China Henan International Co-operation (Group) Co. Ltd v Mshanga (Civil Appeal E030 of 2021) [2023] KECA 1312 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1312 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E030 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

OCTOBER 27, 2023

BETWEEN

CHINA HENAN INTERNATIONAL CO-OPERATION (GROUP) CO. LTD ..... APPELLANT

AND

GILBERT CHARO MSHANGA ..... RESPONDENT

(An appeal against the Judgment and Decree and the Ruling of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 31st January 2019 and 22nd January 2021 respectively in ELC Case No. 245 of 2017)

The ELC improperly exercised its discretion in refusing to set aside an ex parte judgment that was arrived at due to the Appellant's Advocate inadvertence.

The appellant was sued for trespass and occupation of the respondent's land without consent. Despite being served with summons, the appellant failed to file a defence, leading to an ex parte judgment on January 31, 2019, awarding damages and an eviction order. The appellant later sought to set aside the judgment, arguing that it had a valid lease agreement with a third party, but the ELC dismissed the application on January 22, 2021. On appeal, the Court of Appeal found that the Environment and Law Court failed to consider triable issues and improperly exercised its discretion, leading to the setting aside of the ruling.

Reported by John Ribia

Civil Practice and Procedure *– appeals – appeal to set aside ex parte judgment – grounds of appeal being the inadvertence of an advocate - whether the Environment and Land Court's refusal of the appellant's explanation of lack of participation at the trial, especially where it was clear it did not file defence or attend trial, and where the respondent did not challenge the excuse, and refusal to set aside the ex parte judgment was an improper exercise of the courts discretion - whether the Environment and Land Court erred in refusing to set aside the ex parte judgment despite the appellant's claim that its advocate failed to file a defence or notify it of the proceedings - whether the Environment and Land Court's refusal to enjoin an alleged purchaser in a land dispute as an interested party was a misdirection in law - Civil Procedure Act (Cap 21) section 3A, 1A and 1B; Civil Procedure Rules (Cap 21*

Sub Leg) order 10; order 12 rule 7; order 22 rule 22 and order 51 rule 1 and 3; Court of Appeal Rules (Cap 8 Sub Leg) rule 33.

Brief facts

China Henan International Co-operation (Group) Company Limited (the appellant) was sued by the respondent for trespassing onto land parcel Kilifi/Gede/Mijomboni/973 (the suit land), which the respondent claimed to own. The respondent alleged that the appellant unlawfully entered the land, established a site office, and used it to store machinery and equipment, covering an area of two acres. The respondent sought general and special damages, mesne profits of Kshs. 1 million per month from January 2017, costs for land restitution, and the appellant's immediate ejectment.

The appellant was served with summons to enter appearance on December 14, 2017 and engaged legal counsel, but no defence was filed. The case proceeded ex parte, leading to a judgment in favor of the respondent on January 31, 2019, awarding Kshs. 2 million in general damages, Kshs. 4.8 million in mesne profits, and an eviction order against the appellant.

On December 16, 2019, the appellant filed an application to set aside the judgment, arguing that it had a lease agreement with a third party, Leonard Mbonani Bikangi, who had allegedly purchased the suit land in 2007. The Environment and Land Court (ELC) dismissed the application on January 22, 2021, prompting the appellant to appeal, claiming procedural injustice and failure to consider triable issues.

Issues

i. Whether the Environment and Land Court's refusal of the appellant's explanation of lack of participation at the trial, especially where it was clear it did not file defence or attend trial, and where the respondent did not challenge the excuse, and refusal to set aside the *ex parte* judgment was an improper exercise of the courts discretion.

ii. Whether the Environment and Land Court erred in refusing to set aside the *ex parte* judgment despite the appellant's claim that its advocate failed to file a defence or notify it of the proceedings.

iii. Whether the Environment and Land Court's refusal to enjoin an alleged purchaser in a land dispute as an interested party was a misdirection in law.

Held

1. Being the first appeal, the Supreme Court's mandate was to re-evaluate, re- assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the trial court were to stand or not and give reasons either way. In carrying out that duty, the court cannot properly substitute its own factual finding for those of the trial court unless there was no evidence to support the finding or unless the Judge can be said to be plainly wrong. We must be cautious in making our determination as to whether the conclusion originally reached upon evidence should stand and it is not enough that we might ourselves have come to a different conclusion from that arrived at by the trial court.
2. The appellant was challenging the exercise of discretionary power to set aside an *ex parte* judgment. The decision, whether or not to set aside *ex parte* judgment was discretionary was not in doubt. The discretion was intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but was not designed to assist a person who had deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
3. Even though a court in determining an application to set aside an *ex parte* judgment had wide discretion, that discretion must be exercised upon reasons and must be exercised judiciously. The ELC was fully aware of the matters to consider, and addressed his mind to them. For instance, he considered whether the appellant gave a reasonable explanation why 'the Memorandum of Appearance and/or Defence were not filed within the prescribed time.' The Record of the proceedings was clear that the appellant filed the Memorandum of Appearance on time. What he did not file was the Statement of Defence.

4. It was not a proper exercise of discretion for the ELC to trash the appellant's explanation of lack of participation at the trial, especially where it was clear it did not file defence or attend trial, and where the respondent did not challenge the excuse, it gave. What the ELC Judge did was to turn its back on the appellant who clearly demonstrated an excusable mistake on the part of its advocate.
5. The court failed to consider one important aspect of the matter before him, which was whether the appellant had a triable issue that could go to trial. He ought to have considered the pleadings before him and see if, on their face value a *prima facie* triable issue was raised by the appellant. If the same was raised, then whether the reasons for the appellant's appearance were weak, the court was in law bound to exercise its discretion and set aside the *ex parte* judgment to allow the appellant to put forward its defence.
6. The appellant had not filed any Statement of Defence in the matter. However, there were other pleadings filed by the appellant and the intended interested party. Including affidavit evidence and annexures from which to test whether a triable issue was demonstrated, especially in the pending application to enjoin an interested party.
7. There was clear demonstration of misdirection in law, misapprehension of the facts, and failure to take into consideration factors that ought to have been taken into consideration. Looking at the decision generally, the only plausible conclusion we reach was that the decision albeit a discretionary one was plainly wrong. That allowed us to interfere in the exercise of discretion by the ELC. Rule 33 of the Court of Appeal Rules empowered the court to remit the proceedings to the lower court with such directions as may be appropriate.

Appeal allowed.

Orders

i. *The ruling of the Malindi ELC Case No. 245 of 2017 was hereby set aside.*
ii. *The matter was remitted back to the ELC sitting in Malindi with directions that the Notice of Motion application dated December 16, 2019 filed by the appellant, inter alia, for the setting aside of the ex parte judgment delivered by that court on the January 31, 2019 be heard de novo before an ELC Judge except Hon. J. O. Olola, J.*
iii. *Due to the age of the case, we order that the hearing expedite.*
iv. *The appellant would have the costs of the appeal.*

Citations

Cases

1. Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (Civil Application 166 of 2001; [2001] KECA 21 (KLR)) — Applied
2. CMC Holdings Ltd v James Mumo Nzioki (Civil Appeal 329 of 2001; [2004] KECA 143 (KLR)) — Applied
3. David Kiptugen v Commissioner of Lands Nairobi,Chief Land Registrar Nairobi, Attorney General, Heldo Stuff Limited & District Land Registrar, Eldoret (Civil Appeal 67 of 2015; [2016] KECA 712 (KLR)) — Applied
4. EG vs. AG, David Kuria Mbote ([2021] eKLR) — Applied
5. Jeremiah Kimigho Mwakio, Patrick Mulisho, Mohamed Godhana & Amos Amitai v Tana and Athi Rivers Developments Authority (Civil Suit 172 of 2002; [2014] KEHC 3127 (KLR)) — Applied
6. John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others (Petition 64 of 2013; [2024] KEHC 6648 (KLR)) — Applied
7. Joseph Waitiki Ndegwa & another v Duncan Nderitu Ndegwa & another (Civil Appeal 179 of 2002; [2007] KECA 502 (KLR)) — Applied
8. Mbogua Kiruga v Mugecha Kiruga & another (Civil Appeal 52 of 1985; [1988] KECA 122 (KLR)) — Applied
9. Mulemi v Angweye & another (Civil Appeal 170 of 2016; [2021] KECA 214 (KLR)) — Applied

