Mwangi v Njoroge (Environment and Land Appeal 12 of 2016)
[2022] KEELC 15610 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15610 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL 12 OF 2016

A KANIARU, J

DECEMBER 20, 2022

BETWEEN

ALICE NJUGUINI MWANGI ..... APPELLANT

AND

DAVID WAWERU NJOROGE ..... RESPONDENT

(Being an appeal against the Judgement and ruling of Hon. Nyakundi RM delivered on 4.3.2016 and 16/9/2016)

RULING

1. This appeal contests the outcome of the lower court's judgement and ruling of Hon VO Nyakundi delivered on 4/3/2016 and 16/9/2016 respectively in CMCC No 309 of 2015, Embu. The appellant Alice Njuguini Mwangi was the defendant in the suit while the respondent - David Waweru Njoroge – was the plaintiff.

2. In the lower court, the respondent herein had filed a suit against the appellant vide a plaint dated November 10, 2015 seeking removal of caution registered against land parcel No Nthawa/ Gitiburi/1411 which was registered his name. From the court record the appellant was said to have been served with summons to enter appearance but had failed to enter such appearance or file defence, hence necessitating entry of interlocutory judgment against her. The court had proceeded with the hearing and delivered its judgment on March 4, 2016 and it ordered that the caution be removed. It also awarded general damages of Kenya Shillings One Million (Kshs 1,000,000/=) together with costs of suit and interest at court rates.

3. The appellant then filed an application seeking, among other orders, setting aside the judgment of the court; leave to defend out of time; and also stay of execution of the judgment. The court felt it was called upon to determine two issues. The first was whether the appellant had been served with summons to

enter appearance. The court determined that service of summons was not proper as it had been effected via registered post.

4. The second issue for determination was whether the defence filed had merit. The court made a determination that the defence did not raise a single triable issue. It went further to state that the appellant had failed to challenge the high court judgment delivered on November 10, 1999 and that she had failed to annex a copy of title to prove ownership of the land despite her claim that she was the registered owner of the land and that she held title for it. In its ruling, the court held that despite the service of summons to enter appearance being improper, the appellant had no defence worth hearing. It accordingly dismissed the application with costs.

5. The appellant, aggrieved by this ruling, filed the instant appeal by way of a memorandum of appeal dated October 10, 2016. The appellant raised Eight (8) grounds of appeal, which are as follows:

    1. The learned trial magistrate erred in law in arriving at the decision that the plaintiff had proved his case against the defendant when the service to the defendant was never effected.

        2. That the proceedings were contrary to the cardinal provisions of the Civil Procedure Rules particularly, Order V where service of summons and subsequent notices was never effected upon the defendant.

        3. That the trial magistrate erred in law when he considered evidence of a stranger who purported to have a power of attorney on behalf of the plaintiff without verifying its authenticity.

        4. The trial magistrate erred in law when he proceeded with the trial and judgment without satisfaction that service was effected to the applicant.

        5. That the trial magistrate further erred in law by dismissing the Appellant's application dated April 8, 2015 when on his admission "service was improper" therefore no service was effected, and proceeded to dismiss the application.

        6. That the trial magistrate erred in law in dismissing the Appellant's application by failing to consider that as a matter of policy the Kenyan jurisdiction cherishes and places a very high premium on the right to defence. The magistrate erred in law by taking the right of the defendant to defend.

        7. The Trial magistrate further erred in law by basing the ruling on the draft defence citing it was not worthy as it raises no trial issues. On this issue the trial magistrate erred in law and fact as the draft defence raises triable issues and the streak of prejudice runs through the judgment and particularly the ruling.

        8. The learned trial magistrate's judgment and ruling was against the weight of the evidence tendered and the applicable law.

    Reasons wherefore the appellant prays that the appeal be allowed and the judgment dated 4.3.2016 and the ruling delivered on September 16, 2016 together with subsequent orders be set aside with costs to the Appellant.

Submissions

6. The appeal was canvassed by way of written submissions. The appellant filed her submissions on 9.5.2022. She submitted on the grounds as set out in the memorandum of appeal. On grounds 2 and 3 of the Memorandum of Appeal, the appellant submitted that service of summons, pleadings and other documents were never effected upon her. She averred that the provisions of Order 5 of the Civil Procedure Rules were never complied with or effected. It was contended that the trial magistrate had admitted that the service was improper but had disregarded the importance of this issue and proceeded to make judicial pronouncements unfavourable to the Appellant. It was submitted that the court needed not go further in determination of the matter upon admission that service of the pleadings was improper.

7. The appellant also submitted that if at all there was any service, the same was unlawful, unprocedural and not valid in law. He further submitted that any service effected via registered post on February 2, 2016 as purported was invalid. It was said that the provision of Order 5 Rule 3(ii) of Civil Procedure rules only provides for such service to corporations. It was also said that if such service was done, then the appellant would have had (15) days to enter appearance and Defence, yet the suit had been scheduled for formal proof hearing on 5/2/2016, which was (2) two todays after receipt of the said letter from the Plaintiff's advocates.

8. The appellant also further submitted that she was locked out from filing defence or entering appearance as the file was in chambers for writing of judgment. It was her assertion that she was therefore shut out from the suit unprocedurally due to deliberate machinations of the respondent not to serve her with Summons and Pleadings. It was also argued that a party could not enter appearance in the absence of summons and plaint.

9. The appellant was of the view that the time to enter Appearance and file Defence starts to run when a Defendant is served with summons. She relied on the provisions of Order 6 Rule 1 of the Civil Procedure Rules, which stipulates that "where a defendant has been served with Summons to Enter Appearance he shall, unless some Order be made by the court,file his appearance within the time prescribed in the summons" It was her case that the court did not make any order discharging the respondent's obligation to serve her with summons in the case.

10. On whether the Judgment and decree emanating from the order were valid, the appellant relied on the case of *Offical Receiver, Continental Bank LTD vs Mukunya* Civil Case No 8 of 1998 eKLR, where the court held that an order obtained without serving a party affected by it is a nullity and must therefore be set aside *ex debito justitiae*. It was her case that the ex-parte orders and judgment obtained were a nullity and ought to be set aside.

11. The appellant contended that she has a good defence and relied on the case of *National Industrial Credit Bank Ltd vs Mutinda*: Case no 1487 of 2002 eKLR, where the court emphasized the right to defend. She argued that this right ought not to be taken away lightly.

12. On ground 4 of the memorandum of appeal, it was submitted that a stranger had tendered evidence on behalf of the respondent by the strength of a Power of Attorney which only the trial Magistrate was said to have seen but that it was not produced in court. It was said that a power of attorney was a serious document which ought to have been lodged in court as evidence and it should be registered and paid for. The appellant prayed for the said power of attorney to be disregarded.

13. On ground six of the Memorandum of Appeal, the same court was accused of having proceeded on an error for having dismissed an application to set aside an order which was said to have been obtained

irregularly and illegally. On grounds seven and eight, the trial magistrate was accused of not granting the appellant a chance to be heard. The appellant buttressed this by relying on page 5 of the record of appeal where the magistrate referred to a high court judgment delivered on November 10, 1999 in a case in which she was not a party. The trial court was also faulted for dismissing the draft defence as having no triable issues. The appellant urged the court to allow the appeal and set aside the judgment and orders of the trial court.

14. The respondent on his part filed submissions on August 17, 2022. He gave a brief background of the case. He submitted that the court had delivered judgment on 4/3/2016 in a suit where the he had sought removal of a caution lodged by the appellant on Land Parcel number Ntawa/Gitiburi/ 1411 belonging to him. The judgement was said to have been delivered after a formal proof hearing. The applellant was then said to have sought stay of the judgement and leave to file a defence out of time, which application was dismissed by the court on September 16, 2016.

