IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 228 OF 2008

BETWEEN

KENNETH K. MWANGI…….....……....…….……....….. ……..APPELLANT

VERSUS

THE CITY COUNTY OF NAIROBI……...…….....……..…….....1ST RESPONDENT

NANAK HOSPITAL MANAGEMENT

SERVICES LIMITED……...……....…….2ND RESPONDENT

AND

FIDELITY COMMERCIAL BANK…….....…….……INTERESTED PARTY

(An appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Visram, J) dated 7th July, 2005 in H.C.C.A. NO. 232 OF 1996)

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JUDGMENT OF THE COURT

It has been 32 years plus since this dispute graced our judicial system and to date it remains unresolved with finality. This is totally unacceptable, inconceivable and does not augur well for our ability to resolve disputes brought before us timeously as a constitutional imperative. Yes there is a maxim that the wheels of justice grind slowly but surely. However we should not be lullabied into deep slumber by such maxims. There is need for the Judiciary to be proactive and take charge of matters placed before it rather than leave it to the parties to move it as and when they feel like. Had the court taken steps to manage these proceedings we doubt that they would have lasted in court this long.

The appellant was the registered proprietor of all that piece or parcel of land known as **LR NO. 209/ 3011/ 19** with the developments thereon being a 4 storeyed building situate along Kirinyaga road within

the Nairobi Central Business District (hereinafter "the suit property"). It was a rateable property within the meaning and ambit of the **Rating Act**. Under the powers conferred by **section 3** of the **Rating Act** the 1st respondent levied rates arrears and penalties aggregating to Kshs 259,396.50/ as at 31st May 1995 from the appellant. The appellant having failed, neglected and or refused to remit the amount to the 1st respondent, by a plaint dated 16th May 1995 the 1st respondent took out a suit in the Resident Magistrate's court at the City Court against the appellant praying *inter alia* for judgment in the said sum plus interest at 2% per month from 31st May 1995 until payment in full. According to the 1st respondent summons to enter appearance were duly issued and served on the appellant on the 19th September 1995. The appellant did not enter appearance or file a defence to the suit. As a consequence and on the application of the 1st respondent an *ex-parte* judgment in default of appearance was entered against the appellant.

In execution of the decree, the 1st respondent caused to be sold and transferred to the 2nd respondent the suit property on 25th December 1995. Seven months later on 29th July 1996 the appellant sought to set aside the exparte judgment plus all the consequential orders and to be granted leave to defend the suit. The main ground advanced in support of the application was that the appellant had never been served with summons to enter appearance. The application was opposed and by a ruling delivered on 21st August 1996, Mrs Ongeri, learned Resident Magistrate dismissed (as she then was) the application holding that it was too late in the day to do so as the judgment had been executed and the suit premises sold and transferred to a 3rd party, the 2nd respondent herein who had not been made a party to the suit or the application. This then led to an appeal to the High Court by the appellant. It is instructive that up to this stage the 2nd respondent had not been made a party to the suit. It was not until 24th June 2004 and at its insistence that it was made a party.

The appeal was heard by **Alnashir Visram J** (as he then was) who in a judgment rendered on 7th July 2005, dismissed the appeal on the grounds that the affidavit and the annextures in support of the application to set aside the *ex parte* judgment were incompetent having not been dated in violation of the **Oaths and Statutory Declarations Act**. This is how the judge rendered himself on the issue.

> ***"Mr Musyoka, counsel for the appellant, did not dispute that the affidavit, together with all the annextures, is not dated. This violates the Oaths and Statutory Declarations Act, Cap 15, and renders the said affidavit incompetent. Clearly this was overlooked by the lower court. If this fact had been brought to the attention of the learned magistrate, I think she would have struck it out. But the fact that she did not do so, or that it was overlooked, does not make that affidavit any more competent or proper than it was filed. A statutory declaration or an affidavit that offends the law, and is therefore incompetent, is incompetent ab initio. I cannot breathe life into it at this appellate stage. I, therefore, strike the same out, leaving the chamber summons application standing on its own, without any support. On that ground alone, the appellant's application dated 29th July 1996 to set aside the judgment would fail".***

The other ground upon which the appeal was disallowed was that the mere fact that there was no personal service of the summons does not necessarily mean that there was no service at all. The judge observed thus:

> ***"First, let me say that just because the service was not 'personal' did not necessarily render the same ineffective. There are circumstances when service may be effected on an agent or through an adult member of the defendant's family. Here, in this case, the Magistrate did not fully address that issue, and did not make a conclusive finding whether service was proper, because her mind was directed to one important issue that judgment had been executed, and it was too late to set it aside. I would concur with her conclusion. It was indeed too late in the day that the application to set aside was made. Judgment having been executed, the suit property having been transferred, the court could not possibly make orders in vain."***

Undeterred the appellant is now before us on second and perhaps last appeal. He has advanced five (5)

grounds upon which he hopes to impugn the decision of the High Court; that learned judge erred in law and fact in entertaining submissions regarding the competency of the appellant's affidavit in support of the application to set aside the *ex parte* judgment at the appellate stage when the issue had not been raised in the subordinate court , in holding that failing to date the affidavit and the annextures thereto was fatal to the appellant's application, failing to make a specific finding, as he ought to have, on whether or not there was proof of proper service of summons to enter appearance and plaint on the appellant, in concurring with the subordinate court that the judgment had been executed and the suit property transferred, it was too late in the day to make an application to set it aside, and finally that, the learned judge erred in law in failing to find that the learned magistrate had failed to exercise her unfettered discretion judicially.

With the agreement of the parties and our concurrence the appeal was canvassed by way of written submissions with limited oral highlights. The appellant in brief submitted that just by analysing the facts on record and the attendant documents there was no basis at all for the lower court and the High Court to fail to make a definite finding that there was no personal service on the appellant and set aside the exparte judgment. That this Court has previously held that nothing can stop a court from reversing any process if it has found that no service was effected upon an aggrieved party. For this proposition the appellant relied on the case of **Nyayo Bus Services Corporation V Firestone England E. A [1969] Limited C.A. No. 172** of **1998** and **Alice Kemunto Ondieki** & **Kennedy Obwaya Onsongo V Peter Njuguna Gachie Civil Application No. Nai 116 of 2014**. The appellant further submitted that this Court has also held on numerous occasions that even if service is proved to have been effected, in an application to set aside the *ex parte* judgment and leave to defend, the court needs to consider whether there is a valid defence being proffered by the defendant. If a valid defence exists the court, subject to payment of costs should exercise its discretion and allow the application. That in this case there was a draft defence annexed to the application in which the appellant averred that he had paid all the rates arrears, that under the **Rating Act, section 15** thereof a notice of default for non-payment of rates must be served upon a rate payer and only when the default persists that enforcement by filing a suit can be pursued under **section 17**. No such notice of default had been served on the appellant. To the appellant these were valid defences which the two courts below failed to consider. The appellant went on to submit that with such valid grounds of defence affecting such valuable property, the two courts below did not exercise their judicial discretion properly in declining to set aside the entire process. That this was a clear case where the judgment and all consequential orders ought to have been set aside without much ado. For this proposition the appellant relied on the case of **East African Power Management Limited VS Stephens Kithi Ngombo T/A Steve Kithi & Company Advocates eKLR**. It was submitted further by the appellant that once a judgment was deemed to have been entered falsely and illegally, the consequential actions cannot be allowed to stand simply because a third party has since entered the fray. That every court retains the inherent power and jurisdiction to undo all that has been done pursuant to an illegality in terms of **section 3A of the Civil Procedure Act** as well as **Sections 1A & B** of the same Act**.**

On the question of jurisdiction the appellant's case is that the Resident Magistrate's court did not have jurisdiction to issue a vesting order. Only the High Court could issue orders that affect title to land or order the registrar to make any entries in the register under **section 64 of the Registration of Titles Act** (repealed) and that vesting orders fall under such orders or directions which affect title to land. The vesting order thus issued was illegal and the court could not hold that such an illegality could not be remedied. On the issue of undated affidavit, the appellant maintains that it was not a substantive issue before the High Court. In not deciding on the appeal on the merits rather than the technical question of dating the affidavit, the learned Judge completely deviated into an arena that had not been canvassed. That in any event striking out an affidavit did not render the application incompetent and in the circumstances of this case even without the affidavit the application could still stand on its own and be canvassed as it had grounds.

