



**Mora alias Bahati Muah & 2 others v Nyibule & 2 others (Environment and Land Appeal 3 of 2022) [2023] KEELC 19948 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19948 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL 3 OF 2022  
AY KOROSS, J  
SEPTEMBER 21, 2023  
[ORIGINALLY KISUMU ELCA NO.43 OF 2019]**

**BETWEEN**

**BETHSEBA MORA ALIAS BAHATI MUAH ..... 1<sup>ST</sup> APPELLANT  
ODHIAMBO RAMOGI ..... 2<sup>ND</sup> APPELLANT  
JOHN OWUOR ..... 3<sup>RD</sup> APPELLANT**

**AND**

**OCHIENG NYIBULE ..... 1<sup>ST</sup> RESPONDENT  
ABUDI OSEWE ARINGO ..... 2<sup>ND</sup> RESPONDENT  
TOM JILLYANUS AKUN ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the ruling and orders of the SRM Hon. E.N. Wasike delivered on 03/10/2019 in Bondo ELC Case No. 19 of 2018)*

**JUDGMENT**

1. This appeal emanates from a ruling of the trial court on a notice of motion dated December 5, 2018 filed by the 1<sup>st</sup> appellant and 1<sup>st</sup> and 2<sup>nd</sup> respondents' then counsel on record M/s Ken Omollo & Co Advocates. In it, they had sought to set aside the proceedings and judgment of the trial court which had rendered a decision in favour of the 3<sup>rd</sup> respondent.
2. After counsel on record had ceased acting for the parties, the firm of M/s Odhiambo B.F.O & Company Advocates entered appearance for the 1<sup>st</sup> and 2<sup>nd</sup> appellants and filed their submissions dated September 24, 2019.



3. In opposition, the 3<sup>rd</sup> respondent filed his replying affidavit dated April 29, 2019 and to augment his position, he filed written submissions dated July 12, 2019.
4. In the ruling that is the subject of this appeal, the trial court stated that despite the 2<sup>nd</sup> appellant filing a defence, he did not testify. It stated the 1<sup>st</sup> appellant and 2<sup>nd</sup> and 3<sup>rd</sup> respondents had moved the trial court five years after interlocutory judgment had been entered against them which in the trial court's view, was inordinate.
5. It stated the appellants and 1<sup>st</sup> and 2<sup>nd</sup> respondents' defence did not raise any triable issue as they had failed to prove ownership over South Sakwa/Barkowino/4785('suit property') and, despite service, they had failed to file their defences or prosecute their cases. It found the motion was not merited and dismissed it with costs to the 3<sup>rd</sup> respondent.
6. Dissatisfied, the appellants in the present appeal raised 8 grounds *inter alia*: -
  - a. The trial court erred in failing to exercise its jurisdiction to set aside the *ex parte* judgment.
  - b. The trial court erred in failing to appreciate that reviewing its decision would have corrected the anomaly existing on record and would have enabled a fair and final decision being reached.
  - c. The trial court erred by concluding the defendants were served with pleadings whereas it was known publicly that the 1<sup>st</sup> respondent was deceased when suit against the 2<sup>nd</sup> respondent had been withdrawn.
  - d. The trial court erred in failing to appreciate that by disallowing the application, the appellants were denied a right to be heard.
  - e. The trial court erred by failing to appreciate that this was a land matter that did not have to be dealt with summarily and disposed of on technicality.
  - f. The trial court erred by asserting there were triable issues on the appellants' defence when the same had not been admitted and subjected to a fair process.
  - g. The trial court erred by visiting the mistake of the appellants' then counsel on the appellants.
  - h. The trial court erred by failing to appreciate that the high turnover of advocates in the trial court disadvantaged the appellants.
7. The appeal was disposed of by written submissions. None of the respondents filed their submissions. In their submissions filed on May 18, 2023, the appellants' counsel submitted on their grounds of appeal.
8. It was submitted the trial court ought to have scrutinised the draft defence that supported the motion since it showed it involved land, the motion raised triable issues, the affidavits of service dated August 9, 2012 and March 20, 2013 were questionable and the trial court should have interrogated them and the impugned ruling trounced on their right to be heard and be accorded a fair hearing.
9. Counsel further submitted the trial court should have given the appellants an opportunity to rectify shortcomings in the record and it was erroneous for the trial court to find the appellants' defence did not raise triable issues since it had not been subjected to a formal determination. Counsel placed reliance on *Bank of Africa Kenya Limited v Put Sarajevo Limited & 2 others*; Nairobi civil suit number 51 of 2017 which held the mistake of an advocate should not have visited on litigants.
10. As this is a first appeal, this court is called upon to re-evaluate, re-examine and reassess the evidence from the trial court and come up with its own deduction. Madan, JA (as he then was) succinctly stated



the role of an appellate court in *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* (1985) EA 898 as follows:

“The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

11. Having evaluated the appeal and appellants’ submissions, the court has noted that although the appellants raised a myriad of grounds of appeal, they were primarily anchored on one primordial issue; whether the trial court erred in not exercising its discretion judiciously. Other two secondary issues are whether the 2<sup>nd</sup> and 3<sup>rd</sup> appellants ever applied to set aside the trial court’s judgement and whether the appellants had introduced new evidence on appeal. I will deal with the questions raised in the secondary issues before delving into the primary issue.

