Wagah v Mwai (Environment and Land Appeal E017 of 2023)
[2025] KEELC 5249 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5249 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL E017 OF 2023

AE DENA, J

JULY 10, 2025

BETWEEN

DR MARGARET AKINYI WAGAH ..... APPELLANT

AND

JOHN ANDIWO MWAI ..... RESPONDENT

JUDGMENT

1. The subject of this appeal is the judgment of Hon. John Nandi delivered on 13th June 2015 in Bondo Magistrates Court ELC No. 262 of 2015. Vide an amended Memorandum of Appeal dated 5/05/2024 the Appellant raised the following grounds of Appeal; -

    1. That the learned Magistrate erred in both fact in issuing directions to have the Application dated the 17th of April 2023, slated for 30th of April, just to further react on the same and to advice the Appellant to dispense with the same and have the matter pave way for full trial.

    2. That the learned magistrate erred in both law and fact in compelling and/or ambushing the Appellant's counsel to submit its oral submissions on the slated material day for interparty hearing without granting a date for filing of submissions and list of authorities to be relied on.

    3. That the learned magistrate erred in both law and fact in dismissing the Application for summary judgment despite overwhelming tenacious evidence; and the fact that the defence did not raise any triable issues.

    4. That the learned Magistrate erred in law and fact in disregarding the relevance of title to be produced by the Respondent; which was mischievously omitted by the Respondent and which would ascertain the exact acreage of the boundaries.

    5. That the learned Magistrate erred in law and fact in failing to award the Application for summary without considering the relevance of availability of the said title.

6. That the learned magistrate erred in both law and fact in failing to consider the presence of the lead counsel and the co-associate counsel both acting on behalf of the Appellant herein; and rather proceeded to render a ruling in a summary manner without factoring some salient issues raised by each party.

7. That the learned magistrate erred in both law and fact in proceeding to rely on its own list of authorities without according such an opportunity upon the litigants to file their own separate list of authorities.

8. That the learned Magistrate erred in both fact in hastily proceeding to render a ruling the following day without contemplating on the important oral submissions rendered by the Appellant's counsel.

9. That the learned Magistrate erred in both fact in disregarding the Ministry of Lands confirmation findings dated the 27th June, 2013 on the said encroachment on the part of the Respondent.

10. That the learned Magistrate erred in both fact in failing to raise tenable issues as basis of sustaining a defence on record.

11. That the learned Magistrate erred in both fact in demonstrating partiality and/or business towards the respondent.

12. That the learned Magistrate erred in both fact in having the entire suit dismissed in the limine despite having notified the court of the pending appeal lodged herein.

13. That the learned Magistrate erred in both fact in both law and fact in engaging in ambush tactics in order to deliberately frustrate the case

2. On the basis of the above grounds the appellant prays as follows; -

    1. That the suit in Bondo ELC 33 of 2018 be hereby reinstated with no orders as to costs

    2. The application for summary judgement dated the 17th of April 2023 be hereby allowed as prayed.

3. The appeal was canvased by way of written submissions. The appellants submissions are dated 14/03/2024 filed together with a list of authorities of even date.

4. The appellant submitted on 4 issues a) Whether the trial court erred in dismissing the Plaintiff's application for Summary Judgment. b) Whether the trial court properly exercised its discretion in declining to stand over the matter generally. c) Whether the dismissal of the Plaintiff's suit was unjustified in the circumstances. d) Whether the appellant was denied their constitutional right to be heard.

5. The Appellant submits it was reasonable and justifiable to request that the suit be stood over generally pending the determination of the interlocutory appeal. The appeal had a direct bearing on the conduct of the trial. Had the court overturned the trial court's ruling dismissing the summary Judgement application, the entire proceedings would be impacted.

6. The Appellant submits that the trial court's refusal to stand over the suit generally despite the respondent's consent and absence of prejudice was an improper exercise of discretion causing injustice to the Appellant. Reliance was placed in the case of Shah vs Mbogo & Another {1967} EA 116.

