director, Joshua Mbithi Mwalyo did not know and had never seen the process-server, one, Onesmus Kasyoka Musau who had filed the return of service and who claimed to have served him personally.

34 The 1st respondent on its part insisted that the summons were properly served, and that the process server had sworn that he served the 2nd respondent's Managing Director's office in Industrial Area; that he had received instructions from the 1st respondent's advocates on the location for service of the summons to enter appearance, along Road A, off Enterprise Road in Industrial Area, Nairobi; that he proceed as directed and met the 2nd respondent's Managing Director, who was personally known to him, since he had served him severally with Notices to Show Cause in Machakos Election Petition No 3 of 2008 where Joshua Mbithi Mwalyo was the petitioner; that after he served him with the court documents, and had given him copies, Mr Mwalyo read the court summons, but finally refused to sign the acknowledgement of service, stating that he required to consult his advocates.

35 An analysis of the record discloses that the 2nd respondent merely disputed the averments set out in the process server's return of service, but took no steps to challenge or controvert them. There is nothing on the record that supports the assertion that the 2nd respondent was not properly served with the summons to enter appearance. In particular, we have reviewed the single business permit dated March 19, 2012 attached to Joshua Mbithi Mwalyo's affidavit and find that it does not hold any sway because, the business permit attached was in respect of the period March to December 2012 while the date of service was October 21, 2011, which date did not relate to the period covered by the business permit. As a consequence, the only conclusion that can be reached is that service of the summons was properly effected.

36 Next was the question of whether the learned judge took into account the 2nd respondent's defence, or considered whether leave should be granted for the 2nd respondent to defend the suit.

37 In addressing whether or not leave should be granted to file a defence, this Court in *CMC Holdings Ltd vs James Mumo Nzioki [2004] KLR 173* held that;

> 'The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as triable issues. What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial

> Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed.'

38 Upon analysis of the ruling, we are not satisfied that the trial judge took into account the 2nd respondent's defence. We say this because, there is nothing that shows that the trial judge considered whether the 2nd respondent had demonstrated sufficient cause to deserve a right or opportunity to defend this claim. The trial judge had this to say;

> 'The court has considered all the above facts which show that the applicant has not demonstrated reasonable grounds for being given opportunity to file a defence. No reasonable defence is revealed in the above facts. On the other hand, the facts show that all the Applicant is trying to obtain is delay to settle the Respondent's clear claim against it. The application to set aside an otherwise properly entered judgment shows no merit. The right or opportunity to defend would be unjustified and against the clear merits of the plaintiff's case, who in the view of the court, would be seriously further prejudiced if the judgment is set aside.'

39 In discerning whether or not the 2nd respondent ought to have been afforded an opportunity to lodge its defence, the trial court ought to have taken into account whether the defence raised any triable issues. The case of *Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR*, details what is meant by triable issues thus;

> '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, subject or liable to judicial 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.'

40 It is clear from the defence that, the 2nd respondent had challenged the 1st respondent's claims. It affirmed that the parties had entered into certain business dealings, and alluded to having paid the 1st respondent various amounts, contrary to the 1st respondent claims that it had not. Various amounts described as payments to the 1st respondent have been set out in the defence. In our view, the defence does not amount to a mere denial, since it has brought into question whether or not the 1st respondent is entitled to the sums claimed. In its ruling the trial court took into account the 1st respondent's claim and witness statement, but no attempt was made to consider the contents of the defence. Evidently, we find that there are triable matters that were worthy of ventilation before the court. By unceremoniously dismissing the 2nd respondent's application, and with it, the defence without interrogating whether or not the issues raised were triable, the learned judge drove the 2nd respondent out of the seat of justice and denied him an opportunity to be heard.

41 In the case of *Treeshade Motors Ltd vs DT Dobie & Another [1995-1998] EA 324* the court held;

> 'Even if service is valid, the judgment will be set aside if defence raises triable issue. Where a draft defence was tendered together with application to set aside exparte judgment, the court hearing application was obliged to consider if it raised a reasonable defence to the plaintiffs claim.'