10. Philip Ayaya Aluchio v Crispinus Ngayo (Civil Case 74 of 2010; [2014] KEHC 7055 (KLR)) — Applied
11. Philip Keipto Chemwolo & Mumias Sugar Company Limited v Augustine Kubende (Civil Appeal 103 of 1984; [1986] KECA 87 (KLR)) — Applied
12. Insurance Company Limited vs. East African Underwriters Kenya Ltd ([1985] KLR 898) — Applied
13. Mbogo & Another v Shah ([1968] E.A 93; at page 94, paragraph H - 1 Sir Clement De Lestang V.-P) — Applied
14. Peters v Sunday Post Ltd ([1958] EA 424) — Applied

Statutes

1. Civil Procedure Act (CAP. 21) — section 3A, 1A and 1B — Cited
2. Civil Procedure Rules (cap 21 sub leg) — order 10; Order 12 Rule 7; Order 22 Rule 22 and Order 51 Rule 1 & 3 — Cited
3. Court of Appeal Rules (cap 8 sub leg) — rule 33 — Cited
4. Evidence Act (CAP. 80) — section 60(1) — Cited

Advocates

None mentioned

JUDGMENT

1. China Henan International Co-operation (Group) Company Limited, herein after the appellant, appeals against the judgment and decree of the Environment and Land Court [ELC], (JO Olola, J) at Malindi delivered on January 31, 2019, and the ruling of the same Court delivered on the January 22, 2021.

Background

2. By a plaint dated November 6, 2017, the respondent instituted a suit against the appellant seeking special and general damages for entering into his property, Kilifi/Gede/Mijomboni/973, (hereinafter the suit land) measuring 1.21 hectares, and establishing a site office for storage of machinery and equipment covering an area of two acres (2). The respondent pleaded that the land was agricultural, that the appellant's entry into the suit land was without his authority, was wrongful and amounted to actionable trespass. The respondent sought mesne profits at the rate of Kshs 1 million per month from January 2017, costs for restitution of the suit land and costs of damaged crops. He also sought the immediate ejectment of the appellant from the suit property, and for costs of the suit and interest.

3. The suit proceeded undefended as the appellant did not file a statement of defence despite service with Summons to enter appearance on December 14, 2017, and despite engaging the services of lawyers (PN Kaingu & Company Advocates and Michira Messah Company Advocates) who filed each a memorandum of appearance both dated December 21, 2017. Judgment was entered in favor of the respondent (by Hon JO Olola, J) on January 31, 2019, and a Decree given on even date but issued on December 2, 2019 as follows:

    i. An order is hereby issued for the immediate ejectment of the appellant from that parcel of land known as Kilifi/Gede/Mijomboni/973;

    ii. General damages of Kshs 2,000,000/-;

    iii. Mesne profits of Kshs 4,800,000/- along with costs and interest of the suit;

    iv. Interest on (ii) and (iii) above at court rates until the delivery of the land;

v. Costs of the suit.

4. Vide a notice of motion dated December 16, 2019, filed by Messrs Rutto Erica & Associates, pursuant to section 3A, 1A and 1B of the *Civil Procedure Act* and rule 9 order 10; order 12 rule 7; order 22 rule 22 and order 51 rule 1 & 3 of the *Civil Procedure Rules* the appellant sought several orders. The substantive orders sought were stay of execution of judgment and decree of the ELC; the setting aside of the judgment delivered on the January 31, 2019 and the decree therein as well as the proceedings of the June 26, 2018 and that the appellant be granted leave to file a defence in the case.

5. In a ruling delivered by the ELC (Hon JO Olola, J) on the January 22, 2021, the application was dismissed in its entirety. The appellant was aggrieved by the judgment and the ruling of the ELC and filed a notice of appeal dated February 17, 2021. In a memorandum of appeal dated July 23, 2021 the appellant lists seven grounds of appeal. In brief, the appellant challenges the learned ELC Judge for:

   a. awarding damages that were inordinately excessive;

   b. failing to take judicial notice of the fact the respondent had sold the suit land to one Leonard Mbonani Bikangi in 2007;

   c. failing to exercise his jurisdiction to enjoin Leonard Mbonani Bikangi;

   d. failing to properly exercise his discretion by not disposing of the joinder notice of motion dated January 21, 2018 before entering the ex-parte judgment on January 31, 2019 and the ruling of January 22, 2021;

   e. failing to consider the evidence placed before him thus declining to set aside the judgment;

   f. by departing from statutory provisions, natural justice and judicial precedence by failing to find that the appellant was in lawful occupation of a section of the suit land, having had a tenancy agreement with the lawful owner of the portion of the suit land; and,

   g. for unfairly condemning the appellant unheard.

