IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 24 OF 2017

BETWEEN

SAMSON CHERUIYOT BARNWACH.....1ST APPELLANT

DAVID KIPNGETICH CHEPSOI.....2ND APPELLANT

AND

MARY CHEPTOO SOTE.....RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya

at Nakuru ***(Omondi, J)****, dated 21st March, 2014*

in

High Court Civil Case No. 114 of 2012)

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JUDGMENT OF THE COURT

[**1**] The appellants, **Samson Cheruiyot Barnwach** and **David Kipngetich Chepsoi** (1st and 2nd appellant), are dissatisfied with the ruling of the High Court (**Omondi, J**) in which the High Court dismissed a motion dated 3rd April, 2013, lodged by the appellants, seeking to set aside the decree issued in favour of the respondent together with all consequential orders.

[**2**] Although the appellants' motion was not clear, a perusal of the record of appeal reveals that the decree sought to be set aside in the motion, arose from an *ex parte* judgment entered on 4th May, 2012 in favour of the respondent in default of appearance/defence and the subsequent formal proof in which the respondent testified, and a judgment delivered in favour of the respondent. That judgment which was dated 12th February, 2013, is the subject of the decree. The decree included an order for the appellants to vacate the suit premises within 15 days from the date of service of the decree, failing which they were to be evicted.

[**3**] In the motion which was supported by an affidavit sworn by the 1st appellant, the appellants sought to set aside the decree on the grounds that the respondent's suit was an abuse of the court process as she had previously filed a suit anchored on the same cause of action and to which the appellants had filed a defence, but which suit the respondent withdrew; that the appellants were not aware of nor were they served with the summons to enter appearance in regard to the subsequent suit that was filed by the respondent; that the judgment entered against them was therefore irregular; that the proceedings were a nullity; and that the appellants had a good defence to the respondent's claim, which they ought to be given an opportunity to ventilate.

[**4**] In a replying affidavit sworn on 12th April 2013, the respondent dismissed the appellants' motion as an abuse of the court process. She admitted having previously instituted a suit in the Chief Magistrate's court in Nakuru and having withdrawn the same, but maintained that her current suit was distinct from the one that she had withdrawn, and that the suit properties in the two suits were different. The respondent maintained that the appellants were properly served with summons to enter appearance. She urged the court to find that the judgment entered in her favour was regular

[**5**] In her ruling, the learned Judge found that the summons to enter appearance were properly served on the appellants, and that the judgment entered against them was regular and proper. The learned Judge found that no draft defence was annexed to the applicants' motion

which made it difficult for the court to determine whether they had any defence to the respondent's suit. The learned Judge also found that no single triable issue had been raised in the withdrawn suit as the defence filed by the appellants was a mere denial. The learned Judge rejected an averment by the 1st applicant that they had purchased a portion of the suit property from one Chelimo Kipkebut, who had purchased the same from the respondent, because the sale agreement which was produced by the appellants did not bear the name or signature of the respondent. In addition, that any claim regarding the estate of Grace Talai Chelal which devolved on the respondent through **Nakuru High Court succession Cause No. 431 of 2008**, should have been lodged in the succession cause. Finally, the learned Judge overruled the objection on the court's jurisdiction holding that although the dispute involved land, and ought to have been heard in the Environment & Land Court, the matter was heard during the transition period and by virtue of Gazette Notice No. 13268, the Chief Justice had by way of practice direction given jurisdiction for all part-heard cases involving land matters to continue before the High Court.

[**6**] In their memorandum of appeal the appellants have raised 5 grounds which we quote verbatim as follows:

> **"1. That** (sic) **learned trial court erred in law and in fact in finding the** (sic) **there was proper service of summons to enter appearance based on an affidavit of service which never complied** (sic) **the requirements of the law.**
>
> **2. The learned trial judge erred in law and in fact in finding that the applicant/appellant never had a defense to the claim herein while the defense filed in a previous but similar claim raised substantial questions of law and fact and would have merited the matter to be heard inter partes.**
>
> **3. That the learned trial court erred in law and in fact in failing to consider that the oxygen principle introduced by sections 1A and 1B merited that all litigants be afforded a hearing and be allowed to access justice.**
>
> **4. That the learned trial court erred in law and in fact in failing to consider the effect of the ex parte judgment which would mean that the applicant is evicted from the suit land without an opportunity to be heard.**
>
> **5. That the learned trial court erred in the exercise of discretion in taking into consideration irrelevant factors and/or failing to take into consideration relevant factors."**

[**7**] The appellants were represented in this matter by **Mr Githui** while the respondent was represented by **Mr Ochieng Ghai**. Both the appellants and the respondent filed written submissions which were duly highlighted during the hearing of the appeal.

[**8**] In their submissions, the appellants identified the issues whether the learned Judge took into consideration irrelevant factors or failed to take into consideration relevant factors, and whether the exercise of discretion by the learned Judge was wrong as the issues for determination. The appellants submitted that setting aside a judgment entered in default of appearance and/or defence is a discretionary jurisdiction; that although the discretion is not fettered, the objective of the court is to do justice and to ensure that such judgment, if set aside, is set aside on terms that are just. The appellants maintained that where the judgment sought to be set aside was irregular because of want of service or want of jurisdiction, the court will exercise its discretion to set aside *ex debito justiciae*, as the court cannot suffer irregular proceedings to taint its credibility.

[**9**] The appellants challenged the affidavit of service relied on by the respondent on the ground that it fell short of the requirement of Order 5 rule 15 of the Civil Procedure Rules as the identifying person was not disclosed. The appellants faulted the learned Judge for failing to take into consideration relevant matters which were, whether the affidavit met the prerequisite in Order 5 rule 15 of the Civil Procedure Rules and instead, referring to documentary evidence which was not specified. In addition, the learned Judge was faulted for shifting the burden of proof onto the appellants to disprove service of the summons to enter appearance instead of the respondent who had effected service proving that they had in fact done so.

[**10**] In regard to jurisdiction, the appellants maintained that pursuant to Article 162(2) of the Constitution, the High Court has no jurisdiction to hear and determine the respondent's claim, as it was a claim for a declaration that she is the owner of a parcel of land. The learned Judge of the trial court was also faulted for failing to note that the appellants had denied all the issues of fact raised by the respondent, and therefore, there was joinder of issue and the appellants ought to have been given an opportunity to be heard.

[**11**] In highlighting these submissions, Mr. Githui reiterated that the burden was upon the respondent to prove service of summons under Order 5 rule 15 of the Civil Procedure Rules and that the learned Judge was wrong in relying on a letter which was extraneous evidence to prove service. He urged the Court to take into account the authorities cited in their submissions and find that the High Court did not properly exercise its discretion in refusing to set aside the *ex parte* judgment.

[**12**] In her submissions, the respondent argued that the learned Judge properly considered the motion which was before her and identified three issues for determination. These were: whether the proceedings and the judgment were proper; whether the appellants had made up a case for the orders sought; and what orders should be made in regard to costs. The respondent maintained that the learned Judge was right in taking into account the conduct of the 1st appellant who received the summons and in finding that there was no proper basis upon which she could set aside the *ex parte* judgment, as the appellants had not even availed a copy of their intended defence, and that what they had previously filed was a mere denial that did not raise any triable issues.

[**13**] The respondent urged the Court to bring the litigation to an end as she was an old woman whose land had been forcefully invaded by the appellants who were taking advantage of her age, and the fact that she is childless and has no one to support her. She contended that the appeal is baseless and an abuse of the court process, as the appellants were indeed given an opportunity to be heard. She therefore urged the Court to dismiss the appeal.

[**14**] In highlighting the written submissions Mr. Ochieng, pointed out that the Court had unlimited discretion in dealing with the motion and that she could only set aside the judgment in justified circumstances. He urged the Court to find that the appellants were properly served with

summons to enter appearance, and that in any case the appellants have not demonstrated that they have a good defence to the respondent's claim, and therefore they have no reason to be on the respondent's land.

[**15**] We have carefully considered this appeal, the submissions and the arguments made before us. It is evident that the appeal concerns the exercise of the trial court's power to set aside an *ex parte* judgment entered in default of appearance and/or defence. The *locus classicus* in addressing an appeal of this nature is **Mbogo vs Shah** [1968] EA 93 in which ***Sir Charles Newbold, P*** stated 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."**

[**16**] This means that for this appeal to succeed the appellants must satisfy this Court that in rejecting the application to set aside the *ex parte* judgment, the learned Judge improperly exercised her discretion, and misdirected herself in some matter thereby arriving at a wrong decision. The main contention is the issue of service of summons to enter appearance. It is evident that if the respondents were not served with the summons, they would not enter appearance or file a defence as they would obviously not be aware of the suit.

[17] The learned Judge made a finding that the appellants were in fact served with the summons to enter appearance. The learned Judge relied on the affidavit of service that was sworn by **Samuel N. Gekanana,** which she accepted to be truthful. According to the affidavit of service, both the appellants were served with summons to enter appearance on the 5th April 2012. The 1st appellant is said to have been served at the AIC Morop Girls Secondary School where he was said to be working as a school driver.

[18] In her ruling the learned Judge gave reasons as to why she believed the process server, stating as follows:

> **"I am persuaded that the applicants were served with the summons hereto. I say this because, the 1st applicant has not disputed the allegation that he received the advocate's letter mentioned above. That letter although not proof of service, when read together with other documentary evidence adduced in this case, leaves one with no doubt that the applicants were duly served with summons to enter appearance. Instead of filing a defence, they resulted into unorthodox means of resolving the dispute like threatening the respondent."**

[**19**] We are urged to find that the learned Judge misdirected herself in taking into account extraneous matters. However, the circumstances show clearly that what the learned Judge took into account were actually relevant matters relating to how the appellants are alleged to have reacted, when served with the summons to enter appearance. The letter written by the respondent's advocate to the appellants soon after the service of summons, referred to the service and was therefore not irrelevant.

[20] The affidavit of service which was filed by the process server complied with Order 5 rule 15 of the Civil Procedure Rules in so far as it indicated the date, time and manner in which the appellant was served and identified the person who pointed out each appellant to the process server. Although no address of the person who pointed out was given, this was not a mandatory requirement and the omission did not vitiate the service.

[21] The learned Judge also considered the purported defence of the appellants and found that the same was no more than a mere denial. In the circumstances, we are satisfied that the learned Judge did not misdirect herself in exercising her discretion to set aside the ex parte judgment. The learned Judge properly considered the circumstances surrounding the ex parte judgment and took into account relevant factors. There is no justification for us to interfere with the exercise of her discretion.

Accordingly, we find no merit in this appeal. It is dismissed with costs.

DATED and delivered at Nairobi this 10th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR