Atandi & another v Sayo & another (Environment and Land Appeal E008 of 2022) [2023] KEELC 20654 (KLR) (11 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20654 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E008 OF 2022

M SILA, J

OCTOBER 11, 2023

BETWEEN

ALICE NYAMOITA ATANDI .... 1ST APPELLANT

FRED MAGUTU ATANDI .... 2ND APPELLANT

AND

MERCY MALOMBA SAYO .... 1ST RESPONDENT

JOHN MAKORA KENANDA .... 2ND RESPONDENT

((Being an appeal against the ruling of Hon. S.K Onjoro (Senior Resident Magistrate) delivered on 7 April 2022 in the suit Kisii CMCC (ELC) No. 15 of 2020)

JUDGMENT

(Appellants having been sued before the Magistrates' Court for trespass; no appearance entered and matter proceeding ex parte with judgment entered for the plaintiff; appellants subsequently filing an application to set aside the judgment and for leave to file defence out of time; application dismissed with court holding that the appellants were properly served with summons; appellants now preferring an appeal; Court holding that the court was correct in arriving at the conclusion that the appellants were properly served; court however erred in not making a determination whether the appellants have presented to court a compelling defence which they ought to be heard on; judgment set aside and appellants allowed to file defence out of time but condemned to pay thrown away costs)

1. The appellant, vide a Memorandum of Appeal dated 8 April, 2022 has lodged an appeal against the ruling of Hon. S.K Onjoro, dated 7 April, 2022 in Kisii CMCC ELC No. 15 of 2020. Various grounds of appeal have been raised, but before I address them, I think it is necessary that I give the background leading to this appeal.

2. The suit itself was commenced by way of a plaint dated 19 February, 2020, with the 1st respondent as the plaintiff. She pleaded that she is the sole registered proprietor of the land parcel LR No. West Kitutu/ Bomatara/2178 measuring approximately 0.08 Ha (hereinafter referred to as "the suit property"). She further averred that on 4 January, 2020, the defendants (being the two appellants and 2nd respondent in this appeal) trespassed into the suit property, and while thereon, cultivated, destroyed the fence, window panes, blocked access to the washrooms, harassed students and teachers of E-Smart College, and constructed structures thereon. The 1st respondent contended that the actions of the defendants have deprived her of her right to use, possess and benefit from the suit property. In the suit, she sought a declaration that she is the registered owner of the suit property, an order of eviction as well as order permanent injunction against the defendants, and general damages for trespass.

3. Together with the plaint, the 1st respondent filed a notice of motion application seeking orders of injunction to restrain the defendants from the suit property pending the hearing and determination of her suit. She obtained interim orders on 19 February 2020 and the application was listed for inter partes hearing on 5 March 2020. On that day, counsel for the 1st respondent pronounced that the defendants had been served but had not filed any document and asked that the application be allowed. The court obliged and the application was allowed. The court then listed the matter for mention for directions and eventually the case proceeded for hearing ex parte on 4 March 2021 when the 1st respondent testified and closed her case. Judgment was delivered on 4 June 2021 with the court finding that the 1st respondent had proved her case to the required standard and judgment was entered in her favour. The court issued a declaration that she is the lawful owner of the suit property; issued an order of eviction; a permanent injunction against the defendants; and she was also awarded costs of the suit.

4. On 27 September, 2021 the defendants filed a motion of even date seeking orders to set aside the ex parte judgment and enlargement of time to allow them file defence. They annexed a draft statement of defence and counterclaim for consideration. In the supporting affidavit, sworn by the 1st appellant on behalf of the rest of the defendants, the defendants contended that they were never served with summons. The 1st appellant deposed that she came to know of the matter after one of her friends who had a criminal case and was in court, heard her name and that of her co-defendants being called out. She went to the registry and was advised that the matter was slated for delivery of judgment on 3 August 2021. She instructed counsel who followed up on the matter and discovered that judgment had been delivered on 4 June 2021. It is then that the application was filed. She deposed that the suit land was registered in the name of one Pacifica Motugutwa Atandi (deceased), her mother-in-law, who died on 28 December 2013 and that the land is subject to succession case No. 402 of 2021. She annexed a copy of the Green Card to show that the land is still registered in the name of the deceased. She added that there are triable issues in the suit. In the draft defence, it was inter alia pleaded that the defendants were the rightful owners of the suit land as beneficiaries of the estate of Pacifica Motuguta Atandi (deceased) whose administrators are the appellants. They contended that they thus had a right to access the suit property at any time. They added that the plaintiff was intermeddling with the estate of a deceased person. In the counterclaim, it was pleaded that the 1st and 3rd defendants in the suit (being respectively the 1st and 2nd appellants) entered into a sale agreement with the plaintiff on 16 December 2015 and sold the suit land for Kshs. 6,500,000/=. It was contended that the plaintiff had only paid Kshs. 3,191,000/ = leaving an unpaid balance of Kshs. 3,319,000/=. They blamed counsel who drew the sale agreement for having a clause that allowed the purchaser to take immediate possession whilst paying as she wishes. They claimed a breach of the sale agreement. It was also averred that the 2nd defendant in the suit (2nd respondent in this appeal) was merely a broker and was not a necessary party to the suit. In the draft counterclaim, they asked for an order to compel payment of the balance of Kshs. 3,319,000/= together with interest.

5. The 1st respondent filed a replying affidavit to oppose the motion. She asserted that the defendants were lying on oath by alleging that they were not served yet they were duly served on 21 February 2021 and the affidavit of service was annexed. They pointed out that the applicants had not disclosed the name of the friend who heard the case being called out and added that the said friend had not sworn any affidavit. On the defence, it was deposed that the 1st appellant sold the suit property and the plaintiff obtained title on 30 December 2015, after which the plaintiff constructed a college known as E-Smart College. She contended that the defendants thus had no right to the suit property.

6. The application was duly heard and ruling delivered on 7th April, 2022. In his ruling, the trial magistrate agreed with the plaintiff that the defendants had not filed an affidavit sworn by the friend who allegedly informed them of the matter. He also noted that the defendants did not ask for the process server to be called for cross-examination to verify the contents of the affidavit of service. He found that the affidavit of service was clear that the defendants had been served and that the contents therein were not challenged. He thus held that the judgment was regular and did not find any reason to set aside the decree. He dismissed the application with costs.

7. It is this ruling which is the subject of this appeal. The memorandum of appeal has raised 8 grounds as follows:-

    1. That the learned magistrate erred in law and in fact by dismissing the appellants' application dated 27th September, 2021 despite compelling evidence on record that the appellants herein were never served with summons to enter appearance thus occasioning miscarriage of justice to the appellants.

    2. That the learned magistrate erred in law and in fact by failing to consider the appellants' draft statement of defense and counterclaim, which defence raises triable issues that warranted the setting aside the ex parte judgment that was obtained against the appellants

    3. That the learned magistrate erred in law and in fact by failing to consider the Appellants' written submissions and authorities in arriving at its decision.

    4. That the learned magistrate erred in law and in fact by failing to evaluate and/ or interrogate the annextures that were annexed to the appellants' supporting affidavit to the application thus arriving at an unjust decision.

    5. That the learned magistrate erred in law and in fact by disregarding all the evidence placed before him by the Appellants herein thus arriving at an unjust decision

    6. That the learned magistrate erred in law and in fact in disregarding the provisions of articles 48, 50 and 159(2) (d) of *the constitution* of Kenya, 2010.

    7. That the learned magistrate erred in law in by failing to find that no prejudice will be suffered by Respondents herein should the matter begin de novo the same being a land dispute.

    8. That the learned magistrate's decision to dismiss the appellants' application dated 27th September, 2021 albeit a discretionary one was plainly wrong.

8. In their prayers, the appellants pray that Appeal be allowed and the ruling of 7 April 2022 be set aside, and/ reviewed and the suit be reinstated for hearing and determination.

9. The appeal came up directions on 24 May, 2023, whereby the same was admitted and the court directed the same to be heard by way of written submissions. Both parties have filed their submissions for my consideration and I have taken note of the same.

10. In his submissions, counsel for appellant submitted that the trial Magistrate erred in dismissing the appellants' application despite the appellants providing sufficient reason that they were never served with the summons to enter appearance. Counsel added that the trial magistrate erred when he failed to consider the appellant's draft statement of defence and counterclaim attached to the application. Counsel relied on the decision of R. E. Aburili J in the case of *Pravinchandra Jamnadas Kakad v Lucas Oluoch Mumia* [2015] eKLR wherein the learned Judge cited with approval the decision in *Thavu Kamau Mukigi v Francis Kibaru Karanja* [2013] eKLR where it was stated :

> "on the second prayer of the defendant that he be granted leave to file his defense and counterclaim, I will be guided by the principles elucidated in the case of Tree Shade Motor Limited v DT Dobie Co Ltd CA 38/98 where the court held that even when exparte judgement was lawfully entered, the court should look at the draft defense to see if it contained a valid reasonable defense."

11. Counsel argued that the learned trial magistrate deprived the appellants of their rights under article 48, 50 and 159 of *the Constitution* by not allowing them an opportunity to be heard. He further submitted that the trial court did not take into consideration all the relevant factors that need to be considered when a court is exercising its discretion on whether or not to set aside a default judgement as set out in the case of S*hah v Mbogo and another* [1967] E.A 470.

12. For the 1st respondent, counsel while defending the decision of the trial court, urged that the appellants did not challenge the affidavit of service that had been filed on March 3, 2020, showing that they had been served. He submitted that the appellants, as was observed by the learned trial magistrate, did not request to cross examine the process server, so as to test the credibility of his averments in his affidavit of service and thus the same remained unchallenged.

13. I have considered all the above. What was before court was an application to set aside an ex parte judgment. In such instance, a court needs to first determine whether the judgment is one that has been regularly entered or whether it has been irregularly entered. It is a judgment which is irregularly entered where the defendant was not properly served with summons in which instance the judgment needs to be set aside ex debito justitiae (as of right). Where the defendant was duly served, the judgment is a regular judgment, and setting it aside is not as of right, but falls within the discretion of the court. The distinction between a regular and an irregular judgment and the principles applicable to setting aside an ex parte judgment were well laid out by the Court of Appeal in the case of *James Kanyiita Nderitu & Another v Marios Philota Ghikas & Another* [2016], Court of Appeal at Mombasa, Civil Appeal No. 6 of 2015 [2016] eKLR. The Court elaborated as follows :

> "We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or

not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see Mbogo & Another v Shah (supra); Patel v EA Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioki [2004]1 KLR 173).

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiciae, 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. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

14. In our case, the trial Magistrate was not persuaded to set aside the judgment ex debito justitiae. In the opinion of the court, it had been ably demonstrated that the appellants were properly served with summons, but they failed to enter appearance nor file defence. He found the affidavit of service unchallenged as the appellants did not call the process server to be cross-examined on his affidavit.

15. I am unable to fault the trial Magistrate in his finding that this was a regular judgment. Indeed, there was on record an affidavit of service sworn on 3 March 2020 by one Isaac Nyangena Kemari, deposing that he did serve the defendants with summons to enter appearance on 21 February 2020 at 9.30am in their residence in Nyamataro behind Kisii Universal College. He stated, in that affidavit, that he found the three defendants seated in the 1st defendant's house and he personally served all of them. He deposed that they accepted service by retaining their copies but declined to sign on the original.

16. The appellants never availed themselves the opportunity to cross-examine the process server as outlined in order 5 rule 16 which provides as follows :-

    Examination of serving officer [Order 5, rule 16.]

    On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

17. The court appears not to have seen any reason to call the process server, and the appellants did not ask for the process server to be called to be examined on his affidavit of service. I do find that the court properly held that the evidence demonstrated that the defendants had been duly served and this was not an application that he could allow ex debito justitiae.

18. However, the court never examined whether there were other factors which ought to have moved it to exercise its discretion in favour of the appellants. Upon finding that the summons were properly served, the court proceeded to find that the judgment was regular and dismissed the application. No comment

was made on the draft defence annexed and no other examination was made of any other factors that would have affected the court's discretion. I think on this point, the trial Magistrate fell into error.

19. As held in the case of James Kanyiita Nderitu (supra), while exercising its discretion, the court ought to take into account the reasons for not filing the appearance or defence, the length of time lapsed since judgment was entered, and whether the defence raises triable issues. The poverty of a good reason why the appellants had not entered appearance was not the sole issue before court as was held by Sheridan J in the case of *Sebei District Administration v Gasyali & others* [1968] EA 300 where the judge stated as follows :

> " ...The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court"

20. I am in agreement with the above dictum. It should be a last recourse for a court to deny a party a hearing even where such party is guilty of not filing appearance and defence within time. This is especially so where the application has been brought without delay and no prejudice will be caused to the plaintiff that cannot be compensated by way of costs.

21. In our case, the trial magistrate did not go further to examine these principles and I am persuaded that he fell into error. He ought to have done an analysis of the time lapse before the application was made, whether the appellants had presented a good defence that deserved ventilation, and whether any prejudice to the plaintiff would be offset by an award of costs. He did not do all this.

22. This court, being a first appellate court, has power to review the application and come up with its own findings on the same. If persuaded, the court has power to set aside the order dismissing the application. Having that in mind, I will proceed to make an assessment of the time lapse before the application was filed, whether the appellants had a triable defence, and whether there would be any prejudice to the 1st respondent if the judgment is set aside.

23. On the first issue, I observe that judgment in this matter was delivered on 4 June 2021. The application to set aside the judgment was lodged on 17 September 2021 just over three months later. There is no evidence that the appellants were ever served with a notice of entry of judgment as required by order 22 Rule 6. I do not find the delay to be inordinate in the circumstances of this case. The second issue is whether the appellants had demonstrated that they had a good defence that raises triable issues. It will be recalled that in their draft defence, the appellants raised issue that the 1st respondent was intermeddling with the property of the estate of Pacifica Motugutwa Atandi (deceased). In the supporting affidavit, it was deposed that this property was subject to an ongoing succession matter, that is Kisii CM's Court Succession Cause No. 402 of 2021. That in my opinion was an important issue that needed to go for trial. In her suit, the 1st respondent displayed a title issued to her on 30 December 2015. There is an issue there, for how did she obtain title in 2015, if the matter was being subjected to succession in the year 2021? It cannot also be wished away that the appellants in their supporting affidavit, annexed a copy of the register of the suit land, showing that the title of the 1st respondent had been cancelled so that the property may be properly subjected to succession. These, in my opinion, are serious matters that deserve proper interrogation at a full hearing. In my view, the appellants presented a defence that raises triable issues and for which they deserve to be heard.

24. Will there be any prejudice that will be suffered by the 1st respondent that cannot be compensated by an award of costs? I do not see any. In my opinion, compensation by way of thrown away costs will be

sufficient. In my discretion, I proceed to set aside the ex parte judgment, but condemn the applicants to pay thrown away costs of Kshs. 25,000/=. These costs to be paid within the next 60 days or be subjected to execution.

25. The last issue is costs of this appeal. Despite succeeding in this appeal, I do not think that the appellants deserve costs since they failed to file appearance and defence in time despite being served. Given that position, I will make no orders as to the costs of this appeal.

26. Judgment accordingly

DATED AND DELIVERED AT KISII THIS 11 DAY OF OCTOBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII