



REPUBLIC OF KENYA



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**GA Insurance Limited v Ainu Shamsi Automobile & Hardware Ltd & 4 others
(Civil Suit 915 of 2013) [2023] KEELC 415 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 915 OF 2013
JO MBOYA, J
JANUARY 26, 2023**

BETWEEN

GA INSURANCE LIMITED PLAINTIFF

AND

AINU SHAMSI AUTOMOBILE & HARDWARE LTD 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

PERMANENT SECRETARY, MINISTRY OF LANDS 3RD DEFENDANT

THE DIRECTOR OF SURVEY 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Vide Notice of Motion Application dated the 27th of October 2022, the 1st Defendant/Applicant herein has approached the Honorable Court seeking the following Reliefs:
 - i. This Application is certified urgent and may be heard ex parte in the first instance.
 - ii. Pending the hearing and determination of this Application inter-partes, there be a stay of the execution of the judgment of this Court entered on 18th March, 2022 by the Honorable Mr. Justice Oguttu Mboya and Decree issued on the 4th of April, 2022.
 - iii. Pending the hearing and determination of this Application Inter-partes, there be a stay of execution of the Certificate of Taxation issued in favour of the Plaintiff and the Plaintiff's advocates on the 21st of July, 2022.



- iv. Pending the hearing and determination of this Application Inter-partes, there be a stay of the attachment by proclamation made under the Plaintiff's instructions by M/S Cash Gate Auctioneers on 6/10/2022.
- v. Upon hearing the parties Inter-partes, the order made on the 3rd of June, 2014 and issued on the 26th of June 2014 in the absence of and without the participation of the 1st Defendant be set aside.
- vi. Upon hearing this Application inter partes, the Judgment and Decree of this Court respectively entered on 18th March 2022 by the Honorable Mr. Justice Oguttu Mboya and issued on the 4th of April, 2022, to wit –
 - a. THAT the Title over and in respect of L.R. No. 209/20292 be and is hereby cancelled and/or nullified.
 - b. THAT the Titles over and in respect of L.R. No's 209/20038 and 209/1 0853, be and are hereby restored and/or reinstated.
 - c. THAT the 2nd and 5th Defendants be and are hereby ordered and/or directed to restore and/or re-establish the boundary beacons relating to the boundaries between L.R. No's 209/11930 and 209/20038 and 209/10853, respectively.
 - d. THAT the re-establishment and/or restoration of the boundary beacon herein is to be carried out and/or undertaken within 30 days and the costs of the restoration be borne by the Plaintiff herein.
 - e. THAT the 1st Defendant be and is hereby ordered to demolish the wall erected on the 76.29-meter access neck, which falls within and/or forms part of L.R. No. 209/11930 and same be demolished within thirty (30) days from the date hereof.
 - f. THAT in default by the 1st Defendant to demolish the offensive wall within the designated thirty (30) days from the date herein, the Plaintiff herein shall be at liberty to demolish same and costs of such demolition shall be certified and same shall be recovered as part of costs of the suit and all consequential process and orders are reviewed and set aside.
- vii. Upon hearing this Application inter-partes, the Certificate of Taxation issued in favor of the Plaintiff and the Plaintiff's advocates on the 21st of July, 2022 be set aside.
- viii. Upon hearing of this Application inter-partes, the proclamation and attachment made by M/S Cash Gate Auctioneers 6/10/2022 under the Plaintiff's instructions be stayed and is set aside.
- ix. Upon hearing this Application inter-partes, the 1st Defendant is granted leave to defend the suit and shall file Defense with or without counterclaim, List of Documents and List of Witnesses within 30 days of this order.
- x. The suit shall be set down for case management conference on priority basis.



- xi. The costs of this Application shall be costs in the suit.
2. The instant Application is premised and anchored on various grounds which have been enumerated at the foot thereof. Besides, the Application is further supported by the affidavit of Mohamed Rashid Muhamud sworn on the 27th of October 2022 and a Further Affidavit sworn on the 17th of January 2023.
3. Upon being served with the instant Application, the Plaintiff filed an elaborate Replying Affidavit, running to 14 paragraphs, but with numerous sub-headings and consequential, bullet points attendant thereto.
4. On the other hand, the 2nd, 3rd, 4th and 5th Defendant neither filed a Replying Affidavit nor Grounds of Opposition to the instant Application.
5. Be that as it may, the Application herein came up for Hearing on the 24th of January 2023, whereupon same was canvassed and ventilated vide oral submissions.

SUBMISSIONS BY THE PARTIES

APPLICANT'S SUBMISSIONS

6. Learned Counsel for the Applicant raised, highlighted and amplified five salient issues for consideration by the court.
7. First and foremost, learned counsel for the Applicant submitted that the Applicant is a Limited liability company duly incorporated pursuant to the provisions of the *Companies Act*, Chapter 486 Laws of Kenya (now repealed and replaced) by *Companies Act* 2015).
8. To the extent that the Applicant is a limited liability company, learned counsel contended that service of court process could only therefore be effected upon the Applicant company through the Directors, Company Secretary or such other principal officer of the company duly authorized to receive court process.
9. However, in respect of the subject matter, learned counsel submitted that no service was ever effected upon the Applicant's company either as required under the law or at all.
10. In addition, counsel has further submitted that the person who is alluded to and referred to as George and upon whom service is purported to have been effected upon, is totally unknown to the Applicant company.
11. Furthermore, counsel added that the Applicant company does not have any director, company secretary or principal officer by the name of George, either as alleged or at all. In this regard, it was contended that the purported service on (sic) George, on behalf of the Applicant was therefore a nullity.
12. Secondly, counsel for the Applicant has submitted that where summons to enter appearance are not duly and properly served, then no further process can be taken and/or acted upon, in any manner. In this regard, counsel underscored that service of summons to enter appearance is paramount and critical.
13. Thirdly, learned counsel submitted that the affidavit of service indicates that upon service being effected on (sic) George (who is said to be unknown to the Applicant) same is stated to have affixed a rubber stamp of a company known as A S Energy.
14. Be that as it may, counsel for the Applicant has contended that A S Energy whose stamp is indicated to have been affixed on the face of the Plaint and summons to enter appearance, copies of which were



attached to the affidavit of service sworn on the 15th of November 2013, is a separate and distinct company from the Applicant herein.

15. To this end, learned counsel for the Applicant has submitted that one company is different and separate from the other. Consequently, it was contended that where service is to be effected on a particular company, such service cannot be effected on a different company, either in the manner alleged or at all.
16. Fourthly, counsel for the Applicant has submitted that where Judgment is entered against a party, in this case the Applicant, albeit without service of the summons to enter appearance, such a Judgment is irregular and thus ought to be set aside as a matter of right.
17. In any event, counsel added that where the court finds that the resultant judgment was regular (which is not the case), the Honourable court is still vested and conferred with the requisite discretion to set aside the impugned Judgment on such terms and conditions as the court may deem fit, just and expedient.
18. Additionally, counsel for the Applicant also submitted that other than the jurisdictional mandate of the Honourable court to set aside and vary the default judgment, the court is also conferred with jurisdiction to review such a Judgment, if an error or mistake is shown to have occurred in the course of the proceedings culminating into the impugned Judgment.
19. Finally, counsel for the Applicant contended that the Applicant herein has a bona-fide and triable defense, which merits to be canvassed and investigated during the Plenary Hearing.
20. Consequently and in the premises, it was pointed out that sufficient basis has been laid and established to warrant the setting aside of the impugned Judgment and to grant the orders sought.

