



REPUBLIC OF KENYA



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**Njoroge & another v Mungai (Environment and Land Appeal
10 of 2019) [2023] KEELC 744 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 744 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL 10 OF 2019**

YM ANGIMA, J

FEBRUARY 9, 2023

BETWEEN

GILBERT CHEGE NJOROGE T/A 1ST APPELLANT

TANGO AUCTIONEERS 2ND APPELLANT

AND

JOSEPH MUCHIRI MUNGAI RESPONDENT

*(Being an appeal against the ruling and order of Hon SN Mwangi (SRM)
dated and delivered on July 9, 2019 in Nyahururu CMCC No 304 of 2017
– Joseph Muchiri Mungai v Gilbert Chege Njoroge & Tango Auctioneers.)*

JUDGMENT

A. Introduction

1. This is an appeal against the ruling and order of Hon SN Mwangi (SRM) dated and delivered on July 9, 2019 in Nyahururu CMCC No 304 of 2017 – Joseph Muchiri Mungai v Gilbert Chege Njoroge & Tango Auctioneers. By the said ruling the trial court dismissed the Appellants’ application dated February 22, 2019 seeking setting aside of the *ex parte* judgment entered against them on January 15, 2019 together with leave to defend the suit among other orders.

B. Background

2. The material on record shows that vide a plaint dated November 10, 2017 the Respondent sued the Appellants seeking a permanent injunction, general damages, special damages and costs. The Respondent pleaded that he was legitimate owner of Title No. Nyandarua/Ol Kalou South/9 (Parcel 9) whereas the 1st Appellant was the registered owner of an adjacent Parcel No Nyandarua/Ol Kalou South/8 (Parcel 8). It was contended that on March 10, 2017 the 2nd Appellant had on the instructions



- of the 1st Appellant entered parcel 9 and damaged the main house, external kitchen, perimeter fence and main gate among other structures without lawful justification or excuse.
3. It was further pleaded that as a result of the Appellants' wrongful actions the Respondent and his family had been rendered homeless and suffered special damages to the tune of Kshs 1,212,937.50 which the Appellants were liable to make good hence the suit.
 4. The material on record shows that the Appellants did not enter appearance nor file their defences within the prescribed period hence interlocutory judgment was entered against them on December 6, 2017. The record further shows that the 1st Appellant entered appearance on December 19, 2017 and filed a notice of preliminary objection on January 8, 2018 which was served upon the Respondent's advocates on or about January 25, 2018.
 5. It would further appear that the suit was fixed for mention on January 10, 2018 and February 13, 2018 in the absence of the Appellants. The suit was on the latter mention date fixed for formal proof on April 24, 2018 when the suit was heard in the absence of the Appellants. It is not clear from the record whether the 1st Appellant who had entered appearance on December 19, 2017 was ever served with a mention notice or hearing notice on the material dates.
 6. The record shows that the trial court delivered an *ex parte* judgment on January 15, 2019 in the absence of the Appellant. Judgment was entered for the Respondent as prayed in the plaint together with an award of Kshs 100,000/= as general damages for trespass.

C. The Appellants' Application for Setting Aside

7. Vide a notice of motion dated February 22, 2019 based upon order 10 rule 11, order 12 rule 7 and order 51 rule 1 of the [Civil Procedure Rules, 2010](#) (the Rules), and sections 1A and 3A of the [Civil Procedure Act](#) (cap 21), the Appellants sought, inter alia, orders for stay of execution of the *ex parte* decree, the setting aside of both the interlocutory judgment and the final *ex parte* judgment; and leave to defend the suit.
8. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Appellant, Gilbert Chege Njoroge on February 22, 2019 and the annexures thereto. It was contended that although the memorandum of appearance and defence were filed late, the interlocutory judgment entered on January 15, 2019 was irregularly entered because the Respondent's suit was not a claim for liquidated damages only or one for detention of goods as stipulated under order 10 rule 6 of the Rules. It was further contended that the *ex parte* judgment was also obtained irregularly since the 1st Appellant who had already entered appearance was never served with any mention notice or hearing notice prior to the *ex parte* hearing of April 24, 2018. The 1st Appellant further stated that he had a reasonable defence to the action and that the delay in filing his papers was not intentional but was as a result of a mistake by his advocates on record.
9. The Respondent filed a replying affidavit sworn on April 29, 2019 in opposition to the said application on several grounds. First, that the Appellants were duly served with summons to enter appearance. Second, that the interlocutory judgment was entered regularly. Third, there was no memorandum of appearance on record at the time of fixing the suit for formal proof. Fourth, that the Respondent's advocates were not advised to serve a hearing notice upon the Appellants. Fifth, that there was undue delay on the part of the 1st Respondent in filing the application which delay was unjustified.
10. By a ruling dated July 9, 2019 the trial court dismissed the Appellants' said application with costs thereby provoking the instant appeal. The trial court was of the opinion that the Appellants were indolent litigants who had failed to diligently follow up on the matter with their advocates. The court



was also of the opinion that summons to enter appearance were properly served and that the Appellants should bear the consequences of their advocates' mistakes.

D. The Grounds of Appeal

11. Being aggrieved by the said ruling and order the Appellants filed a memorandum of appearance dated July 31, 2019 raising the following 9 grounds:
 - i. The learned trial magistrate erred in law and in fact by delivering a ruling on a discretionary order whereas he failed to exercise his discretion judiciously.
 - ii. That the learned trial magistrate erred in law and in fact by completely failing to consider in his ruling, or at all, the circumstances of the case, the interest of justice, substantial justice and the fact that the judgment was an *ex parte* judgment and hence had not been determined on merit.
 - iii. That the learned trial magistrate erred in law and in fact by paying undue regard to irrelevant factors and failing to consider relevant factors such as the fact that the inadvertence was on the part of the counsel and same should not have been meted on the client and the fact that the matter had not been decided on merit.
 - iv. That the learned trial magistrate erred in law by failing to consider the import of article 50 and 159(2) of the *Constitution of Kenya* in arriving at his decision and which in the circumstances was manifestly harsh.
 - v. That the learned trial magistrate erred in law and fact by failing to consider that the Appellants were never served with a hearing notice for the formal proof as required by law and therefore their right to fair hearing was infringed upon the rules of natural justice were breached.
 - vi. That the learned trial magistrate erred in law and fact by failing to consider the evidence before him such as the draft defence and notice of preliminary objection and the Appellants' written submissions which demonstrated that there was sufficient cause to warrant the court exercising its discretion in favour of the Appellants.
 - vii. That the learned trial magistrate erred in law and in fact by founding his decision to dismiss the Appellant's application and which in the circumstances was manifestly harsh.
 - viii. That the learned trial magistrate erred in law and fact by condemning the Appellant to pay costs whereas the circumstances of the case demanded otherwise.
 - ix. That the trial magistrate erred in law and in fact by failing to consider precedent in comparable cases when he dismissed the Appellant's application which is manifestly harsh considering the circumstances of the case.

E. Directions on Submissions

12. When the appeal was listed for directions the court directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and



exchange their respective submissions. The record shows that the Appellants filed their submissions on July 18, 2022 whereas the Respondent filed his on September 19, 2022.

F. The Issues for Determination

13. Although the Appellants raised 9 issues in their memorandum of appeal dated July 31, 2019 the court is of the opinion that the fundamental issues for determination are the following:
 - a. Whether the trial court erred in law in dismissing the Appellants' application dated February 22, 2019.
 - b. Who shall bear costs of the appeal.

G. The Applicable Legal Principles

14. There is no doubt that in considering the Appellants' notice of motion dated February 22, 2019 the trial court was exercising judicial discretion. It has been held that an appellate court should be slow to interfere with the exercise of such discretion unless certain conditions are satisfied. In the case of [*Shah v Mbogo*](#) [1968] EA 93 it was held, *inter alia*, that:

“I think it is well settled that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong conclusion.”

