



REPUBLIC OF KENYA



**China Road and Bridge Corporation v Mboo (Appeal 5A of 2020)
[2025] KEELRC 515 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 515 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL 5A OF 2020
MA ONYANGO, J
FEBRUARY 20, 2025
FORMERLY MACHAKOS HIGH COURT CIVIL APPEAL NO. 135 OF 2019)
BEFORE HON. LADY JUSTICE MAUREEN ONYANGO**

BETWEEN

CHINA ROAD AND BRIDGE CORPORATION APPELLANT

AND

KIMUYU MBOO RESPONDENT

(Being an Appeal from the Ruling of the Honourable C. C. Oluoch Chief Magistrate (CM) delivered on the 30TH day of October, 2019 in Mavoko CMCC No. 106 of 2016)

JUDGMENT

1. The Appeal herein arises from the decision of Hon. C. C Oluoch, Chief Magistrate in Mavoko CMCC No. 106 of 2016 delivered on 30th October, 2019. The decision was in respect of a ruling in on an application by way of Notice of Motion dated 19th August, 2019 filed through Prof. Albert Muma & Company Advocates.
2. In the application the Appellant herein who was the Defendant in the suit before the trial court sought the following orders:
 - a. This Application be certified as urgent to be heard forthwith and ex-parte in the first instance.
 - b. The execution of the judgment entered herein and all consequential, decree, orders and proclamation, attachment and execution process be stayed, suspended and/or lifted pending the hearing and determination of this Application.
 - c. This Honourable court be pleased to set aside, review and/or vary the judgment entered herein as against the Defendant/ Applicant and allow this matter to proceed to full trial on merits.



- d. This Honourable court be pleased to order the Plaintiff/ Respondent to serve the Applicant with summons to enter appearance and Plaintiff and to grant leave to the firm of Prof. Albert Mumma & Company Advocates, 5th floor, suite no. 1 and 2, 5th Ngong Avenue, P.O Box 10481-001000 Nairobi to come on record for the Defendant/ Applicant.
 - e. The Honourable Court be pleased to grant leave to the Defendant to file its Statement of Defence annexed herein and the same be deemed as duly filed upon payment of the requisite fee.
 - f. This Honourable court be pleased to issue any order it may deem fair and appropriate in the circumstances of this case.
 - g. The costs of this Application be provided for.
3. The Application was opposed by the Respondent herein who was the Plaintiff in the suit in the trial court through a replying affidavit sworn on 9th September, 2019.
 4. Upon hearing the parties and considering submissions filed in respect of the application, the Hon. Chief Magistrate rendered her ruling on 30th October, 2019 dismissing the application with costs.
 5. Aggrieved by the dismissal of its application, the Appellant instituted the instant appeal through its Memorandum of Appeal dated 30th October, 2019 in which it raises the following Grounds of Appeal:
 - a. The Learned Magistrate erred in law and in fact by failing to consider the fact that the subject claim before her fictitious and null and void ab initio.
 - b. The Learned Chief Magistrate erred in law and in fact in failing to find that the Appellants herein were condemned unheard and a failure of justice occasioned by dismissal of the Application.
 - c. The Learned Magistrate erred in law and in fact and misdirected herself in failing to take cognizance of the fact that the Applicant was never served with summons to enter appearance and that service of summons upon the Applicants insurers is not the same as serving the same on the Applicant as required in law.
 - d. The Learned Chief Magistrate erred in law and fact in failing to consider the mandatory requirements of Article 50 of *the Constitution* which guarantees a fair hearing before any Court of law.
 - e. The Learned Chief Magistrate erred in law and fact in failing to apply the Constitutional principle of substantive hearing and determination of disputes on merit without undue regard to procedural technicalities as provided in Article 159 of *the Constitution*.
 - f. The Learned Chief Magistrate failed to appreciate and apply the write legal principles for setting aside ex-parte judgment which encourages matters to be determined on merit.
 - g. The Learned Chief Magistrate erred in law and in fact in failing to consider the public interest in the matter which requires courts Not to encourage abuse of its processes through filing and prosecution of fictitious accident claims.
 - h. The learned Magistrate erred in law and fact by failing to find that the Applicants herein were condemned unheard thus leading to a miscarriage of justice.



