Mwangi & another v Gikonyo & another (Environment and Land Appeal E084 of 2021) [2022] KEELC 3195 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3195 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E084 OF 2021

JG KEMEI, J

JUNE 9, 2022

BETWEEN

JAMES NJUGUNA MWANGI ..... 1ST APPELLANT

STANLEY NGUMA ..... 2ND APPELLANT

AND

ZAKARIA MACHARIA GIKONYO ..... 1ST RESPONDENT

NANCY WANJA MACHARIA ..... 2ND RESPONDENT

(Being an appeal against the Ruling of the Hon A M MAINA, Chief Magistrate delivered on the 8/10/2021 in MCL&E No 175 of 2019)

RULING

1. The Appellants being aggrieved by the Ruling delivered on 8/10/2021 by Chief Magistrate Hon. A.M Maina in Thika MCE&L Suit No. 175 of 2019 filed their Memorandum of Appeal dated 18/10/2021 on grounds That;

    a. The Learned Magistrate erred in law and in failing to fully address the issues raised in the pleadings and submissions by counsel for the Appellants.

    b. The Learned Magistrate erred in law and in fact in failing to apply the principle set out in article 159(2)(d) of the *Constitution*.

    c. The Learned Magistrate erred in law and in fact in condemning the Appellants unheard.

    d. The Learned Magistrate erred in law and in fact in finding that the appellants did not demonstrate that they had any defence against the respondents' claim.

2. The appellants urged the court to grant the following prayers;

a. That the ruling delivered on the 8/10/2021 be set aside.

b. The appellants application dated the 18/8/2021 be allowed as prayed.

c. Costs of the appeal.

3. When the matter came up for directions on the 16/3/2022 the parties elected to canvass the appeal by way of written submissions.

4. The appellants written submissions were filed by the firm of J K Ngaruiya Advocates while the respondents failed to comply despite the directions having been taken.

5. I have read and considered the written submissions on record. In brief;

6. On the first ground, the appellants argued that it was not possible to cross examine the process server because the application was canvassed by way of written submissions only. Regarding failure to annex a draft defence, the appellants were ardent that having not been served with summons and the plaint and their efforts to trace the court file having been fruitless, it was not possible for them to file a defence to the Plaint. Their submissions are that having not been served, the judgment against them was irregular and was ripe for setting aside as held in the case of *James Kanyiita Nderitu & anor*. [2016] eKLR (sic).

7. Addressing the second ground of appeal, theappellants recapped the provisions of article 159(2) (d) *Constitution of Kenya* that justice shall be administered without undue regard to procedural technicalities which in their view include the failure to call for the process server' cross examination and want of a draft defence.

8. Thirdly, the appellants submitted that in dismissing their application, the court contravened their right to be heard as guaranteed under article 50 *Constitution of Kenya* since the trial court suit involved ownership and occupation of L.R No. Thika Municipality/block10/329. That they only learnt of the suit upon being served with orders of demolition of their cafes thereon.

9. Lastly the appellants cited the case of James supra to argue that the judgment against them ought to have been set aside as a matter of right.

10. Is the appeal merited? Before I deal with the matter, I will re-examine the duty of the courtin an appeal in the first instance. As a first appellate court, this court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.

11. To recap the point above, I rely on the case of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular thiscourt is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based

on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270)."

12. The court is therefore under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and lastly it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

13. The starting point is to re-examine the history of the suit. According to the record this suit was filed on the 7/11/2019 vide MCLE No 175 of 2019. The summons to enter appearance were issued on the 7/11/2019. According to the affidavit of service sworn on the 13/11/2019 the defendants were served on the 12/11/2019 at their business premises which are on the suit land. Following service, the 4th defendant entered appearance and filed a statement of defence on the 25/11/2019. On the 3/12/2019 the plaintiffs sought interlocutory judgement against the 1st -3rd defendants for having failed to enter appearance nor file a defence. The said interlocutory judgement was duly entered on the 4/12/2019 and thereafter the suit was fixed for hearing.

14. It is borne of the record that thereafter the suit came up for mentions for various activities on the 10/1/2020, 20/2/2020, 17/6/2020, 11/8/2020 and 15/9/2020 before the hearing commenced on the 19/1/2021.

15. Thecourt's power to set aside ex parte judgment is discretionary as provided under Order 10 rule 11 *Civil Procedure Rules* that; where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. The appellants are therefore mandated to satisfy this court that the trial court failed to exercise its discretion judiciously.

16. The Court of Appeal in the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR observed thus;

> "....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 ...."

17. The court has found that the appellants were duly served and therefore the judgement entered against them was a regular default judgement. In such a scenario, the court is then called upon to exercise its unfettered discretion in determining whether or not to set aside the default judgement. The court is required to consider such factors as the reason for failure to enter appearance and file a defence, duration of delay in bringing the application, whether the applicant has triable issues, the prejudice

that is likely to be suffered by the parties and whether it serves the interest of justice to set aside the default judgement.

18. In this case the appellants failed to file a draft defence and therefore the court isunable on the face of it make a finding that the defence has triable issues.

19. The judgment was delivered on the 7/4/2021 and the application to set aside the said judgement was filed on the 18/8/2021, a period of 4 months. I find that the application was brought without delay.

20. On the issue of prejudice to the parties the court finds that the Respondents will definitely stand to be prejudiced for the delay in the procrastination of their enjoyment of the fruits of the judgement which is in their favour. Though such a prejudice may be ameliorated by way of damages, there has to be justification to do so.

21. Then there is the claim of the appellants that they were unable to file their Memorandum of Appearance and defence for the reason that the file was missing in the registry. I have seen the letter by Kamiro RN & Co. Advocates dated the 9/3/2020 addressed to the Chief Magistrate, Thika Law Courts as follows;

    'We were instructed on the 21/1/2020 to act for the 3 defendants named in the plaint. We drew our appearance for the 3 defendants and to subsequently file defence for the 3 defendants. We have not been able to file defence. We seek the assistance of the executive officer of the court.'

22. It is on record that this letter was received by the Chief Magistrate on even date. According to the record there was no activity ongoing in the file at this time, the last mention having been held on the 10/1/2020 and the next was the 17/6/2020. There is no evidence that this letter was responded to by the Chief Magistrate. The import of this letter is to show that the appellants were aware of the suit having been served with the summons earlier on the 12/11/2019 as stated in the affidavit of service sworn on the 13/11/2019. How else would they have known about the suit? It is therefore not true that they learned of the case on receipt of the demolition notice.

23. There is no evidence to support that the file was missing in the registry. Secondly there is no evidence that the appellants ever drew or entered memorandum of appearance and filed a defence. Not even a draft was presented before thecourt. In any event it was for the appellants counsel to exhibit the duly filed memorandum of appearance together with the defence and leave the registry to look for the file, as it is their role to locate the file and place the documents therein. Had they perused the file they would have known that there was already an interlocutory judgement against them. Save for the above letter, there is no evidence that they requested for the perusal of the file at all. I find this ground least plausible. Indeed it has served to show the indolence of the appellants. Nothing therefore turns on this point.

24. Having now carefully considered the appeal, I find no grounds to fault the Hon Learned Chief Magistrate in holding that the judgement was regular and that the Appellants have not met the threshold to allow her exercise discretion judiciously. Regrettably I have reached the same conclusion.

25. Final orders and disposal;

    a. The totality of the foregoing is that the appeal is bereft of merit and it fails.

    b. It is dismissed without costs asrespondents did not file any submissions in opposition.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st Appellant – Absent

2nd Appellant – Absent

Wainaina for the 1st and 2nd Respondent

Court Assistant - Phyllis