



**Anyona v Oduor & another (Environment and Land Appeal  
E010 of 2022) [2023] KEELC 20165 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20165 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E010 OF 2022  
AY KOROSS, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JANE AWUOR ANYONA ..... APPELLANT**

**AND**

**MICHAEL ODUOR ..... 1<sup>ST</sup> RESPONDENT**

**MAUREEN ATIENO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Respondents' Case**

1. For determination is a notice of motion dated March 8, 2023 brought by the respondents under the provisions of Section 3A of the *Civil Procedure Act* and Orders 10 Rules 4, 5, 6, 9 and 11 and 51 Rule 1 of the *Civil Procedure Rules* in which they sought the following orders:
  - a. Spent.
  - b. That the hon. court do set aside and or vary its interlocutory judgment entered on March 2, 2023 against the respondents for their default to enter appearance and allow them to file their responses and lists of witnesses and documents.
  - c. That the hon. court do grant the respondents leave to file responses and lists of witnesses and documents for not being served with the memorandum and record of appeal.
  - d. Spent.
  - e. Spent.
2. The application is premised on the grounds enumerated on the face of the motion and on the annexed supporting affidavit duly deposited by the respondents on March 9, 2023.



3. In summary, it was the respondent's case they had an arguable case, pleadings and summons were not served upon them in accordance with the provisions of Order 5 of the Civil Procedure Act, they became aware of the appeal when they visited Bondo Law Courts in February 2023 and a visit to Siaya ELC revealed the appeal had been slated for judgment on 2/03/2023. Service had never been effected upon them. It would be in the interests of justice if the judgment rendered on 2/03/2023 was set aside.

### **Appellant's case**

4. His advocates, Rakewa Otieno & Co Advocates filed grounds of opposition dated April 17, 2023 in which they contended inter alia; the motion was misconceived, bad in law and an abuse of court process; the motion was frivolous, vexatious, trivial and should be dismissed; the motion did not meet the legal threshold, was incurably defective and had sought vague orders.

### **Respondents' Submissions**

5. As directed by the court, both parties disposed of the motion by written submissions. The respondents who were acting in person filed their written submissions dated May 4, 2023. They identified two issues for determination (i) whether the motion was merited and, (ii) whether they were accorded a fair hearing.
6. On the 1<sup>st</sup> issue, it was their submissions they had not been served with pleadings and summons in accordance with the provisions of Order 5 Rule 22 (B) of the Civil Procedure Rules and consequently, judgement was rendered on March 2, 2023 in their absence; the interlocutory judgment was irregular.
7. By the provisions of Order 10 Rule 11 of the Civil Procedure Rules, the court had unfettered discretion to set aside the judgment. To this end, they relied on the decision of James Kanyiita Nderitu & Anr vs. Marios Philotas Gbikas & Anr (2016) eKLR which held in instances of default interlocutory judgment, a judgment should be set aside.
8. On the 2<sup>nd</sup> issue, they submitted Article 50 (1) of the Constitution took cognisance of fair hearing and by audi alteram partem principle, they could not be condemned unheard and cited the case of Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong Parish & Another 2018 eKLR which held: -

“...it is important that in any judicial process adjudication (sic) parties involved be given an opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.”

### **Appellant's Submissions**

9. Her counsel, Mr Rakewa, filed the appellant's written submissions dated May 10, 2023. He submitted on the respondents' two issues.
10. On the 1<sup>st</sup> issue counsel submitted the prayers sought in the motion were untenable; this court was an appellate court and not a trial court. Further the provisions of Order 5 Rule 22B of the Civil Procedure Rules that was relied upon by the respondents was misplaced. According to counsel, the motion was frivolous, abuse of court process and wasted the court's time.
11. On the 2<sup>nd</sup> issue, counsel argued that from the judgment rendered on 2/03/2023, the court alluded there was deliberate failure by the respondents to take part in the proceedings and therefore the issue



of fair trial did not suffice and they could not be granted leave to file a defence, lists of witnesses and documents.

