



REPUBLIC OF KENYA



KENYA LAW
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**Choge v Chebet & another (Environment and Land Appeal 27 of 2022)
[2023] KEELC 20052 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20052 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 27 OF 2022
L WAITHAKA, J
SEPTEMBER 19, 2023
FORMERLY ELDORET ELC APPEAL NO.22 OF 2022**

BETWEEN

COLLINS KIMUTAI CHOGE APPELLANT

AND

MARTHA TERIKI CHEBET 1ST RESPONDENT

THOMAS KIPKEMOI KIPTOO 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon. C. Kutwa – Principal Magistrate
Iten delivered on 22nd September 2021, in Iten ELC No.E009 of 2020)*

JUDGMENT

Introduction:

1. By Notice of Motion dated 15th April 2021, the appellant herein inter alia sought to set aside the ex parte judgment and all consequential orders arising from the judgment delivered on 17th March 2021 in Iten SPMC ELC Case No.E009 of 2020 pending the hearing of the application and the suit. The appellant also sought leave to file his statement of defence out of time.
2. As can be discerned from the grounds on the face of the application and the affidavit sworn in support thereof, the application was premised on the ground that due to inadvertence on the part of counsel for the appellant, the appellant did not file a statement of defence to the suit leading to issuance of ex parte judgment against him.
3. The application was opposed on the ground that granting the orders sought would greatly prejudice the plaintiff/respondent who was in possession of the suit land.



4. Upon consideration of the application the Learned Trial Magistrate stated/held:-

“...A careful consideration of the grounds set out in the Notice of Motion and its Supporting Affidavit does show that quite apart from the fact that no explanation has been given for failure by the 1st defendant to enter appearance and respond to the suit, the draft defence exhibited is a mere denial. Further, the 1st applicant’s affidavit clearly show that he was aware of the dispute in court....The 1st defendant’s defence, in my humble view, raises no triable issue. Accordingly, although Article 159(2) (d) of *the Constitution* and Section 1A of the *Civil Procedure Act* was waived in the face of the court as an excuse for the omission, it is trite law that the court’s discretion under order 10 Rule 11 of the Civil Procedure Rules is not meant to assist those who by deliberate omission or otherwise have sought to obstruct the course of justice (See Mbogo vs. Shah (1968) EA 93. Hence I would endorse the words of Kiage, JA in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR that:

‘I am not in the least persuaded that Article 159 of *the Constitution* and the Oxygen Principle which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and create an anarchical free-for-all in the administration of justice. It is in the even handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.’

The foregoing being my view of the matter, I would dismiss the 1st defendant’s notice of motion dated 15th April, 2021 with costs. The Application by the 2nd Defendant is allowed on condition that he pays the plaintiff costs of Kshs.10, 000/- with seven (7) days”

5. The application by the 2nd Defendant which the Learned Trial Magistrate allowed sought the following reliefs:-

1. Certification of the application as urgent and deserving to be heard ex parte within the first instance;
 2. Stay of execution of the ex parte judgment entered on 17th March 2021 pending hearing and determination of the application and the suit;
 3. an order setting aside the ex parte judgment, decree and all consequential orders;
 4. The 2nd defendant/applicant be granted leave to enter appearance and file appropriate defence.
6. Clearly, the orders sought in the 2nd defendant/respondent’s application which the Learned Trial Magistrate allowed were similar to those sought by the 1st defendant/appellant.
7. Dissatisfied with the decision of the Learned Trial Magistrate, the 1st defendant/appellant appealed to this court on the grounds that the Learned Trial Magistrate erred by:-
1. Failing to consider the issues raised in his submissions;
 2. Failing to find that his draft defence raises triable issues namely-1st respondent claims 5 acres while there are only 2½ acres on the ground; that at the time of filing the suit the 2nd respondent was and is still the lawful owner of 2 acres while he is the owner of ½ of the suit land;



