Were v Gardison & 3 others (Environment and Land Appeal E004 of 2021)
[2022] KEELC 4797 (KLR) (20 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4797 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL E004 OF 2021

DO OHUNGO, J

SEPTEMBER 20, 2022

BETWEEN

STANLEY AMWAYI WERE ..... APPELLANT

AND

FRIDA OMARI GARDISON ..... 1ST RESPONDENT

EMMANUEL NYANGALA ..... 2ND RESPONDENT

SHIKOTI SAKWA ..... 3RD RESPONDENT

PETRO LUBOYO KHAKOYA ..... 4TH RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court at Kakamega (E Malesi, Principal Magistrate) delivered on 12th January 2021 in Kakamega MCELC No 381 of 2018 Stanley Amwayi Were v Frida Omari Gardison and others)

JUDGMENT

1. This appeal traces its roots to a plaint filed by the appellant herein on September 13, 2012 as Kakamega HCCC No 228 of 2012, against the respondents herein as defendants. He averred that he was the registered proprietor of the parcel of land known as Butsotso/Shibeye/1002 (the suit property) and sought, among others, eviction of the respondents and demolition of structures erected by them thereon. The respondents reacted to the plaint by filing a defence and counterclaim. They prayed for a declaration that the appellant's registration as proprietor was unlawful and fraudulent, cancellation of the registration, reversion of the registration to the name of the fourth respondent and a declaration that they had acquired the suit property by way of adverse possession.

2. The matter was later transferred from Kakamega High Court to this court and was assigned case number Kakamega ELC No 90 of 2015. Yet again, the matter was transferred, on December 6, 2017, to the Chief Magistrate's Court and became Kakamega MCELC No 381 of 2018. The record shows

that the suit was fixed, by consent of all parties, for hearing on February 4, 2020. Come that date, the appellant and his advocates then on record did not attend court. Upon an application by counsel for the respondents, the subordinate court invoked Order 12 of the *Civil Procedure Rules* and proceeded to close the appellant's case. The respondents' case as comprised in their counterclaim was thereafter heard and closed and judgment scheduled for delivery on February 18, 2020.

3. Judgment was ultimately delivered on May 8, 2020. The subordinate court found in favour of the respondents and held as follows:

   ..... the defendants' counterclaim succeeds and a declaration is it is ordered (sic) that the suit land reverts to the registration status obtaining prior to the registration in the name of the plaintiff. The parties shall then have the liberty to pursue their rights acquired in respect of the suit land (the larger portion thereof).

   The defendants shall have the costs of the suit as against the plaintiff.

4. In an effort to set aside the judgment, the appellant filed notice of motion dated July 2, 2020. The application was heard by Hon E Malesi, PM who, in a ruling delivered on January 12, 2021, found no merit in the application and accordingly dismissed it with costs to the respondents herein. Being dissatisfied with the said ruling, the appellant filed this appeal on February 9, 2021.

5. The grounds of appeal, as listed on the face of the memorandum of appeal, are that the learned magistrate erred in failing to give effect to the overriding objective in sections 1A, 1B of the *Civil Procedure Act* and article 159 of the *Constitution of Kenya 2010* in denying the appellant the opportunity of a just determination and in dismissing the notice of motion on account of mistakes of the appellant's advocates, in denying the appellant an opportunity to be heard even when sufficient reasons had been given to warrant setting aside of the judgement, in failing to consider that land is an emotive issue therefore he could have accorded both parties a fair hearing, by refusing to set aside judgment delivered on May 8, 2020 partly on the basis that this matter was at one time dismissed on November 20, 2018 for want of prosecution yet it is on record the dismissal orders were vacated the same day upon both counsels for the appellant and the respondent appearing and giving reasons, by refusing to set aside judgment delivered on May 8, 2020 partly on the basis that the appellant had obtained judgement in a parallel case and had not brought to the attention of the court whereas there is evidence of the said information having been passed through to his advocate, by refusing to set aside judgment delivered on May 8, 2020 partly on the basis that the order for the cancellation of title had since been effected, by refusing to set aside judgment delivered on May 8, 2020 partly on the basis that the appellant never challenged the allegation previously advanced by his previous counsel who ceased to act on the basis that he was in accessible yet the appellant instructed another counsel, that the learned trial magistrate misdirected himself on the facts and the law by basing his findings on irrelevant considerations and exercised his discretion capriciously and/or improperly, and lastly, that the learned trial magistrate erred in law and in fact in finding that the appellant should suffer for the mistakes committed by his advocate.

6. The appeal was canvassed through written submissions. It was argued on behalf of the appellant while citing the case of *Mohammed & Another vs Shoka* [1990] KLR 463 that the appellant had a defence to the counterclaim and ought to have been given a chance to explain how the subject parcel got into his possession and that being the registered proprietor of the suit property, the orders reverting the same to its original status deprived him of land which he otherwise lawfully held pursuant to section 26 of the *Land Registration Act , 2012*.

7. Further, citing the cases of *James Kamau Mwangi v Ahmed Chege Gikera* [2020] eKLR and *Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others* [2014] eKLR, it was

argued that the main concern of the court is to do justice to the parties and that the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities. It was further argued that failure to attend court was not deliberate and that the reason therefor was explained in the supporting affidavit in that the appellant was unaware of the hearing date and that he had instructed his previous advocates to apply for withdrawal of Kakamega MCELC No 381 of 2018 since he had already obtained judgement in his favour on June 11, 2019 in another parallel case being Kakamega MCELCNo 52 of 2019 relating to the same subject matter. That his advocate was ill and had instructed his clerk to find someone to hold his brief, but which instructions were not fully followed.

8. Relying on article 159 (2) of the *Constitution* as well as the cases of *Francis Mureithi Gituku v Stepehen Musa (Deceased) & 3 others; Joyce Wangui Iguanya & 2 others (1st Intended Defendant)* [2021] eKLR, *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR, and *FM v EKW* [2019] eKLR, the appellant contended that the court should administer justice without undue regard to procedural technicalities, that land is an emotive issue in respect of which a party should not be stopped from agitating his claim on the basis of a technicality and that mistake of counsel should not be visited upon the client. The appellant therefore urged the court to allow the appeal as prayed.

9. In response, counsel for the respondents argued that the issue as to whether the appellant had a defence on the merits should be viewed in terms of whether the appellant had a case with a probability of success. That having filed Kakamega HCCC No 228 of 2012, the appellant later filed Kakamega MCELC No 52 of 2019 concerning the same subject matter and prosecuted the latter suit to completion without disclosing the existence of the earlier suit while frustrating progress of the earlier suit. That since the respondents were not parties to Kakamega MCELC No 52 of 2019, the said suit should not affect them and further that the appellant delayed prosecution of Kakamega HCCC No 228 of 2012 Kakamega HCCC No 228 of 2012 for 8 years, contrary to equity and article 159 (2) (d) of the *Constitution*.

10. The respondents further argued that having had to wait for 8 years to prosecute their counterclaim and the judgment in their favour having been executed, they will be prejudiced if the appeal were allowed. Regarding the reasons given by the appellant for failure to attend court, the respondents argued that the appellant's claim that he had instructed his advocate to withdraw the suit is contrary to the advocate's claim that he had intended to seek adjournment of the hearing. The respondents further pointed out that the appellant's previous advocates ceased to act for him for want of instructions. In conclusion, the respondents urged the court to dismiss the appeal with costs.

11. This appeal is against an order made in the exercise of discretion. The Court of Appeal recently restated in the case of *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment) that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection 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 consideration with the result that it arrived at a wrong conclusion.

12. Regarding an application for setting aside in a situation where the applicant was aware of the proceedings sought to be set aside, the Court of Appeal stated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR thus:

> ... 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.

13. I have carefully considered the appeal and the parties' respective submissions in light of the above guiding principles. Ultimately, the key issue for determination in this appeal is whether the appellant was entitled to setting aside of the judgment as sought in notice of motion dated July 2, 2020.

14. The record shows that the suit was listed for hearing on November 12, 2019 and that on that date, Mr Elungata who appeared for the appellant sought an adjournment on the ground that he had just been instructed. There being no objection to the application for adjournment, the suit was fixed by consent for hearing on February 4, 2020. In other words, the resultant judgment was a regular judgment and in considering the application for its setting aside, the the subordinate court had unfettered discretion and was bound to take into account inter alia the reason for the failure to attend court, the length of time between February 4, 2020 and the date of making the application, whether the appellant had any triable issues to raise, any likely prejudice to the parties and the interest of justice.

15. The reason advanced by the appellant's advocate to explain failure to attend court is that he was ill on February 4, 2020 and that he had instructed his clerk to get someone to hold his brief. While being sick is a normal occurrence, the circumstances surrounding this case call for more scrutiny. The name of the clerk who was instructed is not given. No affidavit was sworn by the said clerk to verify the instructions and the alleged failure by the clerk to instruct another advocate. Despite the fact that the appellant had to file a formal application seeking setting aside, the appellant did not find it necessary to avail any medical evidence to support the allegation of illness.

16. From the accounts given by both the appellant and Mr Elungata, it is apparent that the failure to attend court was only noticed on July 2, 2020 when the appellant was notified by the respondents that the suit property belonged to them and when the appellant in turn went to see Mr Elungata. If the oversight was only on the part of the clerk, both the appellant and Mr Elungata would have noticed it within a few days from February 4, 2020 and taken immediate steps to correct it. The explanation that the courts were closed from March 16, 2020 due to COVID 19 pandemic is neither candid nor helpful. The truth of the matter is that the courts only scaled down operations but were still open and accessible through various other channels. The application was filed on July 6, 2020, after a delay of over five months from February 4, 2020 when the failure to attend court occurred. I consider that to be unreasonable delay.

17. The appellant has argued that there was mistake of counsel which should not be visited upon him. The delay which I have highlighted above was both on the part of the appellant and his counsel. If any consequences are to befall the appellant, he should see himself as a real cause of those consequences. The appellant further argued that there is need to do substantial justice through a full hearing. His plan, as per his affidavit, was to withdraw his case. In those circumstances, he cannot claim that he was deprived of any hearing.

18. The parties referred to a parallel matter being Kakamega MCELC No 52 of 2019. None of the parties annexed the key pleadings and judgment in the said case. In the circumstances, I have not had the benefit of verifying the issues and outcome of the said case.

19. In view of the foregoing discourse, I am not persuaded that there was any misdirection on the part of the learned magistrate or that any valid reasons have been advanced to warrant interfering with his

exercise of discretion. That being the case, this appeal is without merit. I dismiss it with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Osango holding brief for Mr Were for the appellant

Mr Nandwa for the respondents

Court Assistant: E. Juma