Finally the appellant submitted that to dismiss the appeal in its entirety simply because the affidavit was undated was gross misdirection on the part of the learned Judge which this Court should remedy. That we are in a judicial era where courts must address parties grievances in their substance and merit and not jump at the mere technicality to circumvent the case of justice as underpinned by **Article 159 of the Constitution of Kenya**.

The first respondent neither filed written submissions nor was it represented at the hearing of the appeal. On its part the 2nd respondent through its written submissions took the view that though the issue of the undated affidavit was not raised in the subordinate court, it was because the 2nd respondent had then not been made a party to the suit. It was made such a party on 27th October 2004 in this Appeal and that is the time the issue could validly be raised. That the defects in the affidavit were not mere technicalities but fatal considering the import of **section 5 of the Oaths and Statutory Declarations Act** and **rule 9 of the Oaths and Statutory Declarations Rules**. That some of the annextures referred to in the affidavit were not even annexed. Accordingly the High Court was well within the law to act as it did. In the absence of the affidavit, there was no evidence to support the application and therefore the application was doomed to fail. With regard to the two authorities cited by the appellant, viz **Nyayo Bus Services** and **Alice Kemunto Ondieki** (supra), it was the 2nd respondent's view that those cases were clearly distinguishable with the facts obtaining in this case. In the instant case the suit property had been sold and transferred to the 2nd respondent who was not a party to the suit. In fact the suit property had already been charged to the Interested Party in this Appeal by 2nd respondent as security for the loan of Kshs 25,000,000/= advanced to it. Apparently, the 2nd respondent has since defaulted in its repayment schedule and in the exercise of its statutory power of sale, the Interested Party has flogged the suit property to yet another third party not yet enjoined in this Appeal as well. The 2nd respondent reiterated that once immovable property has been sold and transferred to a *bona-fide* purchaser for value there is sanctity of title. There was no fraud claimed against the 2nd respondent in the manner it acquired the suit property and if the appellant has any claim it should be in damages against the 1st respondent. On the question of the jurisdiction of the Resident Magistrate's Court to entertain the suit and issue vesting orders, the 2nd respondent submitted that it was being raised for the first time in this appeal. Accordingly it should be rejected.

The interested party did not file written submissions though it filed list of authorities. However on the application of its counsel and the other parties not objecting we allowed it to make oral submissions. It submitted that it was approached by the 2nd respondent for a loan on the security of the suit property. It carried out due diligence and being satisfied that there were no encumbrances to the suit property a loan of Kshs 25,000,000/= was subsequently disbursed to the 2nd respondent. However, the loan was not serviced properly leading to the interested party to exercise its statutory power of sale. As it were therefore the suit premises has been sold and transferred to a third party who is not a party to this appeal. Therefore it will be an exercise in futility to allow this appeal.

This is a second appeal and accordingly, our consideration of the same must be confined to matters of law only. The approach of this Court in such an appeal was succinctly stated in the case of **Kenya Breweries Ltd V Godfrey Odoyo**, **CA No 127 of 2007** as follows, by Onyango Otieno, JA:

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."***
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> See also **Zacharia Okoth Obado V Edward Akong'o Oyugi & 2 Others** [2014] eKLR.

Certainly some of the issues that the appellant has canvassed in this appeal are matters of fact, which we cannot delve into. Such matters include the emotional submissions on the paltry amount the suit premises were sold for, where the balance of the same is after paying the rates outstanding of Kshs 259,396.50/=, the whereabouts of the receipt acknowledging the said payment and the whereabouts of the certificate showing clearance of the stated rates before the alleged vesting order of the suit property was made. Similarly the assertion that the appellant was still in possession of the suit premises at the time he made the application to set aside the *ex parte* judgment and that all that was required was to set aside the *ex parte* judgment and cancel the vesting order and reinstate the status of the Land Register as it was before pending the full and *inter partes* hearing of the case and the fact that the suit premises is a 4 storeyed

building in Nairobi CBD whose value according to the appellant is currently in excess of Kshs 200,000,000/= and therefore a valuable property, and so warrant more care from court, are all matters of fact which, as already stated, should not really bother us.

