IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 6 OF 2015

BETWEEN

JAMES KANYIITA NDERITU.....1ST APPELLANT

HELLEN NJERI NDERITU.....2ND APPELLANT

AND

MARIOS PHILOTAS GHIKAS.....1ST RESPONDENT

MOHAMMED SWALEH ATHMAN.....2ND RESPONDENT

(Appeal from the ruling and order of the Environment and Land Court at Malindi,

(Angote, J.) dated 19th December 2013 in ELCC No. 162 of 2011,

formerly HCCC No. 2173 of 1994)

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JUDGMENT OF THE COURT

"This is one of the most interesting cases I have come across", so started ***Angote, J's.*** ruling dated 19th December 2013, the subject of this appeal. The reason for those opening words is partly the convoluted nature of the litigation regarding the parcel of land in dispute, which has spawned no less than 9 substantive suits and numerous applications. At least three different parties claim to hold valid documents of title to the same disputed property. An advocate, an officer of the court, has sworn two irreconcilable affidavits, in one claiming never to have obtained the decree and the vesting order in issue in this appeal, and in another, purporting never to have disowned the decree and the vesting order as deposed in the first affidavit. The judge who issued the disputed decree and vesting order has given a statement to the police stating that his signature was transposed on the vesting order. And not the least, the litigation is replete with accusations and counter accusations of irregularities and outright fraud.

At the heart of this appeal is the question whether the High Court and the Courts of equal status under ***Article 162*** of the ***Constitution*** can set aside a judgment alleged to have been obtained irregularly, if the court is in turn moved in an irregular manner. In specific terms, the question is whether a default judgment alleged to have been obtained without service of summons to enter appearance upon a defendant, can be set aside upon the application of such defendant if he dies during the pendency of the

application and is not substituted. Angote, J. had no doubt that the court has power to correct the initial irregularity, which position the respondents support. The appellant however contends that an irregular judgment or order cannot be cured through an irregular application.

To the extent that the facts of this appeal are rather serpentine and several other parties, directly affected by the appeal, participated in the dispute both in this Court and the court below without being reflected among the parties to the dispute, it is apt to briefly delve into the background so as to set the record straight, to the extent that it is possible.

The dispute in this appeal revolves around a subdivision of a property originally known as ***Plot No. 181/III/MN*** measuring 7.2 acres and situate at Kanamai in Kilifi County. For convenience we shall refer to the subdivision, which measures 6 acres, as ***the suit property*** and Plot No. 181/III/MN as ***the original parcel***. At all material times, the original parcel was registered in the name of a Greek national, ***Androniki Philotas Ghikas (Androniki)***. Androniki died on 30th July 1992 and was survived by her sole heir and son, ***Marios Philotas Ghikas (Marios)***, also a Greek national said to have been resident in Moshi Tanzania and Mombasa, among other places**.** By a grant of letters of administration intestate dated 23rd February 1994, ***Ushwin Khanna, Advocate*** was appointed by the High Court as the administrator of Androniki's estate.

On 26th day of February 1993, Marios entered into an agreement for sale with ***James Kanyiita Nderitu*** and ***Hellen Njeri Nderitu (the appellants)*** by which he agreed to sell to them the suit property for Kshs 6,500,000/-. In the agreement, Marios was purportedly selling the suit property in his capacity as the sole heir of Androniki, not as the owner, or administrator of his mother's estate. Indeed, as of the date of the agreement, no administrator had been appointed for Androniki's estate. The appellants paid a deposit of Kshs 1,030,000/- and the balance was to be paid on agreed instalments. ***Messrs. Bryson, Inamdar & Bowyer Advocates*** acted for Marios while ***Musinga & Company Advocates*** acted for the appellants in the transaction. Marios' signature in the agreement was however attested by Mr. Khanna.

Sometime in 1994, the appellants filed against Marios, ***Nairobi High Court Civil Suit No. 2172 of 1994*** through ***Meenye & Company Advocates*** seeking an order for specific performance of the agreement and a further order to compel him to sign and execute all documents necessary to transfer title to the suit property to the appellants, or in default the Deputy Registrar of the High Court to sign and execute the same. The plaint on record is neither dated, nor signed. Indeed it does not even bear the number of the suit. Be that as it may, an interlocutory judgment was entered against Marios and the suit was set down for formal proof on 19th October 1995 and for judgment on 26th October 1995.

By a decree issued on 9th November 1995, the High Court ***(Mbito, J.)*** issued an order for specific performance of the agreement and directed Marios to transfer 6 acres ***"being a portion of the former LR No. MN 111/2270 Mombasa LR No. 181 Section III/MN Mombasa, now LR. No. MN/111/2270"*** to the appellants. Marios was also ordered to sign and execute the necessary document to effect the transfer, failing which the Deputy Registrar was to sign and execute the same. Lastly, the appellants were ordered to deposit the balance of the purchase price of Kshs 4,350,000/- in court within 14 days of registration of the transfer.

Thereafter followed a vesting order issued on 27th May 1996 by which the suit property was purportedly vested, not in the appellants, but in a company known as ***Rehema Estate Limited***. The property that was vested was not ***LR. No. MN/111/2270*** as decreed, but ***LR. No. MN/111/2720***. In the vesting order, Marios was described as the "registered proprietor" of the suit property and it was averred that the appellants had paid to him Kshs 6,500,000/-. It appears from the record that by an application dated 8th May 1996, the appellants applied *ex parte* to amend the plaint and decree so that the suit property would read ***MN/III/2720*** in lieu of ***MN/III/2270*** and for the suit property to be vested, not in their names, but in that of their nominee, Rehema Estate Ltd. Mbito, J. granted that application on 14th May 1996. The appellant's contend that the original parcel was subdivided into two parcels, namely MN/III/2720 measuring 6 acres and MN/111/2719 measuring 1.2 acres, effectively extinguishing the original parcel.

By a Chamber Summons dated 4th July 1997 under certificate of urgency, Marios applied to set aside the *ex parte* orders issued in the suit and in particular the vesting order. He also sought a further order to compel the Registrar of Titles, Mombasa to cancel the registration of the vesting order. In his supporting affidavit, he deposed that he was not the registered owner of the suit property; that it had been brought to his attention that he had no capacity to enter into the agreement with the appellants and to transfer the suit property to them; that he had not received the balance of the purchase price; that he was able, ready and willing to refund the money paid to him by the appellants; that he only learnt of the suit against him on 20th June 1997; and that the appellants had never served upon him summons to enter appearance or any court process respecting the suit.

It appears that Marios was unable to file the application to set aside the default judgment because the court file went missing, prompting his advocates to write to the then Chief Justice on 31st October 1997, seeking his intervention regarding the missing court file. By a letter dated 11th November 1997, the Deputy Registrar confirmed that indeed the court file had gone missing and that all efforts were being made to look for it.

On 19th February 1998, Marios applied for reconstruction of the Court file and for an order directing the appellants' advocates, Messrs. Meenye & Company Advocates, to avail to the Court and to serve upon him copies of all the pleadings, applications filed in the matter and all the orders made by the court. When the application was served upon the said advocates, they returned the same vide a letter dated 23rd February 1998 stating that they were no longer on record for the appellants. Effectively, the advocates who could have availed the necessary documents to reconstruct the missing file were not forthcoming.

Precisely what happened to the applications to reconstruct the file and to set a side the *ex parte* orders is not clear from the record. While the appellants contend that Marios went to sleep and forgot them, he claims that the application for reconstruction of the court file was heard and granted on 12th March 1998. What is not in doubt is that the original court file was never recovered and when Angote, J. ultimately dealt with the matter after the suit was transferred to the ***Environment and Land Court***, Malindi as ***ELCC No. 162 of 2011***, there was only a skeleton file. Indeed the learned judge noted that there was no copy of the plaint, summons to enter appearance, judgment or decree on record.

Subsequently Marios filed an application dated 7th October 2010 seeking similar orders as those sought in the application dated 4th July 1997, to wit, to set aside the *ex parte* orders issued in the suit, including the vesting order, and an order to compel the Registrar of Titles, Mombasa to cancel the registration of the vesting order. The application was supported by his affidavit deposing among others, that he had no capacity to sell the suit property and that he had never been served with summons to enter appearance. Mr. Ushwin Khanna also swore an affidavit in his capacity as the administrator of the estate of Androniki in support of the application.

Before the application could be heard, Marios died on 12th July 2012. In addition, a new party, namely ***Mohammed Swaleh Athman (Athman)***, appeared on the scene. This is how Athman got entangled in the dispute. Sometime in 2008, he filed ***Mombasa HCCC No. 108 of 2008 (OS)*** against the Commissioner of Lands and the Registrar of Titles seeking to be declared the owner of the original parcel, by adverse possession. Peculiarly, the administrator of the estate of Androniki, the registered owner of the original parcel, was not made a party to the suit. Be that as it may, Athman obtained an order in his favour on 3rd September 2008 and was registered the owner of the original parcel on 4th November 2008. On 20th April 2009 the suit was, by consent of the parties, marked as withdrawn. Two days later, on 22nd April 2009 Athman sold and transferred the original parcel to a third party, ***Kanzi Bay Company Ltd.***

When Rehema Estates learnt of these developments, it filed Mombasa ***HCCC No. 137 of 2009*** against Athman, Kanzi Bay Company Ltd and the Registrar of Title claiming that the transfer of the original parcel was fraudulent and illegal because, among other reasons it had ceased to exist after being subdivided into 2720/III/MN and 2719/III/MN. It therefore sought a declaration to that effect, an order for cancellation of Athman's title and restoration of the two subdivisions and a permanent injunction

restraining Athman and Kanzi Bay Co Ltd from dealing with the original parcel.

Next, the theatre shifted back to HCCC No. 2173 of 1994, which was renamed ***Malindi ELCC No. 162 of 2011.*** By a Notice of Motion dated 6th May 2010, Athman applied to be joined as an interested party in the suit and for an order setting aside all the orders issued therein by Mbito. J. On 18th December 2012, the application to join him in the suit was granted by consent and he was directed to file, within 30 days, his application to set aside the decree and orders issued by Mbito, J. in favour of Rehema Estates. He filed the application on 19th January 2013 and contended that he was the duly registered owner of the original parcel since 4th November 2008. He averred further that the appellants had obtained the vesting orders in favour of Rehema Estates Ltd fraudulently. Annexed to his affidavit in support of the application was a lengthy affidavit sworn on 25th February 2010 by G. K. Meenye, Advocate, who had at the material time acted for the appellants. The advocate denied ever having obtained the court order issued by Mbito, J. in favour of the appellants and averred that the same was a forgery. He explained in great detail that from 1995 his firm had changed its name from ***Meenye & Company Advocates*** to ***Meenye & Kirima Advocates*** and that he could not have been operating under the former name as the documents relied upon by the appellants indicated. He annexed to that affidavit the certificate of registration of the firm as a business name, Income Tax Pin, and sample correspondence to show how correspondence from his office was signed and referenced, to discount the possibility that the correspondence relied upon by the appellants emanated from his office.

Also relied upon by Athman was an affidavit sworn on 4th March 2010 by Geoffrey Birundu, the Chief Registrar of Titles, Mombasa in which he deposes that the suit property (i.e. 2720/III/MN) did not exist; that Rehema Estate Ltd and one ***Kiarie Karanja*** each had separate certificates of title to the suit property; that the certificates of title thereto were forgeries and that the only genuine parcel was the original parcel (i.e.181/III/MN). For good measure Athman also attached to his affidavit a statement, apparently recorded by the police from Mbito, J. on 17th May 2011, in which the retired learned judge stated that his signature was transposed on the vesting order dated 27th May 1996 and implored the police to investigate the authenticity of the vesting order.

The appellants opposed both applications on the basis of a notice of preliminary objection dated 6th September 2011; grounds of opposition dated 20th February 2013; grounds of opposition/preliminary objection dated 10th April 2013; and a 50 paragraph long replying affidavit sworn by the 1st appellant on 8th August 2013.

The gist of the appellant's response was that Marios and Athman were guilty of deliberate and inordinate delay in making the application to set aside the *ex parte* orders; that Marios was dead and he had not been substituted in the suit or application; that Marios had the requisite capacity to enter into the agreement for sale and to transfer the suit property to them; that he was duly served with summons to enter appearance but failed to do so; and that the interlocutory judgment, the decree and the vesting orders were all regularly obtained and issued. As regards the application by Athman, the appellants contended that being a nonparty to the suit and application, he had no *locus standi* to move the court to set aside the *ex parte* orders and that his registration as owner of the original parcel was fraudulently procured.

In a strange twist of events, the appellants also relied on a second affidavit sworn by G.K. Meenye, Advocate on 31st May 2010 in which he took a diametrically opposed position to the one he had taken in the affidavit sworn on 25th February 2010. The advocate now deposed that Athman's advocate had merely requested him to swear an affidavit to confirm that he had acted for the appellants in the suit. He further stated that one morning in February 2010, ***"while rushing to court"*** Athman's advocate gave him a short affidavit, which he signed on the second page, confirming only that he had acted in the case. He denied having deponed to the other averments in the first affidavit and swore that he recalled having validly obtained the orders issued by Mbito, J.

As we stated earlier, no less than 9 suits and a myriad of applications were filed in various courts, where different parties were claiming ownership of the original parcel or the suit property or rights over them.

On 15th April 2011, ***Ojwang, J.*** (as he then was) consolidated all those suits pursuant to an order made in Mombasa HCCC No. 137 of 2009 and directed the suits and any applications, whether filed or yet to be filed, be heard in the High Court in Malindi (subsequently the Environment and Land Court). On that basis, Kanzi Bay Company Ltd and Rehema Estates Limited became parties and participated in the matter before the High Court culminating in the judgment, the subject of this appeal.

It is the two applications by Marios and Athman for setting aside the default judgment, the *ex parte* orders and the vesting orders that Angote, J. heard and allowed on December 2013, provoking this appeal. Before hearing the applications, Angote, J., on 21st May 2013, directed the appellants to supply the court with all the pleadings in their possession pertaining to renamed ELCC No. 162 of 2011, and in particular the plaint and the affidavit of service confirming service upon Marios. These documents were never availed to the court.

By consent of all the parties, the appeal before us was canvassed by way of written submissions and oral highlights. ***Mr. K'Opere***, learned counsel for the appellants attacked the ruling of the High Court on four broad grounds, contending that the court erred by entertaining an application by the deceased Marios without substitution; by joining Athman to the suit; by entertaining Athman's application for setting aside Mbito, J.'s order while the application was filed out of time; and by exercising its discretion wrongly and setting aside the orders of Mbito, J.

On substitution, counsel submitted that Marios died before the hearing of the application; that the issue was specifically raised before the High Court but it was not addressed; that by dint of the provisions of ***Order 24*** of the Civil Procedure Rules the High Court could not proceed with the hearing of Marios' application after his death without substitution; and that all proceedings after his death were a nullity.

Regarding joinder of Athman, it was argued that he was wrongly joined in the suit after the death of Marios; that the joinder too was a nullity; and that in any event the High Court erred by joining a party to a suit 17 years after judgment, decree and vesting order. It was also contended that Athman had no *locus standi* in the matter because by the time he purported to obtain an order declaring him the owner of the original parcel, the same had already ceased to exist after it was subdivided into two parcels and two new titles issued.

Next, the appellants submitted that the learned judge erred in entertaining Athman's application for setting aside Mbito, J.'s orders because the application was filed out of time, contrary to the order by the court which required it to be filed within 30 days from 18th December 2012. It was argued that although the appellants raised this issue in their submissions, the learned judge once again failed to address the same.

Lastly the appellants submitted that by setting aside the default judgment and other consequential orders, the learned judge had exercised his discretion wrongly in the circumstances of the case. It was urged that Marios and Athman were guilty of long and unreasonable delay of 17 years before they applied to set aside the orders in question; that Marios was aware of the existence of those orders since 1997 and chose to do nothing about them; that the application to set aside the orders of Mbito, J. was an afterthought; that it was made only after Marios had lost an application for injunction in HCCC No. 315 of 1997 before the High Court and this Court where he was seeking to prohibit the appellants from dealing with the suit property; and that the High Court erred by failing to find that Mr. Ushwin Khanna, by attesting the sale agreement between Mario and the appellants, had effectively represented to the latter that Marios could sell and transfer the suit property as the sole heir of Androniki.

The appellants relied on ***Mbogoh & Another v. Shah [1968] EA 93*** and ***Price & Another v Hilder [1986] KLR 95*** and ***Njagi Kanyunguti & 4 Others v. David Njeru Njogu, CA No. 181 of 1994*** and submitted that the discretion of the court is not intended to assist a party who had deliberately sought to obstruct or delay the course of justice.

Mr. Kiarie, learned counsel for Rehema Estate Ltd, supported the appeal and adopted the submissions made on behalf of the appellants. In particular he emphasized that Athman's claim to the original parcel

by adverse possession was unmaintainable because it was against the Government rather than against the owner of the property. He urged us to dismiss the appeal.

Mr. Wameyo, learned counsel, appeared for the plaintiffs in ***HCCC No. 236 of 2009*** and ***HCCC No. 108 of 2008*** which were consolidated with ELCC No. 162 of 2011 and in which those parties claim to have acquired title to the original parcel by adverse possession. In his brief submissions, counsel submitted that his clients were in occupation of the original parcel and were eagerly waiting the court to determine the real owner of the disputed property, so that they may pursue their adverse claim against that party.

Mr. Khanna, learned counsel, appeared in his capacity as the administrator of the Estate of Androniki and opposed the appeal. He submitted that while he did not currently represent the estate of Marios, he was the plaintiff in HCC No. 315 of 1997, which was consolidated with Malindi ELCC No 162 of 2011. He also submitted that as the administrator of the estate of Androniki, which owns the original parcel, he had a direct interest in the appeal. Counsel narrated the efforts made by Marios when he was alive to set aside the orders of Mbito, J. but were frustrated by the loss of the court file.

It was Mr. Khanna's further submission that the undated and unsigned pleadings in the record and the absence of summons to enter appearance in the court file as reconstructed meant that the orders made by Mbito, J. were not validly made. He also submitted that the unsigned and undated pleadings on record as well as the order appealed from which was not certified, rendered the appellants' appeal incompetent. Mr. Khanna denied having acted for Marios in the sale transaction and maintained that it was Bryson Inamdar & Bowyer advocates who represented him and that at the time he attested the sale agreement, he had not been appointed the administrator of the estate of Androniki.

As regards the appellant's contention that the vesting order was properly issued, it was submitted that the appellants had availed no evidence to show that they had served the summons to enter appearance upon Marios; or that they had deposited in court the balance of the purchase price of Kshs 4, 350,000/- as ordered by the Court; and that the amended plaint and decree, which the appellants purported to have filed before obtaining the vesting orders, were not on record.

On the delay in applying to set aside the orders of Mbito, J. Mr. Khanna submitted that after attempts to obtain proper documents for reconstruction of the court file were thwarted by Meenye & Company Advocates, they were left with no choice but to file HCCC No. 315 of 1997 to challenge the vesting order and protect the original parcel which was part of the estate of Androniki.

Regarding the objections raised by the appellants on the competence of the applications to set aside the orders issued by Mbito, J., it was submitted that the court has inherent jurisdiction to issue necessary orders so as to do substantive justice. In a case like the present where there was no evidence of service of summons to enter appearance, it was urged, default judgment must be set aside as of right.

Next to submit was ***Mr. Bwire,*** learned counsel for Athman, who argued that the appellants were questioning the exercise of discretion by Angote, J., and that on the basis of ***Mbogo & Another v. Shah*** (supra) this Court must be slow to interfere with the exercise of discretion by the High Court. Counsel further contended that under ***Order 10 Rule 11*** of the Civil Procedure Rules the trial court has unlimited discretion to set aside a default judgment; that there was sufficient evidence upon which the High Court found that the decree and vesting orders were irregularly obtained; that part of that evidence was the conflicting affidavits of the appellants' advocate and the statement to the police by Mbito, J.; that where judgment is entered without service of summons, it is set aside as a matter of right and not of discretion; that where summons to enter appearance has not been served, the irregular judgment can be set aside despite the length of time that has elapsed; that on the authority of ***Trouistik Union International & Another v. Mbeyu & Another, CA No. 145 of 1990*** Marios, who was not the administrator of the Estate of Androniki, could not sell and transfer the suit property; and that by entering judgment without service of summons, interested and affected parties were denied an opportunity to be heard.