- i. The Learned Magistrate failed in law in refusing to uphold the Appellant's rights both under *the Constitution* and the *Civil Procedure Act* to defend themselves against the Respondents fictitious claim herein.
 - j. The Learned Magistrate wholly erred in law and fact in arriving at the said decision consequently causing a miscarriage of justice.
6. The Appellant prayed that:
- a. The Honourable court be pleased to set aside and/or review the judgment entered herein as against the Appellant and all consequential decree, orders, proclamation, attachment and process.
 - b. The matter be remitted back to the Chief Magistrates Court for hearing on merit before any Magistrate other than Hon. C. Oluoch.
 - c. Costs of the Appeal be awarded to the Appellant.
7. The appeal was initially filed in the High Court at Machakos but was by a ruling dated and delivered in Machakos on 5th February, 2020, transferred to this court for hearing and determination on grounds that the High Court did not have jurisdiction over the same, being an appeal arising out of an employment relationship.
8. The Appeal was disposed of by way of written submissions. The Appellant's submissions are dated 24th January, 2023 and filed on 1st February, 2023 while the Respondent's submissions are dated 10th February, 2023 and filed on 21st February, 2023.

Submissions of the Appellant

9. The Appellant condensed its 10 grounds of appeal into 3 issues for determination as follows:
- i. Whether the Honourable Court erred in law and in fact by dismissing the Appellants Application dated 19th August, 2019 by declining to set aside the ex-parte judgment entered on the 5th September, 2018 thereby condemning the Appellant Unheard?
 - ii. whether the Honourable court erred in law and in fact by dismissing the Appellants application dated 19th August, 2019 and by failing to set aside the ex-parte Judgment on the basis that the matters in question are a preserve of the Director of Occupational Safety and Health by dint of section 23 of the *Work Injury Benefits Act*?
 - iii. Whether the Honourable court erred in law and in fact by dismissing the Appellants Application dated 19th August, 2019 on the basis that the Defence on record did not raise any triable issues and consisted of mere denials?
10. On the 1st issue the Appellant submitted that the striking out of its application for setting aside ex parte judgment by the trial court was contrary to its right to fair hearing as provided in *the Constitution* and thereby condemned the Appellant unheard. In support of this argument the Appellant cited and relied on the decision in Marion Kaairi v Elisha Mbogo Nthiga [2016] eKLR in which the court quoted with approval the decision in Patel v E.A. Cargo Handling Services (1974) EA 75 where at page 76C and E the court observed:

Where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence



on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie Defence which should go to trial for adjudication.

11. The Appellant further relied on the decisions in *Tree Shade Motors Ltd v DT Dobie & Anor* (1995-1998) 1 EA 324; *Northwood Development Company Limited v Husein Alibhai Pirbhai & 2 Others* [2015] eKLR in which the case of *Kenya Tea Growers Association & Another v Kenya Plantation & Agricultural Workers Union Civil Application Nai. No. 72 of 2001* was cited; *Peter Karumbi Keingati & 4 Others v Ann Nyokabi Nguthi & 4 Others* [2015] eKLR; and *Seven Seas Technologies Limited v Eric Chege* [2014] eKLR.
12. The appellant submits that among the issues raised in the defence were that the occupational accident which is the subject of the suit was fictitious and that the Respondent was not an employee of the Appellant.
13. It is submitted that the second triable issue raised by the Appellant was jurisdiction of the trial court to hear the claim which is paramount and goes to the root of the entire suit.
14. The Appellant submitted that the trial magistrate took into account unnecessary considerations in exercising her discretion and misdirected herself in finding that the defence did not raise any triable issues. The Appellant relied on the decision in *CMC Holdings Ltd v Nzioki* as quoted by Odunga J as he then was in *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 Others* [2013] eKLR.
15. It was further the submission of the Appellant that the trial magistrate should have considered the facts and circumstances both prior and subsequent and the perspective merits of the parties in her consideration of the application filed by the Appellant. That the court instead concentrated on the weaknesses of the defence filed in order to drive away the Appellant from the seat of justice.
16. For emphasis reliance was further placed on *Sebei District Administration v Gasyali & Other* as quoted by Waithaka J. in *Marion Kaairi v Elisha Mbogo Nthiga* where the court stated that ...to deny the subject a hearing should be the last of a court. It is wrong under all circumstance to shut out a defendant from being heard.
17. The Appellant further relied on the decision in *Isaac Awuondo v Vishva Builders Limited Civil Appeal No. 296 of 2004* where the court stated that if the Defence raises even one bona fide triable issue the defendant must be given leave to defend.
18. The Appellant further relied on the decision in *CMC Holdings Ltd v Nzioki* in which *Shah v Mbogo* (1967) was quoted to the effect that the defence already on record should have been considered to establish if the same raised any triable issues besides considering why the defence was not filed in time or why the applicant failed to turn up in court for the hearing.
19. It is submitted that Article 159 of *the Constitution* espouses the court to render justice without undue regard to procedural technicalities. That the matter raised by the Appellant ought to be determined on merit and not through technicalities as the defence presented raised sufficient triable issues warranting a hearing.
20. On the 2nd issue whether the trial court erred in law and fact by dismissing the Appellant’s application and failing to set aside the ex parte judgment on the basis that the matter before the court was a preserve of the Director of Occupational Safety and Health by dint of section 23 of the *Work Injury Benefits Act*, the Appellant submitted that the firm of L. W. Wang’ombe ceased to act for the Appellant upon being instructed that the Respondent was a fictitious employee who had filed a fictitious suit to enrich himself.



