



**Thuranira (Ward representative Ntima West Member of County Assembly Meru) v Muguna & 3 others (Environment and Land Appeal 35 of 2020) [2022] KEELC 15024 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15024 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 35 OF 2020  
CK YANO, J  
NOVEMBER 23, 2022**

**BETWEEN**

**SAMSON THURANIRA ..... APPELLANT  
WARD REPRESENTATIVE NTIMA WEST MEMBER OF COUNTY ASSEMBLY  
MERU**

**AND**

**JUSTUS GITUMA MUGUNA ..... 1<sup>ST</sup> RESPONDENT  
JOSEPH KIMUNYI ..... 2<sup>ND</sup> RESPONDENT  
SKYLAND CONTRACTORS LTD ..... 3<sup>RD</sup> RESPONDENT  
COUNTY GOVERNMENT OF MERU ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The appellant filed this appeal from the ruling and order of Hon. S. N Abuya Senior Principal Magistrate in Meru CMCC No. 290 of 2014 delivered on 25<sup>th</sup> June 2020. The appellant had moved the trial court vide his application dated 13<sup>th</sup> February, 2020 under Order 12 Rule 7 of the *Civil Procedure Rules* in which he sought for orders of stay of execution of the judgment and decree, an order to set aside the judgment entered on 15<sup>th</sup> April 2019 and attendant Order seeking leave to cross examine the 1<sup>st</sup> respondent herein and his witnesses and for the appellant to adduce evidence in defence. The court has noted that the said application does not form part of the record of Appeal. However, I have seen it in the original file. The learned, trial magistrate considered the said application and dismissed it with costs.



2. The appellant was aggrieved by the said ruling and order and filed the present appeal on the following grounds:
  1. That the learned trial magistrate erred in Law and in fact in that despite properly setting out the threshold for a grant of the orders sought, the Honourable court failed to appreciate that such threshold had been met.
  2. That the learned trial magistrate erred in law and in fact by finding that there had been proper service of the hearing notice whereas only one party had been served even as per the affidavit of service filed in court.
  3. That the learned trial magistrate erred in law and in fact by shifting the burden of proof on the issue of service to the appellant's erstwhile counsel yet the affidavit of service on record revealed there was no service on the appellant or the said counsel.
  4. That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant had sufficiently explained why the subject application could not be preferred earlier on.
  5. That the learned trial magistrate erred in law and in fact by dismissing the appellant's application before her which action amounted to condemning the appellant unheard, contrary to the Rules of Natural Justice.
  6. That the ruling of the learned trial magistrate is against the law and the weight of the circumstances surrounding the case.
3. The appellant prayed for orders-;
  - a. That the appeal be allowed.
  - b. That the ruling and order of the learned trial magistrate delivered on 25<sup>th</sup> June 2020 in Meru CMCC NO. 290 of 2014 be set aside and the same be substituted with an order allowing the appellant's application dated 13<sup>th</sup> February, 2020 before the trial court as prayed.
  - c. That the costs of this appeal and costs of the application dated 13<sup>th</sup> February, 2020 before the trial court be borne by the respondents.

### **Submissions**

4. The appeal was canvassed by way of written submissions. The appellant filed his submissions on 21<sup>st</sup> June 2022 through the firm of Mithega & Kariuki advocates while the 1<sup>st</sup> respondent filed his on 27<sup>th</sup> September, 2022 through the firm of Kiogora Ariithi & associates advocates. The 2<sup>nd</sup> to 4<sup>th</sup> respondents never participated in the matter.
5. In his submissions, the appellant's identified the issues for determination to be whether the trial court erred in dismissing the appellant's application, duty of the court to do justice and costs of the appeal.
6. The appellant submits that there was no service of the hearing notice informing him or his counsel of the hearing which was done on the 4<sup>th</sup> of March 2019. That the said hearing proceeded on the basis of an affidavit of service sworn by Rose Wanjohi a court process server who served the notice upon the 2<sup>nd</sup> respondent only. The appellant submits that no service was effected on him or the Meru County Legal Officer, the 4<sup>th</sup> respondent herein and maintains that he was condemned unheard.



7. It is the appellant's submissions that he had provided a sufficient cause as to why he was not present during the hearing conducted on 4<sup>th</sup> March 2019 and cited the case of *Ongom Vs Owota* and the Supreme Court of India decision in the case of *Parimal Vs Veela*. It is the appellant's submissions that the non attendance of the appellant herein was a direct consequence of the deliberate failure by the 1<sup>st</sup> respondent to serve the hearing notice upon the appellant or his counsel on record then the 4<sup>th</sup> respondent herein.
8. The appellant's counsel further argued that the judgment of the trial court issued on 15<sup>th</sup> April 2019 is irregular since the same was arrived at devoid of the appellant's participation in the hearing held on 4<sup>th</sup> March 2019. The court was urged to be persuaded by the observations of Justice Adoyo of the High court of Uganda in *Trans Africa Assurance co. Ltd Vs Lincoln Mujuni* where he stated that;

“the rationale for this rule lies largely on the premise that an *ex parte* judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing.”
9. The appellant submits that he had offered a reasonable and excusable reason for their non attendance and urged the court to exercise its discretion and allow the appeal herein in order to avoid the occurrence of a grave injustice on the part of the appellant. The appellant's counsel cited the case of *Wachira Karani vs Bildad Wachira* [2016] eKLR and *Richard Nchapai Leiyangu Vs IEBC & 2 others*. It is further submitted that it is a fundamental principle of natural Justice that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. It is the appellant's submissions that where this principle is not observed, the aggrieved party is entitled *ex debito justiae* to have any determination which affects him set aside.
10. The appellant's counsel cited Sir Dinshah Mulla in *The Code of Civil Procedure* in discussing the nature and objects of the inherent powers of the court, and also cited the equity maxim that “He who comes to equity must come with clean hands” and submitted that the 1<sup>st</sup> respondent herein by failing to prove that he served a hearing notice upon the appellant and his counsel the 4<sup>th</sup> respondent as he was then is proof enough that he has benefitted out of his own omission to the disadvantage of the appellant herein.
11. The appellant submits that he has demonstrated sufficient proof in support of his appeal and urged the court to find that the same is merited and allow it as prayed.
12. On their part, the 1<sup>st</sup> respondent's counsel submits that when the matter came up for hearing on 4<sup>th</sup> March 2019 the court while allowing the 1<sup>st</sup> respondent to proceed with the hearing of his case *ex parte*, noted that the hearing notice had been duly served upon all the parties by Rose Wanjohi who is a process server. The 1<sup>st</sup> respondent's counsel posed a question that if at all the appellant's advocate had not been served with the notice of the said date as alleged then why did they not file an affidavit denying the said service? They further posed a question that if the allegation by the appellant and their erstwhile advocate that they had not been served with the said hearing notice had any veracity, why did they not file the application seeking to set off the judgment entered before filing the application seeking to be allowed to pay the decretal amount by installment? That notwithstanding and in addition to the forgoing, even after the appellant sought and obtained a conditional stay, he is yet to comply with its terms. That this being a money decree, the appellant is yet to deposit the security as ordered and has thus not come to court with clean hands.
13. It was pointed out that the appellant has also filed in court multiple applications in a deliberate and shrewd manner to avoid performance of the judgment in favour of the 1<sup>st</sup> respondent herein. It is the



1<sup>st</sup> respondents submissions that in as much as this court has wide unfettered discretion to set aside a judgment, the same should be exercised in a manner not to aid a person who deliberately seeks through evasion or otherwise to obstruct the course of justice. It is submitted that the appellant herein is hell bent on obstructing the course of justice as against the 1<sup>st</sup> respondent. That if anything justice should be seen to be done to all parties in a case in any event, and that the appellant had a fair chance to prosecute his case but chose to let it pass only for him to return its prosecution to the first stage again. The 1<sup>st</sup> respondent's counsel cited the case of *Esther Wamaita Njibia & 2 others vs Safaricom Limited* [2014] eKLR.

14. It is the 1<sup>st</sup> respondent's submissions that the appellant did not prove non service as alleged and as such the allegations remain that, pointing out that there is on record an affidavit of service by Rose Wanjohi who is a process server and who was not subjected to cross examination by the appellant on the disputed service. That in the alternative, the appellant's former counsel would have filed an affidavit denying service which he did not. The 1<sup>st</sup> respondent's counsel cited the provisions of section 107 of the *Evidence Act* and submitted that it is incumbent upon a party who alleges to prove. It is the 1<sup>st</sup> respondent's submissions that the appellant's appeal lacks merit and prayed for its dismissal with costs to the 1<sup>st</sup> respondent.