6. The appellant seeks to have the appeal allowed with costs; that the *ex-parte* judgment and decree of January 31, 2019 be set aside with costs; that the plaint dated November 6, 2017, the appellant's defence and counter claim, together with the notice of motion dated January 23, 2018 be considered and heard de novo by any other Judge other than JO Olola, J; and, that the court may make any other order it may deem just and fit to grant.

Submissions

7. The appeal was heard before us on the June 13, 2023 through this court's virtual platform. Present at the hearing was learned counsel Mr Charles Dulo for the appellant and learned counsel Mr Ligami for the respondent. Mr Dulo relied on the submissions dated May 30, 2023 together with the list of authorities of even date. Mr Ligami relied on his submissions and list of authorities that he filed on the morning of the hearing. Each counsel highlighted their submissions before us, which we have considered.

8. Mr Dulo submitted that when the demand letter to the appellant from the respondent was received, alleging it had trespassed onto the suit land and unlawful use of the suit land, the appellant contends that one Mbonani Bikangi was also addressed with same demand letter. That after the respondent filed the suit on November 6, 2017, the Leonard Mbonani Bikangi (hereinafter IP) filed a notice of motion dated January 23, 2018 seeking to be enjoined in suit as interested party. In the supporting affidavit to the motion, the IP annexed, inter alia, a Lease Agreement over a portion of the suit land, between it and

the said IP the appellant being a lessee of the IP. The lease commenced on June 2017 and was run for 12 months. It also annexed a Sale Agreement between the appellant and the IP showing the IP purchased the suit land from the appellant on July 1, 2007. It was the appellant's submission that the application for enjoiner was not heard, despite being on record. Counsel relied on the case of *David Kiptugen v Commissioner of Lands Nairobi & 4 others* [2016] eKLR as well as EG v AG, David Kuria Mbote [2021] eKLR for the proposition that the core of the court's power to join a party to any proceedings, including at the appellate stage, is to bring on board necessary party for purposes of determining the real issues in controversy.

9. Mr Dulo explained that he came on record for the appellant after this court enlarged time as per the ruling of June 30, 2021 (by Hon J Mohammed, JA). He agreed that if the court considered the appeal against the ruling of January 21, 2021 there would be no need to consider the appeal against the Judgment of January 31, 2019.

10. Mr Ligami for the respondent opposed the appeal. Counsel started by stating that the hearing of the suit was given on the May 4, 2018 for June 26, 2018. He urged that after the court was satisfied that the appellant was served with a hearing notice, they heard the case as scheduled and completed it on the same date. The judgment was set for July 31, 2018 but was not delivered until January 31, 2019. Mr Ligami urged that the application to set aside the *ex parte* judgment was dismissed for lack of merit.

11. In answer to ground 1 of appeal, counsel urged that the loss and damage the respondent suffered was based on his unchallenged evidence, and that the award for mesne profits was based on the length of time the appellant had unlawfully occupied the land. He relied on *Duncan Nderitu Ndegwa v KPC Ltd & another* [2013] eKLR for proposition damages are payable for trespass. He also relied on *Philip Ayaya Aluche v Crispinus Ngayo* [2014] eKLR for the proposition on the formular of determining damages for trespass, being the difference between the value of the property immediately before and immediately after the trespass.

12. In answer to ground 2 of the learned ELC Judge failure to take judicial notice that the suit land had been sold to the IP, counsel urged that section 60(1) of the *Evidence Act* applied.

    That the appellant did not ask the court to invoke that principle of law.

13. In regard to grounds 3 and 4 of the appeal, Mr Ligami urged that failure to enjoin the IP was justified as the respondent's cause of action was trespass, which is an action in personum. He urged that the respondent could only sue the person that had trespassed on his land, which was the appellant. For that proposition he relied on the case of *Tana and Athi River Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR.