H. Analysis and Determination

a. Whether the trial court erred in law in dismissing the Appellants' application dated February 22, 2019

15. The court has considered the submissions and material on record on this issue. Whereas the Appellants submitted that the trial court had failed to exercise its discretion judiciously by failing to consider all the relevant factors in the application, the Respondent contended otherwise. The Appellants contended that the trial court had failed to consider the fact that the interlocutory judgment and ex parte judgment were irregularly obtained; that the 1st Appellant who had already entered appearance was never served with either a mention notice or hearing notice; that the merits of the 1st Appellants defence were not considered; among other reasons.
16. Order 10 rule 6 of the [*Rules*](#) stipulates as follows:

“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.”
17. It is clear from the material on record that the Respondent's claim was not a claim for pecuniary damages only for it included a prayer a permanent injunction. It was also not a claim for detention of goods within the meaning of Order 10 rule 6 of the [*Rules*](#).



18. The court is thus of the opinion that Order 10 rule 6 of the Rules was totally inapplicable to the Respondent's case hence the request for interlocutory judgment was misconceived and a non-starter. It is unfortunate and regrettable that the subordinate court fell into error by purporting to enter interlocutory judgment in the circumstances. The the court is of the opinion that the Respondent's case properly fell within the provisions of Order 10 rule 9 of the Rules which stipulates as follows:

“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

19. The trial court went into great length to demonstrate that proper service of summons to enter appearance was effected. However, service was not disputed by the Appellants at all. In fact, service was admitted. In the case of *James Kanyita Nderitu & another v Marios Philotas Ghikas* [2016] eKLR the Court of Appeal stated as follows regarding an irregular judgment:

“In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion.”

20. The material on record shows that after the 1st Appellant's entry of appearance on December 17, 2017 further proceedings were undertaken without service of a mention notice and hearing notice upon the 1st Appellant's advocates who were on record by the time the hearing date was taken and by the time the *ex parte* hearing took place on April 24, 2018. The Respondent did not deny that the 1st Appellant was never served with a mention notice for the mention dates of January 10, 2018 and March 13, 2018. He did not dispute that he never served the 1st Appellant for the hearing of April 24, 2018. The only answer he provided in his replying affidavit sworn on April 29, 2019 was that he was never 'advised' by the trial court to effect service. That cannot be a serious answer to the Respondent's failure to serve the hearing notice upon the 1st Respondent but it is an admission that no service of a hearing notice was served upon the 1st Appellant. The resultant *ex parte* judgment was consequently rendered irregular at least against the 1st Appellant.

21. It is also evident from the material on record that the trial court did not consider the draft defences which were on record at the time of considering the application for setting aside. The trial court did not make a finding that the proposed defences were a sham. The 1st Appellant had in his defence denied the allegations of trespass into the Respondent's land and asserted that execution of the decree of the superior court was confined to Parcel 8. It should also be remembered that the 1st Appellant had also placed a preliminary objection on record raising the defence of *res judicata*. The court is of the opinion that those are issues which were worth investigating at the trial. In nutshell, the Appellants' proposed defences raised some triable issues.

22. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 it was held, *inter alia*, that:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.”



23. The court having found that both the interlocutory judgment and the ex parte judgment of January 15, 2019 were irregular, there is no need to consider any more factors to be taken into account in setting them aside. The same are for setting aside not as a matter of discretion but as a matter of judicial duty to uphold the integrity of the judicial process. Accordingly, the court is satisfied that the trial court erred in law and failed to exercise its discretion judiciously in making its order dated July 9, 2019. Accordingly, this court is entitled to interfere and set aside the said order.

b. Who shall bear costs of the appeal

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful party should be deprived of costs of the appeal. Accordingly, the Appellants shall be awarded costs of the appeal.

I. Conclusion and Disposal

25. The upshot of the foregoing is that the court finds merit in the Appellants’ appeal. Accordingly, the court makes the following orders for disposal thereof:

- a. The appeal be and is hereby allowed.
- b. The ruling and order of the trial court dated July 9, 2019 in Nyahururu CMCC No 304 of 2017 is hereby set aside and substituted with an order allowing the appellant’s notice of motion dated February 22, 2019 in terms of orders (3) (4) (5) and (6) thereof.
- c. The appellants are hereby awarded costs of the appeal.

26 It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 9TH DAY OF FEBRUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

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Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Mwangi or the Appellants

Ms. Tessot holding brief for Mr. Miruka for the Respondent

C/A - Carol

