Njuguna v Njuguna (Environment and Land Appeal E071 of 2022)
[2023] KEELC 22133 (KLR) (15 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22133 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E071 OF 2022

BM EBOSO, J

NOVEMBER 15, 2023

BETWEEN

TERESIA WANJIKU NJUGUNA ..... APPELLANT

AND

ANDREW KURIA NJUGUNA ..... RESPONDENT

(Being an Appeal against the Ruling of Hon. W. Rading, Senior Resident Magistrate, delivered on 22/7/2022 in Kiambu Chief Magistrate Court Civil Case No. 454 of 2018)

JUDGMENT

Introduction

1. The two parties to this appeal are mother and son. The bone of contention in the suit giving rise to the appeal is the registration of land parcel number Ruiru East Block 5/130 [referred to in this Judgment as "the suit land"] in the joint names of the two parties to this appeal. The respondent alleged that the appellant had fraudulently caused the suit land to be registered in their joint names yet he was the sole owner of the land. He challenged the joint registration.

2. The appeal challenges the post-judgment ruling rendered on 22/7/2022 by Hon W. Rading, Senior Resident Magistrate, in Kiambu Chief Magistrate Court Civil Case No 454 of 2018. The respondent in this appeal was the plaintiff in the trial court while the appellant was the defendant. The impugned ruling related to an application by the appellant seeking an order setting aside the exparte Judgment of the trial court rendered on 13/9/2021. The trial court found the appellant's application was unmerited and dismissed it. The broad question to be determined in this Appeal is whether the trial court erred in finding that the appellant was aware of the hearing that culminated in the exparte Judgment. Before I dispose the specific issues that fall for determination in the appeal, I will briefly outline a brief background to the appeal.

Background

3. The suit in the trial court was initiated by the respondent in September 2018 through a plaint dated 13/9/2018. He contended that he solely purchased the suit land from one Margaret Njeri Gachiri, adding that due to the nature of his work as a herbal medicine man, which required him to be away for long, he entrusted his mother [the appellant] with the title relating to the suit land. It was his case that the appellant fraudulently and deceitfully caused the land to be registered in their joint names. He contended that he developed a four storey building on the land not knowing that the appellant had caused it to be registered in joint names. The respondent prayed for an order declaring him as the sole owner of the suit land; a permanent injunction restraining the appellant against alienating or interfering with the suit land; and costs of the suit.

4. Upon initiating the suit, the respondent applied for and was granted interlocutory judgment in the suit under Order 10 rule 6 of the Civil Procedure Rules, notwithstanding the fact that the reliefs he sought could not attract interlocutory judgment under the above framework. Subsequently, the trial court fixed the case for formal proof and conducted an exparte formal proof hearing at the peak of the Covid 19 Pandemic in April 2021. The exparte formal proof hearing culminated in a Judgment dated 13/9/2021. The Judgment was signed in the absence of both parties and was emailed to the parties during the Covid 19 Pandemic.

5. The exparte Judgment triggered an application dated 14/9/2021 by the appellant, seeking an order setting aside the exparte-Judgment. The appellant contended that she had not been served with a hearing notice relating to the hearing of 22/4/2021 that culminated in the exparte Judgment. Upon hearing the application, the trial court rendered the impugned ruling, dated 22/7/2022, in which it found the application unmerited and dismissed it.

Appeal

6. Aggrieved with the findings of the trial court, the appellant brought this appeal, advancing the following verbatim grounds:

    1. That the learned Senior Resident Magistrate erred in law and fact in dismissing the appellant's application dated 14/9/2021.

    2. That the learned Senior Resident Magistrate erred in law and fact by ignoring the preliminary objection on record when admittedly there had been a previous suit, Thika CMCC No. 549 of 2011 between the same parties.

    3. The learned Senior Resident Magistrate erred in law by not finding that the suit herein was res judicata and thus an abuse of court process.

    4. The learned senior resident magistrate fell in error by holding that the appellant did not take an attempt to prosecute the preliminary objection when the court ought to address the same suo moto since the same related to the jurisdiction of the court.

    5. The learned Senior Resident Magistrate erred in law and fact by proceeding with the matter when on the face of it he lacked both pecuniary and geographical jurisdiction to hear and determine the same.

    6. The Senior Resident Magistrate wrongly applied the principles applicable for setting aside exparte judgments and thus exercised his discretion wrongly.

7. That the learned Senior Resident Magistrate erred in law and fact by finding that there had been proper service upon the appellant whilst it was one of the issue raised by the appellant in her application and thus sought for cross examination of the process server.