### **I. Whether 2<sup>nd</sup> and 3<sup>rd</sup> appellants ever applied to set aside the trial court’s judgement**

12. The impugned ruling arose from a motion that had been filed by the 1<sup>st</sup> appellant and 1<sup>st</sup> and 2<sup>nd</sup> respondents. From the record, this court has noted the 2<sup>nd</sup> and 3<sup>rd</sup> appellants never moved the lower court to set aside the judgment nor did the firm of Odhiambo B.F.O & Company represent the 3<sup>rd</sup> appellant.
13. The suit against the 3<sup>rd</sup> appellant was withdrawn on March 20, 2014. In other words, in the absence of a suit against him, there was no basis upon him lodging an appeal unless probably for purposes of setting aside the withdrawal of the suit against him; which he has not. In the absence of any suit against him before the trial court, I find the appeal by the 3<sup>rd</sup> appellant incompetent and hereby strike it out.
14. The 2<sup>nd</sup> appellant who was also represented by the 1<sup>st</sup> appellant’s counsel merely filed joint submissions with the 1<sup>st</sup> appellant for purposes of supporting the 1<sup>st</sup> appellant’s and 1<sup>st</sup> and 2<sup>nd</sup> respondents’ motion.
15. The submissions were mere arguments and never took the place of evidence for purposes of postulating the averments in the 1<sup>st</sup> appellant’s and 1<sup>st</sup> and 2<sup>nd</sup> respondents’ motion and affidavit. See *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR where the Court of Appeal stated: -

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.”
16. Despite merely filing submissions, the trial court considered the issues raised by the 1<sup>st</sup> and 2<sup>nd</sup> appellants’ submissions as evidence. This was erroneous and I find the trial court erred in considering the 1<sup>st</sup> and 2<sup>nd</sup> appellants’ submissions as evidence in prove or disprove of facts.



## II. Whether the trial court should have considered extraneous factors in exercising its discretion

17. Firstly, by grounds (b), (c) (g) and (h), the 2<sup>nd</sup> and 3<sup>rd</sup> appellants have introduced new evidence on appeal. The 1<sup>st</sup> appellant who filed the motion together with the 1<sup>st</sup> and 2<sup>nd</sup> respondents never pleaded or canvassed before trial court the issues postulated on these grounds.
18. For that reason, it was obvious the trial court was incapable of considering them while exercising its judicious discretion in arriving at its decision. In other words, they raised grounds on which no evidence was led on them before the trial court. The parties did not address the trial court on them and, the trial court did not pronounce itself on the new issues the appellants have raised on appeal.
19. The 1<sup>st</sup> and 2<sup>nd</sup> appellants have adduced new evidence without seeking leave in accordance section 78 (1) (d) of the *Civil Procedure Act* and order 42 rules 27, 28 and 29 of the *Civil Procedure Rules*. See also the Supreme Court of Kenya decision of *Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 others* [2018] eKLR. They have not laid a basis upon which this court should entertain these grounds of appeal and I hereby strike out grounds (b), (c) (g) and (h) of the appeal.

## III. The trial court erred in not exercising its discretion judiciously

20. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not prefer an appeal to this court. The motion that was the subject of the impugned ruling did not disclose whether the 1<sup>st</sup> appellant wanted the trial court to set aside the interlocutory judgment that was entered against her on July 23, 2013 or the final judgment that was rendered on August 3, 2018.
21. The appeal was not of assistance; it referred to an *ex parte* judgment rendered on December 5, 2019. However, from the record, none was rendered on that particular date. Understandingly, in the impugned ruling, the trial court addressed itself on the interlocutory judgment.
22. Before the trial court, the 3<sup>rd</sup> respondent had sought interlocutory judgment against the 1<sup>st</sup> appellant and 1<sup>st</sup> and 2<sup>nd</sup> respondents. As for the 2<sup>nd</sup> appellant who had filed a defence, he was served with a hearing notice but did not attend court.
23. By order 10 rules 6 and 7 of the *Civil Procedure Rules*, interlocutory judgment could be entered where a claim for pecuniary damages or detention of goods had been sought.
24. The plaintiff did not make a claim for pecuniary damages but eviction and consequently, order 10 rule 9 should have come into play whereby the 3<sup>rd</sup> respondent was required to set down the suit for hearing; which he did. In my view, the interlocutory judgment was inconsequential since in the absence of the 1<sup>st</sup> appellant entering appearance or filing defence, the 3<sup>rd</sup> respondent fixed the matter down for hearing. This rule 9 provides thus: -