21. It is submitted that the trial magistrate misconstrued the law on compensation and the process envisaged under WIBA Act and thereby misdirected herself when she dismissed the Appellant's application. For emphasis the Appellant cited and relied on the decisions in Attorney General v Law Society of Kenya & Another [2017] eKLR; Corporate Insurance Company Limited v Wamutwe HCC 500 of 2009; Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & Another [2014] eKLR where the Judge quoted Lord Denning in Escoigne Properties Ltd v Commissioner (15) [1958] A.C at 565; Heydoni case (1584) 3 Co. Rep 70 [1957] All ER 2.91. The Appellant further relied on several other cases where the courts discussed the mischief rule of interpretation of statutes.
22. On the 3rd issue whether the trial court erred in law and fact by condemning the Appellant unheard the Appellant submitted that upon the suit being instituted vide a plaint dated 10th February, 2016 by the Respondent who was never an employee of the Appellant, the Plaintiff's advocates forwarded the same to the Appellant's insurance without serving the Appellant.
23. It is submitted that the failure to serve the Appellant was a miscarriage of justice as the Appellant was not aware of the proceedings. That this is confirmed in the Respondent's replying affidavit sworn on 9th September, 2019 in response to the Appellant's application dated 19th August, 2019.
24. It is submitted that the Law Firm of L.W. Wang'ombe & Company Advocates was instructed by the insurance company without informing the Appellant about the existence of the suit. That the said firm of advocates applied to cease acting vide application dated 14th August, 2017 and were allowed to cease acting by the court on 6th November, 2017 following which the suit was heard *ex parte* on 20th June, 2018. That no hearing notice was served upon the Appellant.
25. It is submitted that the Appellant only became aware of the existence of the suit when it was served with proclamation notice by Sadique Entrprises Auctioneers on 14th August, 2019. That the Appellant filed its application dated 19th August, 2019 seeking to set aside that *ex parte* judgment since it was not aware about the proceedings.
26. For emphasis the Appellant relied on the decision in Yonah Namachemo Wafula v Michael W. Wanyonyi & 3 Others and Christine Nafula Odeke & Others Interested Parties where the courts held that counsel would only act on the instructions of the client and cannot be expected to move the court without instructions.
27. It is further submitted for the Appellant that Order 9 Rule 2 provides for agents of parties. The Appellant submitted that service on the Respondent was insufficient relying on the decision in Pravinchandra Jamnadas Kakad v Lucas Oluoch Mumia [2015] eKLR where the court observed that wherever it is possible service should be made on the Defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
28. It is submitted that the Law Firm of L.W. Wang'ombe & Company Advocates ceased acting for the Appellant without informing the Appellant of the same.
29. In conclusion, the Appellant submitted that Article 159 of the Constitution stipulates that justice should be administered without undue regard to procedural technicalities. That this concept was applied in JR. Misc. Application No. 36 of 2016 where Odunga J (as he then was) restated the principle of natural justice that no man should be condemned unheard and that both sides must be heard before passing any order. It is submitted that the Appellant was condemned unheard. That the appeal should be allowed so that the Appellant can be heard.



Respondent's Submissions

30. In the Respondent's submissions dated 10th February, 2023 it identified a single issue for determination being whether or not the court can set aside the judgment herein.
31. The Respondent submitted that the appeal is governed by Order 10 Rule 11 of the Civil Procedure Rules which provides that where judgment has been entered under the said order the court may set aside or vary the judgment and any consequential decree or order upon such terms as are just.
32. That in the case of Patel v EA Cargo Handling Services LTD the court observed that the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. That the court will not usually set aside judgment unless it is satisfied that there is a defence on the merits. The court explained that a defence on the merits does not mean a defence that must succeed but one that raises a prima facie defence and which should go to trial for adjudication, as put by Sheridan J.
33. The Respondent further relied on the decision in Mohammed & Another v Shoka [1990] KLR 463 where the court observed that the test for the correct approach in an application to set aside default judgment are firstly whether there is a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay.
34. It is submitted that summons to enter appearance were served upon the Appellant who entered appearance and filed defence through the firm of L.W. Wang'ombe & Company Advocates.
35. It is submitted that the appeal turns on two key aspects: whether service of summons to enter appearance was duly effected upon the Appellant and whether the default judgment was regular.
36. It is submitted that the Appellant's argument that it was condemned unheard is misleading. That the proceedings in the lower court reveal that the firm of L.W. Wang'ombe & Company Advocates was on record for the Appellant and it beats logic that the firm would come on record without the Appellant's instructions.
37. That even after the firm ceased acting the Respondent's counsel served the Appellant. That a copy of the invitation to fix hearing date was served and received by one Mr. Joel Khamala. That the Respondent however did not attend court for fixing of hearing date and an ex parte date was taken which was again served upon the Appellant and received by one Mr. China Dutch, a man of Chinese extraction. That pursuant to the hearing notice Mr. Victor Mwendwa Muthoka, HR Manager for the Appellant, attended court on 28th March, 2018, being the hearing date and requested for time to appoint an advocate to represent the Appellant in the matter. The adjournment was granted and the case fixed for hearing on 20th June 2018 by consent.
38. That the court record indicates that the Appellant did not attend court on 20th June, 2018, a date taken by consent, when the case proceeded in the absence of the Appellant and its case was closed.
39. It is submitted that the instant appeal would turn on the discretion of the court. That the Appellant ought to confirm that there is a defence on record and that the Respondent will not suffer prejudice.
40. It is submitted that the trial court made a finding that there was no defence on merit on the record as the defence filed on 3rd October, 2016 by the Law Firm of L.W. Wang'ombe & Company Advocates consisted of mere denials. That the Appellant attempted to put another defence on record together with its application which was rejected as there was already a defence on record.



41. It is submitted that the Appellant was aware about the suit in the lower court based on the fact that there is a defence on record and several of its representatives attended court on its behalf in the lower court. It is further noted that the hearing date was taken by consent.
42. It is submitted that the Respondent will be prejudiced as it has paid further court fees which cannot be refunded. That allowing the appeal will defeat the ends of justice as the Appellant was aware about the suit.
43. The Respondent relied on the decision in *Ternic Enterprises Limited v Waterfront Outlets Limited* [2018] where the court quoted *Postal Corporation of Kenya v Inamdar & 2 Others* where while addressing a similar issue the court stated:

“With a view to eliminate delay in the administration of justice which would keep litigants out their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by order 35 subject to there being no triable issues which would entitle a Defendant leave to defend...”
44. The Respondent further relied on the principles set out in *Mbogo v Shah* (1968) EA 93 and *Kenya Orient Insurance Limited v Cargo Stars Limited & 2 Others* [2017] eKLR that the discretion to set aside a default judgment under Order 10 Rule 11 is intended to be exercised “to avoid injustice or hardship resulting from 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.
45. The Respondent concludes by submitting that the appeal is unmeritorious and should be dismissed on grounds that no plausible explanation has been proffered on why the Respondent failed to participate in the hearing on a date taken by consent; there is no defence on the merits on record and the Respondent stands to suffer prejudice because of the delay in accessing the fruits of his judgment.

Analysis and determination

46. I have considered the grounds and record of appeal and the submissions by the parties. The issues arising for determination are whether the Appellant has satisfied the conditions for setting aside default judgment and if the trial court erred in dismissing the Appellant’s appeal for setting aside the default judgment.
47. This being a first appeal, this court is obliged to re-assess, re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore give an allowance for that. [See *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 12].
48. This court further ought not to interfere with the exercise of the discretion by the trial court unless it is satisfied that the trial court’s decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong conclusion [See *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88 IKAR 278]. Further, in the re-evaluation of the trial court’s evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case. [See Supreme Court of Uganda’s decision in *Uganda Breweries Ltd v Uganda Railways Corporation* [2002] 2 EA 634 and *Odongo and Another v Bonge* Supreme Court Uganda Civil Appeal 10 of 1987 (UR).