3. Failing to appreciate the import of his decision dismissing his application given that he has an interest in the suit property comprising ½ an acre thereof;
 4. Failing to appreciate that the 1st respondent's claim against him and the 2nd respondent is joint and inseparable;
 5. Failing to find that no useful purpose would be served by setting aside judgment against one party and declining to do so against another party yet the cause of action and subject matter of the suit is the same; and
 6. Failing to find that justice would be better served by granting the Appellant a chance to be heard.
8. The appellant urges the court to allow the appeal, allow his application dated 15th April 2021, set aside the orders of the Trial Magistrate issued on 2nd June 2021 and to provide costs for the application dated 15th April 2021 and the Appeal.
9. Pursuant to directions issued on 7th December 2023, the Appeal was disposed off by way of written submissions.

Submissions

The Appellant's Submissions

10. In his submission's filed on 8th March 2023 the following are found to be the issues for the court's determination:-
- i) Whether the draft defence by the appellant raises triable issues.

Concerning this issue, it is submitted that the appellant's draft statement of defence raises triable issues which the Learned Trial Magistrate ought to have considered. It is the appellant's case that if the Learned Magistrate considered the issues raised in the appellant's draft defence, he would have given the appellant a chance to be heard in defence. Reliance is placed in the cases of Job Kilach vs Nation Media Group Limited 2015 eKLR; Mercy Karimi Njeri & Another vs. Kisima Real Estate Limited 2015 eKLR; Olympic Escort International Co. Ltd & 2 Others vs. Parminder Sing Sandhu & Another 2009 eKLR and Kenya Trade Combine Trade Ltd vs. M. Shah C.A No.193 of 1999 (unreported). The common grain in the cases is that a trial issue need not be an issue that would succeed but one warranting further interrogation by the court.
 - ii) Whether the 1st respondent's claim against the 1st and the 2nd respondent is joint or severable?

With regard to this issue, it is submitted that the 1st respondent's claim is jointly against the appellant and the 2nd respondent hence necessary to afford both of them an opportunity to be heard in defence of the case.
 - iii) Whether issues raised in the appellant's submissions were considered.

Concerning this issue, it is submitted that the Learned Trial Magistrate gave issues raised in the appellant's submission like the issue of indulgence of the respondent's counsel a wide berth. He is also said to have failed to address the issue as to whether the appellant had a good defence or to give reasons as to why he felt the draft defence did not raise triable issues. It is submitted that failure to consider issues raised in the submissions occasioned grave injustice to the appellant.



- iv. Whether setting aside the ex parte judgment against one party when the subject matter and the cause of action was the same amounted to a miscarriage of justice.

Maintaining that the cause of action is against both the appellant and the 2nd respondent and that the subject matter of the suit is the same, the appellant submits that justice would be better served by setting aside the ex parte judgment against the appellant and the 2nd respondent. The decision of the court is said to deprive the court the opportunity to gather evidence from all parties in order to be able to make a reasoned and justified finding. Based on the decisions in the cases of Stecol Corporation Ltd vs. Susan Awour Mudemba 2021 eKLR and Agip Kenya Ltd vs. Highlands Tyres Ltd 2001 KLR 630, it is submitted that the Learned Trial Magistrate ought to have been hesitant at closing the door to the corridors of justice to the appellant without hearing.

11. It is reiterated that the Learned Trial Magistrate erred by dismissing the appellant's application hereto and the court is urged to allow the Appeal as prayed.

The 1st Respondent's Submissions

12. In the 1st respondent's submissions filed on 3rd May 2023, it is pointed out that the appellant and his advocate were aware of the case and submitted that the appellant and his advocate were slothful and lacking interest in defending the case hence not deserving any equitable remedy from the court; that the appellant did not demonstrate that the ex parte judgment was irregular to warrant its being set aside and that it was not demonstrated that the failure by the appellant to enter appearance on time and file defence was due to an excusable mistake, accident or error to warrant setting aside of the ex parte judgment. It is further submitted that the draft defence does not raise any triable issue.
13. Reliance is placed on the following cases:-Haile Selassie Avenue Development Co. Limited v. Josephat Muriithi & 10 Others (2004) eKLR; Mureithi Charles & Another vs. Jacob Atina Nyagesuka (2022) eKLR; Pindoria Construction Ltd vs. Ironmongers Sanytaryware C.A No.16 of 1996 (Unreported) and Savings and Loans Ltd vs. Susan Wanjiru Muritu (Nairobi) (Milimani) HCCC No.397 of 2002 (unreported).

