Mwangangi v Nduva (Environment and Land Appeal E016 of 2022)
[2025] KEELC 1236 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1236 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND APPEAL E016 OF 2022

EO OBAGA, J

MARCH 13, 2025

BETWEEN

PATRICK MUTUNGA MWANGANGI ..... APPELLANT

AND

BONIFACE WAMBUA NDUVA ..... RESPONDENT

(Being an appeal from the Ruling of Hon. L. K. Mwendwa Principal Magistrate dated 16th August, 2022 in ELC No. 149 of 2019)

JUDGMENT

Introduction and Background

1. The Respondent had filed a suit against the Appellant at the Principal Magistrates Court ast Tawa in which he sought injunctive orders against the Appellant restraining him from interferring with his portion of land measuring 100 x 40 ft comprised in LR. No. Masii/Mithini/445. He also sought recovery of Kshs.61,666/= being the value fo his damaged crops.

2. The Appellant neither entered appearance nor filed defence. The Respondent proceeded to obtain an exparte judgment against the Appellant. The Appellant filed a Notice of Motion in which he sought to have the exparte judgment set aside but the application was dismissed on 16th August, 2022.

3. It is after the dismissal of the Appellant's application that he filed an appeal to this court in which he raised the following grounds:

    1. The trial magistrate erred in law and fact by not considering my application.

    2. The trial magistrage erred in law and fact by dismissing my application to set side exparte judgment whether conditionally or unconditionally as per the civil procedure.

3. The trial learned magistrate erred in law and fact by not finding merit on my application hence paving way for the execution to proceed.

4. The trial magistrate erred in law and fact by not extracting the material fact on my application that I was never served with any pleading in the lower court matter.

5. The trial magistrate erred in law and fact by entertaining a suit whose cause of action arose at Masii Location, Mwala Subcounty, Machakos County which falls under the jurisdiction of Machakos Law Court.

4. On 22nd February, 2023, the Appellant was given stay of execution pending hearing and determination of the appeal. The parties were directed to file written submissions. The Appellant filed his submissions dated 22nd October, 2024. The Respondent filed his submissions dated 21st June, 2024.

Submissions by the Appellant

5. The Appellant grouped grounds 1, 2 and 3 together and submitted that the exparte judgment which was obtained by the Respondent was an irregular one and should thus have been set aside ex debito justitiae that is as a matter of right. The Appellant relied on the case of James Kanyita Nderitu -vs- Marios Philotas Ghika & Another (2016) eKLR where it was held as follows:

   In an irregular judgment, judgment will have been entered against the Defendant who who has not been served or properly served with summons to enter appearance. In such a situation the Defendant 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 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 not considerations of whether the intended defence raises triable issues or whether there has been inordinace delay in applying to set aside the irregular judgment. The reason why such judgment is set aside is of right and not as a matter of discretion is because the party 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.

6. On ground 4, the Appellant submitted that he was not served with summons to enter appearance and that it was upon the Respondent to seek leave of court to summon the process server for examination as to whether he served the Appellant or not.

7. On ground 5, the Appellant submitted that the cause of action arose within Masii which is in Mwala Subcounty within Machakos County and that therefore the suit ought to have been filed at Machakos Law Courts. The Appellant relied on the case of Margaret Wairimu Magugu -vs- Karura Forest Investment Ltd & 4 others (2017) eKLR and the case of Omar Dhadho -vs- Mohammed Mosoud & another (2019) eKLR.

Submissions by the Respondent

8. The Respondent submitted that the Appellants's appilcation of 22nd June 2022 was not merited at all. He submitted that the Appellant had only prayed for stay of execution and that there was no prayer for setting aside the judgment. He therefore submitted tha the Appellant was bound by his pleadings and could not be granted that which he did not pray for.

9. The Respondent relied on the case of Wanjohi -vs- Ndubi & 2 others (Environemtn and Land case E264 OF 2017) [2023] KEELC 22492 (KLR) (22 December, 2023) (Judgment) where it was held as follows:

> " Although the 3rd Defendant's witness admitted in his evidence that the Plaintiff is entitled to be allocated a plot by the 3rd Defendant Company, the Plaintiff has not prayed for an order to compel the 3rd Defendant to allocate her a plot. The court cannot grant her what she has not prayed for."

10. He further submitted that the Appellant had prayed for stay of execution pending hearing and determination of the application. The application was therefore incompetent and was a waste of the court's time.

11. Without prejudice to the above submissions, the Respondent submitted that a court cannot set aside a default judgment just like that. There have to be reasons for doing so. He relied on the case of James Kanyita Nderitu -vs- Maries Philotas Ghika & another (2016) eKLR where it was held as follows:

> " 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 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; whethere the intended defence raises triable issues; the respective prejudice each party is likely to suffer."

12. The Respondent further submitted that there was no draft defence annexed to the Appellant's appication which would have enabled the trial magistrate to determine whether there was a reasonable defence. He relied on the case of Moses Kimaiyo Kipsang -vs- Geoffrey Kiprotich Kimi & 2 others (2022) eKLR where it was stated as follows:

> " I have also tried my best to find whether or not the intended defence raises triable issues but I have not come to that conclusion for the following reasons, namely, that there is no defence that was exhibited in whichever manner to the Application or brought to my attention in any manner howsoever. All that the Applicants stated in the application was that there was an annexed defence but there was was none: it was not even annexed to Mr. Miyienda's affidavit despite the fact that he stated that his clients demonstrated a formidable defence at the interlocutory stage when the court delivered its ruling. Mere words of a strong or formidable defence without demonstrting what that strength or formidability is are mere void words which cannot amount to a defence raising triable issues as the law provides....."

13. On the issue of alleged non service of summons and the process server lying, the Respondent submitted that the Appellant never sought to call the process server for cross examination as to the contents of his affidavit. This having not been done, the averments of the process server remained the true record of what transpired. He relied on the case of Shadrack Arap Boiywo -vs- Bodi Bach (1987) eKLR where the Court of Appeal held as follows:

> " 3. Presumption as to service - There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into

the witness box and opportunity of cross examination given to those who deny the service."

Analysis and determination

14. I have carefully considered the grounds on the memorandum of appeal, the record of proceedings before the trial court, the submissions filed as well as the authorities cited. The issues which emerge for determination are as follows;

    1. Whether the court had jurisdiction to hear the case.

    2. Whether the trial magistrate erred in not setting aside the exparte judgment.

    3. Which order should be made on costs.

15. My duty as the first appellate court is to re-evaluate the proceedings before the trial court and make my own conclusions. This being an appeal from an application, the issue of giving allowance to the evidence of witnesses does not arise. The duty of a first appellate court was clearly set out in the case of Selle -vs- Associated Motor Boat Co. & others (1968) EA 123.

1. Whether the court had jurisdiction to hear the case

16. The Appellant argues that the suit property is situated at Masii location within Mwala Subcounty which falls in Machakos County. He therefore argues that Tawa Law Court which falls under Makueni County should not have entertained the suit. He argues that the suit ought to have been filed at Machakos Law Courts.

17. The two cases which the Appellant relied on Margaret Wairimu Magugu (Supra) and Omar Dhadho case (Supra). The two cases referred to a Gazette Notice which was published regarding the filing of new cases upon the establishment of the Environment and Land Court. The Gazette Notice was No. 5178 of 14th July, 2014. Under Section 14 of the practice directions it was stated as follows:

> " All new cases related to the environment and the use and occupation of and title to land..... shall be filed in the nearest ELC for hearing and determination by the said court."

18. In the instant case, this court takes judicial notice that the distance between Masii and Tawa court is about 10 kilometers whereas the distance between Masii and Machakos Law Court is about 33 kilometres. It is therefore clear that the nearest court from the subject matter of this suit is Tawa Law Courts. Neither the *Environment and Land Court Act* and the Magistrates Court Act or the Civil Procedure Rules confine hearing of cases to within the boundaries of the counties. It is the place where the Defendant resides and the other parties and their witnesses as well as the subject matter which determine which court has to hear a case. I therefore find that the trial magistrate had jurisdiction to hear the case.

2. Whether the trial magistrate erred in not setting aside the exparte judgment

19. The Appellant has argued that the exparte judgment was an irregular one which required to be set aside ex debito justitiae that is a matter of right. This is a wrong assumption. The Appellant had been served with summons to enter appearance but he failed to enter appearance and file a defence.

20. The Appellant aruged that the Respondent did not seek to bring the process server for cross examination on his affidavit of service. It was the Appellant who was saying that he was not served. He is the one who should have called the process server for cross examination. Though the Appellant

indicated in his application that he was going to call the process server for cross examination, he did not do so before the hearing of the application.

21. The trial magistrate was therefore correct in taking the averments in the affidavit of service as the correct position. The case of Shadrack Arap Boiywo (Supra) is clear that the burden lies on the party questioning the affidavit of service to show that it was not correct. The burden was not on the Respondent to call the process server as he is not the one who was questioning the service.

22. The Appellant did not annex a draft defence to his application. The trial magistrate was therefore correct in his finding that there was no basis upon which he could have arrived at a conclusion that the Appellant had a defence which merited the setting aside of the exparte judgment which was regularly obtained.

23. The Appellant had tried to argue that the case against him was brought due to a criminal case at Machakos where the Respondent was a complainant and the Appellant was accused. This criminal case was withdrawn under Section 87 A of the *Criminal Procedure Code*. The trial magistrate in his ruling observed that the criminal case had nothing to do with the civil case.

Deposition

24. From the above analysis, I find that the trial magistrates findings were correct and therefore this appeal is devoid of merit. The same is dismissed with costs to the Respondent.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH, 2025.

In the presence of:

Mr. Musau for Respondent.

Court assistant - Steve Musyoki