To our mind there are only two issues of law in this appeal, namely the exercise of discretion by the two courts below and whether the High Court was right to strike out the affidavit in support of the application to set aside the *ex parte* judgment. We note though that through his written submissions the appellant has rather surreptitiously introduced the ground regarding the jurisdiction of the Resident Magistrate's Court to entertain the proceedings and to issue a vesting order. To the appellant such power is vested only in the high Court pursuant to the provisions of the Registration of Titles Act. In the circumstances of this case therefore, the vesting order issued by the Resident Magistrate's Court was in itself an illegality. The appellant has also invoked **Article 159 of the Constitution** for the very first time before us urging us to find that the High Court ought to have considered the parties' grievances on substance as opposed to technicalities.

We are in agreement with the 2nd respondent's submissions that these issues are being raised for the first time in this Appeal. They are not among the grounds of appeal filed in court. Nor has the appellant sought and obtained leave from this court to argue them. We have no justification at all to entertain the issues so late in the day. In the case of **George Owen Nandi V Ruth Watiri Kibe, CA No 39 of 2015** this Court observed as follows regarding new issues that are raised before it for the first time:

> ***"In general a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this Court is not to decide a point, which has not been the subject of argument and decision of the lower court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See Nyangau V Nyakwara [1986] KLR 712)".***

Similarly in the case of **North Staffordshire Railway Company V Edge [1920] A. C. 254**, Lord Birkenhead justified why an appellate court is reluctant to

entertain new issues on appeal in these terms:

> ***"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...***
>
> ***The efficiency and the authority of a court of appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake a decision which may be of the highest importance without having received any assistance at all from the judges in the court's below."***

We entirely agree with and endorse these observations and accordingly decline to entertain the new grounds urged before us by the appellant for the first time. In any event the proceedings in the two courts below pre-date the current Constitution of Kenya. Therefore **Article 159 of the Constitution** is of no help to the appellant.

Whether or not to set aside an *ex parte* judgment is an exercise in discretion by the court hearing the application. As we stated in the case of **James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another [2016] eKLR**

> ***" ... in such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take in 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 others."***

In refusing to set aside the *ex parte* judgment the two courts below considered the fact that since the entry of the default judgment, a decree had been extracted, executed and a vesting order made in favour of a third party who had not been made a party to the suit or the application at the time of the prosecution of the application. Accordingly, any order made would likely be in vain and courts do not act in vain. On her part the trial magistrate found as a fact that the appellant was in rates arrears

amounting to Kshs 306,000/= as at the time the suit property were sold on 15th December 1995, and that the appellant had paid Kshs 40,000/= on 5th January 1996 by which time the suit property had actually been sold. The High Court on its part delivered itself on the question of the execution of the judgment thus:-

> ***"..... Here, in this case, the Magistrate did not fully address that issue, and did not make a conclusive finding whether service was proper, because her mind was directed to one important issue that judgment had been executed, and it was too late to set it aside. I would concur with her on that conclusion. It was indeed too late in the day that the application to set aside was made. The judgment having been executed, the suit property having been transferred, the court could not possibly make orders in vain".***

Did the two courts below err in deciding the fate of the application on the foregoing basis? As we have already demonstrated, the power of the court on an application to set aside a judgment in default is discretionary. We must then recall the principles that guide an appellate court in determining whether to interfere with such exercise of discretion. In the case of **United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd** **(1985) E. A 898**, Madan J.A. (as he then was) espoused the principles as follows:

> ***"The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that 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 the decision, Albeit a discretionary one, is plainly wrong."***