Analysis and determination

14. In exercise of the duty vested in me as the first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see *Selle & Another vs. Associated Motor Boat Co. Ltd* (1968) E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
15. I have also reminded myself that an appellant court would not readily interfere with exercise of discretionary power of the trial court unless the power was not exercised judiciously. In that regard see the case of *Apungu Arthur Kibira v. Independent Electoral & Boundary Commission & 3 Others* (2019)e KLR where the Supreme Court of Kenya held:-

“We reiterate that in an appeal from decision on an exercise of discretionary powers, an appellant has to show that the decision was based on whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court Case *Kacem vs. Bashir* (2010) NCSC 112 (2011) 2 NZLR 1 where it was held (paragraph 32):-



“In this context a general appeal is to be distinguished from an appeal against a decision made in exercise of a discretion. In that kind of case, the criteria for successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take into account of relevant considerations or (4) the decision is plainly wrong.

Further, in *Deynes Muriithi & 4 others vs. Law Society of Kenya*; SC Application No.12 of 2015; (2016) eKLR this court stated inter alia that the court may only interfere with the exercise of discretion by another court where there is plain and clear misapplication of the law. It stated thus (paragraph 51):-

“It forms an integral element in the concept of jurisdiction, that whenever it becomes plain that the orders made by other courts are destined to occasion grave injustice, and this is apparent on the facts of the decision in question, this court, as the ultimate custodian of constitutional integrity, may not turn a blind eye to such a decision, where it stands in conflict with express provisions of *the constitution*.”

16. As the Appeal hereto arises from exercise of the discretionary power of the trial court in deciding whether or not to set aside the ex parte judgement sought to be set aside and whether or not to allow the appellant to file a statement of defence out of time; it is in the light of the foregoing principles that I will evaluate the decision of the Learned Trial Magistrate in determining whether or not the appellant has made up a case for interference with the decision of the Learned Trial Magistrate.
17. In evaluating the circumstances leading to the making of the impugned decision, I note that it was not in dispute that the 1st defendant had been served with the summons to enter appearance. The affidavit sworn in support of the application for setting aside the ex parte judgment shows that the failure to enter appearance and file a statement of defence was blamable on the counsel for the appellant, who despite having been instructed by the appellant to represent him, failed to enter appearance and file defence within the time stipulated in law. Concerning the failure to file a defence within the time provided by law, Counsel for the appellant has explained that he had gotten in touch with counsel for the 1st respondent who agreed to indulge him by not requesting for interlocutory judgment and not to proceed with the hearing without notifying him. However, counsel for the 1st respondent failed to honour his promise and instead requested for interlocutory judgment against the appellant, which judgment was entered and the matter fixed for formal proof. Those averments by the appellant’s counsel were neither denied nor controverted by the 1st respondent. Instead the appellant contended no good reason was offered for failure to file defence within the time provided in law.
18. Terming the appellant and his counsel indolent, the 1st respondent contended that the appellant did not deserve equitable remedy from the court.
19. The court agreed and inter alia held that no reason had been given for failure to file defence within the time provided by law for doing so.
20. Upon consideration of the circumstances surrounding the filing of the application for setting aside the ex parte judgment, unlike the Learned Trial Magistrate I do find as a fact that there was an explanation given for failure to file a statement of defence within the time provided for by law. That explanation was that the appellant’s counsel had gotten in touch with the respondent’s counsel who had promised to indulge him and not to proceed with hearing of the suit without notifying him. Whilst the explanation offered by the appellant’s counsel for failure to file defence within the time given by law may not be a good explanation, it is nevertheless an explanation.



