



REPUBLIC OF KENYA



KENYA LAW
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**Mukiira v Miaka (Environment and Land Appeal 116 of 2021)
[2023] KEELC 18763 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 116 OF 2021**

**CK NZILI, J
JULY 12, 2023**

BETWEEN

MOSES MUROKI MUKIIRA APPELLANT

AND

JESCA MUKORURU MIAKA RESPONDENT

*(An appeal against the ruling of Chief Magistrate's Court Maua
Hon. Tito Gesora delivered on 7.10.2021 in ELC case No.254 of 2018)*

JUDGMENT

1. Before the court is a memorandum of appeal dated 24.8.2018 in which the appellant, who was the defendant at the trial court, faults the ruling delivered on 7.10.2021 on the basis that the court:
 - i. Failed to find that the appellant should have been personally served with the hearing notice since his erstwhile advocate had ceased acting for him.
 - ii. Punished him for mistakes of a former advocate, yet he had been attending court and keen to prosecute his suit.
 - iii. For ignoring salient issues that had been raised in the affidavit dated 21.7.2021.
 - iv. For relying on clan minutes and failing to accord him an audience.
 - v. For entertaining the respondent suit yet her father did not sue him or consent her to sue on his behalf.
 - vi. For relying on contradictory pleadings regarding how the suit property changed ownership from the grandfather, mother, and appellant.
 - vii. For admitting the statement by the respondent over the subdivisions made to the land.



- viii. For failing to find that he had his land LR No Ithima/Antuambui/2006 separate and distinct to the respondent's father LR No Ithima/Antuambui/21527, later subdivided as LR. No's. Athimba/Antuambui/6226, 6227 & 6228 where the respondent resides.
2. As an appellate court of the first instance, the court is mandated to rehear or re-appraise the lower court record and come up with independent findings as to fact and the law while giving due allowance to the trial court since it had the opportunity to hear and see the witness testify. See [*Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*](#) (2013) eKLR.
 3. Before the trial court, the respondent, by a plaint dated 24.8.2018, had sued the appellant claiming that he had been registered as a trustee as the eldest brother over LR. No Ithima/Antuambui/2006, as ancestral land to hold it for her and her siblings. The respondent averred that the appellant had breached the customary trust by refusing to transfer the land to them despite several reminders. She sought a declaration that the appellant held the land in trust, rectifying the register to include her as a proprietor and the Executive Officer of the court to execute the transfer in her favor. The plaint was accompanied by her witness statements copy of documents, search, chief's letter dated 8.7.2019 and an application dated 27.8.2018, for inhibition and temporary orders of an injunction pending hearing of the suit, case summary, and issues for determination dated 26.11.2019.
 4. The appellant entered appearance through Igweta Murithi & Co. Advocates by a notice of appointment dated 20.11.2018. They did not file any statement of defense with mention notices dated 5.9.2019, 4.9.2020 & 20.5.2021 and acknowledged receipt thereof through their agents.
 5. Regarding the application dated 27.8.2018, the same was compromised on 9.5.2019 in terms of the parties agreeing to maintain the status quo obtaining till the hearing and determination of the suit. Parties also agreed to comply with Order 11 of the [*Civil Procedure Rules*](#). The matter was listed for hearing on 14.1.2021 when Miss Masamba holding a brief for Mr. Igweta for the appellant, sought to cease acting. The trial court adjourned the matter and ordered that the application to cease from acting be filed within 14 days. This case came for mention on 20.5.2021, and a hearing date was set for 10.6.2021 when the respondent testified and closed her case. The court also ordered the defense case closed and eventually rendered its judgment on 1.7.2020 in favor of the respondent.
 6. By an application dated 21.7.2021, the appellant sought to set aside the exparte judgment to be allowed to file a defense and for a stay of execution of the decree. The application was supported by an affidavit sworn by Moses Muroki Mukira on 21.7.2021 because he was not aware of the hearing date, his former advocate had failed to file a defense, he risked suffering irreparable damage and loss, and the plaint dated 27.8.2018 had no merits. Further, the appellant averred that it was not true that he was holding the land as a trustee for the respondent, for he had his land LR No Ithima/Antuambui/1527; he was still alive and had not sued him. He attached a copy of the green card for LR No's Ithima/Antuambui/2006, 1527, eulogy for the late Johana M'Thiringi M'Mukira and a bundle of payment receipts to his advocates.
 7. The application was opposed through a replying affidavit sworn by Jesca Mukoruru Miaka on 25.8.2021 for being full of falsehood for intending to dispose of the land to third parties, that by the time she filed the suit, her father was sickly, aged, and vulnerable, that she was a beneficiary of the suit land and that the appellant had his own land LR No 1338 Igembe Central/Athiru/Ruujine, away from the disputed land and that the transfer had occurred in trust since his father's health had deteriorated and that there were then minors.
 8. Additionally, the respondent averred that the appellant's land measured 2 acres which he had sold to four persons remaining with 0.60 acres under his occupation and, therefore, should not be allowed to



acquire the land. The respondent urged that the court orders issued on 1.7.2021 be enforced, and an eviction order be issued.

9. By a notice of appointment dated 15.9.2021, the appellant appointed the firm of Elijah K. Ogoti Advocates to act for him, yet there was no leave sought under Order 9 Rule 9 of the [Civil Procedure Rules](#) to come on record since the appellant was still represented by the firm of Igweta Murithi & Co. Advocate despite filing the application dated 21.7.2021 in person. The trial court dismissed the application with costs on 7.10.2021, leading to this appeal.
10. With leave of court, parties were directed to dispose of the appeal through written submissions dated 3.4.2023 and 17.4.2023, respectively.
11. The appellant submitted that he was unaware of the hearing date of 10.6.2021 and that the matter proceeded in both his absence and that of his advocates, who had indicated that they were ceasing from acting for him. Therefore, the appellant faults the trial court, which should have ascertained whether the hearing notice was properly served before the hearing commenced. Reliance was placed on [Apollo Muinde & 2 others v Ernest Oyaya Okemba](#) (2019) eKLR.
12. The appellant submitted that his advocates on record contributed failure to file a defence and attend the hearing, and since he is an illiterate old man, requiring an advocate to guide him on court procedures and that such mistakes should not be visited upon him as held in [Winnie Wambui Kibiage & others v Match Electricals Ltd](#) (2012) eKLR.
13. As to whether the appellant has an arguable case due to his illiteracy, he submitted that Articles 50 & 159 (2) of the [Constitution](#) look at substantive justice rather than procedural technicalities. He urged the court to look at the draft defense attached to the written submissions and, in the case of [Martha Wangari Karua v IEBC](#) (2018) eKLR.
14. On the other hand, the respondent submitted that though the appellant and his advocates on record used to attend the trial court, they kept asking for more time to file the defense, which they never did despite numerous opportunities. They also eventually stopped attending court on 25.4.2019. Further, the respondent submitted that a hearing date for 13.5.2021 was taken when the appellant's advocates on record knew very well that they had not filed a defense.
15. Further, the respondent submitted that the appellant's advocate sought to adjourn the matter on 13.5.2021 to put an application to cease acting, which was never filed or attended the mention date on 20.5.2021, forcing another date and service for 10.6.2021, and both failed to participate in despite proper service of the hearing date.
16. The respondent also submitted that the appellant was an indolent litigant who chose not to follow up on his matter with counsel on record and failed to appear in person on 25.4.2019 or ensure that a defense had been filed. Since the appellant was present when such a request for time to comply was given, the respondent submitted that the appellant's indolence necessitated his counsel to seek leave to cease representing him, which the court allowed to be filed within seven days but in vain. The respondent submitted the law firm as a duly authorized agent received the hearing notice on his behalf, and an affidavit of service dated 25.5.2021 was filed.
17. Similarly, the respondent submitted that the former advocate's lack of instruction and none attendance was a clear indication of indolence and disinterest in the matter on the part of the appellant in defending the matter. Reliance was placed on [James Mbuvi Maturu v Musee Kaimbiru & other](#) (2019) eKLR that over and above appointing an advocate to represent him; the respondent submitted that the appellant being a party to the suit and assuming he had the interest to defend the suit he had the duty at the very least to follow up the matter with his former advocates, attend both the mentions and hearing



- dates. Given that no sufficient reason was afforded by the former advocates and the appellant for non-attendance on 10.6.2021, the respondent submitted that the court should not extend any discretion as requested, guided by James Mbuvi Maturu (*supra*).
18. Further, the respondent submitted that equity demands that he who comes to equity must do so with clean hands, and further equity does not aid the indolent. Therefore, the respondent submitted that guided by Sections 1A and 1B of the *Civil Procedure Act* and *Mbogo & another Shab* (1968) EA 93, the court should find that the appellant was accorded a chance to be heard. However, he willingly failed to utilize it as held in *Moses Kimaiyo Kipsang v. Geoffrey Kiprotich Kirui & others* (2022) eKLR on whether the judgment should be set aside since the appellant squandered the opportunity to be heard by failing to attend court or giving sufficient instructions to former counsel and lastly, on the ultimate unexplained failure to participate in the hearing on 10.6.2021 despite proper service of a hearing notice.
 19. The respondent submitted that it follows that the hearing and judgment delivered on 1.7.2020 was regular, which without a satisfactory explanation for non-attendance or good defense, should not be set aside; otherwise, the appellant's application before the trial court was a calculated move to derail the cause of justice. Reliance was placed on *Moses Kimaiyo Kipsang* (*supra*).
 20. Lastly, the respondent submits that an indolent litigant such as the appellant does not deserve the exercise of discretion of this court, and the trial court's ruling should be upheld.
 21. The court has meticulously reviewed the lower court record, the grounds of appeal, written submissions, and the law. The issues commending themselves for my determination are:
 - i. If the appeal before the court is competent.
 - ii. If the application before the trial court was competent.
 - iii. If the appeal has merits.
 22. Order 42 of the *Civil Procedure Rules* provides that key documents forming part of the lower court record must be included in the record of appeal unless dispensed with by the appellate court. In this appeal, the ruling appealed against was issued on 7.10.2021. The ruling and the order appealed against appear on pages 91 & 92 of the record of appeal. All the pleadings and proceedings at the lower court are included in the record of appeal.
 23. What is lacking is the draft of the intended statement of defense, which was never attached to the application dated 21.8.2018, and the appellant has now purported to introduce it to this appeal as an attachment to the written submissions dated 3.4.2023. No leave was sought under the Rules to adduce additional evidence to this appeal. If the appellant intended this court to look at the draft statement of defense, nothing stopped him from seeking leave of court under Order 42 of the *Civil Procedure Rules*.
 24. Times without number, courts have held that written submissions, however powerful or forceful, cannot amount to or replace pleadings or evidence. More or less, they have been termed as marketing tools. Therefore, I find that the record of appeal is incompetent to the extent that it omits a vital document that was never placed before the trial court or this court to determine whether the appellant had an arguable defense or one with merits.
 25. Coming to the merits of the appeal, the appellant blames his former advocates on record and the trial court for not filing the defense on time or at all and for not according him an opportunity to be heard. The history of this matter shows that the firm of Igweta Murithi & Co Advocate filed a notice of appointment on 20.11.2018 after the appellant was served with summons dated 7.11.2018 to enter appearance and an application dated 27.8.2018



26. A hearing notice for 7.11.2019 was issued to the said law firm, a mention notice for 12.11.2020 a hearing notice for 10.6.2021 was received by Dickson B Nyakwara Advocate on behalf of Igweta Murithi and Co. Advocate on 19.5.2021. Evelyn Mbungi, the process server, filed an affidavit of service. The appellant subsequently filed an application dated 21.7.2021 in person without filing a notice to act in person; in the said application, he did not state how he came to know about the judgment and when he last got in touch with his erstwhile advocates on record before and after the hearing exparte.
27. From the receipts of payments attached, the last receipt of legal fees was on 7.11.2019. Between November 2019 and July 2021, the appellant did not account for it when a lot happened in his suit with his participation. The receipts bear a telephone number for his advocates then on record. There was no explanation if he had tried to enquire from the said lawyers about the status of his file between 2019 and 2021. The appellant says he was a diligent litigant willing to prosecute his defense between 2018 and 2021. The appellant does not say if he signed any witness's statements or supplied to the erstwhile advocate documents to be included in his list of witnesses and statements in compliance with Order 11 [Civil Procedure Rules](#).
28. It is no longer fashionable because of Article 159 [Civil Procedure Act](#) and Sections 1A, 1B & 3A [Civil Procedure Act](#) for the parties to heap blame on lawyers when mistakes or legal blunders arise. A suit belongs to a litigant and not a lawyer representing him. It is the litigant who instructs and facilitates the lawyer to effectively represent him by giving appropriate documents and witnesses' statements so that other than a plaint or defense, Order 11 of the [Civil Procedure Rules](#) is complied with.
29. In [Sokoro Savings and Credit Cooperative Society v Mwamburi](#), (Civil Application) E022 of (2022) (2023) KECA 381 (KLR) 31st March 2023) Ruling, the court cited with approval [Rajesh Rughami v Fifty Investments Ltd and another](#) (2016) eKLR on the mistakes arising out of inaction by a party's advocate as dismissed in [Habo Agencies Ltd v Wilfred Odhiambo Musingo](#) (2015) eKLR, that parties have a responsibility to show interest in and to follow up their cases even if represented by a counsel. The court also cited [Mwangi v Kariuki](#) KLR 2632, that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude.
30. The respondents guided by [James Mbuvi Muturu](#) (supra) and Mbogo v. Shah (supra), [Moses Kipsang](#) (supra) submitted that the case belongs to the client and not the advocate and the circumstances of each case must be looked at, especially on past behavior of the applicant. On the other hand, the appellant, guided by [Martha Karua v IEBC](#) (supra), urged the court to look at substantive justice as per Article 159 of the [Constitution](#), which leans towards substantive determination of dispute upon hearing both sides on evidence. The appellant urges the court to cure his mistakes under the dose provided in Article 159 of the [Constitution](#).
31. Courts have held that Article 159 of the [Constitution](#) is not intended to be a one-stop shop for all procedural transgressions. Whereas the procedure is the handmaiden of substantive justice, parties are expected to play by the rules of procedure. Order 7, Rule 1 of the [Civil Procedure Rules](#) provides that a defendant must file a memorandum of appearance within 14 days and, after that, file a statement of defense accompanied by witnesses' statements and a list of documents. Whereas doors of justice should not be closed without a hearing, this can only be so when a party's case is demonstrated.
32. In this appeal, the appellant appointed the firm of Elijah K. Ogoti & Co. Advocates to act for him on 15.5.2021. This was after the respondent had filed a replying affidavit dated 20.8.2021 raising pertinent issues, especially that there was no draft defense attached for that matter with any merits. The appellant was represented by counsel on 16.9.2021 when the trial court was urged to determine the application based on the affidavits filed.



33. The notice of appointment was also irregularly filed without compliance with Order 9 Rule 9 of the Civil Procedure Rules. In its ruling, the trial court made it clear that there was no draft defense annexed for it to establish if there was a triable issue. So, the appellant cannot blame his previous lawyers if he had not drafted one. Further, the appellant wants the court to find he is elderly, illiterate, and legally unable to follow up on legal procedures. This cannot be true. The application dated 21.7.2021 was filed in person. It was not filed through an agent or an interpleader. His next set of lawyers on record and about two law firms before this court never took the legal steps of seeking to include a draft statement of defense, yet without it. The trial court could not pluck out triable issues, if any, from the air in favor of the appellant.
34. Counsels on record are agents, while a party is a principal who must take the driving seat and furnish the agent with facts and evidence. In Geoffrey Mworira v Julia Kanana M'Mbogori (2021) eKLR, the court observed that a party has to give his lawyers sufficient instructions to prosecute the matter. The court cited with approval Jomo Kenyatta University of Agriculture & Technology v Joseph Mutuura Mberia and others (2015) KLR that a counsel cannot plead ignorance and consequential inaction, and if guilty of inactivity, such a mistake could not be excusable. The court further cited with approval Bains Construction Co. Ltd v John Mizare Ogowe (2011) eKLR that counsel was an agent of the principal who was the client, and if the principal did not vest the agent with authority and who fails to perform the principal must bear the consequences.
35. In this appeal, the footprint of inaction from 2018 to the present indicates a litigant and his counsels on record who have been casually ignorant of the facts and the law and are unwilling to play by the litigation rules.
36. The appellant failed to file a defense between 2018-2021. In my view, the failure to do so was a shared responsibility for which the appellant carries the greater burden. Besides the draft defense, the appellant had not filed any witness statements and explained why the property in issue could not have been under his name subject to customary trust.
37. Therefore, I find the appeal both incompetent and lacking merits. I proceed to dismiss it with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 12TH DAY OF JULY 2023

In presence of

C.A John Paul

Parties

Maore for appellant

Masamba for respondent

HON. CK NZILI

ELC JUDGE