### **Analysis and Determination**

15. I have perused and considered the record of appeal, the grounds of appeal, the submissions filed and the authorities. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. In my humble opinion, the issue that calls for my determination is whether the trial court erred in dismissing the appellant's application dated 13<sup>th</sup> February, 2020 and costs.
16. In this case, the appellant herein moved the trial court vide the application dated 13<sup>th</sup> February, 2020 in which he sought orders that the judgment entered on 15<sup>th</sup> April 2019 and all consequential orders be set aside and that the appellant be granted leave to cross examine the 1<sup>st</sup> respondent herein and his witnesses and adduce evidence in defence. The application was premised on Order 12 Rule 7 of the Civil Procedure Rules and supported by the affidavit of the appellant herein in which he contended that he was never served with the hearing notice before the hearing proceeded on 4<sup>th</sup> March 2019. The appellant also contended that the County Legal Officer of Meru County, was also never notified of the hearing date. The appellant averred that he learnt of the non service on 6<sup>th</sup> February, 2020 upon perusal of the court file and argued that he was condemned unheard, and has been prejudiced.
17. In opposing the application dated 13<sup>th</sup> February, 2020, the 1<sup>st</sup> respondent filed a replying affidavit dated 21<sup>st</sup> February, 2020 in which he contended that the issue of service of the hearing notice was settled when the trial court ordered the hearing of the case to proceed and judgment was thereafter delivered. Upon the hearing and determination of the said application dated 13<sup>th</sup> February, 2020, the trial court delivered its ruling on 25<sup>th</sup> June 2020 dismissing the application with costs. It is on that basis that the appellant preferred this appeal.
18. The principles guiding the setting aside of a judgment are trite that the court has wide powers to set aside save where the discretion is exercised, the court will do so on terms that are just. In the case of *Patel vs East Africa Cargo Handling Services Ltd* [1974] EA at page 76 Duffus P states thus;

“There is no limit or restriction on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just.... 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. I agree that 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 merits...”

19. In *Shah vs Mbogoh* ( 1967) EA 116 at page 123, Harris, J stated:

“ This discretion is intended so to be exercised to avoid injustice or 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”

20. Further, in the case of *Sebei District Administration vs Gasyah and others*, (1968) EA 300, it was held that:

“ the nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question whether the plaintiff can reasonably be compensated by costs for the delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court”

21. I have perused the record of Appeal. As earlier noted, the application dated 13<sup>th</sup> February, 2020 does not form part of the record. I further note that even the proceedings from the lower court have not been incorporated as part of the record of appeal. It is not clear to the court whether the omissions were deliberate or by mistake. Nonetheless, the court has perused the original file from the lower court. I note that Thurania Atheru Advocate, a Legal Officer with the 4<sup>th</sup> respondent herein formerly represented the appellant herein together with the 3<sup>rd</sup> and 4<sup>th</sup> respondents. When the matter was fixed for hearing on 4<sup>th</sup> March 2019, the learned trial magistrate proceeded in the absence of the appellant having noted that the hearing notice had been duly served upon the parties by Rose Wanjohi who is a court process server. There is an affidavit of service filed by the said process server. Whereas the appellant’s contention is that they were never served, there was no application made to examine the said court process server on the disputed service. Further, the appellant’s former counsel never filed an affidavit in support of the application dated 13<sup>th</sup> February, 2020 denying service. It is also clear from the record that on 18<sup>th</sup> December, 2019 the appellant herein filed an application seeking inter alia, an order to pay the decretal amount by monthly instalments until payment in full. That was a period of about two months before the filing of the application dated 13<sup>th</sup> February, 2020. The only explanation for this in my view is that the application dated 13<sup>th</sup> February, 2020, was just an afterthought.

22. As held in the case of *Shah Vs Mbogoh* (supra), the discretion of the court is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Having looked at the record, in my opinion, the learned trial magistrate did not err in dismissing the appellant’s application. In my view, the appellant did not give sufficient reason why he failed to attend court on 4<sup>th</sup> March 2019 when his advocate had been fully served for the hearing. I am not persuaded that the learned magistrate exercised her discretion wrongly by dismissing the appellant’s application.

23. Considering the totality of the material in this case, and applying the legal principles outlined above, I am satisfied that the learned trial magistrate was justified in arriving at the decision she made. The findings and holdings of the learned magistrate were well founded and I find no basis to interfere with the same.



24. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the 1<sup>st</sup> respondent.

25. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022**

**In presence of;**

C.C Mwenda

Kirimi for appellant

N/A for Kiogora Arithi for 1<sup>st</sup> respondent

N/A for 2<sup>nd</sup> - 4<sup>th</sup> Respondent

**C.K YANO**

**JUDGE**