21. I note that the 1st respondent had requested for interlocutory judgment which judgment was entered on 19th January 2021 and the matter fixed for formal proof in the absence of the defendants. The court record indicates that a hearing notice was to issue on the defendants. The proceedings of 3rd February, 2021, when the suit came up for hearing, do not indicate whether the defendants had been served with a hearing notice. It appears that because of the interlocutory judgment which had been entered against the defendants, the Learned Trial Magistrate proceeded with the suit without confirming whether the defendants had been served with a hearing notice.
22. In the peculiar circumstances of this case, where the subject matter of the suit is land, the law does not provide for request and entry of interlocutory judgment. Instead it provides for fixing of the suit for hearing. In that regard the case of Ibrahim Gatobu v. Mwichwiri Farmers Co. Ltd (2020)e KLR where it was observed:-

“The question to determine is what the place of interlocutory judgment in land matters is. This issue was aptly captured by judge Munyao in Beatrice Wanjiru Kimani vs. John Kibira Muiruri (2016) eKLR where he stated as follows:-

“I have considered the matter. The claim herein is not liquidated claim or a claim for general damages. If it were a liquidated claim, and no defence filed, order 10 rule 4 would apply.it would be seen from the above that the claim in our case, being a claim for land, does not qualify for entry of interlocutory judgment.”

Also see the case of Solomon Mwobobia Nkuraaru vs. Jacob Mwiti (2015) eKLR the court stated:-

“The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of liquidated claim only.”

23. On whether the draft statement of defence filed by the appellant raises any triable issue, having carefully reviewed the draft statement of defence, I do not agree with the Learned Trial Magistrate that it comprises of mere denials and that it does not raise any trial issue. In the draft defence, the appellant raises a claim of right to 2½ acres out of the land claimed by the 1st respondent. He also denies having fraudulently sold a portion of the suit land to the 2nd respondent and instead claims that he did that as of right.
24. Cognizance of the fact that the suit property constitutes unsurveyed land claimed to have been sold to the plaintiff/respondent by a deceased person, I find the issues raised in the appellant's draft statement of defence as issues worth consideration by the court in determining the alleged claim of entitlement to the suit property by the appellant, hence triable issues. In the circumstances, I agree with the appellant that the Learned Trial Magistrate erred by holding that his defence raises no triable issue(s) and that it comprises of mere denials yet it raises serious issues requiring the consideration of the court on their merits.
25. It is also the considered view of this court that the appellant is a necessary party to the suit for the court to fairly and effectually adjudicate on the issues raised in the suit. Moreover, in the circumstances of this case, where the Learned Trial Magistrate had acceded to the 2nd respondent plea for setting aside of the ex parte judgment, no useful purpose would be served by allowing the 2nd defendant to defend himself while denying the appellant opportunity to defend himself yet the case against the appellant and the



2nd Respondent is inseparable and/or the participation of the appellant is crucial for fair, complete and effectual adjudication of the issues arising out of the suit.

26. I think I have said enough to demonstrate that the discretionary power of the trial court was not judiciously exercised. I therefore, find and hold that the appellant has made up a case for interference with the decision of the Learned Trial Magistrate. Consequently, I set aside the order made on 2nd June 2021 dismissing the appellant's application dated 15th April 2021 and substitute it with an order allowing the application in terms of prayer (b) and (c). Because the plaintiff/respondent incurred costs defending the application, which application was occasioned by lack of diligence on the part of the appellant, I award the cost of defending the application, assessed at Kshs.15,000/- to the plaintiff/respondent.
27. The cost of the appeal shall abide the outcome of the suit.
28. The 1st defendant/appellant to file his statement of defence with seven (7) days from the date of delivery of this judgment.
29. The suit shall be heard by a court presided by a Magistrate other than the Magistrate who presided over it.
30. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 19TH DAY OF SEPTEMBER, 2023

L. N. WAITHAKA

JUDGE

Delivered virtually in the presence of:

N/A for the appellant.

MS. Cherop holding brief for Mr. Kiplangat for the respondent.