PLAINTIFF'S/RESPONDENT'S SUBMISSIONS

21. Counsel for the Plaintiff/Respondent similarly raised and amplified five issues for due consideration by the court.
22. First and foremost, learned counsel for the Plaintiff submitted that the 2nd to the 5th Defendants duly entered appearance and participated in the proceedings, culminating into the impugned Judgment.
23. Consequently and to the extent that the 2nd to the 5th Defendants duly participated in the proceedings, counsel contended that the resultant Judgment was therefore an inter-parties Judgment as against the 2nd to the 5th Defendants.
24. Based on the foregoing, counsel has therefore submitted that the Judgment, which entered as against the 2nd to the 5th Defendants, therefore ought not to be disturbed and/ or interfered with, in any manner, whatsoever.
25. Secondly, learned counsel for the Respondent has further submitted that the 1st Defendant herein also “owns” three other companies, inter-alia, A S Energy.
26. In the premises, learned counsel contended that by virtue of being related to or associated with a sister company known as A S Energy, service on (sic) the Sister company, is therefore deemed as appropriate service on the 1st Defendant/Applicant, herein.
27. Thirdly, counsel submitted that the provisions of Order 5 Rule 3 of the Civil Procedure Rules which stipulate that service on a body corporate ought to be effected on the authorized officers of the company is not couched in mandatory terms.



28. According to counsel, the word used in the provisions of Order 5 Rule 3 of the Civil Procedure Rules is “may” and hence service can be effected on such other person, even if same is not an authorized officer of the company.
29. The 5th ground that was argued by counsel for the Respondent relates to the fact that the 1st Defendant/Applicant has not controverted the contents of the affidavit of service pertaining to and concerning service of the summons to enter appearance.
30. Furthermore, learned counsel added that having not controverted the contents of the affidavit of service, the court is called upon to presume that service was duly and properly, effected on the 1st Defendant herein.
31. Additionally, learned counsel has also contended that the burden of proving that the 1st Defendant/Applicant was not duly served with the summons to enter appearance and Plaintiff fell on the 1st Defendant/Applicant. However, counsel has contended that the Applicant has failed to discharge the burden of proof, either as required under the law or at all.
32. On the other hand, learned counsel also submitted that the limb of the Application seeking to set aside, vary and rescind the Certificate of Taxation, is misconceived and legally untenable. In this regard, counsel added that the certificate of taxation can only be impeached vide the provisions of Rule 11 of the Advocates Remuneration Order and not otherwise.
33. Finally, learned counsel for the Plaintiff/Respondent has submitted that in the event the Honourable court is inclined to allow the instant Application and to set aside the resultant Judgment, the Honourable court ought imposed or set conditions to be complied with by the 1st Defendant/Applicant.
34. In this regard, counsel has invited the court to take note of the elaborate and stringent conditions enumerated vide paragraph 13 of the Replying Affidavit sworn on the 11th of December 2022.
35. Notwithstanding the foregoing, learned counsel for the Plaintiff/Respondent has however invited the court to find and hold that the Application by and at the instance of the Applicant is misconceived, devoid of merit and otherwise geared towards defeating the due process of the court.
36. In a nutshell, counsel has therefore invited the court to find that the Application is misconceived, devoid of merit and to dismiss same with costs.

2ND TO 5TH RESPONDENTS’ SUBMISSIONS

37. On behalf of the 2nd to 5th Defendants/Respondents, learned counsel Mr. Allan Kamau raised and amplified three salient issues, which same invited the court to consider.
38. Firstly, learned counsel submitted that the provisions of Order 5 Rule 3 of the Civil procedure Rules, 2010, are succinct and apt. For clarity, counsel pointed out that the said provisions underscore that service on a company can only be effected upon the authorized officers of the named company and not otherwise.
39. Furthermore, counsel added that where service is not effected upon the authorized officers of the company, as provided vide the provisions of Order 9 Rule 2 of the Civil Procedure Rules, then such service is irregular, illegal and invalid.
40. Secondly, learned counsel submitted that where proceedings are carried out, culminating into a Judgment, albeit without service of court process, the resultant Judgment is irregular.



