



**Bonea v Bonea (Environment and Land Appeal 8 of 2020)
[2023] KEELC 17222 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 8 OF 2020
EK MAKORI, J
APRIL 26, 2023**

BETWEEN

OMAR BORIDE BONEA APPELLANT

AND

KHADIJA BORIDE BONEA RESPONDENT

(An appeal from the Order of Hon. R.G Mundia SRM issued on 19th June 2019 in respect of the Notice of Motion dated 17th May 2019 in Mpeketoni Land Case No. 5 of 2018)

JUDGMENT

1. For determination is the appeal that arises from the decision by Hon R G Mundia SRM in respect of the Notice of Motion dated May 17, 2019.
2. Aggrieved by the decision, the appellant preferred an appeal against the ruling which appeal is premised on the following grounds:
 - i. That the learned magistrate erred in failing to consider the respondent's grounds for seeking an extension of time within which to file a response to the application dated May 17, 2019, the main ground being that the respondent had misplaced some crucial evidentiary documents relating to the relevant correspondence and title documents to the suit documents hence his response would have been baseless without the same.
 - ii. The learned magistrate erred in failing to consider that the respondent and his family are currently residing on the suit property and have no other home hence the injunctive orders would render them homeless and destitute.



- iii. That the learned magistrate erred in fact and in law in failing to consider that, the applicant had not satisfied the well laid down conditions upon which to issue an injunction as set out in order 40 rule 1 of the Civil Procedure Rules.
3. The court directed parties to file written submissions. I did not see any submissions on record.
4. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse the same and come to its own conclusion.
5. Significant in this matter is that this appeal questions the ex parte mandatory orders issued by the trial court, which subsequently necessitated that the appellant be evicted (sic) from the suit property. In considering whether to offset the orders issued *ex parte* by a trial court in the exercise of its discretion, this court is guided by the principles as enunciated in the case of *Shah v Mbogo & another* [1968] EA 93 in the following terms:

“I think it is well settled that this Court will not interfere with the exercise of discretion by the inferior Court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so, arrived at a wrong conclusion”
6. In *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR the Court of Appeal expressed itself thus:

“We agree with the noble principles which go further to establish that the court’s discretion to set aside an *ex parte* Judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error but not to assist a person who deliberately seeks to obstruct the course of justice.”
7. The appellant herein impugns the orders issued on June 19, 2021 on the grounds that he was not granted leave to file his response out of time. I have perused the proceedings by the trial court and it is my finding that at no point did the appellant seek leave to file a response out of time. As of November 5, 2019 from the proceedings, the appellant told the trial court that he had filed an appeal. While acting in person, he told the court that his former advocates had been compromised and lied to him that they had responded. At no point did he mention that he intended to file a response to the notice of motion dated May 17, 2021. As such, in my view, this ground of appeal is not merited.
8. It is the appellant’s further contention that the injunctive orders – which were mandatory in nature issued by the court, would render him and his family homeless and destitute. In addition, the learned magistrate failed to consider the well-laid down conditions upon which an order of mandatory injunction ought to be granted. From the ruling delivered on June 19, 2021, the trial court granted prayers 2 and 3 as per the notice of motion dated May 17, 2021. From the said motion, the prayer sought was pending the hearing and determination of the application. However, upon perusal of the record, the court order dated June 21, 2021, the order granted was final in nature, issued ex parte totally locking out the appellant from the seat of justice and leading to eviction orders (sic) *ex parte* pending the disposal of the suit (sic). From my point of view, the said order disposed of the application which as it stands is yet to be heard and determined inter partes. From the record, what follows next is contempt proceedings directed at the appellant for failure to vacate the suit property. Looking at those orders, it is my humble opinion that an injustice will be caused if not reversed. The orders were issued without the trial court considering the effect the same could cause on the parties. It is not a good practice to



issue blanket orders based on the prayers sought by a party in a motion without considering the merits. Perhaps the trial court ought to have written a considered ruling than issuing orders based on prayers sought in the motion – leading to ex parte eviction orders (sic) as in this case, The appellant would stand evicted without a hearing at all. The orders fly contra the rules of natural justice - audi alteram partem and the right to be heard - as enshrined in Art 50(1) of the *Constitution*. The orders dated June 21, 2021 by the trial court cannot, therefore, be left to stand and ought to be set aside in the interest of justice. The orders which then commend for issuance are as follows:

- a. The orders dated June 21, 2021 are hereby set aside in entirety.
- b. The file is hereby remitted back to the Principal Magistrate Mpeketoni to rehear and determine the application dated May 17, 2021 on merit.
- c. Status quo orders issued by this court be in place that the appellant is not to be evicted until the trial court determines the application dated May 17, 2021 on Merit.
- d. Mention on the May 4, 2023 at Mpeketoni PM’s Court for further orders.

DATED, SIGNED, AND DELIVERED AT MALINDI THIS 26TH DAY OF APRIL, 2023.

EK MAKORI

JUDGE