14. On ground 5 of failure to consider evidence adduced before it and thus declining application to set aside *ex parte* judgment. Counsel urged that the power to set aside is discretionary, and that the appellate court is enjoined not to interfere with the exercise of that discretion. For that proposition, he cited the case of *Phillip Kipto Chemwolo & another v Augustine Kubendi* [1986] eKLR.

15. On grounds 6 and 7 that the appellant was condemned unheard, counsel placed reliance on the Supreme Court case of *John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others* Petition No 17 of 2015 [2021] KESC 39 KLR which he urged, delimited components of fair hearing as, (i) an opportunity of hearing must be given, and (ii) that opportunity must be reasonable.

Determintion

16. We have considered the issues raised in this appeal. This being the first appeal, this court's mandate is to re-evaluate, re- assess and re-analyze 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. In carrying out that duty, we cannot properly substitute our own factual finding for those of the trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. We must be cautious in making our determination as to whether the conclusion originally reached upon evidence should stand and it is not enough that we might ourselves have come to a different conclusion from that arrived at by the trial court. See *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, *Kiruga v Kiruga & another* [1988] KLR 348 and *Peters v Sunday Post Ltd* [1958] EA 424.

17. The appellant brought two appeals in one composite notice of appeal, challenging the *ex parte* judgment and decree of the ELC Judge of January 31, 2019 and the ruling of January 22, 2021 disallowing an application to set aside the *ex parte* judgment afore mentioned.

18. We note that the appellant filed its notice of appeal on February 26, 2021. The appellant then filed a notice of motion dated February 26, 2021 seeking extension of time to fie and

    serve the notice of appeal in an appeal against judgment and decree of the ELC Judge of January 31, 2019 and the ruling of January 22, 2021. After considering the application, the learned Judge of Appeal, sitting as a single Judge (Hon J Mohammed, JA) made the order, *inter alia*:

    > "21 (c). That leave is hereby granted to the applicant to file and serve a record of appeal out of time against the ruling of the ELC at Malindi (JO Olola, J) in ELC No 245 of 2017..." [Emphasis added]

19. The appellant was granted leave to appeal only against the ruling. The only ruling he was appealing against is the one of January 22, 2021. That then is the appeal that is before us and which we shall consider. Having considered the rival arguments of both counsels in this appeal, we find that even though several grounds of appeal were raised, the issue that falls for our determination are two. One, whether the learned ELC Judge in exercise of its discretionary power misdirected himself or acted on matters on which he should not have acted or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion. Two, whether the decision of the learned ELC Judge should stand.

20. This court in *Mulemi v Angweye & another* (Civil Appeal 170 of 2016) [2021] KECA 214 (KLR) (Civ) (5 November 2021) (Judgment) on the principles regarding interfering with discretion of lower courts observed as follows;

    > " In *Mbogo & another v Shah [1968] EA 93; at page 94, paragraph H - 1 Sir Clement De Lestang V.-P*: had this to say:
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    > "I think it is well settled that this court will not interfere with the exercise of 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 or 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."
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    > See also Sir Charles Newbold, P, in the same decision at page 96 paragraph G - H where he expressed himself as follows:

> "For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."
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> In reiteration of the above principle, the court in the United India *Insurance Company Limited v East African Underwriters Kenya Ltd* [1985] KLR 898 was explicit that interference with exercise of judicial discretion only arises where there is clear demonstration of misdirection in law, misapprehension of the facts, taking into consideration factors the court ought not to have taken into consideration or failure to take into consideration factors that ought to have been taken into consideration or looking at the decision generally. The only plausible conclusion reached is that the decision albeit a discretionary one is plainly wrong."

21. The appellant is challenging the exercise of discretionary power to set aside an *ex parte* judgment. That the decision, whether or not to set aside ex parte judgment is discretionary is not in doubt. It is not in doubt that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. (See *Shah v Mbogo & another* [1967] EA 116.)

22. In this case the grounds upon which the application to set aside the judgment was made were twofold. First, it was contended that the appellant instructed counsel to defend the suit, and that all he filed was the memorandum of appearance on December 21, 2017 but not a statement of defence. That the said counsel did not notify the appellant of the hearing dates, and that it only learnt that the case was determined when Auctioneers served them with the Warrants of Sale and Proclamation. Secondly, the respondent had failed to disclose that prior to filing the suit, he had disposed of the suit land to one Leonard Mbonani Bikangi, and whose application to be enjoined in the suit was pending at the time the suit was heard. Thirdly, and as a result the appellant was condemned unheard.