49. The application from which the instant appeal arose is dated 19th August 2019 and sought the following orders:
- a. This Application be certified as urgent to be heard forthwith and ex-parte in the first instance.
 - b. The execution of the judgment entered herein and all consequential, decree, orders and proclamation, attachment and execution process be stayed, suspended and/or lifted pending the hearing and determination of this Application.
 - c. This Honourable court be pleased to set aside, review and/or vary the judgment entered herein as against the Defendant/ Applicant and allow this matter to proceed to full trial on merits.
 - d. This Honourable court be pleased to order the Plaintiff/ Respondent to serve the Applicant with summons to enter appearance and Plaintiff and to grant leave to the firm of Prof. Albert Mumma & Company Advocates, 5th floor, suite no. 1 and 2, 5th Ngong Avenue, P.O Box 10481-001000 NAIROBI to come on record for the Defendant/ Applicant.
 - e. The Honourable Court be pleased to grant leave to the Defendant to file its Statement of Defence annexed herein and the same be deemed as duly filed upon payment of the requisite fee.
 - f. This Honourable court be pleased to issue any order it may deem fair and appropriate in the circumstances of this case.
 - g. The costs of this Application be provided for.
50. The grounds in support of the Application both on the face of the application and in the supporting affidavit of MARY KIMANI the Human Resource Officer of the Applicant were that the plaintiff (who is the Respondent in the appeal) filed a fictitious claim arising from a purported accident on 29th October, 2015. That the Plaintiff irregularly obtained judgment after deliberately failing to serve the applicant (the Appellant herein) with summons to enter appearance and misleading the court that there was proper service.
51. It was the Appellant's averment that the affidavit of service for the service of summons was false. Further, that the Respondent was at the material time not an employee of the Appellant.
52. It was the averment of the Appellant that the Respondent had instructed Sadique Enterprises Auctioneers to attach the Appellant's property and the Auctioneer had proclaimed and undervalued the Appellant's property and was likely to proceed to sell the same thereby occasioning the Appellant irreparable damage.
53. Upon hearing the application the trial court delivered its ruling on 30th October, dismissing the application with costs. It was the finding of the trial court that the record showed the Appellant was served with summons and there was an appearance by the firm of L.W. Wang'ombe who had also filed defence. That the said firm of advocates further filed a list of documents and list of witnesses.
54. It was further the finding of the trial court that pre-trial directions was done on 9th November, 2016 and the suit fixed for hearing on 8th March, 2017. That on the hearing date counsel for the Respondent filed an application to cease acting which application was allowed on 8th November, 2017.
55. The trial court made a further finding that the Respondent fixed the suit for hearing and served hearing notice. That on the hearing date one Victor Mwendwa Muthoka, a human resource manager attended court and requested for time to engage another advocate, which application was not opposed by the Respondent's counsel. The suit was then by consent fixed for hearing on 20th June 2018 when the



Appellant did not appear and the suit proceeded ex parte and judgment was delivered on 5th September, 2018.

56. The trial court found that in view of the background given in the ruling, it could not be true that the Appellant was not served with summons to enter appearance and pleadings. The court specifically found that the Defendant duly received the summons as well as pleadings and filed a defence. The Defendant was also made aware that the advocate on record had ceased acting and the court duly gave the said party an opportunity to engage another advocate. The Defendant chose not to attend court on the hearing date fixed by consent. The Judgment on record is therefore regular.
57. It was further the finding of the trial court that there was a judgment on record, that the Appellant's draft defence could not be considered as there was a valid defence on record which had not been withdrawn. That the defence on record contained mere denials and did not raise any points of law.
58. It was further the finding of the trial court that although a list of witnesses had been filed no witness statements were filed by the firm of L.W Wang'ombe by the time it ceased to act and it was unlikely that if the judgment was set aside the Appellant would call any witnesses at the hearing.
59. The court further held that the Respondent would suffer prejudice as he had paid further court fees in the sum of Kshs. 33,980 which cannot be reimbursed.
60. In the appeal the Appellant submitted that it has a good defence which the trial court did not consider. The said defence is not on record. There is a defence on record which it did not seek to replace in its application before the trial court. No mention is made in the appeal of the finding of the trial court that there was already a valid defence on record, which defence did not raise any triable issues.
61. The Appellant can therefore not make any submissions on the basis of a defence that was never admitted on record. The only defence validly on record is the one filed by L.W. Wang'ombe & Company Advocates which the Appellant did not pray to withdraw, replace or to amend.
62. In view that the Appellant has not commented on the defence on record at the trial court, I will take it that what the Respondent has submitted and what is in the ruling of the trial court to the effect that the defence on record does not raise any triable issues is the correct position. This is reinforced by the fact that the Appellant saw the need to file a fresh defence in respect of which unfortunately it did not pray for. If there was a good defence on record the Appellant would not have sought to file another defence.
63. The other issue raised is that the Appellant was not served with summons to enter appearance and pleadings. The finding of the trial court was that there was proper service as was evident from the affidavits of service and the fact that the Respondent appeared in court through its representatives.
64. This court is disadvantaged as the record of appeal does not contain the affidavits of service which the Appellant for whatever reason, did not find necessary to include in the record of Appeal. However, going by the record of proceedings before the trial court, it is evident that the Appellant was properly served and was aware about the proceedings and indeed sent representatives to attend court after L.W. Wang'ombe ceased acting for the Appellant.
65. The other issue raised by the Appellant in its submissions is the jurisdiction of the trial court to handle the matter being that it arose from the Work Injury Benefits Act. This issue was neither raised in the trial court and nor has it been raised in the grounds of appeal.
66. Even if I took it that issues of jurisdiction can be raised at any time, still this would not be relevant as the accident occurred in 2015 when the judgment in Attorney General v Law Society and another (supra)



had not been delivered by the Court of Appeal and the prevailing position was that in the decision of the High Court which reinstated the common law position on work injuries.

67. On the Appellants arguments on application of Article 159 of *the Constitution*, the Court of Appeal while discussing the subject in *Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 others* [2011] eKLR held:

“... Article 159 (2) (d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents. The court in that regard exercise judicial discretion”.

68. Similarly in *Nicholas Salat v IEBC & 6 others*, CA (Application) No. 228 of 2013, the Court of Appeal further held that: -

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

69. As stated above, the appeal herein is in respect of an application before the trial court which sought orders setting aside of the ex-parte judgment dated 5th September, 2018. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence. The principles applicable under this rule were laid down by the Court of Appeal in *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR and restated in *Toshike Construction Company Limited v Harambee Co-operative Savings & another* [2019] eKLR as:

- (a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E
- b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA
- c. Thirdly the 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. Mbogo v Shah [1968] EA 93."

70. In the instant case there was an advocate on record who filed a defence. As has been observed above, the advocate withdrew from acting and the Appellant was served and sent a representative to court and a date was taken for hearing by consent. On the hearing date the Appellant failed to attend court and the suit proceeded ex parte.
71. Although courts have wide powers to set aside ex parte judgments, the law limits the threshold within which such discretion is to be exercised. In the instant case the Appellant has failed to acknowledge that it was properly served even though the record shows otherwise. It has further insisted that it was condemned unheard even though it has a defence on record and sent a representative to court.
72. The prayers sought by the Appellant are equitable in nature and it would serve the Respondent well if it conceded that it made errors and explained what exactly happened after Mr. Victor Mwenda Muthoka attended court on 28th March, 2018 and sought an adjournment for the Appellant to instruct counsel.
73. It would also have been excusable if the appellant had perused the record and acknowledged that there was a defence on record and perhaps sought to amend or replace the same, which it did not.
74. A party who comes to equity must do so with clean hands and must be prepared to acknowledge its errors so that the court can determine whether or not such errors are excusable.
75. In the case of Republic v Speaker Nairobi City County Assembly & another Ex Parte [2017] eKLR, it was held that blunders will continue being made and that just because a mistake had been made by a party does not mean that he should not have his case heard on merit. (See Article 50 of *the Constitution*). Further in the case of Prime Bank Limited v Paul Otieno Nyamodi [2014] eKLR, it was held that it did not follow that just because a mistake had been made, a party should suffer the penalty of not having his case heard on merit.
76. However, a party who does not acknowledge its errors which are obvious on the face of the court record does not deserve the discretion of the court to be exercised in its favour. A court should not assist a party who has "deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice" as was held in the case of Shah v Mbogo (Supra). It is for this reason that I find the appeal herein unmeritorious and dismiss it with costs.

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 20TH DAY OF FEBRUARY 2025

MAUREEN ONYANGO

JUDGE