15. The respondent contended that the appeal was erroneous and fatal for seeking to set aside both the judgment and ruling rendered by the court. It was submitted that those were two different decisions which had been delivered over six months apart and could therefore not be challenged in a single appeal. It was contended that the decision made on March 4, 2016 was being challenged outside the prescribed time by law and it was his assertion that proceeding in that manner was unprocedural, illegal, irregular, and fatally defective. The court was urged to dismiss the appeal on that ground.

16. The respondent also submitted that upon issuance of the decree by the court, he sold the land in issue to a third party as there was no order prohibiting him from dealing in the land. He argued that it was incumbent upon the Appellant to ensure that the suit premises still existed in the name of the respondent before filing the appeal. He was of the view that any order made by the court would not be of benefit to either the respondent or the Appellant.

17. It was further contended that the appellant had lodged a caution on the subject land 10 years ago on November 13, 2006, after the respondent became the registered proprietor. She did so in her capacity as a purchaser. She was then accused of going to sleep until awakened by the respondent in 2015 when he filed a case seeking removal of the caution. He further argued that prior to filing of the suit, the respondent had been served with notices of intention to remove the caution by the land Registrar, Mbeere, and it was alleged that she had never tried to assert her right then.

18. On the issue of service of summons, the respondent submitted that he had served the appellant with the summons to enter appearance via registered mail, and this was evidenced in the affidavit of service at page 70 of the record of appeal and the certificate of posting at page 71 of the record of appeal. It was argued that the appellant had acknowledged receiving notices from the land registrar at paragraph 4 of her affidavit in support of the application dated 8/4/2016. It was further said that she had sought that the caution be retained until Embu HCCA NO 52/1996 was finalized. The judgement emanating from that case was said to have been delivered on November 10, 1999 and its outcome was said to have confirmed the appellant's de-registration from the suit parcel of land. It was contended that the appellant had failed to appeal this decision and as such the matter of ownership was therefore *res judicata*. The appellant could not therefore seek to raise the same as she sought in her proposed defence.

19. Still on the issue of service, the appellant was said to have acknowledged receiving a letter from Rugaita & Co Advocates on 2/2/2016, and it was said that her assertion that there were no enclosures in the letter were untrue. The respondent questioned how the appellant was therefore able to know case number and even engage an advocate in the circumstances. The respondent maintained that the appellant had been served with the summons to enter appearance but choose to ignore the court

process, in the same manner as she had ignored the judgement in Embu HCCA NO 52/1996. The court was therefore urged to dismiss the appeal.

Analysis And Determination

20. I have considered the lower court record, the record of appeal, and the rival submissions. As the first appellate court, I appreciate my duty as spelt out in *Selle Vs Associated Motor Boat Company Ltd* [1968] 123 and *Williams Diamonds Ltd Vs Brown* [1970] EA, which is to subject the entire matter before me to a fresh and exhaustive scrutiny and thereafter make appropriate conclusions from it while giving due allowance to the fact that I did not see or hear the witnesses who gave evidence in the lower court.

21. The appeal before me is a composite one, given that it focuses on both a ruling and a judgement. In the lower court, the respondent's suit was essentially about removal of a caution placed by the appellant on the register of land parcel No Nthawa/Gitiburi/1411 ("the disputed land" hereafter). The placement of that caution on the register was said to be unlawful, malicious, and without any semblance of right. The appellant was said to have been duly served with the matter but she never bothered to respond, which led to entry of judgement against her. The respondent also finds fault with the manner the appeal herein was conceived and filed. Further, it was intimated to the court that the land has since changed hands and the appeal therefore may already have been overtaken by events.

22. The appellant on her part averred that she was never served and that such of the service as is alleged to have been effected on her was improper as it is not the one envisaged by law. She also found fault with the lower court for accepting evidence given on behalf of the respondent by a person purporting to have a power of attorney of unproven authenticity. It was also alleged that the lower court was wrong for taking the position that the proposed defence proffered by the appellant had no triable issues and for failing to take seriously the appellant's right to be heard.

23. I would wish first to address the issue raised by the respondent concerning the formulation and the filing of the appeal. True, the appeal is both against a ruling and a judgement. True also, an appeal is expected to be about a single outcome or decision of a court, not against two or more different outcomes. To this extent therefore, the respondent is raising a valid and formidable argument. The court itself is not placed in a very enviable position, for when you appeal both against a ruling and a judgement in one single appeal, it is not clear whether the ensuing decision should be expressed via a ruling or a judgement. The approach taken by the appellant in conceptualizing and filing the appeal is therefore wanting and a bit unhelpful.

24. The respondent would like the court to treat the appeal as incompetent and dismiss it. I feel tempted to agree but on further consideration – which is informed largely by my reading and appreciation of the manner the lower court proceedings were conducted – I am persuaded to take a different position.

25. Since I have mentioned the lower court proceedings, it is only good that I say something about them at this stage. The suit in the lower court was filed on November 11, 2015 vide a plaint dated November 10, 2015. An affidavit of service dated 19/1/2016 filed in court on the same date shows that the appellant was served via registered mail said to have been sent on 4/12/15. Slightly over one month later – or on 19/1/2016 to be specific – a written request for entry of judgment was filed in court citing failure by the appellant to enter appearance or file a response as the reason for making the request. Such judgement is shown to have been entered against the appellant on 26/1/2016. Subsequently, hearing proceeded by way of formal proof and the court rendered its final judgment on 4/3/2016.

26. The appellant later got to know of the case after allegedly first receiving a letter from Land Registrar, Embu, requesting for removal of caution from the register of the disputed land and secondly after receiving another letter from the respondents counsel on 2/2/2016. The appellant then acted by

moving the lower court vide an application dated 8/4/2016 filed on 11/4/2016 seeking, in the main, to set aside the judgement. The record shows that a ruling delivered on 16/9/2016 dismissed the appellant's application. It is that dismissal that prompted the filing of this appeal but instead of the appellant appealing against the ruling only, she decided to appeal both against the ruling itself and the judgment that she was seeking to set aside in her application.

27. The judgement was delivered on 4/3/2016; the ruling was delivered on 16/9/2016. As pointed out by the respondent, the two were delivered six months apart. The memorandum of appeal was later filed here in court on October 10, 2016. It is dated the same. (I take judicial notice here that 10th of October of ever year is normally a public holiday, albeit a low key one where the kind of fanfare and celebrations associated with other public holidays are largely lacking or totally absent. Courts and other government offices are usually closed on that day and I don't understand how the memo of appeal could have been filed on that date. But as the other side has not raised the issue, I don't want to pursue it further.)

28. As the ruling was delivered on 16/9/2016 and the memorandum of appeal was filed on October 10, 2016, it appears to me that the aspect of the appeal that focuses on the ruling cannot be said to be incompetent. For an appealable ruling, there is normally 30 days within which to appeal and with the ruling herein delivered on 16/9/2016, it appears clear that everything regarding the ruling was done within the required time. But the same can not be said about the judgment. It was delivered on 4/3/2016. The appeal was filed on October 10, 2016. To mount a competent appeal against such judgment, one would need to seek leave of the court first in order to file it. That is what the appellant should have done. She didn't do it. The aspect of the appeal that is against the judgement is therefore incompetent. I therefore reject that aspect of the appeal and strike it out. I think this explains why what I am writing now is a ruling, not a judgement. The only competent process before me is against the ruling. An appeal against a ruling would ordinarily give rise to a ruling at the appellate stage, hence the styling of this pronouncement as a ruling.

29. I have said that the reason for taking a different position from that of the respondent as regards the competence of the entire appeal is mainly informed by the way the lower court proceedings were handled. First, there is the issue of service. It is not in doubt that service on the appellant was via a registered mail. The appellant has faulted that kind of service and I am generally in agreement with her. The lower court itself found that kind of service improper but nevertheless proceeded to refuse to set aside the judgment.

30. Order 5 rule 8(1) and (2) of *Civil Procedure Rules*, 2010, provides as follows:

    1. "Wherever practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient

        2. A summons may be served upon an advocate who has instructions to accept service and to enter appearance to the summons and judgement in default of appearance may be entered after such service"

31. As a matter of law and practice, the primary mode of service is by or through a process server, who normally takes the documents to be served to the person or entity to be served. Proper service consists in showing time and date of service, manner or mode of service, name and address of the person identifying place of service, indication of whether the person serving is known to the person being served, and where service is not personal, the person serving needs to indicate the relationship between the person served and the person the summons were directed at. The process server must also show that he required the signature of the person served and the reaction of the person so served. It is important to

appreciate that even where this primary mode of service is done, omission of some of the requirements already pointed out here may lead to its rejection.

32. The respondent deviated from this primary mode of service and resorted to one –which is service via registered mail – normally reserved for companies or corporations. It is important to appreciate that even for companies or corporation, this is still not the primary mode of service envisaged by law. A look at order 5 rule 3 of *Civil Procedure Rules*, 2010, shows that a process server is still supposed to take or effect service on corporations or companies and service via registered mail is supposed to be resorted to only where the officials to be served can not be found.

33. It was wrong for the lower court to decline to set aside the judgement it had entered even after correctly making a finding that the service was improper.

34. But the lower court was also wrong on another score namely: making a finding that the draft defence made available by the appellant had no triable issues. As pointed out earlier, the respondent's suit in the lower court was mainly about the removal of a caution placed on the register of the disputed land allegedly without basis. The draft defence filed by the appellant in the lower court show her pleading that she owns the land and that she placed the caution on the register after the land registrar asked her to surrender the title to the land "without reasonable grounds." It is therefore plain from the plaint filed by the respondent that he claims the land as his own. It is plain also from the draft defence filed by the appellant that she also claims the disputed land as her own. At the core of the dispute therefore is the issue of ownership. If this is not a triable issue, then it is difficult to fathom what a triable issue is.

35. Another pertinent point was raised by the appellant relating to a power of attorney donated by the respondent to his son – John Mbuthia Waweru. The lower court judgment is clear that the respondent was represented by his son in the lower court after a power of attorney was donated to that son. The proceedings themselves show that the respondent himself had started testifying but was stood down at some point. The court ordered that the matter had to start afresh. When the matter came up in court next time, it actually started afresh with the respondent's son giving evidence in place of him. On record also is the power of attorney donated to the son. It is clear that the power of attorney was not registered. I think the appellant is making a valid point when he doubts the authenticity and validity of the power of attorney.

36. I think it is now clear that while the respondent is making a strong argument for treating the appeal herein as incompetent, the appellant herself has also made a strong argument that lays bare the infractions of law that took place during proceedings in the lower court. This in my view reinforces my position that the entire appeal should not be construed as incompetent. Such aspect of it which complies with the law should in my view be considered for its worth. This is what is done here as it is clear to me that the matter of the respondent treating the appeal as incompetent has to be weighed against the infractions of law that took place in the lower court proceedings. Those infractions are not justifiable in any objective sense. The prevailing situation requires that the lower court matter be heard afresh.

37. Article 159 (d) of our Constitution, Sections 1A, 1B, and 3A of *Civil Procedure Act* (cap 21) and Sections 3 and 19(1) of *Environment and Land Court Act* require that where the imperative of justice so demand, the court should act without allowing itself to be hampered by the procedural strictures that may impede it from giving a decision based on the merits of a case. This is precisely what I am doing here.

38. When I struck out the aspect of the appeal that focused on the judgment, the judgment was left standing and intact. But it is that same judgment which is the focus of the aspect of the appeal that I have found to be proper and competent. The judgement is sought to be set aside. I have already found

that there are good reasons to set aside the judgment. I therefore allow the appeal relating to the ruling of the lower court dated and delivered on 16/9/2016. I set aside the judgement.

39. I direct that the appellant file her defence to the lower court suit within sixty (60) days from the date of delivery of this ruling. The lower court file should be returned to the lower court immediately. Costs in the cause.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 20TH DAY of DECEMBER, 2022.

In the presence of Njeru Ngare for appellant and M/s Nzekele for Wairimu R for respondent.

Court assistant: Leadys

A.K. KANIARU

JUDGE