23. As was held by this court in *CMC Holdings Ltd v Nzioki* [2004] KLR 173:

> "In an application for setting aside *ex parte* judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously... In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgment was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate... 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 whether the defence if filed already or if draft defence is annexed to the application, raises triable issues."

24. The legal principle applicable to this case, as pronounced in the cases cited above, and indeed in many more, is that even though a court in determining an application to set aside an *ex parte* judgment has wide discretion, that discretion must be exercised upon reasons and must be exercised judiciously. The question then is whether the learned ELC Judge gave reasons for his decision, and whether he exercised his decision judiciously.

25. We note that the learned ELC judge was fully aware of the matters to consider, and addressed his mind to them. For instance, he considered whether the appellant gave a reasonable explanation why 'the memorandum of appearance and/or defence were not filed within the prescribed time.' The Record of the proceedings is clear that the appellant filed the memorandum of appearance on time. What he did not file was the statement of defence.

26. As for the explanation given by the appellant, it said that the counsel on record at the time did not inform them of steps taken in the matter, that he failed to file defence and to inform them of the hearings date set for the case. In this regard, the learned ELC Judge delivered himself thus:

> "While the defendant heaps the blame on its former advocates for the failure to file a statement of defence and to take part in the trial, it does not demonstrate what actions it took to move the matter forward... In this matter the summons were served upon the defendant on December 14, 2017. The matter proceeded to hearing and judgment delivered herein more than a year later on the 31st January
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> 201. There is no evidence that the defendant took any action to find out from the former Advocates as to what was going on. Indeed, it took no action until almost another year later when the plaintiff moved to execute the decree in December 2019..."

27. On that basis alone, the learned ELC Judge dismissed the appellant's application. The appellant explained itself and demonstrated the mistake of counsel, leaving it in a blackout until the execution process, which is what served as a notice to the appellant that the case was heard and determined. It was not a proper exercise of discretion for the learned ELC Judge to trash the appellant's explanation of lack of participation at the trial, especially where it was clear it did not file defence or attend trial, and where the respondent did not challenge the excuse, it gave. What the learned ELC Judge did was to turn its back on the appellant who clearly demonstrated an excusable mistake on the part of its Advocate.

28. The learned ELC Judge failed to consider one important aspect of the matter before him, which was whether the appellant had a triable issue that could go to trial. He ought to have considered the pleadings before him and see if, on their face value a *prima facie* triable issue was raised by the appellant. If the same was raised, then whether the reasons for the appellant's appearance were weak, the court was in law bound to exercise its discretion and set aside the *ex parte* judgment to allow the appellant to put forward its defence.

29. We note that the appellant had not filed any statement of defence in the matter. However, there are other pleadings filed by the appellant and the Intended IP including affidavit evidence and annexures from which to test whether a triable issue was demonstrated, especially in the pending application to enjoin an IP dated January 23, 2018.

30. We find clear demonstration of misdirection in law, misapprehension of the facts, and failure to take into consideration factors that ought to have been taken into consideration. Looking at the decision generally, the only plausible conclusion we reach is that the decision albeit a discretionary one is plainly wrong. That allows us to interfere in the exercise of discretion by the learned ELC Judge. Rule 33 of the *Court of Appeal Rules* empowers this court to remit the proceedings to the lower court with such directions as may be appropriate. Accordingly, we make the following orders:

    1. The appellant's appeal against the ruling of the ELC (JO Olola, J) delivered on the January 22, 2021 in Malindi ELC Case No 245 of 2017 be and is hereby allowed.

    2. Consequently, the ruling of the Malindi ELC Case No 245 of 2017 be and is hereby set aside.

    3. The matter is remitted back to the ELC sitting in Malindi with directions that the notice of motion application dated December 16, 2019 filed by the appellant, *inter alia*, for the setting aside of the *ex parte* judgment delivered by that Court on the January 31, 2019 be heard *de novo* before an ELC Judge except Hon JO Olola, J.

    4. Due to the age of the case, we order that the hearing expedite.

    5. The appellant will have the costs of this appeal.

31. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR