Mainye v Nyagaka (Environment and Land Appeal E021 of 2023)
[2025] KEELC 5206 (KLR) (9 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5206 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E021 OF 2023

M SILA, J

JULY 9, 2025

BETWEEN

MARY KERUBO MAINYE ..... APPELLANT

AND

PAULINE KWAMBOKA NYAGAKA ..... RESPONDENT

((Being an appeal against the ruling of Hon. S.N Abuya, Chief Magistrate, delivered on 28 November 2023 in the case Kisii CMELC No.126 of 2020)(Appeal on refusal of the trial Magistrate to set aside ex parte proceedings; matter having proceeded for hearing in absence of the appellant as 1st defendant; after the ex parte hearing, case given a judgment date to be delivered via email; appellant filing an application under urgency after the hearing and at least 10 days to the date of judgment; counsel for appellant deposing that he was duly served with the hearing notice but forgot to diarize the matter hence his absence; application not considered but placed before court after the judgment; in the meantime, judgment delivered via email and judgment entered for the 1st respondent; trial court subsequently dismissing the application on basis that it is overtaken by events; in circumstances of the case, appellant cannot be faulted for she filed the application to set aside the ex parte proceedings well before the date for judgment; good reason given as to her non-attendance; appellant deserved to be heard on the substance of the case; obiter, court of opinion that delivery of judgment by email not a method that ought to be encouraged; appeal allowed subject to payment of thrown away costs))

JUDGMENT

1. The genesis of the suit leading to this appeal was a plaint filed on 28 December 2020 by the 1st respondent against the appellant. The plaint was subsequently amended on 27 January 2023 to introduce the 2nd respondent as the 2nd defendant. The 1st respondent pleaded to have purchased the land parcel West Kitutu/Bomatara/1413 in the year 2013 from the 2nd respondent and obtained title in her name. It was averred that the 2nd respondent had in turn purchased the same land from the husband

of the appellant, one Gilbert Joel Mainye, and Mr. Mainye transferred title to him. She pleaded that she took possession and cultivated napier grass on the suit land until 2015 when she offered the napier grass to one Daniel Obanyi since she had disposed off her animals. It was pleaded that the said Obanyi used the land until 2017 when the appellant invaded the suit land, registered a caution , and in December 2017, proceeded to erect a temporary structure on the land. She also destroyed the napier grass and proceeded to plant maize and other crops. In the amended plaint, the 1st respondent asked for an order of eviction and permanent injunction against the appellant. She also prayed that in the event that the court finds that the property was not validly sold then the 2nd respondent be condemned to pay the 1st respondent the market value of the suit land.

2. The appellant filed defence and counterclaim. She pleaded that she is wife to Mr. Mainye who died on 13 October 2013 leaving her on the suit land. She claimed to have been in possession of the land since 2003; that she put a caution in the year 2014; and nobody came to claim the land until this suit was filed. She contended that the transactions between the 1st and 2nd respondents were questionable as she had no notice of the same. In the counterclaim, she averred that she has been in continuous occupation of the suit land since 2003 and therefore she has acquired title through adverse possession.

3. I have not seen any appearance or defence filed by the 2nd respondent.

4. On 7 June 2023, the matter came up for mention when neither counsel appeared and the court on its own motion fixed the matter for hearing on 8 August 2023 with direction for the court process server to serve the hearing notice. Come 8 August 2023, only Mr. Ayora, learned counsel for the 1st respondent was present. Mr. G.J.M Masese, learned counsel for the appellant was absent. The trial Magistrate, Hon. S.N Abuya, Chief Magistrate, directed the matter do proceed. The 1st respondent (as plaintiff) testified, called one witness and closed her case. Given that there was no appearance for the appellant (as 1st defendant) and no appearance had been entered for the 2nd respondent (as 2nd defendant) the court ordered the defence case closed, ordered submissions be filed in 14 days, and directed that judgment would be delivered on 31 August 2023 via email.

5. Subsequently, the appellant filed an application dated 14 August 2023 under certificate of urgency seeking the following orders :

    1. That this application be certified as urgent and be heard ex parte in the first instance.

    2. That the court be pleased to set aside the ex-parte proceedings of 8 August 2023 whose judgment is scheduled for 29 August 2023 (sic).

    3. That costs of this application be provided for.

6. The application was noted to be brought under Order 12 Rule 7 of the Civil Procedure Rules. The application was supported by the affidavit of Mr. Masese, counsel on record for the appellant, who deposed that he was indeed served with the hearing notice of 8 August 2023, but he inadvertently forgot to diarise the same nor inform his client about the hearing. He averred that on 10 August 2023 he was served with a judgment notice and it is then that he realized his mistake. He deposed that he was entirely responsible and was prepared to pay costs.

7. I see that the application was paid for on 17 August 2023 but received in court on 21 August 2023. It does not seem to have been placed before any court until 6 September 2023 when it went before Hon. C. Ocharo, Senior Principal Magistrate. She directed that the respondent be served for inter partes hearing on 3 October 2023. In the meantime, on 31 August 2023, judgment was delivered via email as scheduled.

8. On 3 October 2023, the application went before the trial court, Hon. Abuya. Only Mr. Ayora attended and he asked for time to file a response. The court gave him 14 days to respond and directed that the application be heard on 24 October 2023. On 24 October 2023, both Mr. Masese and Mr. Ayora were present and the court directed that the application be canvassed through written submissions and the matter be mentioned on 7 November 2023 for a ruling date. On 7 November 2023, both Mr. Masese and Mr. Ayora were present and they confirmed that they have both filed submissions. The court directed that the ruling will be delivered on 28 November 2023 through email. In all these appearances there was no mention that the judgment has already been delivered. The ruling was delivered as scheduled on 28 November 2023 vide email as earlier directed.

9. In the ruling, the trial Magistrate found that the application is overtaken by events since judgment was delivered on 31 August 2023. She proceeded to dismiss the application with costs.

10. Aggrieved, the appellant has now preferred this appeal on the following grounds :

    1. That the trial Magistrate erred in law and in fact in dismissing the appellant's application.

    2. That the trial Magistrate erred in law and in fact in not upholding the principle of not condemning a party unheard.

    3. That the trial Magistrate erred in law and in fact in condemning the appellant for mistakes committed by her counsel and for which an apology had been tendered.

    4. That the trial Magistrate ruled against the weight of evidence on record.

11. The appellant asks that the ruling dismissing her application be set aside and the court be pleased to give the appellant a chance to be heard.

12. The appeal was heard by way of written submissions and oral highlighting at the hearing thereof. I have taken note of the submissions of both Mr. Masese for the appellant and Mr. Ayora for the 1st respondent. Mr. Ayora particularly stressed that what is appealed from is the ruling of court of 28 November 2023 and not the judgment, and that the appellant did not file any application to set aside the judgment. He asserted that the application was seeking orders which had been overtaken by events. He added that even if the appellant's appeal succeeds, the trial Court's judgment will still take effect given that there is no application to set aside the judgment. He submitted that the appeal is thus moot and referred me to a couple of authorities on the doctrine of mootness.

13. I have considered the appeal.

14. The genesis of the appellant's tribulations was the lack of appearance by herself and counsel at the hearing of the suit which was scheduled for 8 August 2023. On that day the matter proceeded for hearing and judgment was reserved for 31 August 2023 (not 29 August 2023 as mentioned in the application). The appellant was however quick to come to court on realizing that the matter had proceeded ex parte and filed the application dated 14 August 2023. I did mention that the application was received in court on 21 August 2023 and it had been filed under certificate of urgency. It means that the application was in the court file prior to delivery of the judgment on 31 August 2023.

15. I have no explanation in the file why the application was not considered by the trial court prior to the trial court pronouncing the judgment despite it being on record. I further observe that judgment was through email, meaning that there was no court appearance and no opportunity for the appellant to query the position regarding her application, which was already on record, or even seek that the judgment be arrested before it is pronounced. Instead, the application was placed before Hon. Ocharo,

who must have been acting as a duty Magistrate, on 3 September 2023, after judgment had been pronounced.

16. I do not think I can fault the appellant, because immediately she became aware of the ex parte proceedings, she filed the application. I do not think the appellant ought to be persecuted because the trial court never considered her application before delivering the judgment. Of course, in the body of the application, there was no mention of setting aside judgment, which was to be expected, because no judgment had been delivered when the application was filed. Judgment was subsequently delivered, but the application still remained one made pursuant to Order 12 Rule 7 which provides as follows :

> Where under this Order judgment has been entered or the suit has been dismissed the court on application, may set aside or vary the judgment or order upon such terms as may be just.

17. Order 12 of course deals with proceedings including ex parte proceedings when a party does not appear, and it will be seen from Rule 7 above, that a party is given leeway to apply to set aside such ex parte judgment.

