Juma v Joseph Gikunda (Legal representative of the estate of M'Ikiara M'Rinkanya) (Environment and Land Appeal 50 of 2018) [2022] KEELC 3646 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3646 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 50 OF 2018

CK NZILI, J

MAY 11, 2022

BETWEEN

NGATIA JUMA ..... APPELLANT

AND

JOSEPH GIKUNDA (LEGAL REPRESENTATIVE OF THE ESTATE OF M'IKIARA M'RINKANYA) ..... RESPONDENT

JUDGMENT

A. Pleadings

1. The appellant had been sued in the lower court by the respondent for trespass to plot grant no. 24829 and L.R 2890/59 Timau owned by the estate of M'Ikiara M'Rinkanya represented by the respondent. The respondent sought for vacant possession and mesne profit of Kshs.10,000 up to the date of giving up vacant possession.

2. The appellant denied the claim through a defence dated 26.3.2013. In particular the appellant challenged the ownership of the suit land by the respondent and the jurisdiction of the court to determine the suit.

3. By a notice of motion dated 4.4.2018, the firm of G.M Wanjohi and co advocates sought leave to cease acting for the appellant. This was after the case was fixed for hearing on 2.4.2018 and later on 14.5.2018. The appellant advocates failed to show up on that day to prosecute the application nor did the appellant attend hence the matter proceeded exparte.

B. Testimony

4. The respondent testified and produced exhibits namely a certificate of lease as P. exh (1), payment of rent receipt as P. exh (2), demand letter P. exh (3) copy of the grant P. exh (4) map P. exh (5), grants p. exh (6) letter dated 6.7.1972s P. exh 7, application dated 10.12.1968 P. exh (8) grant for LR 24829 dated

18.1.1972 P. exh (a) letters dated 16.12.1992, 13.2.1993, 20.11.1993, 6.1.1971, 20.2.1969, 17.2.1969, 10.9.1969, notification of approval or refusal to development as P. exh (17) payment receipts for the approval for development P. exh 18, approval for development for plot no. 2890/59 P. exh (19), septic tank details sketch map P. exh (20), payment receipts for rent as P. exh 21 and a death certificate as P. exh 22.

5. The respondent closed his case and there being no representation or appearance by the appellant the court ordered the defence closed.

6. The respondent filed written submissions dated 8.6.2018 and a judgment was reserved for 27.7.2018 wherein the court allowed the respondents claim.

7. On 13.8.2018 the firm of Mwirigi Kaburu and Co advocates filed a notice of appearance to come on record for the appellant. Eventually on 20.8.2018 the said law firm filed an application dated 17.8.2018 seeking for leave to come on record for the appellant, stay of execution and the setting aside of the judgment on the basis that the appellant had not been aware of the hearing date, since his former advocates on record had not informed him of the hearing date and that the application to cease acting had been sent to the wrong address, hence was condemned unheard contrary to his constitutional right to fair hearing. By a ruling dated 29.10.2018 the court dismissed the application for lacking merits.

C. Grounds of appeal

8. The appellant now complains that the trial court failed to consider he had an arguable defence; it visited the mistake of an advocate upon him hence denied him an opportunity to be heard; failed to find that he had had shown sufficient cause to set aside the judgment against him; exercised its discretion improperly hence denying him a chance to be heard and lastly failed to balance the clearance of old cases with the right of a party to a suit to be heard.

D. Written submissions

9. The appellant submitted that on 30.8.2017 parties were ordered to fix the suit for hearing within 60 days failure of which the suit would stand dismissed. Therefore it was the appellants take that as at 22.11.2017 the suit stood dismissed by default hence there was nothing left to prosecute after 30.10.2017.

10. Regarding the application dated 6.8.2018 reliance was placed on *Wachira Karani vs Bildad Wachira* (2016) KLR on conditions for setting aside a judgment especially on sufficient cause which in this matter the appellant urged the court to find there was sufficient cause given the application to cease from acting by his former lawyers had been sent to a wrong address that is P.O box 51 Timau instead of P. O Box 108 Timau.

11. On that score alone the appellant submitted he should have been given a chance to be heard considering that the suit was filed in 2013 and was only heard in 2018, that he had not delayed the matter and could not be wholly blamed for any delay.

12. Reliance was placed on *Richard Ncharpi Leiyagu vs IEBC and 2 others* (2013) eKLR on the principles for setting aside exparte judgment and the explanation offered to safeguard the constitutional right to fair hearing.

13. The respondent on the other hand submitted that the grounds of appeal especially the one of unaliable defence was misplaced since it was not raised as a ground in the notice of motion dated 29.10.2018. Therefore the fact that neither the appellant nor his then advocates on record appeared in court on

14.5.2018 in spite having been served with a hearing date could not be raised an issue at this appellate stage.

14. Further the respondent submitted the appellant had never demonstrated in the notice of motion or even before this court that his defence had raised triable issues. It was submitted the trial court had addressed itself on the issue of mistake of counsel and found that the appellant failed to give sufficient reasons more so after his former lawyers had been served with a hearing notice and that the allegations of letters being sent to the wrong address had no basis or truth at all since the appellant had failed to annex the said letters to his affidavit in support, for the court to establish the truth.

15. Additionally it was submitted the former advocate failed to swear any affidavit to confirm that the alleged letters were sent to the wrong address.

16. The respondent further submitted the alleged address was never disowned by the appellant and or explained where his former lawyers got the address from. Again at paragraph 3 & 4 of the defence it was submitted that the appellants' documents at page 3, 20, 31 & 32 indicate the address as Box 51 Timau.

17. The respondent submitted the trial court took into consideration all the replying affidavits and written submissions and exercised its discretion judiciously, and that the concept of the expeditious disposal of suit was at the very cornerstone of any judicial work given the suit was five years old.

18. Concerning the issue of no suit in existence as at 30.11.2017 the respondent submitted such a ground was not raised before the trial court or in the grounds of appeal herein.

19. Regarding *Wachira Karani* case (supra) the respondent submitted it was distinguishable since the same was on the service of summons unlike in the instant case which was on the failure to attend the hearing after a proper service of a hearing notice.

20. This being a first appeal the court has the mandate to rehearse, re-appraise and review the lower court record and come up with its independent findings and conclusions.

E. Issues for determination

21. Having gone through the pleadings pretrial compliance document, evidence tendered and the post judgment applications the issues commending themselves for my determination are:

    i. If the appellant was properly served with the hearing date for 14.5.2018.

    ii. If the court was in order to proceed with the hearing not withstanding a pending application to cease acting for the defendant, by his former advocates on record

    iii. If the appellant had met the threshold for the stay of execution, setting aside the exparte judgments and for the matter to start denovo.

    iv. If the trial court exercised its discretion properly in reaching the impugned decision.

22. There is no dispute that the parties herein were served with a hearing notice dated 18.4.2018 for 7.5.2018 issued by the court. An affidavit of service was duly filed by Tabitha Kirubi on 2.5.2018.

23. After the said service the firm of G.M Wanjohi and co advocates filed the notice of motion dated 4.4.2018 to cease acting for the appellant on the day of the hearing and ensured it was placed in the court file perhaps to stifle the hearing of the case.

24. The trial court gave another hearing date for 14.5.2018 and directed a fresh hearing date be served upon the appellant. This was done and an affidavit filed on 14.5.2018 sworn by Desderio Nyaga Nyamu advocate indicating service was done through Wells Fargo Courier Services to the appellants' advocates address. There is no indication that upon the filing of the notice of motion to cease acting for the appellant that the said former lawyers for the appellant fixed a hearing date for the said application and or served the same upon the appellant. The appellant has however admitted that the said application was sent but to an alleged wrong address.

25. Be that as it may the respondent failed to attend court together with his advocates then on record when there had been properly serviced with the hearing notices including the one for 21.12.2017 and 7.5.2018 respectively. The appellant did not attend court nor his advocates then on record.

26. The court had no option but to proceed with the hearing in absence of the appellant and his then advocate on record. The appellant's advocates on record knew the matter was slated for hearing and did not attend court to prosecute its application to cease from acting for the appellant at the very least and or explain out the reasons the matter should not proceed.

27. Further and looking at the application to cease acting the erstwhile advocate deposed that the appellant had failed to instruct them and was therefore unable to proceed representing him. The said law firm was making this application in 2018 whereas the appellant had filed his witness statement on 26.3.2013.

28. In the appellant's list of documents dated 26.3.2013, the documents listed as no. 4, 5 and 6 particularly by his lawyer use the portal address as Box 51 Timau. Between 2013 and 2018 the appellant did not state in his supporting affidavit particularly paragraph 4 when he had last visited his erstwhile lawyers offices and was told about the progress of his case.

29. The record of appeal at page 72 the suit came up for hearing on 14.72014 and an order for compliance with Order II *Civil Procedure* Rules was made.

30. Thereafter the court on 30.8.2017 directed that the matter be heard on priority basis given its age. A hearing date for 18.12.2017 was issued thereafter a warning an order was made for a date to be fixed within 30 days otherwise the suit would stand dismissed. In compliance with those orders on 21.12.2017 a date for 2.4.2018 was fixed for the hearing by the respondent. The hearing date was fixed within the timelines directed by the court. I therefore disagree with the preliminary issue by the appellant that there was no suit pending after 30.10.2017.

31. Going by the foregoing record it is quite apparent that the appellant should have given more explanation why his erstwhile lawyers were attending to his case for over three years without his presence to an extend that in 2018, the said lawyer had no option than to file an application to cease acting for him on account of lack of instructions.

32. The appellant did not counter such serious allegations particularly coming from his erstwhile advocates that he had not been giving them instructions for a quite while.

33. Consequently my finding on issues no 1 and 2 are that there was proper service of the hearing notice upon the advocate then on record for the appellant and secondly that the failure by the appellant and his erstwhile advocate on record to attend court and clarify on the issue of legal representation left the trial court with no option but to proceed with the scheduled hearing in line with Order 16 & 17 *Civil Procedure Rules* where the defendant failed to attend court upon proper service of a hearing notice.

34. Coming to the 3rd and 4th issues that the court has wide discretion to set aside exparte proceedings or judgment is not in dispute. In this matter the appellant lays blame on his erstwhile advocates who failed to attend court or notify him of the hearing through his known address. He submitted that the trial

court should not be condemned out of mistakes of his former lawyers and driven him out of the seat of justice.

35. In *Neeta Gohil vs Fidelity Commercial Bank Ltd* (2019) eKLR the court held it was not in every case that a mistake allegedly committed by an advocate would be a ground for the setting aside of the orders of the court. Kimaru J in Savings And Loans Ltd vs Susan Wanjiru Murithi held a case belongs to a litigant and not his lawyer and the former had a duty to pursue the prosecution of his case by constantly checking with his advocate on the progress of his case.

36. In this case it is quite apparent that if the appellant was vigilant enough he would have known the happenings on the hearing of his case slightly before 2018.

37. It is not possible in this days of technological advancement that the only way the appellant was able to communicate which his advocates then on record was only through postal mail and or physical visit to their offices.

38. The appellant cannot simply blame an advocate for a mistake, which in this matter I take the view that none has been demonstrated at all and fail to show any tangible steps and or efforts he individually made between 28th March 2013 and 7th May 2018 to fast track and or take interest towards the prosecution of his case.

39. In *Patel vs E.A Cargo Handling Services Ltd* (1974) E.A 75 the court held there are no limits or restrictions on its exercise of discretion, the main concern being to do justice to the parties.

40. In *Shah vs Mbogo* (1967) E.A 166}} the court held the power to set aside exparte proceedings was intended to be exercised to avoid injustice or hardship but not to assist a party guilty of deliberate conduct intended to obstruct or delay the cause of justice.

41. In exercising the said discretion the court in *Rayat Trading Co Ltd vs Bank of Baroda and Tetezi house ltd* (2018) eKLR stated it had to establish if the defendant had a real prospect of successfully defending the claim and that there must be some good reason why the judgment should be set aside or varied.

42. In Patel vs E.A Cargo (supra) it was held where the judgment was a regular one the court will not normally set aside the judgment unless it was satisfied there was a defence on merits which did not mean a defence that must succeed but one raising a triable issue.

43. In *Wachira Karani va Bildand Wachira* (supra) Mativo J, citing with approval *Richard Ncharpi Leiyagu* (supra) held that the discretion was intended to avoid injustice or hardship out of an excusable mistake resulting from an accident, in advertence or error but not to assist a party out to obstruct the cause of justice.

44. In this matter the appellant at paragraph 4 of the supporting affidavit cites his defence and says he used to visit his lawyers and would be told there would be communication on when the suit was going to be heard.

45. Looking at the proceedings herein it is quite obvious that the averment cannot be true given there are several hearing dates between 2013 and 2017. If at all the appellant was visiting the offices of his lawyers then on record surely he would have been privy to the progress. The very fact that he has failed to specify the exact date leaves many doubts as to the truthfulness of his assertions.

46. The right to fair hearing and access to justice also bestows upon a party certain obligations including playing by both procedural and substantive rules of the trial. The appellant had legal presentation and was under an obligation to keep him abreast of his case and also attend to the lawyers offices for updates on the progress of his case. The court did all it could and served the hearing notices upon the

parties through known address. The appellant squandered the opportunity and the chance to present his defence.

47. Unfortunately the appellant instead of owning up his indolence and lack of condour blames his erstwhile lawyers for alleged mistake which has not been substantiated at all.

48. The appellant did not tender any evidence on who owned the alleged two postal addresses so as to lead credence to his assertion that the mails were addressed to the wrong address. The court has also indicated that the said address appears to have been used by his lawyers, previously as indicated in his own list of documents. The address was known to him then and cannot become unknown to him now.

49. In the premises I find no merits in the appeal herein and confirm the findings and conclusions by the trial court. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 11TH DAY OF MAY, 2022

In presence of:

Mwirigi for appellant

Miss Gitonga for respondent

HON. C.K. NZILI

ELC JUDGE