Lastly we heard submissions from ***Mr. Mogaka,*** learned counsel for Kanzi Bay Co Ltd who submitted that his client was a *bona fide* purchaser for value of the suit property; was directly affected by the appeal;

and had participated in the proceedings giving rise to this appeal, having been a party to one of the consolidated suits. Relying on ***Jomo Kenyatta University of Agriculture & Technology v Mussa Ezekiel Oebah, CA No. 217 of 2009*** and ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others, CA No. 39 of 2002,*** counsel emphasized that the approach of this Court is not to readily interfere with the exercise of discretion by a trial court; that Marios lacked capacity to enter into the agreement with the appellants for the sale and transfer of the suit property or a part thereof because he was not the administrator of the estate of the Androniki; that the said agreement was, on the authority of ***Trouistik Union International & Another v Mbeyu & Another,*** (supra), illegal, null and void; that on the authority of ***Mapis Investments (K) Ltd v. Kenya Railways Corporation, CA No. 14 of 2005, Patel v. Singh No.2 [1987] KLR 585*** and ***Heptulla v. Noormohamed [1984] KLR 580*** the said agreement was unenforceable once its illegal nature was brought to the attention of the court; and that on the authority of ***Chumo Arap Songok v. David Kibiego, CA No. 141 of 2004 (Nakuru)*** a court of law is not powerless in the face of an illegality and is duty bound to correct the illegality and to do substantive justice.

Relying further on ***Ali Bin Khamis v Salim Khamis Korobe & 2 Others [1956] 23 EACA 195,*** Mr. Mogaka submitted that an order made without service of summons is a nullity which must be set aside *ex debito justitiae*. In such a nullity, counsel urged, procedure was unimportant and that the court can set aside the null order on its own motion pursuant to its inherent jurisdiction.

We have anxiously considered the record of appeal, the ruling of Angote, J.; the grounds of appeal, the submissions by respective counsel, their lists of authorities and the law. We bear in mind that the substantive dispute involving the original parcel and the suit property in the 9 consolidated suits is yet to be heard on merit by the Environment and Land Court. To that extent, we shall refrain from making any definitive findings on disputed issues which are best resolved by the trial court after full hearing of the parties. (See ***David Kamau Gakuru v. National Industrial Credit Bank Ltd, CA No. 84 of 2001*** and ***BP (Kenya) Ltd v. Kisumu Market Service Station, CA No. 25 of 1992***). Among such issues that we cannot prejudge in this appeal are whether Marios could sell and transfer the suit property to the appellants; whether Rehema Estate Ltd was properly registered as owner of the suit property; whether, without suing the estate of Androniki, Athman could be registered the owner of the original parcel through adverse possession; and whether Kanzi Bay Company Limited is a *bona fide* purchaser for value; among others.

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 the case. From the outset, it cannot be gainsaid that a distinction has always existed between a 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 appearance 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 factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See ***Mbogo & Another v. Shah*** (supra), ***Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75***, ***Chemwolo & Another v. Kubende [1986] KLR 492*** and ***CMC Holdings v. Nzioki [2004] 1 KLR 173).***

In an irregular default 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 underlined the importance of the right to be heard as follows in ***Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:***

> ***"[T]here must be ever present to the mind the fact that our laws 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."***

The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In ***Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010***, the High Court expressed itself thus:

> ***"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process***."

Earlier in ***Kabutha v. Mucheru, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he then was)*** had expressed the principle thus:

> ***"[W]ith respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.***

(See also, ***Bouchard International (Services) Ltd v. M'Mwereria [1987] KLR 193, Remco Ltd v. Mistry Jadva Parbat & Co. Ltd. & 2 Others [2002] 1 EA 233*** and ***Baiywo v. Bach [1987] KLR 89.***

Having carefully considered this appeal, we are deeply concerned by the following four factors, which leave no doubt in our minds that the default judgment in this case was irregular. The first is that when Marios applied for reconstruction of the Court file, the original of which the Deputy Registrar had confirmed to have gone missing, the advocates on record for the appellants, who were reasonably the only persons with copies of the plaint, the summons to enter appearance and affidavit of service confirming when and where Marios was served with summons, defeated that possibility by returning the application vide a letter dated 23rd February 1998, claiming that they were no longer on record. The appellants therefore ensured that these vital documents were not availed to the court or to the other parties for purposes of confirming the true position regarding service of summons to enter appearance.

The second is that on 21st May 2013, Angote, J. specifically ordered the appellants to supply the court with the plaint and the affidavit of service confirming service upon Marios. As of the date of the hearing the application to set aside the default judgment and consequential orders, the appellants had not supplied those documents. The only documents on record were undated and unsigned copies.