41. To this end, counsel added that where the court finds and hold that a Judgment is irregular, then the court ought to set aside such Judgment Ex-Debito Justitiae.
42. Thirdly, learned counsel submitted that there is only one Judgment which was rendered and delivered by the court in respect of the instant matter. In this regard, counsel added that where the impugned Judgment is set aside, no limb thereof can remain in existence as against the 2nd to the 5th Defendants or at all.
43. In the premises, learned counsel contended that the moment the court finds and holds that the Summons to enter appearance were not properly or duly served upon the 1st Defendant, then the court ought to impeach, vacate and set aside the resultant Judgment, in its entirety

ISSUES FOR DETERMINATION

44. Having reviewed the Application dated the 27th of October 2022, the Supporting and Further Affidavit attached thereto and having taken into account the Replying Affidavit on behalf of the Plaintiff/ Respondent; and having considered the submissions ventilated by the respective Parties, the followings issues do arise and are thus worthy for determination:
 - i. Whether the 1st Defendant/Applicant was duly or properly served with Summons to enter appearance and Plaintiff in respect of the subject matter?
 - ii. Whether the resultant Judgment was a regular Judgment or otherwise and whether the court is conferred with the requisite discretion to set aside the resultant Judgment?
 - iii. Whether the 1st Defendant/Applicant has a Bona fide triable defense to warrant interrogation and investigations in a Plenary hearing?

ANALYSIS AND DETERMINATION

DIVISION - ISSUE NUMBER 1

Whether the 1st Defendant/Applicant was duly or properly served with summons to enter appearance and Plaintiff in respect of the subject matter?

45. It is common ground that the Plaintiff/Respondent filed the instant suit and impleaded the various parties, whose details and identities are duly disclosed on the face of the plaint and the consequential pleadings.
46. For coherence, one of the parties who was sued and impleaded by the Plaintiff/Respondent was M/s AINU SHAMSI AUTOMOBILE & HARDWARE LTD. For clarity, same was sued as the 1st Defendant.
47. Having sued and impleaded the 1st Defendant, it was incumbent upon the Plaintiff/Respondent or her authorized agents to extract and thereafter effect service of the summons to enter appearance and the requisite court process upon the named 1st Defendant.
48. It is imperative to state and underscore that service of court process upon a named party, is required to be effected in accordance with the established procedures stipulated and provided under the applicable laws. See Order 5 Rule 3 of the Civil Procedure Rules 2010.
49. Additionally, it is also appropriate to state and underscore that service of court process is an intentional and deliberate act, which is required to be effected upon the named person or such other authorized



- agent. For clarity, where the law permits service on an authorized agent, the authorized agent is well delineated under the law.
50. In respect of a company, the law has stipulated and defined who are the authorized agents, mandated to receive service of court process, for and on behalf of a company. In this regard, the provisions of Order 9 Rule 2(c) of the Civil Procedure Rules are explicit and succinct.
51. For convenience, the Provisions of Order 9 Rule 2(c) are reproduced as hereunder:
2. Recognized agents [Order 9, rule 2.]
The recognized agents of parties by whom such appearances, applications and acts may be made or done are—
 - (a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;
 - (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
 - (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.
52. Having made the foregoing observations, it is now appropriate to interrogate the contents of the Affidavit of service sworn on the 15th of November 2013 and to ascertain whether same meets and satisfy the established and elaborate procedure provided for under the provisions of Order 5 Rule 3 of the Civil Procedure Rules 2010.
53. Firstly, the named process server has indicated that same proceeded to Upper Hill Area, Gemini House, 10th Floor, where it was said that a sister company of the 1st Defendant was located.
54. In addition, the process server thereafter states that upon arriving at the offices in question, same found a gentleman known as George at the reception and upon enquiring from George about the whereabouts of a Mr. Shamsi, George informed him (process server) that Mr. Shamsi was out of office.
55. Furthermore, the process server proceeds and avers that same thereafter served the summons to enter appearance in respect of the instant matter upon the said George, who allegedly contended that same had authority to receive court documents on behalf of the 1st Defendant.
56. Other than the foregoing, the process server further avers that upon service/handing over of the Summons to enter appearance and Plaint, George affixed a rubber stamp of a sister Company known as (sic) A S Energy, but not the stamp of the 1st Defendant company.
57. From the foregoing observations, several issues do arise, which merit interrogation and resolution.
58. Firstly, the process server contends that George whom he met at the reception of a separate and distinct company held himself out as having authority to accept service on behalf of the 1st Defendant. However, no such authority has been attached or exhibited to the affidavit of service.
59. Secondly, the process server was aware that service on a company can only be effected on an authorized officer of the company. In this regard, when the process server served George whom he met at the



reception, it behooved same to authenticate the designation of George and thereby ascertain whether same was a messenger, receptionist or otherwise.

60. To my mind, the burden of proving that George was duly authorized to accept service for an on behalf of the 1st Defendant was on the process server and by extension the Plaintiff/Respondent. Unfortunately, the said burden was not discharged.
61. Thirdly, the process server avers that upon serving the summons to enter appearance and the attached Plaintiff, George affixed a stamp of a separate company, known as A S Energy. Clearly, the stamp which was affixed did not belong to the 1st Defendant herein, who was the Party sued.
62. In my humble view, the moment George affixed the rubber stamp of a company separate and distinct from the 1st Defendant, both the process server and by extension, the Plaintiff/Respondent herein should have been forewarned.
63. Notwithstanding the foregoing, the Plaintiff/Respondent believed that the affixation of the rubber stamp of A S Energy on the summons to enter appearance and Plaintiff was sufficient to constitute proper service on the 1st Defendant, a Completely different Company and Legal Entity.
64. Clearly, service of court process cannot be accidental. For the avoidance of doubt, service must be intentional and deliberate and same must be directed to the named person, or such other authorized agent of the Party. No more and no less.
65. In view of the foregoing deliberations, I come to the conclusion that the Summons to enter appearance and the Plaintiff were never served or properly, upon the 1st Defendant, either as required under the law or at all.
66. To underscore the importance and significance of proper service of summons to enter appearance and the court process, it is appropriate and expedient to take cognizance of the holding in the case of *Gulf Fabricators vs County Government of Siaya* [2020] eKLR, where the court stated as hereunder;

35. It must be appreciated that service of summons to enter appearance and plaintiff upon the Defendant in a suit is crucial. In addition, before the court can be asked to proceed and grant leave to the plaintiff to apply for interlocutory judgment and before such interlocutory judgment leading to formal proof hearing in unliquidated claims is entered and or issued, the court must be satisfied that summons to enter appearance and plaintiff were properly served upon the defendant, as stipulated in the law.

ISSUE NUMBER 2

Whether the result Judgment was a Regular Judgment or otherwise and whether the court is conferred with the requisite discretion to set aside the resultant Judgment?

67. Having found and held that the 1st Defendant was not duly or properly served with the summons to enter appearance and the attendant court process, the question that does arise is whether the resultant proceedings and the judgment that followed therefrom were regular or otherwise.
68. Be that as it may, I beg to underline and underscore that service of court process is paramount. Consequently, where the requisite court process is not served, either in accordance of the law or at all, then the consequential proceedings, including the resultant Judgment become a nullity in the face of the law.



69. To this end, I beg to cite and reiterate the holding in the case of *Macfoy versus. United Africa Co. Ltd* [1961] 3 All E.R. 1169, where Lord Denning's words while delivering the opinion of the Privy Council at page 1172 (1) state and made the following remarks:

70. For clarity, the revered Judge said:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.

And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

71. Having found and held that proceedings and Judgment arising out of none service constitutes a nullity, the next question that merits deliberation is whether such orders ought to be set aside *Ex-Debito Justitiae* or on the basis of discretion.

72. To my mind, once it is established and proved that the proceedings and resultant Judgment arose from a process which was null and void, then the Honourable court is obligated to strike down the impugned proceedings and judgment as a matter of right.

73. To this end, it is important to restate and reiterate the holding of the Court of Appeal in the case of *James Kanyita Nderitu versus Maries Philotas Ghika & Another* [2016] eKLR where it was held:

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such 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 (see *Mbogo & Another V Shah* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to



be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo V Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

74. Premised on the elaborate and rich exposition of the law as enunciated in the decision (*supra*), I come to the conclusion that the impugned proceedings and the resultant Judgment ought to be set aside *Ex – Debito Justitiae*.