### **Analysis and determination**

12. Having perused the appellate record and carefully considered the motion, affidavit, grounds of opposition and rival submissions, in my considered view, the single issue that falls for determination is whether the respondents have met the legal threshold to warrant setting aside the judgment delivered on 2/03/2023.
13. Before dealing with the issue, certain disconcerting issues emerged from the motion. In accordance with the provisions of Orders 10 Rules 4, 5, 6, 9 and 11 of the *Civil Procedure Rules*, the respondents sought to set aside ‘interlocutory judgment’ that was ostensibly rendered on 2/03/2023.
14. No doubt, in rendering its decision on 2/03/2023, this court sat as an appellate court and these provisions of Order 10 was inapplicable in the circumstances of the case. Its jurisdiction as an appellate court is laid out in Section 78 of the *Civil Procedure Act* as follows: -

- “(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
- (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require the evidence to be taken;
  - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

15. As a first appellate court, its role was to re-evaluate, re-examine and reassess the evidence from the trial court and come up with its own deduction. Put in another way, it could not render a summary or interlocutory judgment and is incapable of granting leave to the respondents to file witness statements and documents unless they had sought leave to file additional evidence in accordance with the provisions of Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules*; which they have not. See also the Supreme Court of Kenya decision in *Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR.
16. The question that suffices is whether the respondents’ blunder on reliance on inapplicable provisions of law and erroneously seeking to set aside “interlocutory” judgment allegedly rendered on 2/03/2023 is curable.
17. The appropriate provision of law for setting aside the judgment of a 1<sup>st</sup> appellate court is provided for in Order 42 Rule 23 of the *Civil Procedure Rules* which provides as follows: -

“Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause



from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit.”

18. The court has also noted the impugned judgment was rendered on 2/03/2023 which is the date the respondents have referred to in their motion. It is not lost to this court the respondents are self-represented. It is apparent there was an error on nature of the judgment the respondents have sought to set aside.
19. It appears they jumbled up the nature of the judgment which is an excusable error. Reliance on inapplicable provisions of law is also curable. The court is concerned with carrying out substantive justice and is called upon to disregard technical errors. I hereby invoke Article 159 (2)(d) of the Constitution and consider the term ‘interlocutory judgment’ as a mere technical error.
20. I will now delve into the substance of the issue for determination. From the record, the respondents have alluded they were not served with documents by the appellant while on the other hand, the appellant was of the view that according to the impugned judgment, the court affirmed albeit being privy of the appeal, the respondents had failed to attend court.
21. Indeed, in paragraph 13 of the impugned judgment, the court stated the respondents had written a letter to it that they became privy of the appeal from the trial court and despite being aware of the mention date of January 17, 2023, they did not attend court. At no time did the court mention the respondents were served with a memorandum and record of appeal or submissions.
22. I have scrutinised the record and apart from a mention notice that was served upon the respondents on 7/11/2022, there is no evidence the respondents were served with the appeal documents including submissions.
23. As a first appellate court, Order 42 of the Civil Procedure Rules contains express and mandatory provisions of law requiring service of the memorandum of appeal, hearing notices and written submissions. Salient provisions of this Order 42 provide as follows: -

“Service of memorandum [Order 42, rule 12.]

Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.

Filing declaration and written submissions [Order 42, rule 16.]

- (1) Any party to an appeal who does not intend to appear in person or by advocate at the hearing of the appeal may file a declaration in writing to that effect and lodge written submissions of the arguments in support of or in opposition to the appeal, as the case may be and shall, within seven days after lodging the submission serve a copy thereof on the other party or on each other party appearing in person or separately represented.
- (2) A party who has lodged written submissions under this rule may, with leave of the court, address the court at the hearing of the appeal.

[Order 42 Rule 17] Service of hearing notice.

Notice of the day fixed for hearing of the appeal shall be served on the respondent or on his advocate in the manner provided for under Order 5.

[Order 42 Rule 18] Contents of notice.



The notice to the respondent shall declare that, if he does not appear in the court to which such appeal is preferred on the day so fixed, he appeal may be heard *ex parte*.”

24. The purport of these provisions of law is to ensure all parties are kept abreast of steps being undertaken towards adjudication of the appeal. These provisions resonate with Article 50 (1) of the [Constitution](#). See Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish (Supra).
25. In the absence of service, I find the respondents are in the interests of justice and in accordance to the provisions of Order 42 Rule 23 of the Civil Procedure Rules entitled to have the judgment rendered on 2/03/2023 and all its consequential orders set aside. See [Joseph M'Rukiri v Thangicia M'Imunya](#) [2021] eKLR.
26. It is trite law costs follow the event and each party shall bear their respective costs. Accordingly, for the reasons and finding set out above, I hereby make the following orders: -
  - a. The Judgment of the court dated 2/03/2023 together with all consequential orders are hereby vacated and/or set aside, *ex debito justitiae*.
  - b. The appeal shall be heard *de novo*.
  - c. The matter shall be mentioned for directions on the re-hearing of the appeal on October 18, 2023
  - d. Each party shall bear their respective costs of the motion.

**DELIVERED AND DATED AT SIAYA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**28/09/2023**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr Rakewa for the appellant

1<sup>st</sup> respondent

2<sup>nd</sup> respondent

Court assistant: Ishmael Orwa

