



**Bor v Keittany & 3 others (Environment and Land Appeal E007 of 2023)
[2023] KEELC 22363 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E007 OF 2023
JM ONYANGO, J
DECEMBER 14, 2023**

BETWEEN

JOHN KIPROP BOR APPELLANT

AND

SOPHIE JEPKOSGEY KEITTANY 1ST RESPONDENT

YASMIN NOOR 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

MARK KIBET BII 4TH RESPONDENT

*(Being an appeal against the ruling of Hon. P.N Areri in
CM ELC case No. 166 of 2022 delivered on 6th April 2023)*

JUDGMENT

1. John Kipro Bor the Appellant is the plaintiff in Eldoret CMELC Case No 166 of 2022 where he has sued the Respondents herein for trespass inter alia and sought the following orders:
 - a. A declaration that the occupation and use by the 1st and 2nd defendants of the 3 -bedroom permanent house sitting on a 0.1 acre portion of land parcel number Cheptiret/Cheplaskei Block 3 (Sertwet)/287 belonging to the Plaintiff amounts to trespass.
 - b. An order of eviction against the 1st and 2nd defendants, their agents, servants, employees or any other persons claiming under them from the 3- bedroom permanent house and 0.1 acre portion belonging to the plaintiff in the suit property.
 - c. A temporary injunction to prevent the 3rd defendant either by itself its servants, agents, employees or any other person claiming under it from paying any award, carrying out any



works and/or dealing in the suit land in any manner before the 1st and 2nd defendants vacate the plaintiff's 3- bedroom permanent house sitting on his 0.1 acre portion of the suit land.

2. Contemporaneously with the plaint, the plaintiff filed a Notice of Motion dated 30th November, 2022 seeking a temporary injunction to restrain the defendants from selling disposing of, sub-dividing, transferring, alienating leasing or otherwise dealing with the suit property in any manner likely to affect the rights to his portion of the property.
3. He also sought a temporary injunction to restrain the 3rd defendant from paying any award to the 1st and 2nd defendants or carrying out any works on the suit property in furtherance of its mandate in the construction of the bypass road project.
4. The Defendants did not file any response to the application and when it came up for hearing on 13th December, 2022, it was granted pending the hearing of the main suit. Upon being served with the orders, the 1st and 2nd defendants filed an application dated 19th December 2022 seeking to discharge, vary or set aside the orders issued on 13th December 2022. They also prayed that the court grants an order of status quo pending the hearing of the main suit.
5. The application was canvassed by way of written submissions and after considering the application and submissions filed by the parties, the trial Magistrate rendered his ruling on 6th April 2023 allowing the application and setting aside the orders of injunction issued on 13th December 2022. The court did not make any orders with regard to the *status quo*.
6. It is the said ruling that triggered the instant appeal based on the following grounds:
7. That the trial learned magistrate erred in law and fact in;
 - i. Allowing the Respondents' application dated 19th December 2022 without considering the pertinent issues raised by the Appellant in his Replying affidavit, Supplementary Affidavit and submissions without any ground in law.
 - ii. Interfering with prayer number 3 as allowed in the Appellant's application yet the 3rd Respondent whose order was directed to (sic) did not oppose both applications.
 - iii. Failing to exercise his discretion judiciously in allowing the Respondent's application despite the glaring strong evidence that their actions were based on fraud of the Respondents or their agents.
 - iv. Analyzing and considering the demerits of the Appellant's application dated 30th November, 2022 to allow the Respondent's application which clearly had no merits whatsoever. The honourable magistrate made a ruling on the appellant's application instead of the Respondent's application dated 19th November, 2022.
 - v. Dwelling so much on the Appellant's application dated 30.11.2022 instead of putting his mind on the Respondent's application hence reaching a wrong decision and exhibiting open bias.
 - vi. Introducing extraneous issues which were not raised by any party in their pleadings and which matters were to be interrogated substantially at the main hearing of the suit, including whether or not there was sub-division of the sold part of the suit parcel and failing to frame pertinent issues raised by the parties in the pleadings.
 - vii. Holding that the Appellant did not do equity and that he came to court with unclean hands by not sub-dividing the sold portion, becoming the author of the "whole mess" yet the same did not come up in the pleadings at the main suit or applications and when it was clear that the



Respondents came to court with clean hands by doctoring and/or forging their documents hence participating in fraud. (sic)