“ Subject to rule 4 in all suits not otherwise specifically provided for by this order, where any party served does not appear the plaintiff may set the suit down for hearing.”
25. In my understanding, this formed the basis for my brother S.M Kibunja J rendering himself on this matter on July 6, 2016 when he stated ‘the interlocutory judgment against the 1<sup>st</sup> defendant was applied for and entered on July 23, 2013 pending formal proof. The formal proof is yet to take place.’
26. This ruling has not been set aside by a review or appeal and the only logical conclusion that this court can arrive at is that the 1<sup>st</sup> appellant sought to set aside the final judgment rendered on August 3,



2018. In *Samson S. Maitai & another v African Safari Club Ltd & another* [2010] eKLR, Emukule, J observed as follows on the definition of formal proof: -

“...I have not seen judicial definition of the phrase “formal proof”...in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case.”

27. By the provisions of order 10 rule 11 of the *Civil Procedure Rules*, the trial court had discretion to set aside the judgment rendered on August 3, 2018. The principles that guide courts to set aside a default judgment are now settled and well summarized in the Court of Appeal decision of *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR which held: -

- a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E
- b) Secondly, this 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.
- c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93.”

28. As an appellate court, I will not to interfere with the exercise of discretion of the trial court unless it was wrong or it misdirected itself in considering extraneous matters or acted on matters it should not have or failed to take into consideration matters which it should have taken into consideration. See *Mbogo and another v Shah* [1968] EA 93.

29. Counsel’s submissions on grounds (a) and (f) of the appeal were contradictory. On the one hand he submitted the trial court ought to have scrutinized the appellants’ draft defence and exercised its discretion favourably in the appellants’ favour because the dispute involved land while on the other hand he submitted the trial court should not have made a finding that the defence had not raised a triable issue. He also submitted the motion raised triable issues.

30. I respectfully disagree with counsel. It was inconsequential whether the subject dispute was land. What was significant was whether the trial court exercised its discretion judiciously. Additionally, bona fide triable issues are ordinarily in practice contained in a draft defence attached to an affidavit and was one of the criteria upon which the trial court could exercise its discretion upon since it would be on that basis that the trial court would have granted leave to the 1<sup>st</sup> appellant and 1<sup>st</sup> and 2<sup>nd</sup> respondents to file their defence. See *Continental Butchery Limited v Nthiwa* [1978] KLR.



31. Be that as it may, instead of the 1<sup>st</sup> appellant tendering the draft defence in the motion, the 1<sup>st</sup> and 2<sup>nd</sup> appellants improperly attached it to their submissions. See *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi* (supra). As earlier reasoned in this judgment, submissions are not evidence and it was erroneous for the trial court to consider the draft defence in its impugned ruling.
32. In its decision, the trial court found that despite being served with summons by the 3<sup>rd</sup> respondent, the 1<sup>st</sup> appellant and 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to enter appearance or file a defence. Indeed, from the record, this is the position. In an affidavit sworn on December 5, 2018 in support of their motion, the 1<sup>st</sup> appellant who had authority of the 1<sup>st</sup> and 2<sup>nd</sup> respondents deponed in paragraph 3 as follows; ‘That I know of my own knowledge that the said suit as when (sic) filed in court and summons issued to us the matter proceeded exparte...’
33. The summons to enter appearance that were served upon the appellants were intended to give them notice of the existence of the suit and give them an opportunity to defend themselves by entering appearances and filing defences.
34. The provisions relating to summons to enter appearance are based on a general principle that no party should be condemned unheard See the Court of Appeal decision of *Giro Commercial Bank Ltd v Ali Swaleh Mwangula* [2016] eKLR. The appellants and moreso the 1<sup>st</sup> appellant was given an opportunity to put her case forward and be heard but she squandered the opportunity by deliberately failing to participate in the proceedings and it is now obnoxious for her to blame the trial court for denying her an opportunity to be heard.
35. Except for my findings, I find that trial court did not err in considering the motion dated December 5, 2018. I fully associate with the final disposal order of the trial court and have no reason to disturb it.
36. The upshot of the foregoing is that I hereby strike out the appeal by the 3<sup>rd</sup> appellant. The appeal by the 1<sup>st</sup> and 2<sup>nd</sup> appellants fail and I hereby dismiss their appeal. It is trite law costs follow the event. The 3<sup>rd</sup> respondent instructed an advocate who filed a notice of appointment of advocates and for that reason, I hereby award the 3<sup>rd</sup> respondent costs which shall be borne by the appellants. For the reason the 1<sup>st</sup> and 2<sup>nd</sup> respondent did not participate in these proceedings, I will not award them costs.
- 37.. Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**21/09/2023**

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

Mr. Odhiambo B.F.O. for the appellants

N/A for the respondents

Court assistant: Mr. Ishmael Orwa.