42 Fortified by the above, we find the learned judge's failure to consider the 2nd respondent's defence to have been an improper exercise of discretion, for which it has become necessary to interfere with that determination and set aside the exparte judgment.

43 Having found as we have above, would mean that all the consequential orders including the garnishee orders would fall away. But that said, we think it would be remiss of us to fail to address the second issue regarding the appellant's Notice of motion dated June 19, 2012, seeking to have the garnishee orders reviewed, discharged or set aside under rule 1 of Order 45 of the Civil Procedure Rules. After all, this was the gravamen of the appeal that is before us.

44 The appellant's complaint is that the ruling incorporated the appellant's application within the 2nd respondent's application to set aside the exparte judgment, instead of considering it as a stand-alone application for review, of discharge. That as a consequence, there was no substantive determination in respect of the appellant's application.

45 A consideration of the appellant's application shows that it was brought under Order 45 of the Civil Procedure Rules, where the appellant averred that the garnishee orders were issued on the understanding that the 2nd respondent supplied the appellant with the goods in good working condition in return for payment; that the 2nd respondent acted in breach of the contract by vandalizing the deep freezer thereby rendering it unusable; that as such, the money held by the appellant was not payable to the 2nd respondent, and therefore the garnishee order requiring payment to the 1st respondent should be reviewed, discharged or set aside; that a review was merited under Order 45 of the rules, as new and important matters were subsequently discovered more particularly that the freezer having been put into disuse; that even if the appeal did not meet the test for a discovery of new and important matters or evidence, the appeal still stands on the third requirement of Order 45 rule 1, that being 'or any other sufficient reason'.

46 In reply the 1st respondent asserted that, the trial court did not fall into error in dismissing the application since at the time of delivery of the ruling, the new facts did not exist; that the appellant had consented to the garnishee orders; that the appellant had not disclosed or proved fraud, or that there was non-disclosure of material facts or mistake to warrant the court to review, vary, and or set aside its order.

47 In considering the appellant's application at the conclusion of the ruling, the learned judge then stated;

> 'In the above circumstances, this application has no merit. It is hereby dismissed with costs. Since as earlier indicated, the Garnishee application is based on the same facts, it is the view of the court that the Garnishee application dated July 17, 2012 also fails with costs.'

48 The record is clear that central to the appellant's application was the question of review, discharge of the garnishee orders, which differed from the 2nd respondent's application to set aside the exparte judgment for reasons that it was not served. The appellant had sought a review of the garnishee orders because new and important matters were subsequently discovered, or for'other sufficient reason'. But a review of the ruling does not disclose that the judge considered or arrived at a determination in respect of the appellant's application. We can find no mention in the ruling of the prerequisites for review under rule 1 of Order 45, or whether the appellant had met the threshold requirements for grant of orders of review or setting aside. Nothing was said of whether the court took into account the existence of new and important matters, or whether sufficient reasons were advanced for review of the garnishee orders. Essentially, there is nothing that demonstrated that the learned judge rendered a decision on the appellant's application, for review, discharge or setting aside of the garnishee orders, which in our view has given rise to a miscarriage of justice, and we so find.

49 In sum, we are persuaded that the learned judge misdirect himself in law, misapprehended the facts, took into account matters that should not have been considered and failed to take into account

important factors, and as such, we have reason to interfere with the learned judge's exercise of discretion.

50 In sum, the appeal is merited and is allowed. We set aside the exparte judgment of December 8, 2011, the garnishee order nisi and absolute, and order the 2nd respondent to file and serve its defence within the next fourteen (14) days from the date hereof. We further order that the case be fixed for management a priority basis.

51 Since the appellant's appeal against the 1st respondent has succeeded the 1st respondent will pay the costs and, since the 2nd respondent's cross appeal against the 1st respondent only partially succeeded, we order each party to bear their own costs.

It is so ordered.

Delivered and dated at Nairobi this 17th day of March, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR