



Ministry of Lands and Physical Planning & 2 others v Benson (Sued as the legal representative of the estate of Benson Mbuuri alias Kathakai Benson Mburi (Deceased); M'Mukangu (Interested Party) (Environment and Land Appeal E046 of 2022) [2023] KEELC 18950 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18950 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E046 OF 2022**

CK NZILI, J

JULY 19, 2023

BETWEEN

**THE MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST APPELLANT
LAND ADJUDICATION & SETTLEMENT OFFICER RUIRI/
RWARERA, IMENTI NORTH AND SOUTH, CENTRAL IMENTI &
BUURI 2ND APPELLANT
THE HON ATTORNEY GENERAL 3RD APPELLANT**

AND

**LYDIA KANARIO BENSON (SUED AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF BENSON MBUURI ALIAS KATHAKAI BENSON MBURI
(DECEASED) RESPONDENT**

AND

M'MWORIA M'MUKANGU INTERESTED PARTY

*(An appeal from the ruling of Hon. DW Nyambu C.M Meru
delivered on 7.6.2022 in Meru ELC Case No. 22 of 2019)*

JUDGMENT

1. Before the court is a memorandum of appeal dated 12.8.2022 in which the appellants, who were the 2nd – 4th defendants at the lower court, fault the decision by the trial court delivered on 7.6.2022 because it:



- i. Erred in law and fact in dismissing the application dated 25.5.2022, whose effect was to disregard or fail to consider the evidence of their witness by way of a replying affidavit dated 27.5.2022.
 - ii. Failed to consider that the effect of the dismissal was a denial of an opportunity to defend the suit, thus violating their rights of natural justice to be heard.
 - iii. It failed to find the overarching principles that guide the court to avoid them suffering a greater risk in not participating in the proceedings.
2. As a first appeal, the court must re-appraise itself of the lower court record and come up with independent findings on facts and law. See *Peters v Sunday Post* (1958) E.A 424. At the trial court, the respondent as the plaintiff had sued the interested party alongside the appellants as 1st – 4th defendants by a plaint dated 25.2.2019 alleging that they had jointly colluded, fraudulently, and irregularly created land parcel LR No. Ruiiri/Rwarera/2107 out of her late husband's land parcel LR. No. 130, initially measuring 14 acres, reducing it to 1.30 acres, placing on a different map creating new maps, subdividing it, recording 13 acres in favor of the interested party, effectively denying her the right to her land as initially demarcated. She had prayed for the cancellation of title in favor of the interested party, amendments of the map to reflect her land as measuring 14 acres, a permanent injunction against any interference by the interested party, and an order of eviction if the interested party re-entered her land. The plaint was accompanied by a case summary, issues for determination, witness statements, and a further list of documents dated 13.11.2019.
3. The interested party entered an appearance on 4.3.2019 and filed a statement of defense dated 28.3.2019 accompanied by witness statements dated 4.3.2019 and further witness statements dated 28.3.2019 dated 6.11.2019. He admitted that the respondent was the first recorded owner of land parcel L.R No. 130 in 1971 and took possession thereon. The interested party denied that the respondent was the then-occupant of the suit land. He averred that he lawfully bought the land from the respondent's late husband and became the registered owner and possessor of LR No. Meru Central/Ruiiri/Rwarera/2107 with effect from 1970. The interested party admitted the pendency of Civil Suit No. 288 of 2017, which later became Meru CMCC ELC 60 of 2018 and was eventually withdrawn. He averred that the interested party always knew the existence of the said portion of land adjacent to LR No. Ruiiri/Rwarera/130, which the respondent had allegedly subjected to a succession cause.
4. The interested party denied any alleged fraud or collusion since he had acquired the suit land regularly and legally. The interested party's statement of defense was accompanied by a case summary and list of issues for determination dated 10.9.2019 and a further list of witnesses dated 15.11.2021.
5. The appellants filed a notice of appointment dated 22.10.2019, a defense dated 11.11.19, a list of witnesses dated 16.10.2020, a witness statement filed on 16.10.2020, and a list of documents dated 16.10.2020. The appellants denied the contents of the respondent's claim suit and averred that she failed to object to the register when it was initially published to point out any alleged errors. The appellants maintained that they lawfully executed their statutory duties and mandate in the manner that the adjudication process was undertaken and the adjudication register forwarded for titling once complete after all parties with claims were heard and claims determined. They denied any alleged fraud, illegality, or collusion with the interested party as alleged by the respondent. In reply to the defense dated 23.12.2020, the respondent averred that the appellants had abrogated their statutory obligations and deprived her of the land.



6. From the lower court record, the respondent filed a notice of motion dated 25.2.2019 which attracted replying and supplementary affidavits by the interested party, dated 4.3.2019, seeking both inhibition and temporary injunction against the interested party. Another application dated 26.6.2019 was filed by the respondent seeking to stay the proceedings and ruling dated 8.4.2019, review orders granted on 25.2.2019, and re-issuance of both inhibition and temporary orders of injunction. The interested party opposed the application through a replying affidavit sworn on 1.7.2019.
7. In a ruling delivered on 16.7.2019, the trial court reinstated the orders of inhibition and temporary injunction, directed the parties to comply with Order 11 of the *Civil Procedure Rules* within 14 days, and listed the matter for a full hearing. From the record, the matter was listed for a case conference on 12.8.2019, 10.9.2019, and lastly on 21.10.2019. The appellants were allowed to comply with Order 11 of the *Civil Procedure Rules* alongside the interested party.
8. The case was after that listed for hearing on 19.11.2019 but adjourned at the instance of the appellants' counsel's absence, said to have gone to the clinic for medical attention. The case was listed for hearing on 18.2.2020, in which Mr. Kieti, learned state counsel appeared for the appellants.
9. Lydia Kanario Benson, Kathakai Benson M'Mburi & Washington Kamari M'Nairobi testified as PW1, 2 & 3, adopting their witness statements dated 25.2.2019 and 13.11.2019. PW 1 Produced P. Exh Nos. 1-11. There is no indication why the appellants failed to attend court after PW 1 was stood down for re-examination, yet the date was taken by consent for 7.4.2020. The interested party testified as DW 1 on 11.8.2020. She adopted her witness statement dated 4.3.2019 and produced her documents per the list dated 28.3.2019, as D. Exh No's 1-6. Upon request, the appellants were ordered to file their list of witness statements and documents within 14 days for the defense hearing on 28.9.2020. The interested party testified and closed the 1st defendant's defense on 5.4.2022. The court also ordered that the Appellants' defense be marked as closed. Parties were directed to file written submissions before 6.6.2022.
10. At this point, the appellants filed an application dated 25.5.2022 seeking to reopen their case long after written submissions had been filed on 25.4.2022. The grounds were contained on the face of the application and a supporting affidavit sworn by Mbaikyatta Darlive learned, state counsel appearing for the appellants on 26.5.2022. Briefly, the deponent stated that on 5.4.2022, she could not attend court since she was attending a funeral service out of town; the appellants were government officers willing to testify, but their lawyer was unavailable that day; sins of lawyers should not be visited upon them and that sufficient reasons had been given why they should be heard on merits in the interests of justice. The respondents opposed the application by replying to affidavits sworn on 2.6.2022 and 27.5.2022, by Lydia Kanairo and Danson Mukono. The respondent termed the application as vexatious, frivolous, an abuse of the court process, a delaying tactic, and lacking merits. In paragraph 3 of the affidavit by Mr. Mukono, he admitted the request to hold a brief by counsel for the appellants. Parties made oral submissions on 6.6.2022. By a ruling dated 7.6.2022, the trial court dismissed the application and set a judgment for 19.7.2022. This ruling had elicited an appeal before the court, in which parties were directed to file written submissions by 29.6.2023.
11. The 2nd and 3rd appellants, by written submissions dated 6.6.2023, isolate two issues for the court's determination: whether counsel provided a reasonable excuse for not attending court and whether the appellant was entitled to the prayers sought in the notice of motion. On the first issue, it was submitted that counsel had attended a funeral out of town and asked Mr. Kiruai' advocate to hold her brief on that particular day to seek for another date which the trial court declined. Therefore, parties should not suffer from the mistakes of the counsel. Reliance was placed on Philip & Another v Augustine Kubende 1982-88 KL 103 and *James Mwangi Gathara & Another v OCS Loitoktok* (2018) eKLR.



12. On the second issue, it was submitted that Article 50(1) of the Constitution grants the right to a fair and public hearing, with each party being allowed to present their case before a decision is made. Therefore, a party should not be driven out of the seat of justice, especially where there was no deliberate attempt to obstruct or delay justice. Reliance was placed on Agip Kenya Limited v Highlands Tyres Limited (2001) eKLR.
13. By submission dated 11.6.2023, the interested party identified one issue for determination: whether the interested party was denied an opportunity to be heard contrary to Article 50 of the Constitution. In this instance, since there was an explanation why counsel for the appellants was not before the court, to deny them an opportunity to be heard amounts to a denial of the rights to natural justice and condemnation without being heard. Reliance was placed on Evans Kidero v Ferdinard Waititu & 4 others Petition No. 18 of 2014 as consolidated with Petition 20 of 2014(2014) eKLR and Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others Petition 7 of 2018 as consolidated with Petition 9 of 2018 (2018).
14. The court has carefully gone through the lower court record, the record of appeal, the grounds of appeal, and the written submissions. The issues for the court's determination are:
 - i. If there is a competent appeal before this court.
 - ii. If the appeal has merits.
15. Order 42 of the Civil Procedure Rules require key documents to accompany a record of appeal, among them the order or ruling appealed against and all the documents relied upon by the trial court in making the decision appealed against. In this record of appeal, the ruling delivered on 7.6.2022, the application, and the replying affidavits by the respondent and the interested party do not form part of the appeal record. On that ground alone, I find the omission fatal and, by extension, the appeal incompetent.
16. Coming to the merits of the appeal, the court has taken time to set out the history of this matter. The trial court went out of its way to bend backward and accommodate the appellants. The lower court file shows that the appellants were served with hearing notices on 16.2.2021, 8.12.2021 & 7.2.2022 and waited until 26.5.2022 to move the trial court on the application to set aside and to re-open the proceedings.
17. The record shows that on 5.4.2022, Mr. Kiruai advocate never mentioned anything regarding instructions to hold brief for counsel for the appellants allegedly attending a funeral, or seek an adjournment on behalf of the appellants. The same counsel had filed an affidavit of service against the appellants and called DW 3. Counsel did not tell the trial court that he was unwilling to call his next witness because of the absence of the appellants' counsel. The appellants' witnesses were not before the trial court. No explanation had been given why they were absent before court, even if the counsel representing them was absent. Therefore, Mr. Danson Kiruai Mukono's affidavit was not only misleading, an afterthought and amounted to perjury. The trial court was right to ignore or disregard it, for the record did not reflect its contents.
18. Counsel for the appellants, in her explanation, had not stated where exactly she was outside town and why it was so difficult for her to write to the trial court before the hearing date and seek indulgence instead of leaving it to the respondent counsel to pass on the message to the trial court. Further, there was no evidence that the appellants took the liberty of informing counsels for the other parties that they would seek an adjournment.
19. The appellants' case was marked closed on 5.4.2022. As to whether the appellants were condemned unheard, the application before the trial court was filed on 25.6.2022, which was close to two and a



half months. Counsel for the appellants, if diligent enough, ought to have liaised with either the trial court or the other parties to know the outcome of the proceedings. The delay in re-opening the case was inordinate and not explained at all. Is it that the funeral out of town took two and a half months or that the appellants were casual or at least less concerned about the matter? Were the witnesses also attending the funeral on the material day? All these are issues or facts the appellants never laid bare before the trial court.

20. Whereas the court has discretion to re-open a case, the same must be exercised on sound reasons and judiciously. Sufficient and reasonable cause or grounds must be laid before the court. In this appeal, the appellants invoke Articles 25 and 50 (1) of the *Constitution* on a fair hearing and cited Philip v Kubende James Mwangi Gathara, *Agip Kidero v Waititu supra*. In *Mbituka Titus v Jackline Mutindi* (2020) eKLR, the trial court held that in granting an adjournment, the court must be satisfied that a sufficient cause must be shown. In the record before the court, there is no indication if any application for an adjournment was sought on behalf of the appellants. Mr. Kiruai advocate never sought for such. The record reflects that he had no such instructions on behalf of the appellants to adjourn the suit for whatever reasons. Before the trial date, the appellants had failed to appear in court, even when PW 1 was stood down for re-examination.
21. A party who has been allowed to present his defense and fails to appear in court on time or at all must have sufficient reasons why he did not attend court, especially in seeking to reopen an already concluded matter awaiting judgment.
22. In *Joseph Ndungu Kamau v John Njibia* (2017) eKLR, the court cited with approval *Samuel Kiti Lewa v HFCK Ltd & another* (2015) eKLR, on the need to consider the embarrassment and prejudice to the opposite party, if it was to fill gaps, the inordinate and the unexplained delay.
23. In the case of *Festus Shinyala v Kalasinga Ahmed* (2021) eKLR, the court held that under Order 12 Rule 2 & 17 Rule (3) of the *Civil Procedure Rules*, where there was sufficient notice, the court guided by the overriding objective under Section 1A of the *Civil Procedure Act* could proceed with the matter, if there was a delaying tactic on the part of the party absent.
24. In this appeal, the appellants never laid a basis for why there was non-attendance or non-prior communication for the non-attendance. The absence and delay in applying for the reopening of their defense were not sufficiently addressed. It was not enough to say that counsel was attending a funeral without substantiating the same. There was no offer to pay throwaway costs, remorse, or apology for not attending court. Counsel for the appellants was casual and not remorseful for not attending court. Instead of owning up, counsel passed the buck to Mr. Kiruai advocate, who could not help improve the situation or make it better.
25. The upshot is that I find the appeal both incompetent and lacking merits. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 19TH DAY OF JULY 2023

In presence of

C.A John Paul

Arithi for Interested party

Thangicia for respondent

HON. CK NZILI



ELC JUDGE

