



**Otieno v Otieno (Environment and Land Appeal 35 of 2021)  
[2022] KEELC 13677 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13677 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 35 OF 2021  
GMA ONGONDO, J  
OCTOBER 25, 2022  
(FORMERLY MIGORI ELCA NO. 27 OF 2021)**

**BETWEEN**

**TOBIAS ONYANGO OTIENO ..... APPELLANT**

**AND**

**EUNICE ATIENO OTIENO ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. Celesa Okore-Principal Magistrate delivered on the 22nd April, 2021, in Oyugis Principal Magistrate's Court Environment and Land Case No. 8 of 2018)*

**JUDGMENT**

1. On 19<sup>th</sup> May, 2021, the appellant, Tobias Onyango Otieno through M/S Odoni Owino & Company Advocates, lodged this appeal by way of a Memorandum of Appeal of even date. The appeal is from the ruling delivered on the 22<sup>nd</sup> April, 2020 by the Honourable Principal Magistrate in Oyugis Environment and Land Case No. 8 of 2018 where she reasoned in part thus:

“...the defendant and counsel chose not to attend court when they ought to have been in court... I find the application unmeritorious in terms of prayers 3, 4 the same are disallowed...”

2. The Memorandum of Appeal is anchored on four (4) grounds stated on the face of the same and include:
  - a. The learned trial magistrate erred in law and fact in failing to sufficiently appreciate that to deny a party a hearing should be the last resort of a court of law.



- b. The learned trial magistrate erred in law and fact in failing to appreciate the nature of the action which is ownership of a parcel of land.
3. On 23<sup>rd</sup> July 2021, the appellant duly filed a Record of Appeal dated 22<sup>nd</sup> July 2021. This appeal was admitted on 24<sup>th</sup> November 2021.
4. Originally, this appeal was lodged at Migori Environment and Land Court. On 18<sup>th</sup> October, 2021, Kullow J sitting at Migori Environment and Land Court directed that the appeal be transferred to this court for hearing and determination.
5. When the matter came up for directions on 24<sup>th</sup> November, 2021, this court ordered and directed that the appeal be argued by way of written submissions.
6. Accordingly, Learned Counsel for the appellant filed submissions dated 7<sup>th</sup> February 2022 on 9<sup>th</sup> February 2022. Counsel submitted that the appellant was aggrieved by the ruling of the learned trial magistrate dated 22<sup>nd</sup> April 2021 in which the court declined to grant an order of stay of execution and to set aside ex-parte proceedings and judgment against the defendant issued on 26<sup>th</sup> November, 2021. That on the date set for hearing, the appellant and his counsel were absent and the matter proceeded in their absence. Counsel urged this court to exercise its discretion and set aside the said judgment on the ground of mistake or error on the part of the former advocate of the defendant. That a mistake of the advocate should not be visited upon a litigant.
7. Counsel further stated that the appellant has built a home and has been in occupation of the suit land for 20 years. Counsel cited the unreported case of Charles Mwalia –vs- Kenya Bureau of Standards, High Court Civil Suit No. 1058 of 200 at Milimani, to fortify the submissions.
8. The respondent’s counsel filed submissions dated 23<sup>rd</sup> February 2022 on 25<sup>th</sup> February 2022 and adopted the respondent’s submissions dated 8<sup>th</sup> April, 2021 filed at the trial court in respect to the appellant’s Notice of Motion application dated 30<sup>th</sup> December, 2020. Counsel submitted that the appellant herein merely blamed his former counsel, but failed to adduce sufficient grounds for the exercise of the court’s discretion to set aside the trial court’s judgment.
9. In that regard, the single issue for determination herein flows from the grounds of appeal which are compressed to:
  - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal.
10. I have thoroughly considered the pleadings, the trial court’s proceedings including the evidence on record as well as the judgment of the learned trial magistrate. This court is duty-bound to review the evidence adduced before the trial court in order to determine whether the conclusion originally reached upon that evidence should stand as held in *Peterson –vs- Sunday Post* (1958) EA 424 at 429.
11. The plaint (fast-track) dated 21<sup>st</sup> February 2018 and filed on 22<sup>nd</sup> February 2018 raises the issue of ownership of Land Title No. West Kasipul/Kodera Karabach/1305 (the suit land herein). The plaintiff/ respondent herein sought the following orders:
  - a. A declaration that the suit land belongs to the plaintiff absolutely and an order of the right specific performance be given.
  - b. Eviction order to issue.
  - c. Costs



- d. Interest.
12. PW1, Yunis Atieno Otieno, the respondent herein, testified on 12<sup>th</sup> November 2020, inter alia, that she is the proprietor of the suit land. That she was gifted the same by her mother-in-law, one Mary Oduol Ogeya, who acquired the same from one Joseph Ombata. She produced in evidence, a copy of official search certificate, a copy of title deed, mutation forms and transfer form (PExhibits 1-4 respectively). She urged the court to grant her vacant possession of the suit land.
  13. The defendant/appellant herein filed a statement of defence dated 14<sup>th</sup> March 2018 denying the respondent's claim. He stated that the suit land belongs to his grandfather and the claim of ownership by the plaintiff is based on fraud. Further, he stated that he has been staying on the suit land for a period of 10 years.
  14. When the suit came up for hearing on 12<sup>th</sup> November, 2020 the defendant and his counsel did not attend court. Therefore, the defendant did not testify in the matter.
  15. In arriving at the impugned judgment, the learned trial magistrate noted at page 2 thereof thus:

“ ... The court allowed this matter to proceed, their absence notwithstanding. Since the date was taken by consent of both counsels for both parties, hence the defendant and his counsel were fully aware of the same but ignored, disregarded and/or refused to attend court...” (Emphasis added)
  16. The learned trial magistrate further noted at page 3 of the judgment as follows:

“...Failure by the defence to appear for hearing of this case or tender defence evidence, basically means that the plaintiff's evidence together with all the exhibits produced herein, is not challenged and or controverted. The court shall therefore rely on the evidence adduced herein to make a determination in this case...” (Emphasis laid)
  17. The learned trial magistrate relied on Order 12 Rule 2 (a) of the *Civil Procedure Rules*, 2010 which gives the court discretion to proceed with hearing of a case if the defendant fails to attend court, after the court is satisfied that the defendant has or had sufficient notice of the same.
  18. This court is cognizant of the provisions of Article 48 of *the Constitution* of Kenya, 2010 which anchors the right of access to justice. Furthermore, Article 50 (1) of the same Constitution provides for the right to fair hearing.
  19. Besides, I note that at the trial court, the hearing date was taken by consent of counsel for the respective parties. The defendant and his counsel were thus, fully aware of the date but failed to attend court without giving any explanation thereto; see also *Ogada -vs- Mollin* (2009) KLR 620.
  20. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
  21. Section 109 of the same Act stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. Under Section 108 of the same Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side; see also the Court of Appeal decision in *Jennifer Nyambura Kamau -vs- Humphrey Mbaka Nandi* CA Civil Appeal No. 342 of 2010 [2013] eKLR.



22. The Court of Appeal has emphasized that even in undefended claims, the claimant is bound to discharge the burden of proof. See *Monica Karimi Mutua v Al-Arafat Shopping Centre and Another* [2018] eKLR.
23. Similarly, in *Kirugi and Another v Kabiya & 3 Others* [1987] KLR 347, the Court of Appeal held thus,  
“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”
24. Considering the totality of the evidence availed in this case, and applying the requisite legal principles, it is clear that the respondent who was the plaintiff before the trial court, proved her case to the requisite standard. Clearly, the grounds of appeal are quite untenable. So, it is the finding of this court that the learned trial magistrate’s judgment is sound at law. I hereby uphold the same.
25. Wherefore, the instant appeal instituted by way of a Memorandum of Appeal dated 19<sup>th</sup> May, 2021, be and is hereby dismissed with costs to the respondent.
26. Orders accordingly.

**G.M.A ONG’ONDO**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 25TH DAY OF OCTOBER 2022.**

Present

Mr. Odondi Awino, Learned Counsel for the appellant

Mr. B. Mboya, holding brief for Mr. Bana, Learned Counsel for the respondent

Okello and Mutiva, Court Assistants