18. We can of course split hairs and say that now that judgment was already pronounced and there was no prayer in the application seeking to set aside the judgment, then the trial court was right in dismissing the application. Indeed, that appears to be the position that the trial court took. But as I have elaborated, such prayer could not be in the application, as it was filed before the judgment, and there was no opportunity for the appellant's counsel to inquire of the application, or make any oral application in court, before the judgment was pronounced. It was however apparent from a reading of the application what the applicant wanted. She simply wished to be heard so that the case is not decided on the ex parte proceedings but upon a proceeding that she has participated. I would think that in the circumstances of this case, declaring that the application had been overtaken by events, when it was clear what the appellant wished for, was being overly reliant on technicalities rather than on the substance, which would go contrary to Article 159 (2) (d) which is drawn as follows :

> 159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) – (c) ....(not relevant)
>
> (d) justice shall be administered without undue regard to procedural technicalities;

19. I am persuaded that the appellant made out a good case that the failure to attend court at the hearing was due to an error by her counsel. Mr. Masese indeed owned up to this mistake and offered to compensate the 1st respondent for the costs incurred. The application was also not made after any delay and there was in fact ample time to consider it before the date of judgment. I do not think that it was fair, in the circumstances that have played out, to punish the appellant for mistakes of her counsel. In any event, this was a mistake which could be remedied by an award of costs. The only loss that the 1st respondent stood to suffer was at most an expense for bringing her counsel, herself and her witnesses back to court for another hearing. This could easily have been remedied by awarding the 1st respondent the costs for the day that the matter proceeded ex parte and maybe some thrown away costs on the application. If you weigh this against the right of the appellant to be heard on both her defence and counterclaim, it is clear where the scales of justice tilt.

20. It is discernible from the above discourse, that I find that there is merit in this appeal. Subject to payment of thrown away costs which I will shortly assess, I proceed to set aside the ruling of the trial

court, the ex parte proceedings of 8 August 2023, and the ex parte judgment delivered via email on 31 August 2023.

21. And I think this is an opportune time for me to share my thoughts about delivery of judgments and/or rulings by way of email without the presence of the parties. I am not a fan of such mode of delivery as I am of the view that it has potential to lead to some injustice. As I have outlined in my judgment herein, this style of delivery of decisions denies a party the chance to inform the court of something that may be important for the court to consider, and this may be a point that may be for consideration either prior to, or immediately upon, delivery of the judgment. You never know what parties may inform court prior to delivery of the decision. The court may even be informed that parties have settled the case and have a consent to record. It may be also be alerted of the presence of an important application on record which first ought to be considered by court before the court pronounces itself. Delivery of decisions vide email , in absence of parties, also denies the parties the opportunity to make immediate post judgment applications which they may fully be entitled to make. For example, under Order 42 Rule 6 (3) a party is at liberty to make an informal application for stay of execution pending the filing of a formal application. They can also seek some clarifications on the judgment/ruling. If judgment or ruling is not ready for one reason or another, the court will also have a chance to give an explanation to the parties.

22. My view is that a judgment or ruling ought to be delivered in the presence of the parties. An email containing the full text of the judgment can subsequently be sent to them. That way, their rights are fully preserved. It also removes them from the anxiety of sitting by their computers not knowing at what time the email containing the judgment/ruling will arrive, or whether it will ever arrive at all. Sometimes, some emails are sequestrated, or even sent to spam folders without the parties' knowledge. There is no need of putting parties through such when they can simply be informed of the decision of court in their presence.

23. I have already allowed this appeal subject to payment of thrown away costs. I assess the thrown away costs at Kshs. 15,000/= . This money be paid within the next 14 days. In default the ex parte proceedings of 8 August 2023 and ex parte judgment of 31 August 2023 will stand. If payment is made, the suit will be reinstated, and in this event, I will order that it be heard by any other Magistrate part from Hon. Abuya to safeguard any fear of bias since the Hon. Magistrate had already made a decision on the matter.

24. The last issue is costs of this appeal. For the circumstances herein, each party to bear his/her own costs of this appeal.

25. Judgment accordingly.

DATED AND DELIVERED THIS 9 DAY OF JULY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT,

AT KISII

Delivered in the presence of :

Mr. G.J.M Masese for the appellant

Mr. Ayora for the 1st respondent

N/A for the 2nd respondent

Court Assistant : Michael Oyuko