Kirionki v Mitimbao (Environment and Land Appeal 22 of 2021)
[2023] KEELC 21722 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21722 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

ENVIRONMENT AND LAND APPEAL 22 OF 2021

EM WASHE, J

NOVEMBER 16, 2023

BETWEEN

NTUU OLE KIRIONKI ..... APPELLANT

AND

OLE RAPANYA MITIMBAO ..... RESPONDENT

JUDGMENT

1. The Appellant herein filed a Memorandum of Appeal dated 24th of July 2019 (hereinafter referred to as "the present Appeal") seeking to set-aside the Ruling and Orders issued on the 9th July 2019 (hereinafter referred to as "the Trial Court Ruling" by Honourable D.K Matutu, Principal Magistrate (hereinafter referred to as "the Trial Court") on the following grounds; -

    a. In dismissing the Appellant's Notice of Motion dated 11th February 2019, the Learned Trial Magistrate denied the Appellant his fundamental right of fair hearing as enshrined in Article 50 (1) of our constitution.

    b. The Learned Trial Magistrate never exercised his discretion under Order 12 Rule 7 in the best interest of justice in M&ELC No. 03 of 2018.

    c. The Learned Trial Magistrate erred in law and fact bys observing in his Ruling that no affidavit of service by one Erastus Kirui had not been challenged.

    d. The Learned Trial Magistrate erred in law and fact by not taking cognizance of the fact that if the Respondent executes his judgement to recover the Land Parcel No. Transmara/Shartuka/199, he will definitely evict the Appellant from his parcel no. L.R.Transmara/Shartuka/1627.

    e. The Learned Trial Magistrate erred in law and fact by avoiding to address his mind on non-service of Notice of Entry of Judgement upon the Appellant as

mandatorily required under Order 22 Rule 6 of the Civil Procedure Rules, 2010 before execution process can commence.

f. The Learned Trial Magistrate generally failed to consider and/or analyse critically the legal issues raised by the Appellant through the Notice of Motion Application dated 11th February 2019.

g. The Learned Trial Magistrate erred in law and fact by not taking cognizance of the fact that the Appellant's draft defence raised a number of triable issues which ought to have been allowed to go on trial.

h. The Learned Trial Magistrate quoted the holding in Patel-versus- East African Cargo Handling Services Ltd (1974) out of context.

i. Just as the Learned Trial Magistrate was under the overriding objective of hearing the case expediously, he ought to have afforded the Appellant a chance to present his case (within some directions and/or conditions) by allowing his Notice of Motion dated 11th February 2019.

j. In the circumstances, the Learned Trial Magistrate gravely caused a miscarriage of justice in the Lower Court suit.

2. The Trial Court Ruling that has aggrieved the Appellant and resulted to the present Appeal related to a Notice of Motion Application dated 11th of February 2019 filed in the proceedings known as M&ELC No. 03 of 2018 (hereinafter referred to as "the Trial Court Application").

3. In this Trial Court Application, the Appellant sought for the following Orders;-

a. The instant application be certified very urgent and same be heard ex-parte in the first instance.

b. Pending the hearing and determination of this application, the Honourable Court be pleased to grant interim orders of stay of execution of its orders issued on the 28th of August 2018 and subsequent ones thereto.

c. Pending the hearing and determination of this suit, the Honourable Court be pleased to grant Orders of stay of execution of its orders issued on the 28th August 2018 and the subsequent ones thereto.

d. The Honourable Court be pleased to set aside its ex-parte judgement of 28th August 2018 and allow the Defendant/Applicant to file his statement of Defence and defend] himself in this suit.

e. Upon grant of prayer No.4 above, the Applicant's draft Statement of Defence annexed herewith be deemed as duly filed once requisite fees is paid.

f. Costs of this Application be in the cause.

4. The Grounds relied upon in support of the prayers sought in the Trial Court Application can be summarised as follows;-

i. The Summons to Enter Appearance and the substantive pleadings were never served upon the Defendant/Applicant.

ii. As a result of the none service of the Summons to Enter Appearance and the substantive pleadings thereof, the Trial Court entered an ex-parte judgement on the 28th of August 2018.

iii. The Plaintiff/Respondent was now in the process of executing the ex-parte judgement entered on the 28th of August 2018 without even serving a Notice of Entry of Judgement as required Under Order 22 Rule 6 of the Civil Procedure Rules,2010 which is a mandatory requirement.

iv. If the ex-parte judgement of 28th August 2018 is executed, it would result to an eviction and/or interference of the Defendant's/Applicant's property known as L.R.No.transmara/Shartuka/1627 without being given a chance to be heard.

v. In essence therefore, the Defendant/Applicant would have been condemned unheard against the rules of nature justice and the provisions of Article 50 of the Kenyan Constitution, 2010.