8. That the learned Senior Resident Magistrate fell in error by not addressing the issue as to whether the applicant would suffer irreparable loss if the application was disallowed.

9. The learned Senior Resident Magistrate fell in error by exhibiting outright bias by holding that the appellant had not obeyed court orders when there had never been any contempt proceedings brought against her.

10. The learned Senior Resident Magistrate erred in law and fact by not considering the reasons advanced for non-attendance of the applicant when the matter came up for virtual hearing, given the then prevailing corona virus pandemic and the advanced age of the applicant.

11. The learned Senior Resident Magistrate completely disregarded the appellant's evidence, submissions and the authorities cited and thus fell in error.

12. That the Senior Resident Magistrate's ruling and orders were against the weight of the evidence on record and therefore bad in law.

7. The appellant urged this court to allow the appeal; set aside the impugned ruling; and substitute it with an order allowing the application dated 14/9/2021 in terms of prayer (c). She urged the court to award her costs of this appeal.

Appellant's Submissions

8. The appeal was canvassed through written submissions dated 7/2/2023, filed by M/s Njehu Ndirangu & Company Advocates. The appellant clustered the 12 grounds of appeal into three.

9. On grounds 1,2,3,4 and 5, counsel submitted that the trial court erred in ignoring the preliminary objection filed in the suit and in assuming jurisdiction to determine the dispute, adding that the appellant raised weighty issues relating to sub judice and res judicata in the preliminary objection. Counsel added that both the trial court and the respondent confirmed the existence of another suit filed over the same subject matter, arguing that the respondent having admitted the existence of a previous suit, and this fact having been acknowledged by the learned trial magistrate, it was incumbent on the trial court to consider whether or not the suit offended the doctrine of res judicata.

10. In response to the respondent's contention that the preliminary objection had been filed late, counsel relied on the Court of Appeal case of Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others [2016]eKLR where the court held that even if the issue of jurisdiction were to be raised for the first time on appeal, it would be proper for the appellate court to consider and dispose it. Counsel added that the trial court lacked pecuniary jurisdiction to adjudicate the matter.

11. On grounds 6, 7 and 10, counsel faulted the trial court for finding that there was proper service of court process on the appellant when in fact the court record showed that on 3/10/2018, the court found that there was no proper service. Counsel added that one of the prayers sought by the appellant in the application dated 14/9/2021 was the plea for cross- examination of the deponents of the affidavits of service filed at the trial court. Counsel argued that the inconsistences in the affidavits of service

should have influenced the trial court into giving the appellant the benefit of doubt, adding that the court should have exercised discretion in favour of the appellant. Counsel relied on the case of Remco Limited v Mistry Jadva Parbat & Co. Ltd and 2 Others [2002] 1 EA in support of his submission.

12. On grounds 8, 9, 11 and 12, counsel for the appellant submitted that the effect of the impugned ruling was to dispossess the appellant of the suit property and render her a destitute. Counsel added that the trial court erred in law and fact and exhibited bias by casting aspersions on the appellant when it stated that she had not obeyed court orders in its ruling dated 22/7/2022 yet no contempt proceedings had been initiated against the appellant. Lastly, counsel urged the court to allow the appeal as prayed in order to give the appellant the leeway to participate in the suit at the trial court to its logical conclusion.

Respondent's Submissions

13. The appeal was opposed through written submissions dated 8/6/2023, filed by M/s T W Murage & Co. Advocates. On grounds 1, 2, 3, 4 and 5, counsel submitted that the appellant did not seek a date to prosecute the preliminary objection dated 12/11/2019. Counsel added that the preliminary objection was filed after the entry of interlocutory judgement on 16/7/2019, adding that the sole purpose of the preliminary objection was to stall the hearing of the suit in the trial court. In response to the claim that the suit was sub-judice, counsel submitted that the parties were litigants in Thika Chief Magistrates Court Civil Case No. 549 of 2011, adding that the said suit was dismissed on 21/8/2017 for non-appearance by the parties. Counsel added that the suit was not res judicata, given that Thika Chief Magistrate Court Case No. 549 of 2011 was not heard or finally decided by the court on merit.

14. Counsel added that contrary to assertions made by the appellant, no defence or counter-claim was filed by the appellant save for the defence annexed to the preliminary objection dated 12/11/2019, which related to Thika CMC Civil Case No 549 of 2011. Counsel faulted the appellant for filing the preliminary objection after interlocutory judgment had been entered in the matter. Counsel added that other than sub-judice, there was no other ground that had been raised in the preliminary objection as to the jurisdiction of the court.

15. Counsel argued that the application dated 14/9/2021 was mired in untruths, defects and inconsistencies, among them: (i) the allegation that a defence and counterclaim had been filed, which upon perusal it was found that the defence and counter-claim which was attached to the preliminary objection related to Thika Chief Magistrate Court Civil Case Number 549 of 2011; (ii) lack of a defence in the affidavit or a draft defence to unable the court invoke its discretion in the appellant's favour; and (iii) non-compliance with court orders. Counsel argued that when the matter came up for formal proof on 25/9/2019, despite there being an interlocutory judgment, the appellant appeared and was given 14 days within which to file a defence but the appellant did nothing.

16. In response to ground numbers 6, 7 and 10, counsel contended that on 3/10/2018, the court observed that service of the application dated 13/9/2018 was not proper and ordered for re-service. Counsel added that the court subsequently indicated that service was proper and went ahead and granted an injunction against the appellant.

17. On whether the appellant stood to suffer irreparable loss if the application was disallowed, counsel submitted that the bone of contention was the ownership of parcel number Ruiru East Block 5/130 which was jointly registered in the names of the appellant and the respondent. Counsel added that the issue to be determined related to the proprietary interest of the appellant and how she acquired the suit property.

18. Lastly, counsel submitted that the appellant had not demonstrated that the trial court failed to properly exercise judicial discretion in determining the application dated 14/9/2021. Counsel urged the court to uphold the decision of the trial court and dismiss the appeal with costs.

Analysis and Determination

19. I have read and considered the entire original record of the subordinate court; the record filed in this appeal; and the parties' respective written submissions in the appeal. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common concise statement of issues to be determined by the court.

20. Taking into account the grounds of appeal and the parties' respective submissions, the following are the three key issues that fall for determination in this appeal: (i) Whether the appellant was made aware of the formal proof hearing that culminated in the impugned ex-parte Judgment; (ii) Whether the trial court properly exercised its jurisdiction in declining to set aside the interlocutory and final Judgments; (iii) What order should be made in relation to costs of this appeal. I will briefly analyse and dispose the three issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

21. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of Susan Munyi v Keshar Shiani (2013) eKLR as follows:

> " As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

22. The above principle was similarly outlined in Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

23. The first issue is whether the appellant was made aware of the formal proof hearing that culminated in the impugned exparte Judgment. Through the notice of motion dated 14/9/2021, the appellant urged the trial court to set aside the exparte Judgment and allow her to file her defence. Her case was that she was never served with a hearing notice relating to the hearing that culminated in the impugned exparte Judgment. She added that the exparte hearing was conducted during the period when the Covid 19 pandemic was at its peak and normal court operations had been affected [see ground numbers (iii) and (vii) in the notice of motion dated 14/9/2021]. The appellant swore a supporting affidavit dated 14/9/2021 reiterating that she was never notified about the hearing that culminated in the impugned exparte Judgment.

24. The appellant having demonstrated that she was not notified about the hearing that culminated in the exparte judgment, in tandem with the provisions of Section 107 of the *Evidence Act*, the burden of proof shifted to the respondent to prove that a proper hearing notice relating to the hearing of 22/4/2021 had been served on the appellant. Did the respondent discharge the burden?

25. I have looked at the proceedings of the trial court. The hearing date of 22/4/2021 was fixed on 11/2/2021 in the presence of the respondent's counsel, Mr Murage. Neither the appellant nor her advocate were in court. It was therefore incumbent upon the respondent to serve a proper hearing notice on the appellant.

26. Opposing the application for an order setting aside the exparte judgment, the respondent swore a replying affidavit dated 21/10/2021. I have looked at the affidavit. The respondent never bothered to address the issue of service of a hearing notice relating to the hearing of 22/4/2021. Instead of the respondent placing before the trial court evidence demonstrating that he caused a proper hearing notice to be served on the appellant, he focussed on issues that did not address the question of service of a hearing notice relating to the hearing of 22/4/2021.

27. Further, an examination of the record of the trial court does not reveal any affidavit of service relating to the hearing of 22/4/2021. Indeed, the respondent did not exhibit any hearing notice or affidavit of service relating to the hearing of 22/4/2021.

28. Similarly, the trial court did not address the question of service of hearing notice prior to embarking on the ex-parte hearing that was conducted on 22/4/2021. The normal practice in Kenya's civil procedure jurisdiction is that, where a party is absent, the trial court makes an inquiry as to whether the absent party is aware of the hearing. The court then notes down the position regarding the issue.

29. The subordinate court did not follow the above procedure. Put differently, the trial court conducted an exparte hearing on 22/4/2021 without satisfying itself that the appellant had been duly notified about the hearing date. The totality of the foregoing is that there was no evidence of any form of notification that was made to the appellant relating to the hearing of 22/4/2021. The conclusion that one draws is that, exparte hearing was conducted without service of a hearing notice on the appellant who, at that time, was represented by M/s Muhuhu & Co Advocates. That is my finding on the first issue.

30. Did the trial court properly exercise its jurisdiction in declining to set aside the exparte interlocutory and formal proof judgments? The record of the trial court shows that the respondent made an application for interlocutory judgment and on 15/7/2019, the trial court entered interlocutory judgment against the appellant in the following terms:

> " The defendant Teresia Wanjiku Njuguna having been served with summons to enter appearance failed/entered appearance/defence within the stipulated period and on the application by the plaintiff's advocate, interlocutory judgment is entered as prayed."

31. Subsequent to the above order granting the respondent interlocutory judgement, the trial court conducted an exparte formal proof hearing which culminated in the impugned final judgement. This court has already made a finding to the effect that the hearing of 22/4/2021 was conducted without any notice to the appellant who had a firm of advocates on record.

32. Our superior courts have, in a line of decisions, made a clear distinction between a regular default or ex-parte judgment and an irregular default or exparte judgment. The courts have laid down clear principles that should guide our courts when exercising jurisdiction to set aside either of the two categories of ex-parte or default judgments.

33. In James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another (2016) eKLR, the Court of Appeal spelt out the relevant principles in the following words:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default

judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment 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 the default judgment, and will take into account such factors 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; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd(1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 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 justitiae, 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. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:

> " [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

34. In Patel vs East African Cargo Handling Services Limited [1974] EA 75 the Court of Appeal spelt out the following principle:

> " 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 to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means, as Sheridan J put it, "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

35. In the application giving rise to the ruling that culminated in this appeal, there was no evidence of service of a hearing notice relating to the hearing of 22/4/2021. Besides the above jurisprudence which required the trial court to set aside the exparte judgment on account of lack of service of a hearing

notice, Article 50(1) of *the Constitution* obligated the lower court to ensure fair hearing to the parties to the dispute. Suffice it that where a party is not notified about the hearing of a suit in which he is a party, the ensuing trial cannot be said to be fair.

36. One other glaring violation of the law which emerged in this appeal is the trial court's decision to enter interlocutory judgment in the suit and thereby make it impossible for the appellant to file a defence. Claims that attract interlocutory judgment are specified in Order 10 rule 6 of the Civil Procedure Rules. The reliefs which the respondent sought in the plaint dated 13/9/2018 did not fall within the category of reliefs that attract interlocutory judgment. The interlocutory judgment which the subordinate court entered against the appellant on 15/7/2019 was therefore an unnecessary obstacle to the appellant's right to file a defence. What the trial court was required to do was to simply set down the suit for hearing in tandem with the requirements of Order 10 rule 9 of the Civil Procedure Rules.

37. The trial court having entered irregular interlocutory judgment, it proceeded to conduct an irregular formal proof hearing. Even if there were to be service of a proper hearing notice, no regular final judgment could be anchored on the irregular interlocutory and irregular formal proof hearing. Consequently, even if there were to be no other good reason for interfering with the judgment of the trial court, this particular irregularity would attract nothing but an order vacating the irregular interlocutory judgment together with the irregular formal proof hearing and the ultimate irregular final judgment.

38. For the above reasons, this court finds that the trial court erred in declining to set aside the irregular interlocutory and final judgments.

39. On costs, much of the errors that culminated in this appeal are largely attributable to the trial court. For this reason, parties will bear their respective costs of this appeal.

Disposal Orders

40. In the end, this appeal succeeds in the following terms:

    a. The ruling of the lower court rendered on 22/7/2022 in Kiambu CMC Civil Case No 454 of 2018 is wholly set aside and is substituted with an order setting aside the exparte judgment rendered on 13/9/2021 alongside the irregular interlocutory judgment that had been entered in the suit on 15/7/2019 and the irregular formal proof proceedings.

    b. The defendant in the said suit shall be at liberty to file her pleadings within 15 days from today.

    c. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 15TH NOVEMBER 2023

B M EBOSO

JUDGE

In the presence of: -

Ms Addallah for the Appellant

Court Assistant: Osodo/Hinga