



**NK v VMM (Environment and Land Appeal E004 of 2022)
[2024] KEELC 13580 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13580 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E004 OF 2022
TW MURIGI, J
DECEMBER 4, 2024**

BETWEEN

NK APPELLANT

AND

VMM RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 7th March, 2022, the Appellant appealed against the Judgment of Hon. J. O. Magori (SPM) delivered on 15th February, 2022 in Makindu SPMCC No. 1 of 2018 and set out nine grounds of Appeal.

Background

2. The Appellant had sued the Respondent by way of a Plaint dated 12th October 2017 seeking the following orders:-
 - a. An order directing the Defendant to demolish the building erected on land Title No. MAKINDU/K/xxxx.
 - b. General damages for trespass.
 - c. Costs of the suit plus interest.
3. The Defendant filed a Statement of Defence and counterclaim dated on 6th December 2017 in which she denied the Plaintiff's claim. In the counterclaim, the Defendant sought for the following orders:-
 - a. An order for cancellation of the title herein Makindu/K/xxxx.
 - b. A permanent injunction restraining the Plaintiff, her servants, employees, agents and/or from whomsoever from trespassing encroaching on the suit property.



- c. General damages for trespass.
 - d. Costs and interest.
 - e. Any other relief the court may deem proper to grant.
4. She urged the court to dismiss the Plaintiff's suit with costs.
 5. In the proceedings before the lower Court, the Appellant was the Defendant while the Respondent was the Plaintiff. After the trial, the Learned Trial Magistrate delivered his judgment on 15th February 2022 in the following terms:
 1. The Defendant is ordered to demolish the building erected on the land Title No. MAKUENI/K/xxxx.
 2. The Plaintiff is awarded general damages of Kshs. 400,000/= for trespass.
 3. The Plaintiff is awarded costs of this suit plus interest at court rates.
 4. The Defendant's counterclaim is dismissed with costs to the Plaintiff.
 6. Being aggrieved, the Appellant appealed to this court on the following grounds:-
 1. That the learned trial magistrate erred in fact and in law by failing to give concise statements of the case, points of determination, decision thereon and reasons for his judgment.
 2. That the learned trial magistrate erred in law and in fact in failing to allow the Appellant to defend the case, in that both the Appellant and the Respondent have proprietary interests over the suit property.
 3. That the learned trial magistrate erred in law and in fact in holding that the Appellant was properly served yet the Affidavit of service by the various process servers had glaring and evident mistakes.
 4. That the learned trial magistrate erred in law and in fact by failing to ascertain whether the Appellant had been served personally rather than service to her former advocate before proceeding to hear the matter and closing the Defence case without the Appellant's case being heard.
 5. That the learned trial magistrate erred in law and fact in failing to consider the fact that the Appellant is to be evicted by the Respondent from her land hence doing an injustice to the Appellant yet the Appellant was not heard by the trial court.
 6. That the learned trial magistrate erred in law and fact by denying the Appellant an opportunity to be heard and as such contrary to the rules of natural justice and fairness.
 7. That the learned trial magistrate erred in law in only considering the procedural tenets of service rather than the real substantive issues at hand in that the suit property where both the Appellant and the Respondent have proprietary interests.
 8. That the learned trial magistrate erred in law and fact by failing to appreciate the spirit behind the provisions of Article 159 (2) of *the Constitution* of Kenya, 2010 by ignoring the fact that personal service ought to have been effected upon the Appellant rather than her former Advocate who never appeared in court.



9. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the Appellant ought to have been served before closing the Defence case.
7. The Appellant prays for: -
 1. The Appeal be allowed and the judgment against the Appellant be set aside and the Appellant be allowed to defend the suit.
 2. That an order does issue for retrial of this case before another court of competent jurisdiction.
 3. Costs of the Appeal.
 4. Any other order this Honourable Court deems fit to grant.
7. Parties directed to canvass the appeal by way of written submissions.

The Appellant's Submissions

8. The Appellant filed her submissions on 12th February, 2024 where she outlined the following issues for the court's determination: -
 - a. Whether the Respondent proved his case against the Appellant on a balance of probabilities; and
 - b. Whether the appeal is merited.
9. On the first issue, the Appellant submitted that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. She further submitted that the trial court erred in law and fact by closing her case without according her an opportunity to be heard. She contended that the trial court visited the consequences of her Advocates non-attendance upon her. It was her submission that the trial court ought to have granted her the opportunity to defend the suit and to prosecute her counterclaim.
10. She further submitted that her defence raises triable issues as parties are claiming ownership over the suit property.
11. The Appellant relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules to submit that the court may set aside the judgment on such terms as it may deem just. She urged the court to find that the trial court erred in law and fact in arriving at its judgment. None of the authorities cited by the Appellant were availed for the court's perusal.