ISSUE NUMBER 3

Whether the 1st Defendant/Applicant has a bona fide triable Defense to warrant interrogation and investigations in a plenary hearing?

75. The 1st Defendant/Applicant has annexed a draft Statement of Defense to the Supporting Affidavit and in respect of the said draft of defense, the 1st Defendant/Applicant has alluded to various and numerous issues, inter-alia, the contention that same is the lawful and legitimate proprietor of L.R No. 209/20292.
76. In addition, the 1st Defendant/Applicant has also contended that her property, details in terms of the preceding paragraph, was duly surveyed and the beacons thereto planted by a license surveyor.
77. In this regard, the 1st Defendant/Applicant has denied and disputed the claim that a portion of her property has encroached onto the Plaintiff's/Respondent's parcel of land.
78. Furthermore, the 1st Defendant/Applicant has also averred that her property has not blocked or otherwise restricted the Plaintiff/Respondent from accessing the suit property, either in the manner alleged in the body of the Plaint or at all.
79. Suffice it to point out that the draft Statement of Defense has enumerated many other issues, which the 1st Defendant contents would merits interrogation and investigations by the court, albeit during a plenary hearing.
80. Having examined the draft statement of defense, attached to the supporting affidavit, what becomes apparent and evident, is that there are numerous triable issues that would certainly required to be investigated by the court.
81. In my humble view, the draft statement of defense that has been annexed to the supporting affidavit sworn on the 27th of October 2022, discloses bona fide and triable issues.
82. In this regard, it is imperative to remember that what constitutes or comprises of a bona fide triable issue, must not of necessity be an issue that will ultimately succeed, at the trial.
83. For coherence, it suffices that the issue being raised or which is otherwise disclosed in the Applicant's pleading, is one that suffices to be canvassed, interrogated and investigated before a court of law.



84. To underscore the import, tenor and meaning of what constitutes a bona fide and triable issue, I beg to adopt and reiterate the ratio decidendi in the case of Patel versus E A Cargo Handling Services Ltd (1974) E.A 75 at page 76, where the court held as hereunder:

“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. I agree that where it 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, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

85. Other than the fact that the impugned proceedings and the resultant Judgment were procured without due and proper service, it is also evident that indeed the 1st Defendant has a bona fide and triable defense on merits.

FINAL DISPOSITION

86. Having duly addressed and analyzed the issues that were enumerated in the body of the Ruling herein, it must have become apparent and evident that the instant Application is meritorious and thus deserving of being granted.

87. Consequently and in the premises, the Application dated the 27th of October 2022 be and is hereby allowed on the following terms:

- i. The Judgment rendered and delivered by the court on the 18th of March 2022 together with the consequential orders, including the Decree and the Certificate of Taxation arising therefrom be and are hereby set aside and vacated.
- ii. The 1st Defendant/Applicant be and is hereby granted liberty to enter appearance and file the requisite Statement of Defense and same to be filed and served within 21 days from the date hereof.
- iii. The Plaintiff and the rest of the Defendants shall have leave to file and serve Reply to the Statement of Defense filed by the 1st Defendant, if any, and same shall be filed and served within 14 days from the date of service.
- iv. Thereafter, the Parties herein shall file and exchange the requisite List and Bundle of documents, as well as the witness statements and same to be filed and exchanged within 30 days from the close of pleadings.
- v. The subject matter shall thereafter be mentioned on a named date to be agreed upon by the Parties after the delivery of the instant Ruling.
- vi. Costs of the Application be and are hereby awarded to the 1st Defendant/Applicant.

88. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

HON. JUSTICE OGUTTU MBOYA,



JUDGE

In the Presence of:

Benson - Court Assistant.

Mr. S M Mwenesi for the 1st Defendant/Applicant.

Mr. Vincent Oloo for the Plaintiff/Respondent.

Mr. Allan Kamau for the 2nd, 3rd, 4th and 5th Defendants/Respondents.