- viii. Holding that the Appellant was claiming a portion of the suit land yet it was clear from the pleadings that he was claiming a 3-bedroom house sitting on 0.1 of the suit property (sic).
 - ix. Failing to act fairly and thereby occasioning a miscarriage of justice.
 - x. Failing to allow the Appellant to be heard in a full trial hence occasioning a miscarriage of justice.
8. The appeal was disposed of through written submissions and submissions were filed on behalf of the Appellants, 1st, 2nd and 4th Respondents.
 9. Having considered the Grounds of Appeal, submissions and the entire Record of Appeal, the following issues emerge for determination:
 - i. Whether the trial magistrate erred in the exercise of his discretion by allowing the Respondent's application dated 19th December 2022.
 - ii. Whether the trial magistrate erred in setting aside the orders issued on the 13th December 2022.
 - iii. Whether the trial magistrate erred in failing to issue an order of status quo.
 - iv. Whether the appeal should be allowed and the orders issued on 13th December 2022 reinstated.
 10. The application dated 19th December sought two main orders;
 - a. That the Honourable court be pleased to discharge, vary and or set aside the orders issued on 13th December 2022
 - b. That the Honourable Court be pleased to issue such orders of maintenance of status quo pending the hearing and determination of the application and the suit.
 11. The law on setting aside of *ex parte* orders is found under Order 12, rule 7 of the [Civil Procedure Rules, 2010](#) which provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
 12. This provision is amplified by Order 51, rule 15 which provides that the court may set aside an order made *ex parte*.
 13. This is an appeal against a discretionary order. The principles upon which an appellate court may interfere with exercise of a discretion by a trial court have been stated in many decisions. In the case of *Mbogo & another v Shah* [1968] EA where, Sir Clement de Lestang, V.P. at page 94 stated thus,

“I think it is well settled that a court will not interfere with the exercise of its discretion of an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or it failed to take into consideration which it should have taken into consideration and in so doing arrived at the wrong conclusion.”
 14. Even though the court has the discretion to set aside an *ex parte* judgment or order, the discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or



excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah v Mbogo & another* [1967] EA 116.

In *Patel v East Africa Cargo Services Ltd* (1974) EA 75 this principle was reiterated thus:

“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 ... 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.”

15. The application which the 1st, 2nd and 4th Respondents filed in the lower court was essentially an application for setting aside the order of injunction given *ex parte* on 13th December, 2022. Order 40 Rule 7 of the [Civil Procedure Rules](#) specifically gives the court power to set aside, discharge or vary an order of injunction whether given *ex parte* or otherwise.
16. Order 51 Rule 14 required the Respondents if they intended to oppose the application for injunction, to file and serve on the Appellant a Notice of Preliminary Objection, Replying Affidavit or a Statement of the Grounds of Opposition not less than three clear days before the hearing date. Rule 14 (4) of Order 51 provides that if a respondent fails to file a Replying Affidavit or a Statement of Grounds of Opposition the application may be heard *ex parte*. In this case the Respondents failed to file a Notice of Preliminary Objection, Replying Affidavit or a Statement of the Grounds of Opposition before the hearing date of the application *inter partes*.
17. When the application came up for inter partes hearing, the Respondents did not attend court. Counsel for the Appellant informed the court that the Respondents had been served with the application and he had filed an Affidavit of Service but the Respondents had not served him with any response.
18. Before granting the application on 13.12.22 the court observed as follows:

“The application dated 30.11.22 having been duly served and not responded to is hereby allowed in terms of prayers 3 and 4 pending hearing of the main suit”
19. It is important to note that the main ground upon which the application for setting aside the order of injunction was based is that the Respondents were never served with the application. It was therefore necessary for the trial Magistrate to make a finding on the issue of service in order to determine whether the injunction was issued regularly. Even if he found that they had been served but they had satisfactory explanation, he still had the discretion to set aside the injunction and allow the Respondent to file their response to the application so that it could be heard on merit.
20. However, in his ruling, the trial Magistrate steered clear of the issue of service and delved his into the merits of the application. He then considered whether the Appellant had satisfied the conditions for the grant of an injunction and came to the following conclusion:

“That being the case the Plaintiff/Applicant did not establish a prima facie case with high chances of success against the 1st and 2nd Defendants/ Applicants, that he will suffer damages which cannot be compensated by an award of damages or that the balance of convenience tilts in his favour to warrant injunctive orders against them It will be unfair and unjust to restrain the 1st and 2nd Defendants/Applicants from the 0.4 acres which is rightfully theirs were the orders issued on 13.12.22 to stand. To me it is clear that the Plaintiff/Respondent’s claim is only on a portion measuring 0.1 acres. It was incumbent upon the seller of the land who is the Plaintiff/ Respondent in this case to sub-divide the land sold to the 1st and 2nd



Defendants/Applicants and demarcate the same with clear boundaries. He did not and he is therefore the author of the whole mess. Equity demands that whoever comes to equity must come with clean hands and that he who seeks equity must do equity. In this case the Plaintiff/ Respondent did not do equity and has come to court with unclean hands. That being the case, I find the application dated 19th December 2022 has merit. I allow the same and set aside, vacate and /or discharge the orders issued on the 13th December 2022. The 1st and 2nd Defendants shall have the costs of the application. Orders accordingly”

21. What I find indefensible is that the trial magistrate did not address the critical issue of service, yet there is an Affidavit of Service on record sworn by one Daniel Shiraho indicating the 1st and 2nd Respondents were served. Rather than give the reason why he decided to set aside the injunction despite the same having been duly served upon the Respondents, he jumped the gun and dealt with the application for injunction. To the extent that he dwelt on the application for injunction rather than the application for setting aside dated 19th December, 2022, I am of the view that he erred and the criticism levelled against him in grounds 1, 4, 5 of the Grounds of Appeal is valid.
22. In ground 2, the trial Magistrate has been faulted for interfering with prayer No 3 in the Appellant’s application yet the 3rd Respondent against whom the order was directed did not oppose the application. In the said prayer, the Appellant had prayed that:
 - “ 3. “Pending the hearing and determination of this application inter partes this court be pleased to grant a temporary injunction restraining the 3rd defendant / respondent whether by themselves, their agents employees and/or anyone acting on their authority from paying any award to the 1st and 2nd defendants / respondents and or carry out any works in respect of the land Cheptiret/ Cheplaski Block 3 (Sertwet)/287 in carrying its mandate and intention of constructing a by-pass road project (sic).”
23. The effect of setting aside and discharging all the orders issued on 13th December, 2022 was that there was nothing stopping the National Land Commission (3rd Defendant) from paying compensation to the Respondents following the acquisition of the suit property for the construction of the bypass before the ownership of the portion measuring 0.1 acres on which there is a 3-bedroom permanent house is determined.
24. Although the sale of 0.4 acres of the suit property to the 1st and 2nd Respondents is not in dispute, the portion measuring 0.1 of an acres on which there is a 3-bedroom house is hotly contested and it would defeat the ends of justice if the 3rd defendant proceeds to compensate the 1st and 2nd defendants for the entire parcel before the question of ownership of the house standing on 0.1 acres is determined.
25. Another complaint raised by the Appellant is that the trial Magistrate introduced extraneous issues which were not raised by the parties in their pleadings and which should have been interrogated at the main hearing. One such issue was the question of sub-division of the suit property where the trial Magistrate observed that the Appellant had failed to sub-divide the suit property and put clear boundaries and that he was therefore the author of “the whole mess”. As correctly submitted by both counsel for the Respondent and the Appellant, this is a matter that ought to have been determined at the hearing. The learned trial Magistrate thus erred by making a finding on a contested issue at an interlocutory stage.
26. For the foregoing reasons, I am satisfied that the learned trial magistrate misdirected himself in law in several respects and he did not exercise his discretion judicially.



27. Accordingly, I allow the appeal with costs to the Respondent. I set aside the ruling of the trial court issued on 6th April, 2023 with respect to the application dated 19th December, 2022 in so far as it purports to determine the application dated 30th November, 2022 and substitute it with the following orders:
- a. The order of injunction given on 13th December, 2022 is varied and instead there shall be an order that the status quo be maintained pending the hearing and determination of the application dated 30th November 2022.
 - b. The Appellant's Notice of Motion for an order of injunction dated 30th November, 2022 shall be heard de novo before another magistrate. The Respondents are at liberty to file their Replying Affidavits to that application within 14 days of this judgment.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF DECEMBER 2023

J.M ONYANGO

JUDGE

In the presence of;

Mr. Kerui for the Appellant

Mr. Kibii for the Respondent