The Respondent's Submissions

12. The Respondent filed her submissions dated 6th June, 2024.
13. On her behalf, Counsel identified the following issues for determination: -
 - a. Whether or not the learned magistrate erred in law in allowing the Plaintiff to proceed with her case in the absence of the Defendant.
 - b. Whether or not the learned magistrate erred in law in closing the Defence case in the absence of the Defendant.
 - c. Whether or not the Appellant's record of Appeal is incompetent.
14. On the first issue, Counsel cited the provisions of Order 12 Rule 2 of the Civil Procedure Rules to submit that the trial court was satisfied that the Appellant's Advocate was duly served with a hearing



notice on 7/10/2021. Counsel further submitted that the learned trial magistrate observed that there was an affidavit of service on record with the annexure of the hearing notice duly served in accordance with Order 5 Rule 15 (1) of the Civil Procedure Rules.

15. Counsel submitted that the Appellant's remedy is founded under the provisions of Order 12 Rule 7 of the Civil Procedure Rules
16. Counsel further submitted that the record of appeal is incompetent for failure to annex the Notice of Appointment of Advocates dated 25/1/2021 by the law firm of Gikandi & Co. Advocates. Concluding his submissions, Counsel urged the court to dismiss the appeal with costs. None of the authorities cited by Counsel were availed for the court's perusal.

Factual Background

17. PW1, PW, a son to the Plaintiff testified that he was authorized to act on her behalf vide the power of Attorney dated 19/12/2014. He adopted his witness statement dated 18/08/2018 as his evidence in chief. He also produced the list and supplementary list of documents in support of her case. It was his testimony that on 20/12/1999 the Plaintiff purchased land from Richard Kikwau Mbithi deceased who was once married to the Defendant but later divorced.
18. He further testified that Richard had purchased the suit property from Patrick Maseve Ngoloma and instructed him to transfer the land directly to the Plaintiff. That upon subdivision, Maseve Ngoloma transferred the suit property to the Plaintiff and the title thereof was issued on 27/3/2013. That while the Plaintiff was in Germany undergoing treatment in the year 2013 the Defendant hired people to dig trenches on the suit property where she constructed a one roomed house on the suit property. That despite being issued with a demand letter the defendant refused to demolish the house hence the present suit.
19. PW2 MM testified that she is a sister to the Plaintiff. She adopted her witness statement filed on 31/5/2018 as her evidence in chief and echoed the evidence of PW1.

Analysis And Determination

20. This being a first appeal, the court is bound by the duty of the first appellate court as clearly set out in the case of *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court of Appeal held as follows: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”

21. The nine grounds of appeal can be condensed into two grounds as follows: -
 - i. Whether the Learned Trial Magistrate framed the issues for determination.



- ii. Whether the Appellant was granted an opportunity to be heard and defend her case.

Whether The Learned Trial Magistrate Framed The Issues For Determination

22. The Appellant faulted that the Learned trial magistrate for failing to give a concise statement of the case, the points of determination, the decision thereof and reasons for the decision.
23. Order 21 Rules 4 of the Civil Procedure Rules provides that:-
 4. Judgments in defended suits shall contain a concise statement of the case, the points of determination, the decision thereon, and the reasons for the decision.
24. In the case of *Rukidi vs Iguru and Another* (1995-1998) 2 EA 318 the court held that:-

“Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. It makes the hearing of the case more focus oriented and saves the time of the court

”
25. I have perused the impugned judgment and I find that the learned trial magistrate framed the issues for determination which he was enjoined to do under Order 21 Rule 4 of the Civil Procedure Rules as follows:-
 1. Whether the Plaintiff should be granted an order directing the Defendant to demolish the building erected on land No. Makindu/K/xxx.
 2. Whether the Plaintiff should be granted general damages for trespass.
 3. Whether the Plaintiff is entitled to costs of the suit with interest.

I therefore find that the learned trial magistrate gave a concise statement of the case, points of determination, the decision and the reasons for the decision.

Whether The Appellant Was Granted An Opportunity To Be Heard

26. The Appellant faulted the Learned Trial Magistrate for failing to give her an opportunity to be heard and defend the case. She lamented that the learned trial magistrate erred in holding that she was properly served yet the affidavit of service by the various process servers had glaring mistakes.
27. The right to be heard is anchored in Article 50 of [the Constitution](#) which provides that:-
 1. 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 or, if appropriate, another independent and impartial tribunal or body.
 2. Every accused person has the right to a fair trial, which includes the right:-
 - (c) to have adequate time and facilities to prepare defence.
28. The record shows that the Respondent instituted this suit against the Appellant vide a Plaint dated 12th October 2017. The Appellant filed a memorandum of appearance dated 23rd November 2017. On 6th December 2017, the Appellant filed a statement of Defence and counterclaim. The Plaintiff had initially filed her suit in Makueni Environment and Land Court which was later transferred to the Makindu Law Courts on 03/05/2018 for hearing and determination. The record shows that the firm of Mwangangi and Associates filed a Notice of Appointment of Advocates dated 4th September 2018 to act on behalf of the Appellant. Thereafter the firm of Mwangangi & Associates filed an application



dated 12/09/2019 seeking to cease from acting for the Defendant. On 29/09/2019, the application was allowed as prayed.

29. The record shows that when this matter came up for hearing on 25th May 2021 before the trial court, the Respondent together with her Advocate I. Kitonga were present while the Appellant and her Advocate were absent. The court observed that service had been effected upon the Appellant's Counsel and an affidavit of service filed to that effect. The court proceeded to record the evidence of PW1 and PW2 evidence. The Appellant's case was closed on account of her absence. The Appellant faulted the learned trial Magistrate for failing to ascertain whether she was personally served before closing the defence case. She contended that the affidavit of service by various process servers had glaring mistakes though she did not pinpoint the mistakes therein. This court is called upon to determine whether the Appellant was aware of the hearing date. I have looked at the affidavit of service sworn by Joseph Musyoki Muia a licensed process server on 7th October 2021. He deponed that on 24/09/2021, he served Mr Gikandi Advocate with a hearing notice for 12/10/2021 who accepted service by signing and stamping the hearing notice.
30. From the record, it is clear that the firm of Gikandi was served with the hearing notice for the 12/10/2021. The record shows that on 08/12/2020, the court observed that there was nothing to show that the firm of Gikandi & Co Advocates was on record for the Defendant.
31. An appellate court will not interfere with the discretion of the trial court especially when the said discretion has been exercised judiciously and in accordance with the law. In the case of *Eliud Mukhisa Nalinya & John Mabonga v Joseph Wanjala Fulafu & Joseph Wanjala Simon (Civil Appeal 108 of 2017)* [2019] KECA 113 (KLR) the Court of Appeal cited the following passage in regards to the discretion of a court: -

“In the instant matter, we remind ourselves dicta from *Mbogo & Another- vs- Shah (1968)* E.A. 93 at page 95, where Sir Charles Newbold P. held:

“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...”
32. I have carefully perused the court record and I note that the firm Gikandi & Co Advocates did not file a Notice of Appointment of Advocate or anything to show that the firm was on record for the Appellant. On 8/12/2020, the trial court directed the firm of Gikandi to regularize its position. Although the hearing notice was served upon the firm of Gikandi & Associates, there is no evidence on record to show that the firm was on record for the Appellant. From the foregoing, it is clear from the record that the Appellant was not represented by the firm of Gikandi and Associates. In the circumstances, I find that the Appellant was not accorded an opportunity to be heard and defend the case.
33. As correctly submitted by the Respondent, the Appellant ought to have filed an application to set aside the judgment in accordance with Order 12 Rule 7 of the Civil Procedure Rules. However, Article 159(2)(d) of *the Constitution* mandates this court to dispense justice without undue regard to procedural technicalities.
34. In the end, I find that the appeal is merited and the same is hereby allowed in the following terms:-
 - a. The judgement of the subordinate court delivered on 15th February, 2022 by Hon. J. O. Magori (SPM) is hereby set aside.



- b. That an order for retrial of the suit is hereby issued be conducted by another magistrate of competent jurisdiction other than Hon. J. O. Magori (SPM).
- c. Each party to bear its own costs.

.....

HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4TH DAY OF DECEMBER, 2024.

In The Presence Of:

Parties absence

Court assistant Alfred