As already stated in dismissing the application the two courts below considered the fact that the application had come too late in the day, the decree had been executed and the suit premises sold and transferred to another party who the appellant had failed to enjoin in the suit, the possibility of making orders in vain, the prejudice that may ensue to one of the parties and of course the interest of justice. There is no doubt at all that these were relevant considerations in the circumstances of this case. It cannot therefore be said that by the two courts below exercising their discretion on this basis they erred in law. They cannot be accused of misdirecting themselves in law, misapprehending the facts, taking in to account irrelevant considerations as opposed to relevant and so forth. We discern no misgivings at all in the manner the two courts exercised their discretion. Had the appellant joined the third party who had purchased the suit property at the time of lodging and prosecuting the application as he already knew that the suit property had already been sold, perhaps different considerations would have come into play and different conclusions reached. It is not in dispute that thereafter the 2nd respondent charged the suit property to the interested party for a loan of Kshs 25,000,000/=. It defaulted in servicing the loan and in the exercise of its statutory power of sale, the interested party off loaded the suit property yet to another third party who was not made a party to the appeal in the High Court nor has it been made one in this appeal. The

issue of prejudice and being condemned unheard in respect of these third parties becomes a relevant consideration, not forgetting the question of the courts making orders in vain.

The appellant made a lot of hay on the question of personal service. He took the view mistakenly though, that the only mode of service of court on a person is personal service. As the learned judge of the High

Court correctly observed

> ***".....just because the service was not 'personal' did not necessarily render the same ineffective in law". There are circumstances when service may be effected on an agent or through an adult member of the defendant's family.***

There is no doubt that this is correct proposition of law. In this case it was claimed that service was effected upon one Ng'ang'a, a tenant of the appellant in the suit premises as well as on an alleged agent. Both courts below did not fully address that issue because they determined the application on other grounds already discussed elsewhere in this judgment in their unfettered discretion. We cannot hold that, that was wrong exercise of discretion. Each case must of course turn on its own peculiar facts. Even if the two courts below had considered the issue, we doubt whether it would have gone the appellant's way given that there is evidence by way of an affidavit that the appellant knew the said Nganga as his tenant yet he never caused him to swear an affidavit to counter the depositions of the process server in his affidavit of service in support of the application for judgment in default of appearance. Similarly, one would have expected the appellant to ask for the process

server to be availed for purposes of cross-examination on his affidavit if the appellant strongly believed that he was never served with the court papers.

On the question of the undated affidavit, we do not agree with the appellant that the 1st Appellate Court had no jurisdiction to entertain it. First, this was a first appeal as such the court was entitled to re-examine the material laid before the Magistrate's Court, reappraise it and reach its own conclusion. Indeed it is in the nature of a rehearing. (See **Bidco Oil Refineries Limited V Rosslyn Development Limited [2006] eKLR** where this Court expressed itself thus:

> ***"An Appellate Court also has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand, but this is a jurisdiction which should be exercised with caution."***

Secondly this was an issue of law. Thirdly, the appeal was not filed by the 2nd respondent so as to make it a ground of appeal. As already stated the 2nd respondent only came in to the picture on 27th October 2004 and on its own application. Accordingly this issue could only have been raised once it joined the appeal. Of course if the affidavit is defective it goes to the very substance of the application. Without the evidence in support of the application normally by way of the affidavit, the application is left bare and unlikely to succeed.

Section 5 of the Oaths and Statutory Declarations Act stipulates that:

> ***"Every commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made".***

There is no doubt at all that the use of the word "shall" connotes the mandatory nature of the requirement. The appellant does not dispute the fact that the affidavit was not dated. It must be appreciated that this Appeal was decided on 7th July 2005 before the advent of the current constitution as well as the overriding objective and or oxygen principles that now compel courts to look more to the substance of the case as opposed to technicalities. We are certain that if confronted with a similar application in the current dispensation the judge most probably may reach a different conclusion. However we cannot fault the learned judge for applying the law as it was then.

On the whole, we are satisfied that this Appeal is bereft of merit and the same is for dismissal with costs. It is so ordered.

Dated and delivered at Nairobi this 14th day of July, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR