



Wario v Provincial Electrical Engineer Kenya Limited & another (Environment & Land Case 002 of 2021) [2022] KEELC 14936 (KLR) (21 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14936 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 002 OF 2021
PM NJOROGE, J
NOVEMBER 21, 2022**

BETWEEN

SALA WARIO APPELLANT

AND

PROVINCIAL ELECTRICAL ENGINEER KENYA LIMITED .. 1ST DEFENDANT

COUNTY GOVERNMENT OF ISIOLO 2ND DEFENDANT

(Being an Appeal from the Ruling of and Order/Judgement and Decree of Honorable S. M Mungai in Isiolo CM's ELC No. 7 of 2009 delivered on 14th December, 2018 at Isiolo)

JUDGMENT

1. The Memorandum of Appeal in this matter reads as follows;
amended memorandum of appeal

The appellant above named, Sala Wario being dissatisfied with the Judgement/Namely order of the Honourable S.M Mungai sitting at Isiolo on December 14, 2018 appeals to the High Court on the following grounds;on

1. The learned magistrate erred in law and fact in denying the appellant a chance to prosecute his case.
2. The learned magistrate erred in law and fact in finding that the appellant's advocate was served with the hearing notice when in fact the advocate who was served was not the appellants advocate.
3. The learned magistrate erred in law and fact in disregarding the 1st defendant's evidence.
4. The learned magistrate erred in law and fact in determining that the court had jurisdiction when there were minutes and as such being a matter for judicial review.



5. The learned magistrate erred in law and fact in finding that the plaintiff's evidence stood unchallenged.
- 2 It is proposed to ask the court for the following orders that;
1. This appeal is allowed.
 2. The judgement and order of 14th December, 2018 be reviewed and /set aside and be substituted with an order that the suit be and is dismissed.
 3. The costs of the appeal be awarded to the appellant.

Dated At Meru This 11th Day Of January, 20amended At Meru This 16th Day Of March, 2020 M/s Norbert O & Co Advocates For The Appellant

2. The appeal was canvassed by way of written submissions.
3. In his submissions the appellant says issues for determination in this suit are;
 - a. Whether the appellant was condemned unheard? And whether there was a delay in filing the applicant's application to set aside the proceedings of 6th November, 2018.
 - b. Who should bear the costs of the appeal.
4. The appellant submits that he was condemned unheard as he was not served with the hearing notice for November 6, 2018. He further says that he had never instructed the firm of Kaimenyi Kithinji to represent him as his advocate was EPO OMWAYO & CO Advocates who were no longer in practice. He argues that as the firm of M/S Kaimenyi Kithinji had not communicated to him the apposite hearing date, the mistake of an advocate ought not to be visited upon him. To support this assertion, the appellant proffered the case of *Tana & Athi Rivers Development Authority Versus Jeremiah Mwakio & 3 others* [2015 eKLR]
5. The appellant says that he had filed an application to set aside the proceedings of November 6, 2018 on November 13, 2018 and this demonstrate that this was done without incardinate delay. He points out that at that time the respondents had not filed their submissions and the judgement had not been entered.
6. The appellant submits that the principles of natural justice should always be upheld and that no litigant should be condemned unheard. To buttress this point the appellant proffered the case of *Onyango Oloo Versus Attorney General* [1986-1989] EA 456. On the same point he also proffered the following cases;
 - a. *Union Insurance Co of Kenya Ltd Versus Ramzan Abdul Dhanji*, Civil Application No Nai 179 of 1998, where the court of Appeal opined that the right to be heard ought not to be taken lightly.
 - b. *Ridge Versus Baldwin* [1963] 2 ALL ER 66, where Lord Reid opined as follows; "Time and again in the cases I have cited, it has been stated that a decision given without the principles of natural justice is void".
 - c. Nancy Musili (Appellant) and Joyce Mbeta Katisi (Respondent) to support the merits of this court granting the orders sought in the appeal.
 - d. *Lucy Nchebeere Versus Rose Ndululi Musee & Another*, Nairobi ELC Case No 930 of 2013 [2021] eKLR to support the merits of this court granting orders sought in the appeal.