5. The Trial Court Application was opposed by the Plaintiff/Respondent through the Grounds of Opposition dated 10th January 2019 on the following grounds;-

i. The suit property which was being litigated upon was the property known as L.R.No.transmara/Shartuka/199.

ii. The Trial Court Application filed by the Defendant/Applicant was premised on the ownership of the property known as L.R.No.transmara/Shartuka/1627.

iii. The Trial Court proceedings never touching on the property known as L.R.No.transmara/Shartuka/1627 but the Plaintiff/Respondent's suit property known as L.R.No.transmara/Shartuka/199.

iv. In essence therefore, there was no claim made against the Defendant's property known as L.R.No.transmara/Shartuka/1627 to establish any dispute between the parties that would warrant a stay of execution.

v. On the issue of service, the Plaintiff/Respondent pleaded that the Defendant/Applicant was fully aware of the proceedings from when they were instituted but declined to accept service and/or participate in the Trial Court proceedings.

6. The Respondent then sought to have the Trial Court Application dismissed with costs.

7. The Appellant being aggrieved by the Trial Court Ruling has invoked the appellant jurisdiction of this Honourable Court.

8. The case of *Selle & Another-versus- Associated Motor Boat Co.ltd & others*(1968) EA 123 the Court observed as follows;-

> " A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh

and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

9. The Honourable Court has indeed perused the pleadings and proceedings relating to the present Appeal and the issues for determination can be summarised as follows;-

Issue No.1- Was the Appellant Entitled to a prayer of stay of execution of theEx-parte Judgement Pronounced On the 28th of August 2018?

Issue No.2- Was the Appellant entitled to the prayers of setting-aside the trial Court Judgement & Leave to defend the suit?

Issue No. 3- Are the prayers sought in this appeal merited?

10. The issues for determination having been clearly outlined hereinabove, this Honourable Court will now proceed to evaluate the merits independently and draw its own conclusions thereinafter.

Issue No.1- Was the Appellant Entitled to a prayer of stay of execution of the Ex-parte Judgement pronounced on the 28th of August 2018?

11. The Appellant sought for stay of execution of the judgement pronounced on the 28th of August 2018 on the ground that if the same was executed, then it would infringe on his ownership rights over the property he occupies known as L.R.No.transmara/Shartuka/1672.

12. Secondly, the Appellant was of the view that an ex-parte judgement could not be executed before a notice of its entry as provided under Order 22 Rule 6 of the Civil Procedure Rules, 2010 is issued and served upon the Defendant.

13. The Respondent on the other hand opposed this two arguments on the basis that the Appellant did not have any interest in the suit property known as L.R.NO.transmara/Shartuka/199 which was the suit property.

14. The Respondent was of the view that the execution of the judgement pronounced on the 28th of august 2018 did not affect the Appellant's property known as L.R.No.Transmara/Shartuka/1672 and therefore, there was no legal basis for issuance of the stay of execution orders.

15. Indeed, perusal of the Trial Court proceedings confirms that the Appellant did not file any appearance and/or defend the Respondent's Plaint dated 22nd of March 2016.

16. According to the Respondent's Plaint dated 22nd of March 2016, the substantive prayers against the Appellant were as follows;-

    a. Recovery of possession of the said premises.

    b. Mesne profits of the said premises from the date of expiry of the Agreement till possession is delivered up to the Plaintiff.

    c. .....

17. According to the Trial Court Judgement, the Plaint dated 22nd March 2016 was heard on its merits through the testimonies of two witnesses but in the absence of the Appellant herein who was the Defendant.

18. The Decree that issued on the 28th of August 2020 pursuant to the Trial Court Judgement provided as follows;-

    a. Judgement is entered for the Plaintiff for the recovery of possession of the Land Parcel Number Transmara/Shartuka/199 from the Defendant.

    b. The Defendant shall give vacant possession of the land within Ninety (90) days.

    c. The Plaintiff is at liberty to apply for warrants for the eviction of the Defendants upon expiry of that period.

19. The issue to be resolved herein is whether the Appellant had any tangible grounds to warrant the granting of a stay of execution against the Trial Court Judgement.

20. According to the pleadings, the Appellant clearly does not seek any proprietory interest in the Respondent's suit property known as L.R.No. Transmara/Shartuka/199.

21. The only issue that has prompted the Appellant to file the Trial Court Application is the execution of the Trial Court Judgement.

22. The exercise of execution of the Trial Court Judgement in effect amounted to an eviction of the Appellant from the property known as L.R.No.transmara/Shartuka/1627.

23. In other words, the physical possession and/or occupation of the Respondent's suit property known as L.R.No.transmara/Shartuka/199 as directed in the Trial Court Judgement directly interfered with the occupation and/or legal rights of the Appellant's property known as LR.No.transmara/Shartuka/1627.

24. The direct interference in terms of possession and/or the ownership rights of the Appellant's property known as LR.No.transmara/Shartuka/1627 through the implementation of the Trial Court Judgement by the Respondent would cause in the eyes of this Honourable Court irreparable harm to the Appellant.

25. In essence therefore, the Appellant had a sufficient ground to warrant the granting of the stay of execution orders against the Trial Court Judgement being executed.

26. The second ground upon which the Appellant sought to stay execution of the Trial Court judgement was none compliance o*f Order 22 rule 6 of the Civil Procedure Rules,* 2010.

27. According to the provisions of order 22 rule 6 of the *Civil Procedure Rules,* 2010, a claimant can apply for Judgement due to default of appearance or filing of a Defence.

28. The Application for Judgement under order 22 rule 6 must be done through Form No.14 of Appendix A as provided under the *Civil Procedure Rules* and Regulations.

29. Once a claimant has filed the said Form and a judgement entered accordingly, then the requirement to serve a Notice not less than Ten (10) before an application for execution is filed must be issued.

30. Unfortunately, the Trial Court Judgement which was being executed was not entered by virtue of a request under Order 22 Rule 6 of the *Civil procedure Rules*, 2010 but from a hearing undertaken on the 29th of May 2018 where two witnesses gave their testimony and provided various documents.

31. Clearly therefore, the provisions of Order 22 Rule 6 of the *Civil procedure Rules*,2010 requiring the Respondent to serve a Notice at least 10 days prior to making the application for execution does not apply against the Trial Court Judgement.

32. In other words, the Appellant's ground that an application for execution could not be entertained before the issuance of the Ten (10) Days' notice therefore fails.

Issue No.2- Was the Appellant entitled to a prayer of setting-aside the Judgement Pronounced on the 28th of August 2018?

33. The second issue for determination is whether the Trial Court Judgement should be set-aside and the Appellant granted leave to defend the suit filed in the Trial Court.

34. The main ground which the Appellant relies upon is that the Respondent did not serve the Summons to Enter Appearance or the substantive pleadings on him.

35. On the other hand, the Respondent disputed this allegation through the Replying Affidavit sworn on the 25th February 2019 by stating that both the Summons to Enter Appearance and the substantive pleadings were served on the Appellant by one process server known as Erastus Kirui.

36. Paragraph 12 of the Replying Affidavit sworn on the 25th February 2019 purported to table before this Honourable Court various Affidavits of Services by the said Erastus Kirui to confirm service on the Appellant.

37. The Affidavits of Service placed before the Trial Court appear on pages 49 and 51 of the Record of Appeal.

38. None of these two Affidavits of Service appearing on Pages 49 and 51 refers to service of the Summons to Enter Appearance and the substantive pleadings.

39. In essence therefore, there is no evidence by way of an Affidavit of Service confirming proper service on the Appellants with the Summons to Enter Appearance and the substantive proceedings.

40. Paragraph 12 of the Replying Affidavit sworn on the 25th February 2019 should have at least identified the date of service of the Summons to Enter Appearance and the other substantive pleadings but again it failed to touch on it.

41. In other words, this Honourable Court is of the view that the Respondent did not prove the allegation that service of the Summons To enter Appearance and the other substantive pleadings was done satisfactorily.

42. The failure to serve this vital and/or crucial documents goes to the validity of the proceedings that were undertaken on the 29th May 2018.

43. In the case of *James Kanyiita Nderitu & another* (2016) eKLR, the Honourable Court made the following finding;-

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such

factors as the reason for 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; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I KLR 173.

In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to 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 into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against 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."

44. The failure to serve the Summons To Enter Appearance and the other substantive pleadings on the Appellant render the subsequent proceedings and judgement to be irregular and this Honourable does not have any other choice but to set-aside such proceedings and judgement as a matter of right.

Issue No. 3- Are the prayers sought in this Appeal merited?

45. The last issue for determination is whether or not the Appellant should succeed in the prayers sought in the present Appeal.

46. Indeed, this Honourable Court's determination in Issue No.2 hereinabove confirms that the proceedings undertaken in the Trial Court as well as the Trial Court Judgement were irregular.

47. Similarly, the Appellant's constitutional right to a fair hearing were infringed in the irregular proceedings and judgement hence he should be given an opportunity to defend the suit against him by the Respondent in the Trial Court.

48. In essence therefore, the Appellant has successfully prosecuted the present Appeal and is entitled to the Orders sought therein.

Conclusion.

49. In conclusion therefore, this Honourable Court hereby makes the following Orders in determination of the Memorandum of Appeal dated 24th July 2019;-

    A. The memorandum of appeal dated 24th July 2019 be and is hereby upheld.

    B. The Proceedings and/or Judgement of the trial court pronounced on the 28th of August 2018 be and are hereby set-aside and/or vacated forthwith.

    C. The Appellant is hereby granted leave of 30 days from the date of this judgement to prepare, file and serve their defence and other relevant documents in support of their case in the proceedings known as M&ELC Case no.3 of 2018.

D. The Proceedings Known as M&ELC Case No.3 Of 2018 Be heard afresh before any Court of Competent Jurisdiction.

E. Costs of the appeal will be borne by the Respondent.

DATED, SIGNED & DELIVERED VIRTUALLY IN MILIMANI LAW COURTS' ON 16TH NOVEMBER 2023.

EMMANUEL M.WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: Mr. Brian

ADVOCATE FOR THE APPELLANT: Mr. Bigogo

ADVOCATE FOR THE RESPONDENT: Mr. Ogembo