Kyelu v Mulwa (Civil Appeal 039 of 2022)
[2025] KEHC 12036 (KLR) (11 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12036 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL 039 OF 2022

TM MATHEKA, J

AUGUST 11, 2025

BETWEEN

MICHAEL KYELU ..... APPELLANT

AND

FR THADDEUS MULI MULWA ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. L.K Mwendwa (PM) in the Principal Magistrate's Court at Tawa, Civil Case No.1 of 2022, delivered on 2nd August 2022)

JUDGMENT

1. The Respondent Fr. Thaddeus Muli Mulwa Tawa, MCCC No.1 of 2022 against the appellant Michael Kyelu seeking to recover kshs 215,000/= from the him. His claim was that he had advanced the money to the Appellant on 18/06/2016 on the Appellant's own request and on the promise that the Appellant would repay the same on demand.

2. On 16/02/2022, a default judgment was entered against the Appellant for failure to enter appearance or file defence within the prescribed period.

3. Through an application dated 16/03/2022, the Appellant moved the trial court to set aside the default judgment and all consequential orders and through a ruling delivered on 02/08/2022, the trial court dismissed the application.

4. Aggrieved by the ruling, the Appellant filed this appeal on 16 grounds:

    a. The principal Magistrate's Court erred and misdirected itself on the principle of setting aside judgment under the provision of the civil procedure Rules.

    b. The principal Magistrate Court erred and misdirected itself in failing to find that the defendant had a defence raising triable issues.

c. That the principal magistrate court erred in law and fact in finding that the plaintiff claim is based on monies advanced and thus the claim is based on a contract for which the period of limitation as per section 4(1) (a) of the limitations of actions act is six years when there was no any written agreement on record and therefore this was a triable issue.

d. The principal magistrate erred in failing to find that the claim before the court is a debt claim which was supposed to be filed within three years from 18/6/2016 and since the claim was filed on 18/6/2022 then this was a triable issue raised in the defence.

e. That the principal magistrate erred in finding that according to paragraph 3 of the plaint the subject contract was entered on 18th June, 2016 thus six years would have lapsed on 18th June, 2022 when on record there was no any contract signed by the parties and whether or not there was a contract was a triable issue raised in the defence.

f. That the principal magistrate erred in finding that the defence of limitation is not available to Respondent herein.

g. That the principal magistrate court erred in finding that the other defence raised was mere denials of the contract between the plaintiff and the defendant despite that there was no contract in existence.

h. That the principal magistrate erred in considering return of service sworn by Boniface Muutu Malisu on 26th January, 2022 and filed on 16th February, 2022 and finding that the Respondent never challenged this return of service despite not allowing cross examination as requested in the supporting affidavit.

i. That the principal magistrate erred in finding that he was not persuaded that the Respondent was not served despite the return of service showing that there was no personal service of summons to enter appearance to the Appellant.

j. The principal Magistrate erred and misdirected himself in failing to find that the notice of the entry of judgment was not served or there was no evidence to show that it was served. In so doing, the Principal Magistrate erred and misdirected himself on service of notice of entry of judgment under civil procedure Rules.

k. The principal Magistrate Court erred and misdirected itself in law in finding that the summons was served, yet he did not issue summon to the process sever for cross examination on affidavit of service after the Appellant requested the said leave at paragraph 7 of the supporting affidavit in support of notice of motion dated 16th March, 2022.

l. The principal Magistrate Court erred and misdirected itself in failing to note that no notice of entry of judgment was filed and served on the Appellant.

m. The principal Magistrate Court erred in law in failing to find the defendant had a reasonable defence which was enclosed in the supporting affidavit and which was not mere denials of the contract between the plaintiff and the defendant as the said contract was not before the court.

n. The principal Magistrate Court erred and misdirected itself in finding that the interlocutory judgment was regular despite there being no evidence that the Respondent gave any money to the Appellant.

o. The Principal Magistrate Court erred and misdirected itself in failing to find that the purported agreement to pay Kshs.215, 000/- to the Plaintiff was not entered prior to filing the suit herein as non-existed.

p. In the premises, the principal Magistrate Court erred and misdirected itself in the exercise of its discretion and the provisions of the civil procedure Rules in general and in particular the provisions that he failed to set aside a judgment.

5. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

6. Out of the 16 grounds the appellant argued three of them.

7. On Ground 1 whether the trial magistrate erred and misdirected himself on the principle of setting aside judgment under the provision of the civil procedure Rules reliance was placed on Trust Agencies Ltd & 2 Ors -vs- Chimnilal K.M Shah & 3 others, Civil Appeal 20 of 2003 for the submission that firstly, the Applicant must show why no appearance was made and/or defence filed whichever the case and secondly, the Applicant must also show that he has an arguable defence for obviously no purpose would be served in setting aside a default judgment if the Defendant`s defence is a bogus one.

8. It was submitted that the Applicant had a reasonable and just cause for failing to enter an appearance or filing a defence since he was not served with the summons to enter appearance. That the summons to enter appearance which were signed by the court are still in the court file and the court process server license of one Boniface Muutu Malisu was not filed. That the Appellant does not have a home at Kenya Israel Estate in Machakos as alleged in the purported affidavit of service. Reliance was placed on Kingsway Tyres & Automart Ltd Civil Appeal No. 220 of 1995(1996) eKLR where the Court of Appeal held that;

> " .....To our minds, the onus was on the Respondent to fault the service. Having failed to do so, and in absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that the ex parte judgment was a regular judgment. It would only, if at all, be properly, vacated on grounds other than non-service of summons. There are ample authorities to the effect that, notwithstanding the regularity of it, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits. The Respondent did not annex to its application in the lower court a draft defence. A director of the company did, however, swear an affidavit to state that the appellant's claim was based on certain L.P.O.s which had been stolen from it (the Respondent) by its employees. Too, that the employees had been arraigned in court on criminal charges relating thereto. In view of that, it did not think the claim, properly, lay against it. It was desirable, we think, for the Respondent to annex to its application a draft defence to include all that and any other defences it may have had to the appellant's claim. Be that as it may, the defence, above, were not such as would have, properly, influenced the court below to exercise its discretion in favour of setting aside. That is the more so considering the manner the parties conducted business transactions between themselves."

9. It was submitted that in this matter and the lower court case the Appellant faulted the service and therefore the ex-parte - judgment is irregular. That despite the said challenge and the fact that the Appellant had requested to cross examine the deponent of the affidavit of service, the court did not allow and it had a duty of giving directions on the said cross examinations. It was submitted that failure

to cross examine the deponent was not evidence of service. It was submitted that the summons to enter appearance are not signed by the Appellant or the person who was purportedly served. That the affidavit of service does not state the time the purported service was done and no license of the process server was attached to show that Bonface Muutu Malisu is a process server. It was submitted that the court erred when it found that there was service. Reliance was placed on Elizabeth Kavere & another -vs- Lilian Atho & another [2020] eKLR where the court stated:

> " 7. 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 discretion of the court to set aside ex parte default judgment is conceded and both parties cited the Court of Appeal for Kenya Pithon Waweru Maina V Thuka Mugiria [1983] eKLR, where Kneller JA observed as follows:
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> > "The former relevant order and rules were order IX rules 10 and 24. The court has no discretion where it appears there has been no proper service; Kanji Naran v Velji Ramji [1954] 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: Fort Hall Bakery Supply Company v Frederick Muigon Wargoe [1958] EA 118.
> >
> > The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC.
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> > This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah v Mbogo [1969] EA 116,123 BC Harris J.
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> > The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani v McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo v Shah [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7 namely: "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be

considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30: "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..." So, the magistrate should have recalled these points. The Respondent has a judgment which was not obtained by consent or as the consequence of a trial. The nature of the action is one that concerns land and who purchased it first and whether or not consent of the local land control board to the transaction was necessary and obtained by either of them and, altogether, it is not a trivial matter. A defence was before the court in time which was not dealt with at the trial. The Respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. Shabir Din v Ram Parkash Anand (1955) 22 EACA 48, 51 and Hancox J (as he then was) in Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/ a Khudadad Construction Company Nairobi HCCC 1547 of 1969. The magistrate did not take these matters into consideration when he exercised his discretion. So, the learned judge was entitled to interfere with the decision of the magistrate although it was a discretionary one. See Brandon LJ in The El Amria [1981] 2 Lloyd's Rep 539."

Principles for the grant of setting aside"

10. On ground 2 as to whether the trial court erred by failing to find that the defendant had a defence raising triable issues it was submitted that there were triable issues of whether or not the claim is time barred and whether or not the claim was based on tort or contract. Reference was made to paragraph 21 of the ruling delivered by this court on 18/05/2023. Further, it was submitted that according to paragraph 8 of the draft defence, the Defendant avers that there is no money owed to the Plaintiff and that the Plaintiff is not entitled to the sum of Kshs.215,000/= plus interest or any other prayers sought for in the plaint or at all. That, whether or not any money was given to the Appellant as a debt is also a triable issue.

11. Reliance was placed on Telkom Kenya Limited -vs- Kenya Railways Corporation [2018] eKLR where the court held that:

> "Under s.4(1) of the *Limitation of Actions Act* (Cap 22), the limitation period for actions founded on contract is six years. KRC however contends and submits that the limitation period in the instant case was one year. In this regard, KRC relies on s.87(b) of the *Kenya Railways Corporation Act* (Cap 397). 44. So far as is relevant, s.87 of the *Kenya Railways Corporation Act* (Cap 397) provides as follows: 87. Limitation Where any action or other legal proceeding commenced against the corporation for any act done in pursuance or execution or intended execution, of this Act or of any public duty or authority, the following provisions shall have effect (a) ... (b) the action or legal proceeding shall not lie or be

instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage within six months next after cessation thereof. 45. While Telkom's take is that its claim could only be time barred after the lapse of six years, KRC insists that it is one year. To buttress its contention KRC made reference to s.31 of the *Limitation of Actions Act* which alludes to limitation period as may be provided by any other written law. 46. Besides the contractual aspect of the claim, Telkom relies on a series of agreements, signed minutes of meetings and a letter allegedly signed by KRC as "acknowledgments" falling under and within s.23 of the *Limitation of Actions Act* to stake its claim and submit that the claim is not barred. The last of the acknowledgments is said to have been made on and dated 24 February 2015. If I was to confirm this as an acknowledgment it would bring the claim within time, whether the applicable limitation period is that provided for under s.4(1) of the Limitations of Actions Act or under s.87 of the *Kenya Railways Corporation Act*. 47. I will shortly discuss "acknowledgments" in the context of limitation of actions. The issue now is whether the operative provision for purposes of limitation is the former statute or the latter. 48. In reviewing the limitation of actions provisions in both statutes, I am conscious of the fact that limitation statutes limit the right of access to court and thus justice. Such statutory provisions must thus be given meanings which do not intend to avoid the right of access to justice or to court. It ought to be a construction which seeks to promote the right, even as I am aware that the same statutory provisions seek to promote and preserve the quality of adjudication by requiring actions to be instituted without delay. 49. The *Limitation of Actions Act* which was enacted in 1967 is the statute which provides generally for periods of limitations for actions in tort, contract and other actions. The *Kenya Railways Corporation Act* as enacted in 1978, at s.87 specifically provides for limitation period for specific actions taken against KRC. My reading of s.87 reveals that it governs actions commenced under the said statute. The section, in my view, relates to duties provided, undertaken or executed by KRC specifically under the *Kenya Railways Corporation Act* even if it involves third parties. Such duties and undertakings will ordinarily involve contracts for carriage of goods and passengers, contracts for storages of goods and for railway concessions. 50. In my judgment, s.87 of the *Kenya Railways Corporation Act* was not intended by the legislature to amend s.4(1) of the *Limitation of Actions Act*, which still enjoys primary effect over other written limitation laws unless expressly stated or provided otherwise in such written law.....53. I conclude that the operative provision of the law for purposes of the limitation period was s.4 of the *Limitation of Actions Act*. The claims would be barred by statute upon expiry of six years from the time Telkom or its predecessor was entitled to obtain a remedy from the court against KRC for any nonpayment."

12. It was submitted that the claim can only be revived if there was any acknowledgement from the Appellant and that this is a triable issue as the Plaintiff will have an opportunity to show whether or not there was any acknowledgment. It was contended that a triable issue is not the one that must succeed but a bona fide triable issue. That, the existence of triable issues warrants the grant of leave to defend. Reliance was placed on Elizabeth Kavere & Anor -vs- Lilian Atho & another [2020] eKLR where the court held:

> " 42. However, the draft defence presented by the 1st defendant raises the triable issue whether the partners in the partnership agreement the subject of this suit were to all manage the business and share the profits and losses and, consequently, whether the losses alleged by the defendants were contributed to by the plaintiffs and therefore to be shared by the plaintiffs in their loss and

profit sharing ratio, which would impact on the liability of the defendants to recompense the plaintiffs thereon and therefore the claim for refund of their contributions and profits the subject of the Plaint and default judgment.

43. It is settled that an arguable case need not be one that must eventually succeed at the end of trial. The triable issue herein raises an arguable case which may or may not succeed at the hearing but it is consistent with the right to hearing under Article 50 (1) of *the Constitution* that a fair hearing be granted to the parties to the dispute in accordance with the law.

44. Another triable issue which was not taken up by the counsel, and which, therefore, the court cannot base its decision on the application for setting aside herein on, is that the alleged joint agreement between the parties made provision for settlement of disputes by mediation and arbitration, which may affect the validity of the proceedings before the court.

45. Although the default judgment was properly and regularly entered having been on a claim of a liquidated sum the Plaint and Summons whereof was properly served on the defendant's agent in accordance with the rules of the court, the existence of a triable issue warrants the grant of leave to defend. In accordance with the authorities leave to defend in the circumstances where there is a triable issue but a lawful regular judgment is granted upon reasonable conditions imposed by the court."

13. On ground 2 as to whether the trial court erred by finding that the plaintiff's claim is based on monies advanced and thus the claim is based on a contract for which the period of limitation is 6 years (ground 3), it was submitted that there was no indication in the plaint about a contract between the plaintiff and defendant. That according to paragraph 4 of the plaint, it was a debt claim as there was a promise of repayment on demand. That paragraph 5 of the plaint talks of a purchase price but there are no particulars as to the subject matter of the purported purchase.

14. PN ground 10, as to whether the trial court misdirected itself for failing to find that the notice of entry of judgment was not served , it was submitted that the issue was raised in the application but was not determined by the trial court. Reliance was placed on Elizabeth Kavere & another -vs- Lilian Atho & another [2020] eKLR where the court held:

> " Order 22 rule 6 of the Civil Procedure Rules require notice of entry of a default judgment as follows:
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> "[Order 22, rule 6.] Application for execution.
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> 6. Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:
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> Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

26. The requirement of notice applies to application for execution by way of 'payment, attachment or eviction' and may only have affected the initial attempt at attachment of the 1st defendant's movable property by application for execution dated 4th December 2018, which was unsuccessful prompting the application for execution dated 17th April 2019 seeking Notice to Show Cause why the judgment-debtor/applicant should not be committed to civil jail for failure to comply with the decree herein. The procedure for execution by arrest and detention already has statutory protections for notice to show cause, and the hearing thereof, making the notice of entry of judgment under Order 22 rule 6 of the Civil Procedure Rules unnecessary."

15. In conclusion, this court was urged to find that the Appellant had displayed an arguable defence warranting the setting aside of the default judgment entered against him.

Respondent's Submissions

16. The Respondent identified the following as the issues for determination;

    a. Whether the default judgment entered against the Appellant was regular?

    b. Whether the trial court properly exercised its discretion?

17. As to whether the default judgment was regular, reliance was placed on James Kanyita Nderitu -vs- Maries Philotas Ghika & Anor (2016) eKLR, where the Court of Appeal stated:

> " 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..."

18. It was submitted that the Appellant was duly served with the summons to enter appearance as evidenced by the affidavit of service sworn and duly filed by a court licensed process server in accordance with Order 5 Rule 15. Further, it was submitted that the burden of proving any claim of non-service, more so when there is an affidavit of service on record, squarely rests on the party making the claim. Reliance was placed on Shadrack arap Baiywo -vs- Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] quoted in Daniel Tukero -vs- Taleo Kalamoyo & another [2021] eKLR as follows;

> " There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect..."

19. It was submitted that the Appellant's claim of non-service remains unsubstantiated. That he has neither countered the affidavit evidence of the process server nor produced evidence to support his claim that he does not live in the area mentioned in the return. That the Appellant's claim that the court did not allow cross-examination of the process server is equally inadequate as the trial court had to be convinced that there is doubt of proper service. Reliance was placed on Peter Gitahi Kamaitha -vs- Nyeri Municipal Council [2014] eKLR where the court stated:

> " In our view the said provision does not make it mandatory for the court to examine the process server on oath every time there is an allegation by party that he/she was not served. What the provisions obligate a court to do is to consider the allegation and the evidence and

determine if there was proper service. This examination can be through affidavit evidence or through cross examination of the parties on the issue of service."

20. It was submitted that the trial court considered the allegation of non-service as against the affidavit of service and rightly found that it was not persuaded that the Appellant was not served. That the Appellant did not raise a morsel of doubt as to whether service was effected so as to warrant cross-examination of the process server. That the Appellant did not properly move the court to cross-examine the process server as he only alluded to it in the supporting affidavit and never followed up on it.

21. As to whether the court properly exercised its discretion, it was submitted that where a default judgment is entered regularly, the court has an unlimited discretion to set aside the judgment or not to. That the court itself has come up with set of considerations to guide it in exercising this discretion. Reliance was placed on Langer -vs- Mutambu & another (Civil Case 303 of 2011) [2023] where the court stated:

> "...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 such party is likely to suffer..... whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay."

22. It was submitted that the main consideration in this matter is whether the Appellant has a triable defence and the same was answered in the negative. Reliance was placed on Board of Management Thika Technical Training Institute -vs- Grace Wairimu Mukundi (suing as the Personal Representative of the estate of Elias Mukundi Wambugu (Deceased) t/a Emu Enterprises (Civil Appeal 205 of 2019) [2022] where the court stated;

> "In Magunga General Stores v Pepco Distributors Ltd [1987] 2 KAR 89, where the defendant used such generalised denial, Platt, J.A., said:
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> > 'First of all, a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

23. It was submitted that the Appellant's Defence on record does not give any reason as to why the money is not owed. That he simply denies the debt and puts the Respondent to strict proof thereof. It was submitted that the limitation of actions period for the loan agreement had not been depleted as the suit was filed 6 months before the limitation period ended and as such, the defence of limitation of actions is not available to the Appellant.

24. It was submitted that an appellate court ought to be guided by the evidence that the trial court had in reaching its decision as per the principle in Selle -vs- Associated Motor Boat Company Limited [1968] E.A. That in an attempt to mislead this court, the Appellant changed his position in the memorandum of appeal by stating that it is a debt claim whose limitation of time is 3 years. It was submitted that this claim lacks merit as the money owed was a loan advanced under an oral contract. This court was urged

to only be guided by the defence on record and the issues it raises. That the *Civil Procedure Act* and Rules provide for the procedure for presenting new evidence to an appellate court and the Appellant has not adhered to them hence his attempt to circumvent procedure is an abuse of the court process.

25. It was submitted that an appellate court should not interfere with the exercise of discretion of the trial court unless the circumstances so require. Reliance was placed on Board of Management Thika Technical Training Institute (supra) where the court stated:

> " In the case CMC Holding Ltd v James Mumo Nzioki (2004) eKLR it was stated as follows on how the appellate court ought to deal with an appeal where the discretion of the court is questioned;
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> > "We are fully aware that in an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate Court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition. One such authority is that of Magunga General Stores v Pepco Distributors [1987] 2 KAR 89 to which we were referred and in which this Court stated as follows: 'The Court on an appeal will not interfere with the exercise of a discretion on an application for summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts."

26. Further, it was submitted that if this court is inclined to set aside the default judgment and ruling of the trial court, then it should be guided by the holding in Rayat Trading Co. Limited -vs- Bank of Baroda & Tetezi House Ltd [2018] eKLR where the Court held that:

> " If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim."

Duty of Court

27. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. This position was held in Selle & Another v. Associated Motor Boat Company Ltd & Others (1968) EA 123 where the court stated as follows:-

> " ... This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen nor heard the witness and should made due allowance in that respect ..." [See also Jivanji vs Sanyo Electrical Company Ltd (2003) KLR 425]

28. I have considered the entire record, the grounds of appeal, and the rival the rival submission. The issue for determination is whether the trial court erred by failing to set aside the default judgment.

Analysis & Determination

Whether the trial court erred by failing to set aside the default judgment

29. A default judgment can either be regular or irregular. It is regular where there is proof that the defendant was served with summons to enter appearance but failed to do so for one reason or another. It is irregular where service was not affected upon the defendant and in that case, it should be set aside as a matter of right. If the default judgment is regular, the court has discretion to determine whether or not to set it aside depending on various considerations. The difference between the two was elaborated in detail by the Court of Appeal in James Kanyita Nderitu (supra). In Yooshin Engineering Corporation -vs- Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment), the Court of Appeal observed that;

> " What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise."

30. In this case, the Appellant insists that the default judgment was irregular as he was never served with summons to enter appearance. It was therefore upon him to prove that he was never served with the summons. On the other hand, the Respondent's position is that the Appellant was served and an affidavit of service filed in court.

31. In paragraph 7 of the Affidavit in support of the application to set aside the default judgment, the Appellant deposed that the Affidavit of service was false and misleading. He sought to cross-examine the process server and further deposed that he had no home at Kenya Israel where the alleged service took place. Cross-examination of a process server is recognized as way of testing the veracity of an affidavit of service. This has been affirmed in many authorities . In the case of Shadrack Arap Baiywo -vs- Bodi Bach [1987] eKLR, the Court of Appeal stated;

> " There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service."

32. The Respondent argued that the Appellant did not properly move the court to cross-examine the process server as he only alluded to it in the supporting affidavit and never followed up. It is not clear how the Appellant was expected to follow up after his application to set aside judgment was declined by the trial court without an opportunity to cross-examine. The denial meant that his intention to cross-examine had been overtaken by events.

33. Additionally, paragraph 3 of the Affidavit of service states; "That upon arrival, I found the defendant at his home with his family and upon exclaiming myself to him and the purpose of my visit, I served him with the said summons to enter appearance attached with the plaint which he accepted my service but declined to sign the principle copy which is hereby returned to this honorable court as having been

duly served." The principal copy of the summons which is said to have been returned to court was not attached to the affidavit. Hence there was no return of service.

34. It is noteworthy that there are two original copies of the summons each together with a co[y of the plaint, signed by the Executive Officer in the court file, a fact that raises eye brows a to whether service was actually affected.

35. The possibility that the summons to Enter Appearance were not served hence rains irregularity on the default judgment putting it up for setting aside as a matter of right.

36. In any event , a trial court has discretion to set aside a regular judgment where it is demonstrated that there are triable issues. In Bouchard International (Services) Ltd -vs- M'mwereria [1987] KLR, the court stated that;

> "If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

37. In the draft defence attached to the Appellants application to set aside default judgment, the Appellant denied being indebted to the Respondent in the sum of kshs 215,000/= and averred that the debt claim was time barred as it was filed after a period of over 6 years. In dismissing the issue of limitation, the trial magistrate concluded that the claim was based on contract for which the period of limitation is six years. The question of whether it was a debt claim or claim based on contract, whether it was time barred or not, these are was a triable issue which should have been ventilated in a full trial. On these triable issues the court had ground for the setting aside of the default judgment.

38. In the circumstances I find that the appeal has merit. The ruling of the trial court is set aside. The default Judgment is set aside.

39. This matter be and is hereby remitted back Tawa Law Courts for hearing and determination by a different Magistrate .

40. The Deputy Registrar to ensure the file and the Judgment are dispatched to Tawa Law Courts within 7 days hereof.

41. Due to the age of the matter, the HOS to ensure the matter is given dates on priority.

42. Each party to bear its own costs of this appeal

DATED SIGNED NA DELIVERED VIA CTS THIS 11TH AUGUST 2025

MUMBUA T MATHEKA

JUDGE

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