- e. [*Safaricom Limited Versus Jusenga Company Ltd & 4 others*](#) [2021] eKLR to support the merits of this court granting orders sought in the appeal.
7. The 2nd respondent, the County Government of Isiolo, did not file written submissions.
8. In his submissions the 1st respondent proffered that the memorandum of appeal raises the following issues for determination.
- a. Whether the issue of setting aside judgement can be raised on appeal without having been raised before the trial court.
 - b. Whether in any event the appellant was denied the chance to prosecute his case.
 - c. Whether the judgement issued on December 14, 2018 should be set aside.
 - d. Costs.
9. Regarding setting aside of the apposite judgement, the 1st respondent is unequivocal that the proper court for setting aside the judgement was the court which passed the judgement and not an appellate court. He asserts that the appellant could only have approached this court on appeal against the decision of the trial court upon refusal to set aside the judgment.
10. Regarding the claim that the appellant was condemned unheard, the 1st respondent has submitted that he had produced proof that service upon the appellant's advocate had consistently been done. He says that at no time during the trial was this evidence of service challenged.
11. The 1st respondent submits that since the appellant had entered appearance and filed his defence, the judgement delivered in this suit was a regular judgement.

He proffered the case of [*James Kanyiira Nderitu & Another*](#) [2016] eKLR where the court of appeal opined as follows;

“From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgement that is regularly entered.

In regular default Judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default Judgement. Such a defendant is entitled, under Order 10 Rule 11 of the [*Civil Procedure Rules*](#), to move the court to set aside the default Judgement 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 default Judgement, and will take into account such factors as the reason for 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 Judgement was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgement, among others. See [*Mbogo & Another Versus Shab*](#) [1968] EA 98;

[*Patel versus EA Cargo Handling Services Ltd*](#) [1975] EA 75; [*Chemwelo & Another Versus Kubende*](#) [1986] KLR 492 and [*CMC Holdings Versus Nzioka*](#) [2004] IKLR175”.

12. Regarding regularity of the apposite Judgement, the 1st respondent proffers the case of [*Edward Miso*](#) [2021] eKLR where the court opined as follows;

“That in the instant case, the Judgement of March 19, 2019 was a regular one as summons had been properly served; the defendant indeed entered appearance and filed his defence,



but was not heard or did not participate in the trial fully, before the Judgement on record was prepared and delivered.

13. The 1st respondent submits that the appellant cannot purport to have been denied a chance to defend the suit since his memorandum of appearance and defence are properly on record. He argues that on contrary, it was the appellant's choice not to attend the hearing despite having been properly served with a hearing notice notifying him of the same. He concludes that the appellant was the sole author of his predicament.

14. The 1st respondent says that setting aside of the apposite judgement would be prejudicial to him, as the same was delivered upon hearing of the issues in dispute, although in the absence of the appellant who has not offered a viable reason as to his non-appearance.

He says that in all circumstances, a suit belongs to the litigant who should diligently follow up its direction with his advocate.

He points that the appellant had lost interest in this case and had he been careful enough he should have known the arrangement between the firms of M/S EPO Omayo & Co Advocate and Kaimenyi Kithinji & Co Advocates. He argues that a litigant can not wholly abandon responsibility of his suit in the hands of Only his advocate. He proffered the case of *Edward Misoi Versus Francis K Misoi* [2021] eKLR where the court opined as follows;

“Indeed, a trial is the responsibility of the parties and they cannot wholly abandon responsibility for its prosecution at the foot of advocates”

15. In support of his assertion that a suit belongs to the litigant and not his advocate, the 1st respondent proffered the case of *Rachal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) Versus Hannab Wanjiru Kiniti & Another* [2021] eKLR where the court stated as follows;

“This court is always skeptical of parties that seek to blame their advocate and fail to produce any evidence that they have taken any steps to make the said advocate liable for their negligence. The court recognizes that a case belongs to a party and it is upon that party to follow up on their case and once a party appoints an advocate, the party then becomes liable for the actions of the said advocate who was acting on their behalf”

16. The 1st respondent concludes that this appeal is devoid of merit and is merely an attempt to keep dragging him to court over matters that he was unwilling to defend. He asks the court to dismiss the appeal with costs.

17. Although this will not affect my decision in this matter, I note that the Notice of Change of Advocate filed by Vivian Loice Aketch, advocates is dated May 26, 2022.

It was filed on June 13, 2022. The submissions filed by the firm of advocate on behalf of the appellant were filed o May 9, 2022, 17 days before the firm came on record for the appellant. The submissions themselves are dated May 24, 2022, 15 days before they were filed. Nevertheless, these curious inconsistencies, do not affect, in any way, my determination in this appeal.

18. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically divergent assertions. The key issue for determination in this appeal is whether or not the appellant was condemned unheard.

19. The issue as to if or of not the appellants application to set aside the proceedings of November 6, 2018 was filed with undue delay can be disposed of easily. The trial court did not deny the application on



account of delay. It dismissed the application on November 13, 2018 upon finding that the impugned hearing notice had been properly served on the appellant's advocate. The issue of delay never arose.

20. This being a first appeal, this court is entitled to consider all apposite issues and arrive at its own decision regarding whether the appeal should be allowed or not. I find that all the 5 grounds in the appeal can be adequately answered upon a careful consideration of the pleadings and the proceedings in the trial court.

Having carefully considered the pleadings, the proceedings in the lower court and the submissions filed by the parties, I will now proceed to consider the grounds of appeal.

21. On ground No 1, upon careful consideration of the proceedings in the lower court, I find that the appellant was at every stage of the proceedings, through his advocate on record, made aware of the various dates the proceedings were taking place. He therefore cannot claim that he was not given chances to be heard. Indeed, at one time, the parties had intimated that they were exploring an out of court settlement. I do find that the appellant failed to diligently prosecute his case. Indeed, when he filed his application date November 12, 2018 seeking to have the proceedings of November 6, 2018 set aside, the parties had not filed their submissions. He never the less did not file any submissions.

A suit, at every stage of its evolution, belongs to the litigant. As stated in the case of *Edward Misoj Versus Frauus K Misoj* [2021] eKLR merely blaming an advocate will not suffice.

I hereby dismiss this ground.

22. Ground No 2 is also dismissed. The appellant had not given a satisfactory explanation regarding how the said advocate came to represent him. From the proceedings, it is apparent that the firm of Kaimenyi Kithinji, took over the business of the appellant's original advocate, the firm of M/S Omwayo & Co Advocates. It is apparent that the firm of Kaimenyi Kithinji was acting at the behest of M/S Omwayo & Co Advocates. The appellant should have been diligent enough to discover this new development, and if he wished, take ameliorative action.

As was opined in the case of Racheal Njango Mwangi (*Supra*) "once a party appoints an advocate, the party then becomes liable for the actions of the said advocate who was acting on their behalf"

23. On ground No 3 from the proceedings, there is no evidence that the appellant's evidence was disregarded. He does not elaborate on this issue in his submissions. I find that he simply refused and or failed to participate in the trial court proceedings. This ground is dismissed.
24. Ground No 4 is nebulous. It raises the issue of jurisdiction without any elaboration. The appellants submissions are glaringly silent on this ground. The issue of jurisdiction should have been raised at the earliest opportunity in the trial court. This ground is dismissed.

25. Regarding ground No 5, there is no doubt that the appellant did not adduce evidence in the trial court. The 2nd respondent also did not adduce any oral evidence, although it, to a certain extent, participated in the proceedings.

I find that the appellant did not controvert the 1st respondents evidence. This ground is dismissed.

26. In the circumstances, I find that this appeal fails in all respects. I issue the following orders:
- a. This appeal is hereby dismissed.
 - b. Costs shall follow the event and are awarded to the 1st respondent only.

Delivered in open court at Isiolo this 21st day of November, 2022 in the presence of;



Court assistant: Balozi

Caleb Mwiti holding brief for Aketch for the Appellant

Ken Muriuki present for 2nd respondent.

Ken Muriuki holding brief for Manasses Kariuki for 1st Respondent.

HON. JUSTICE P.M. NJOROGE

JUDGE

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