7. With regard to dismissal of the suit for non-attendance it is urged that while under Order 12 Rule 3(1) of the Civil Procedure Rules the court has powers to dismiss a suit where parties fail to attend it is not mandatory. That courts primary concern should be to do justice. The court is referred to the case of James Kanyita Nderitu & Another vs Marios Philotas Ghikas & Another {2016} e KLR,

8. The appellant asserts justice would have been served better by standing over the matter generally, rather than dismissing, especially where there was no opposition and where the pending interlocutory appeal had the potential to dispose of the suit.

9. Moreover it is urged that it was an error dismissing the Appellant's suit in limine for non- attendance yet there was an advocate holding brief for the Appellant's advocate and who requested for adjournment to allow parties to first canvass the interlocutory appeal before this court which naturally was capable of disposing of the issue without the need of going for a lengthy and expensive trial.

10. Further if the reason given was not plausible, the absenteeism by the Appellant's counsel was excusable because the record reveals that it was the 1st time that he was missing court and the court ought to have given the plaintiff at least another hearing date. That even if the court agreed with the respondents still the mistake of an advocate should not be visited on the clients as per the holding in Phillip Chemwolo and another vs Kubeda {1982—1988} KAR 103 . It is urged that allowing the appeal would favour equity since the matter will go to trial where the parties will have an opportunity to put their respective facts before the tribunal of fact.

11. It is reiterated that the Respondent stood to suffer no prejudice had the court stood over the matter generally pending the appeal. On the contrary it is the appellant who has been prejudiced by the trial court dismissal of her case without considering its merits.

12. In conclusion it is asserted that the trial court failed to exercise its discretion properly, acted unfairly and denied the Appellant a fair hearing as guaranteed by article 50 of *the constitution* of Kenya.

Respondents Submissions

13. The respondent submissions are dated 26/03/2025 and addresses four issues namely 1) whether the trial court erred in dismissing the plaintiff's application for summary judgement 2) Whether the trial court properly exercised its discretion in declining to stand over the matter generally 3) whether the dismissal of the plaintiff's suit was unjustified in the circumstances and 4) whether the appellant was denied his constitutional right to be heard.

14. It is submitted that the power to grant summary judgement is the discretion of the court. The court in considering whether a pleading raises triable issues is mandated to focus on the pleadings and its accompaniment. Pleadings in themselves should be capable of raising triable issues which was the case with the defendants pleadings in the trial court. The defendants made substantive denials made accompanied by his own understanding of the borderline dispute a case in point and denial of encroachment in the said land. That a defence which raises triable issues does not mean a defence that must succeed. Therefore, the matter at hand was not for summary dismissal. Reliance was placed in Order 2 Rule 15(1) (a)(b)(c)(d) and D.T. Dobie & Company(Kenya)Ltd Vs Joseph Mbaria Muchina & Ano (1980)ekLR; Raghbir Singh Chatte V National Bank of Kenya Ltd (1996)eKLR and Kenya Trade Combine Ltd Vs NM Shah (2001)eKLR.

15. It is submitted that standing over the proceedings was not necessary since the applicant had already been granted leave to defend the suit. That given the prayers in the intended appeal there was no justified reason as to believe the hearing of the suit would render the intended appeal nugatory. Further that the suit was filed in 2018 and allowing the application would be against the interests of justice

and frustrate the courts overriding objective of facilitating affordable and expeditious resolution of disputes.

16. On the dismissal of the Plaintiffs suit for non-attendance is urged that this is within the wide discretion of the court. That it was incumbent upon the plaintiff to establish he was prevented from attending court by a sufficient cause. That the primary responsibility of prosecuting the suit rested with the plaintiff and having been informed the suit would proceed on the material date is solely attributable to counsels actions. The plaintiffs were not interested in pursuing their own case.

17. It is submitted that the plaintiff was given fair opportunity to present its case before court and chose not to appear upon facing unfavorable outcome. Further that appeal has been filed a whole year after the striking out of the suit. That equity only aids the vigilant. The plaintiff failed to assert his right in a timely and diligent manner by actively pursuing his case and cannot claim violation of the same. The appellant has failed to disclose any sufficient reason to warrant the courts discretion to grant the orders sought in their appeal.

18. The court is invited to dismiss the appeal with costs.

Issues For Determination

19. Having analysed the Memorandum of Appeal, Record of Appeal the rival submissions and considered the law, the following issues commend determination: -

    1. Whether the trial court erred in dismissing the Plaintiff's application for Summary Judgment.
    2. Whether the trial court properly exercised its discretion in declining to stand over the matter generally.
    3. Whether the dismissal of the Plaintiff's suit was unjustified in the circumstances.
    4. Whether the appellant was denied their constitutional right to be heard.

Issue number 2 and 3 above shall be handled concurrently since they are interrelated.

20. This is a first appeal. The court will be guided by the case of Selle Vs Associated Motor Boat Company Ltd (1968). The court shall not interfere with the decision of the learned trial magistrate except where it is satisfied that the trial court misdirected himself thus arriving at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.

Whether the trial court erred in dismissing the Plaintiff's application for Summary Judgment.

21. This issue is derived from the 3rd ground of the Amended Memorandum of Appeal dated 5/05/2024. According to the appellant the trial court erred in dismissing the application for summary judgement despite overwhelming tenacious evidence. Further that the defence did not raise triable issues. The application was brought on the basis that the defence did not disclose triable issues but contained mere denials.

22. The application is dated 17/04/2023 (page 100 – 103 of the ROA). It was brought under the provisions Order 36 Rule 1(b) of the Civil Procedure and section 18 of the *Land Registration Act*.

23. Order 36 of the Civil Procedure Rules stipulates as follows: -

    In all suits where a plaintiff seeks judgment for—

    (a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

24. Page 126 of the Record of Appeal (ROA) bears the ruling in respect of the said application and which I have read. The trial court extracted the provisions of order 36 above verbatim.

25. The trial court also highlighted a number of court decisions that dealt with the relief of summary judgement notably;-

a. ICDC Vs Daber Enterprises Ltd (2000) 1EA 75 where the Court of Appeal highlighted the purpose of summary judgement which is to enable a plaintiff get a quick judgement where there is plainly no defence to the claim. That where the matter is not plain and obvious a party should not be deprived of his right to have his case tried by a proper trial, where if necessary there has been discovery and oral evidence subject to cross examination.

b. Dhanjal Investments Ltd V Shabaha Investments Ltd Civil Appeal No.232 of 1997 where the court of Appeal recalling the history of the procedure on summary judgement emphasised that if the defendants shows a bona fide triable issue he must be allowed to defend without condition...'

c. Lalji T/a Vakked Bulding Contractors V. Casousel Ltd 1989 KLR 386 where the court reiterated the above position but added that summary judgement is a draconian measure which can only be granted in the clearest of cases.

26. In addition there were several cases that were cited by the trial court where courts have provided guidance on what would constitute triable issues and specifically that it would not be an issue that must succeed.

27. The trial court guided by the above proceeded to determine if the defence filed raises triable issues and referred to paragraph 10 of the defence which avers that the plaintiffs claim is a boundary one thus ousting the jurisdiction of the trial court by dint of section 18 of the *Land Registration Act* 2012. The court noted that in paragraph 5 of the defence the defendant has denied encroaching on the plaintiffs land. The trial court found there was a triable issue.

28. The trial court in reviewing the grounds of the application and specifically the letter dated 27/6/2013 wherein it is urged by the Applicant/appellant was not refuted and summary judgement ought to be entered pursuant thereto.

29. I have reviewed the provisions of order 36 herein. Indeed, the power to grant summary judgement is donated under the provisions of Order 36 Rule 1(b) as rightly cited by the applicant/Appellant in invoking the jurisdiction of the trial court. One critical requirement is the absence of a defence where a defendant has entered appearance. In the present case the defendant entered appearance and filed a 'Defendants Statement of Defense' dated 29th July 2022.

30. Having noted there is a defence then the trial court rightly proceeded to interrogate the defence as guided by the case law. I have read the case law and the question that occurred in mind is whether the position has since changed? I say so because it is contended that the trial court proceeded to cite its own authorities. What we are not told by counsel for the plaintiff is whether the position in the case

law cited has since changed. No case law has been cited to the contrary. But let me add more decisions that support the case law cited by the trial court; -

31. In the case of Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] eKLR, the Court quoted with authority the celebrated case of Saudi Arabian Airlines Corporation V Premium Petroleum Company Ltd [2014] eKLR it was held that:"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. The power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is "demurer of something worse than a demurer" beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Shedridan J Test In Patel V E.a. Cargo Handling Services Ltd. [1974] E.A. 75 at p. 76 (Duffus P.) that "... a triable issue... is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away."

32. In the locus classicus case D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another[1980] eKLR the court cautioned thus;-

> " The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)).
>
> As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.'
>
> Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XTV" rule 2."

33. Having noted that the caselaw above has not changed and has continued to be cited and applied by the courts, this court also reviewed the defence. On the provisions of section 18 of the *Land Registration Act*, I agree with the trials court position that a triable issue emerges. The defendant states clearly at paragraph 5 of the defence that he agrees his land parcel does border the plaintiffs and at no point has he ever encroached on and or fence off the plaintiffs' land. Encroachment in my view has been clearly denied. Having been denied then it would be an issue to be weighed on the scales of justice after both parties are heard on merits.

34. With regard to the letter dated 27/6/2023 and the invitation to the trial court to adopt it, I must reiterate that against the unequivocal denial by the defendants above it would still require to be put through the rigours of cross examination for its probative value. Before hearing it remains a mere paper. The same argument would in my view apply to the surveyor's report and the alleged missing title. We have also seen from the case law cited the court is not supposed to review the merits of the case at this stage.

35. I think I have said enough to demonstrate why the learned trial magistrate did not err both in fact and law in arriving at the decision to sustain the defence.

Whether the dismissal of the Plaintiff's suit was unjustified in the circumstances.

36. The plaintiff suit was dismissed for non attendance and this court is invited to reinstate the suit for hearing on its merits.

37. I will at this juncture set out the relevant proceedings. I have perused the proceedings of 13/06/2023. Mr Suti held the brief of Mr. Kokul counsel on record for the plaintiff/appellant. Mr Suti informed the court that the plaintiff was not ready to proceed as an appeal E017 of 2023 had been lodged. Counsel requested that the case be Stood Over Generally until determination of the appeal. He indicated that the appeal was coming up for directions 7/9/2023 and prayed for a mention date.

38. Mr Odongo Counsel on record for the defendant responded indicating that they were not aware of the appeal however he proposed a mention date in the circumstances.

39. The trial court noted that the matter was fixed for hearing. There was no order staying the hearing of the case in the magistrates court. That filing an appeal does not warrant to a stay of proceedings automatically. The trial magistrate declined to grant the date for mention and ordered the case to proceed for hearing.

40. Later at 1.30pm the court reconvened where Mr. Suti was absent. Mr. Odongo counsel for the defendant applied for the suit to be dismissed. The record reveals that by 2.00 pm Mr Suti had not logged into court, the firm on record having been called (the mobile Number is given) promised to log in but failed to do so. The trial court dismissed the case for non-attendance and prosecution with costs to the defendant.

41. Order 12 of the Civil Procedure Rules is on hearing and consequence for non attendance and donates the power to dismiss a case for want of attendance.

42. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010 as rightly cited by the appellant which provides thus:

> " 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."

43. The power donated to the court to set aside its own orders therefore is discretionary.

44. This court is aware that an appellate court must refrain from interfering with the exercise of discretion of the trial court unless the trial court considered some facts it ought not to have considered or that the court has been clearly wrong in the exercise of its discretion and that as a result there has been miscarriage justice. This was the position taken in Mbogo & Another V. Shah [1968] EA 98.

45. I pondered over what attendance before court would entail. And I think I would be right to state that attendance could encompass the attendance through a recognised agent or by the litigant herself. The

matter appears to have been dismissed later in the day when Mr. Suti failed to log in back to the court. It is however clear that counsel had been present in the morning as holding the brief of Mr. Kokul. In my view this is attendance on behalf the Plaintiff and which the court ought have considered. There was no complete/total non-attendance by the Plaintiff.

46. Coming back to the issue of reinstatement of the suit the power is donated to be exercised in terms that may be just and fit. It is urged that standing over the matter would have served justice better. First, I will point out that the correct procedure for Counsel for the plaintiff was to obtain an order of stay of proceedings pending hearing and determination of the present appeal. The trial court was spot on in stating that she could not stay proceedings in the absence of a court order and that filing an appeal was not an automatic ticket to earning a stay of proceedings.

47. But I would still revert to the events of the day. Firstly, there was no complete/total non-attendance by the Plaintiff since counsel held the brief of Mr. Kokul.

48. The right to be heard is a well-protected right in our Constitution and is also the cornerstone of the rule of law. This right should therefore not be taken away by the strike of a pen, where sufficient cause has been shown. Counsel may have not followed the correct procedure of obtaining a stay but intimated from the bar they were aggrieved by the orders dismissing the application. I have noted the proposition that a mistake of counsel should not be visited upon its client. I was not able to understand where this was coming from since the mistake was not clearly stated by counsel.

49. However I would look at the issue from the point of the litigant who hires counsel knowing that she is fully represented but what has happened did happened.

50. Moreover courts exist to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as enunciated in Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR.

51. In the case of Daudi Kiptugen v Commissioner of Lands, Nairobi & 5 others [2016] eKLR the Court of Appeal stated thus;-

'Article 50 (i) of *the Constitution* stipulates that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court.

On the right to be heard, this Court in the case of Mbaki & Others vs Macharia & Another (2005) 2 EA 206, stated thus:

> " The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. (emphasis ours)"

52. The court has noted the contention that there has been a delay in filing the appeal. I have also read the decision Philip Keipto Chemwolo & Ano. Vs. Augustine Kubende (1986)eKLR. The Court of Appeal faced with the issue of delay stated that in all circumstances it would be just that the judgement be set aside. The Court of Appeal indeed chose to allow parties to go for trial on the issues in the suit. I think appropriate orders can be made to have the matter heard on priority basis which will mitigate the concerns.

53. In view of the foregoing I will choose justice. I see no prejudice to be occasioned to the defendant. There must be a balance since justice cuts both ways. The defendants have had justice by having the

opportunity to defend their case. Infact they were amenable through counsel to have the matter stood over to a specific date. On the other hand the Plaintiff appellant will now have a chance to prosecute its case. At the end of the day let both parties will have been accorded the opportunity to present their cases.

54. The upshot of the foregoing is that the appeal partly succeeds and the following orders hereby issue to dispose of the same.

    1. That the suit in Bondo ELC 33 of 2018 be hereby reinstated with no orders as to costs.
    2. The ruling of the trial court on the application for summary judgement dated the 17th of April 2023 is upheld
    3. The matter shall be fixed for hearing on priority basis
    4. Let each party bear their own costs of this appeal.

Orders accordingly

JUDGEMENT DATED SIGNED AND DELIVERED THIS 10 TH DAY OF JULY 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

10/7/2025

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. George Adulo for the Appellant

Mr Gakuyo for Respondent

Court Assistant: Ishmael Orwa