



**Abdulrahman v Siaka (Environment and Land Appeal E015 of 2023)  
[2023] KEELC 21490 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21490 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E015 OF 2023  
SM KIBUNJA, J  
NOVEMBER 15, 2023**

**BETWEEN**

**MWANAISHA SHARIF ABDULRAHMAN ..... APPELLANT**

**AND**

**MBWARAHAJI HAMIDI SIAKA ..... RESPONDENT**

*(Being an appeal against the ruling and order of the Hon Maureen Nabibya  
in Mombasa CMCC No. 1696 of 2015 delivered on the 25th October  
2022 on the Appellant's Notice of Motion dated the 6th August 2019)*

**JUDGMENT**

1. The appellant, who was the defendant in the lower court matter, being dissatisfied with the decision of the court in the ruling of the October 25, 2022 in respect of the application dated the August 6, 2019, filed this appeal through the memorandum of appeal dated the March 7, 2023, raising nine (9) grounds reproduced verbatim herein below that:
  - a. “The learned trial magistrate erred in fact and in law by reaching a finding that the draft defence at paragraph 5 does not raise any triable issue.
  - b. The learned trial magistrate erred in fact and in law by reaching a finding that the draft defence at paragraph 3 does not raise any triable issue.
  - c. The learned trial magistrate erred in fact and in law by failing to reach a finding that paragraph 4 of the draft defence raises triable issues.
  - d. The learned trial magistrate erred in fact and law by reaching a finding that only paragraph 5 of the draft defence and paragraph 4 of the defence no triable issues have been raised.
  - e. The learned trial magistrate erred in law by concluding that the draft defence raises no triable issues at all.



- f. The learned trial magistrate erred in law and fact by failing to properly apply the law in that only one triable issue is sufficient to sustain a defence.
- g. The learned trial magistrate erred in fact and in law in dismissing the appellants motion by admitting that whereas paragraphs 4 and 5 of the draft defence raise triable issue the defence raises no triable issues.
- h. The learned trial magistrate erred in fact and law in reaching a conclusion that the draft defence is a mere and or full of bare denials.
- i. The learned trial magistrate erred in fact and in law when she failed to consider the appellant arguments, submissions and authorities when arriving at her decision.”

The appellant therefore seeks for the appeal on the ruling and order of the learned trial magistrate delivered on the October 25, 2022 to be allowed with costs.

2. The Record of Appeal dated the June 7, 2023 was consequently filed and served. During the mention of July 6, 2023, the counsel for the parties agreed to canvass the appeal through submissions to be filed and exchanged within the given timelines. The learned counsel for the appellant and respondent then filed their submissions dated the September 11, 2023 and September 21, 2023 respectively, which the court has carefully considered.
3. The following are the issues for the determinations by the court:
  - a. The issue arising from grounds 1 to 5 is whether the appellant draft defence raises triable issues to go to trial.
  - b. And grounds 6 to 9 raises the issue of whether the learned trial magistrate erred in law and fact in coming to the decision that the draft defence did not raise any triable issues.
  - c. Whether the appeal has merit.
  - d. Who pays the costs.
4. The court has carefully considered the grounds on the memorandum of appeal, the Record of Appeal, the submissions by the learned counsel, the superior courts decisions cited thereon and come to the following determinations:
  - a. That this being a first appeal, the court is required to reconsider the evidence tendered before the trial court, evaluate it itself and come to its own conclusions. This was well captured in the case of *Barnabas Biwott v Thomas Kipkorir Bundotich* [2018] eKLR, in which the case of *Selle & Another v Associated Motor Boat Co Ltd* [1968] EA 123 was cited where it held that;
 

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

The evidence relating to the application dated the August 6, 2019, that was decided through the ruling of October 25, 2022 that is subject matter of this appeal, was wholly canvassed through Affidavits, and therefore no witnesses were heard and or seen by the trial court. It is



therefore unnecessarily to restate the caution that the court should give allowance for it has not seen or heard the witnesses testify.

- b. The respondent's claim against the appellant before the lower court is as set out in the plaint dated the September 8, 2015. The claim is based on a sale agreement dated May 14, 2007 over a house without land situated on Plot No.217/section1/MN. That though they were issued with a certificate of divorce dated the October 23, 2011, the appellant has been interfering with the respondent's peaceful enjoyment of the house. The respondent therefore filed the claim in the lower court seeking for injunction to restrain the appellant, her servants, agents or anybody else acting on her behalf from evicting or harassing tenants and or from selling, disposing, alienating or in any way dealing with the property on Plot No 217/Section 1/MN and costs.
- c. The documents in the Record of Appeal dated the June 7, 2023 confirms that the appellant was represented by counsel in the lower court matter. The first counsel was Ms C A Odhiang & Co. Advocates who filed their notice of appointment dated the November 1, 2017. The counsel is also the one through whom the appellant's replying affidavit sworn on November 22, 2017, in response to the respondent's application dated October 18, 2017 was drawn and filed. Thereafter the counsel filed the chamber summons seeking to cease acting for the appellant. There is also the notice of appointment of advocate by Ms W O Ochuka & Co Advocates dated the February 26, 2019 ostensibly coming on record for the appellant. A notice of motion under certificate of urgency dated March 22, 2019 seeking for the matter to be heard by another judicial officer other than hon J A Kassam, SRM, was filed through the same counsel.
- d. The appellant had in the application dated August 6, 2019 acknowledged having instructed Ms C A Odhiang & Co Advocates, but denied being served with the chamber summons for counsel to cease acting for her. She also disputed having appointed Ms W O Ochuka Advocates to come on record for her, but admitted having met one Peter Orimba who represented himself to her as an advocate and to whom she gave some money. That the said Peter Orimba then gave her some documents to thump print. I have perused the Record of Appeal and the only proceedings attached are those between pages 187 to 190 covering the activities of September 9, 2015, September 23, 2015, July 27, 2021, August 12, 2021, September 2, 2021, November 4, 2021, November 24, 2021, June 23, 2022 and July 21, 2022.
- e. The proceedings appear to suggest that after the proceeding of September 23, 2015 there were no other activities on the file for almost six (6) years until July 27, 2021. The proceedings cannot be a correct reflection of the activities in the lower court file as the judgement and decree the appellant was seeking to have set aside through her application dated the August 6, 2019 is indicated to have been delivered on the June 14, 2019. The application also refers to some proceedings having taken place on March 14, 2019 that are not covered in the copy of the proceedings attached to the Record of Appeal. In the absence of the proceedings covering the period when the chamber summons by Ms C A Odhiang & Co Advocates to cease acting was filed and heard, the court is unable to make an informed determination on when the counsel was allowed to cease acting. The court is also not able to confirm whether the learned trial magistrate had ensured that the appellant had been served before allowing her counsel to cease acting. It is also difficult to confirm whether Ms W O Ochuka Advocates filed their notice of appointment to come on record for the appellant before or after Ms C A Odhiang & Co Advocates application to cease acting had been granted. A determination on the last issue would have helped to answer the question of whether Ms W O Ochuka Advocates was required



to file a notice of change of advocates or notice of appointment of advocates. In compliance with order 9 of *Civil Procedure Rules*.

f. What is however apparent is that though the appellant had appointed counsel in the lower court suit, no defence was filed and hence the application dated the August 6, 2019 that sought for:

- “ 1. This application be certified as urgent and the same admitted for hearing ex parte in the first instance.
2. The court be pleased to set aside the judgement entered on the June 14, 2019, decree issued on July 11, 2019 and proceedings of March 14, 2019 pending the hearing and determination of this application interparty.
3. The court be pleased to grant the defendant leave to file a defence and defend the suit.
4. Costs be in the cause.”

The application is at pages 101 to 106 of the Record of Appeal. It is premised on the grounds on its face, that end at ground 15 at page 103. The page containing the rest of the application is missing as the page following page 103 is page 104 that contains paragraphs 8 and 9 of what looks like a defence. The supporting affidavit sworn by the appellant starts at page 105 and ends at paragraph 15 at page 106. The supporting affidavit is also incomplete. Though the Record of Appeal index indicates at number 31 that the defence dated August 6, 2019 was at pages 109 to 110, I have not traced it. In fact, pages 107 to 110 are missing from the Record of Appeal. Fortunately, I have seen a copy of the said draft defence that is annexed to the appellant’s supporting affidavit to the notice of motion dated March 8, 2023 seeking for inter alia leave to file this appeal out of time. There was lack of keenness in preparing and filing the Record of Appeal.

g. In the draft defence dated the August 6, 2019, the appellant proposed response to the respondent’s claim set out in (b) above is inter alia that the respondent did not have the financial ability to purchase the suit property; that the appellant was not party to the alleged sale agreement; the appellant has not received valuable consideration for the house and that the respondent is without any enforceable claim over the suit property. In the handwritten ruling attached to the application for leave to file the appeal out of time, delivered on the October 25, 2022, the learned trial magistrate’s finding that the draft defence raises no triable issues is the one that aggrieved the appellant leading to the filing of this appeal. In determining this appeal, the court is required to apply the principles laid down in *Shah v Shah & another* [1968] EA 93 on the circumstances under which an appellate court may interfere with the decision of a trial court. The court held that;

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so, arrived at a wrong conclusion.”



- h. In the case of *Kimani Kigano & Co. Advocates versus Jimba Credit Corporation Ltd* [1991] KLR 503, the court held that;

“The power to set aside *ex parte* judgement in default is discretionary. The discretion is unfettered provided it is properly exercised. The discretion is a judicial one and therefore it must be exercised on the basis of evidence and sound legal principles.

The court has power under the provisions of order 1xa rule 10 of the old *Civil Procedure Rules* on terms as are just. The court is obliged to look at the defence that the applicant defendant may have to the claim, and if a party establishes that he has a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the court ought to be inclined towards setting aside.”

- i. And in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, the Court of Appeal held that;

“We agree with the noble principles which go further to establish that the court’s discretion to set aside an *ex parte* judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error but not to assist a person who deliberately seeks to obstruct the course of justice.”

That while it is apparent that the respondent had in his replying affidavit to the application dated August 6, 2019, that is at page 111 of the Record of Appeal, that is also incomplete, accused the appellant of filing the application merely to delay and prevent him from getting the fruits of his judgement, I have noted in her ruling of October 25, 2022, the learned trial magistrate found the application had been filed in good time. I take that to mean there was no unreasonable delay on the part of the appellant in filing the application, and that is evidently not the conduct of a party who is only out to delay the other from reaping the fruits of the judgement or order or decree already issued. Further, the issues raised in the draft defence of whether or not the appellant was a party to the sale agreement under which the respondent claim is actually based on, and whether valuable consideration under the alleged contract was paid are matters that reasonably responds to the respondent’s claim in the plaint. Remembering that the parties herein were husband and wife before their divorce as averred at paragraph 5 of the plaint, it is only fair and just that the appellant be accorded an opportunity to present her defence before the court to makes a decision thereof on merit.

- j. That having come to the conclusion that the draft defence attached to the appellant’s application dated the 6<sup>th</sup> August 2019 raised triable issues that should go to trial, it follows therefore, that the learned trial magistrate’s decision to fail to set aside the *ex parte* judgement and allow the appellant to file her defence and defend the suit was clearly wrong and exposed the appellant to injustice and hardship for the mistakes or inadvertence on the part of her then counsel. However, as the counsel was at all times an agent of the appellant and she does not appear to have been diligent in making follow ups with the counsel to be briefed on the progress of her case, and her casual instructions or dealings with one Peter Orimba that she later got to know was not an advocate, the appellant will meet the costs of this appeal the provisions of section 27 of the *Civil Procedure Act* chapter 21 of laws of Kenya notwithstanding.

5. Flowing from above determinations, the court finds and orders as follows:



- a. That the appellant appeal filed through the Memorandum of Appeal dated the March 7, 2023 has merit and is hereby allowed.
- b. That the learned trial magistrate decision in the ruling delivered on the October 25, 2022 is hereby set aside and in its place an order setting aside the *ex parte* judgement of June 14, 2019 and all consequential orders is hereby issued.
- c. That the appellant is hereby granted leave to defend the respondent's suit. To this end, she is to file and serve her statement of defence together with all documents and statements if any, within thirty (30) days from today.
- d. That the suit be heard de novo [afresh] before another magistrate, other than hon Maureen Nabibya, SPM.
- e. The appellant will meet the respondent's costs in this appeal in any event.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 15<sup>TH</sup> DAY OF NOVEMBER 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Appellant: No appearance

Respondent: No appearance

Wilson – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