The third issue is the two completely inconsistent affidavits sworn by the then appellants' advocate, G. K. Meenye on 25th February 2010 and 31st May 2010. In the first affidavit he disowned the orders issued by Mbito, J. claiming that they were forgeries and that he had not obtained them. He attached to that affidavit a host of private documents which would not have been readily available to any member of the public, to demonstrate that by the time the orders of Mboto, J. were issued and the correspondence thereafter written, he was operating under different name, contrary to what the correspondence purported to show. Barely three months later, he swore a second affidavit, admitting having sworn the first affidavit, but

denying the most important averments therein. In the latter affidavit, he suddenly remembered having obtained the orders from Mbito, J! These contradictory affidavits were sworn, not by any layman, but by an advocate of the High Court and officer of the court.

Lastly is the statement that Mbito, J. recorded with the police where he maintained that his signature on the vesting order was a transposition deserving further investigation by the police.

In their totality, the above factors strongly suggest, in our minds, that the default judgment and all consequential orders by Mbito, J. were made without service of summons to enter appearance; are completely irregular; and warranted the orders made by Angote, J setting them aside to afford all the parties an opportunity to be heard.

We do not think there is any merit in the complaints by the appellants that the learned judge erred by joining Athman to the suit and by entertaining his application, which was filed out of time. Athman was joined into the suit on 18th December 2012 by the ***consent*** of the parties, including the appellants. The appellants took no action or steps to challenge the consent order joining Athman to the suit, if indeed they were aggrieved by it. They waited to raise the issue of joinder in their submissions in the applications to set aside the orders of Mbito, J. It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example on grounds of fraud, mistake or misrepresentation. (See ***Brooke Bond Liebeg (T) Ltd v. Mallya [1975] EA 266; Flora Wasike v. Destimo Wamboko [1988] KLR 429,*** and ***Kenya Commercial Bank Ltd v. Benjoh Amalgamated & Another, CA No. 276 of 1997).***

As regards Athman's application, which the appellants contend was served out of time, the consent order required him to file the application within 30 days from 18th December 2012. He filed the application on 19th January 2013. The application was out of time by two days only. It seems to us that this was such a minor infraction that the learned judge decided to overlook it. Under the overriding objective spelt out in ***section 3*** of the Environment and Land Court Act, the principal objective of that statute is to enable the court to facilitate just, fair, expeditious, proportionate and accessible resolution of disputes. As ***Ouko, JA*** observed in ***Nicholas Salat v IEBC & 6 Others, CA (Application) No 228 of 2013,)*** the general trend, following the introduction of the overriding objective in various statutes as well as ***Article 159*** of the ***Constitution***, is that the courts strive to sustain rather than strike out pleadings on purely technical grounds. The learned judge explained:

> ***"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."***

We are satisfied that these two grounds of appeal have no merit and dismiss them accordingly.

The last ground of appeal faults the learned judge for entertaining the application by Marios who was deceased at the time of the hearing, without first substituting him with a representative of his estate as required by Order 24 of the Civil Procedure Rules. We have already emphasized that the once an irregular default judgment is brought to the notice of the court, the court will set it aside as a matter of right and that the court may set aside such judgment even on its own. We do not think, in the circumstances of this case, the trial judge can be faulted for setting aside the irregular default judgment. Apart from Marios, the fact that the default judgment was irregular was brought to the attention of the Court by the administrator of the estate of Andronikí, the owner of the original parcel, as well as by Athman, who claimed to have acquired ownership thereof through adverse possession. The court was therefore not expected to shut its

eyes to the glaring irregularities we have pointed out above regarding the default judgment.

The former Court of Appeal for Eastern Africa, in ***Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195*** *e*xpressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, *ex debito justitiae*, from setting aside such an order. ***Briggs, JA.,*** with whom ***Worley P.*** and ***Sinclair, VP.*** concurred, stated thus:

> ***"On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR."*** (Emphasis added).

Having carefully considered this appeal in its entirety, we must come to the conclusion that the learned judge did not err by setting aside the default judgment and all the consequential orders. Accordingly the appeal fails and is hereby dismissed with costs. It is so ordered.

Dated and delivered at Mombasa this 17th day of June 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR