



**Mahiva v Musine & another (Environment and Land Appeal  
E052 of 2021) [2023] KEELC 20450 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20450 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E052 OF 2021  
DO OHUNGO, J  
OCTOBER 3, 2023**

**BETWEEN**

**HUMPHREY MWANJIRWA MAHIVA ..... APPELLANT**

**AND**

**ALBERTUS MILLIMU MUSINE ..... 1<sup>ST</sup> RESPONDENT**

**VICTORIA ISIRE ASUNDA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the Chief Magistrate's  
Court at Kakamega (Hon. E. Malesi, Principal Magistrate) delivered  
on 2nd November 2021 in Kakamega MCELC No. 6 of 2017)*

**JUDGMENT**

1. In the proceedings before the Subordinate Court, the appellant herein is the plaintiff while the first and second respondents are the first and second defendants, respectively. The suit before the Subordinate Court is partly heard; the plaintiff's case was closed, and the first defence witness was heard. The first respondent was then granted an adjournment to enable him to call his next witness and the matter was a date for further defence hearing.
2. The second respondent then filed an application through Notice of Motion dated 2<sup>nd</sup> November 2020, seeking extension of time to file his list and bundle of documents. The reason given for failure to file the documents earlier was that the second respondent gave the documents to his advocate at the time of drafting defence, but the advocate inadvertently failed to file them in court. Upon considering the application, the Subordinate Court (Hon. E. Malesi, Principal Magistrate) delivered a ruling on 6<sup>th</sup> April 2021, allowing it with an order that costs be borne by the second respondent's advocate.



3. The issue did not end there. The appellant then filed Notice of Motion dated 9<sup>th</sup> September 2021 seeking the following orders:
  1. [Spent]
  2. That this Honourable Court do review the ruling delivered on 6<sup>th</sup> April 2021 which allowed the application dated 2<sup>nd</sup> November 2020 filed by the second defendant herein.
  3. That the pleadings filed by the plaintiff including the Grounds of Opposition and Replying Affidavit (both dated 26<sup>th</sup> January 2021) and the plaintiff's submissions all in response to the second defendant's application dated 2<sup>nd</sup> November 2020 be admitted as duly filed and thereafter, a ruling to the said application be delivered based on all the documents filed.
  4. That this Honourable Court be pleased to issue any other further orders as it may deem fit and just to grant in the interest of justice.
  5. That the costs of this application be provided for.
4. Once again, the application fell for determination by Hon. E. Malesi, Principal Magistrate who delivered a ruling on 2<sup>nd</sup> November 2021 and dismissed it. Dissatisfied with the outcome, the appellant filed this appeal through Memorandum of Appeal dated 30<sup>th</sup> November 2021. The following are the grounds of appeal as listed on the face of the memorandum of appeal:
  1. The learned magistrate erred in law and fact in allowing the application dated 2<sup>nd</sup> November 2020 and thereby admitting documents filed by the 2<sup>nd</sup> respondent after the plaintiff had closed his case.
  2. The learned magistrate erred in law and fact in failing to find that allowing the application by the 2<sup>nd</sup> respondent to introduce documents would be prejudicial to the plaintiff who had already prosecuted and closed his case.
  3. The learned magistrate erred in law and fact in allowing the 2<sup>nd</sup> respondent to file his list and bundle of documents after the close of the plaintiff's case.
  4. The learned magistrate erred in law and fact in allowing the application dated 20<sup>th</sup> November 2020 (sic) despite the fact that there was evidence that the 2<sup>nd</sup> Defendant (respondent herein) had never served her pleadings upon the plaintiff, occasioning the reply to defence to be filed 'Under protest.'
  5. The learned magistrate erred in law and fact in failing to take in to account and to consider the grounds of opposition and the submissions adduced on behalf of the appellant.
  6. The learned magistrate erred in fact by failing to take in to account and to consider the evidence adduced on behalf of the appellant.
  7. That the learned trial magistrate's findings were contrary to the law and procedure hence occasioning miscarriage of justice.



5. Based on those grounds, the appellant urged this court to allow this appeal with costs, to set aside the ruling delivered on 2<sup>nd</sup> November 2021 and in its place make an order dismissing the Notice of Motion dated 2<sup>nd</sup> November 2020 with costs.
6. The appeal was canvassed through written submissions. The first respondent opted not to file any submissions, instead taking the position that the appeal concerns only the appellant and the second respondent. Although given an opportunity to do so, the second respondent neither attended this court nor filed any submissions.
7. The appellant argued that no good reasons had been tendered as to why the second respondent opted to introduce the said documents after failing to do so before commencement of hearing. That the second respondent's advocates actively participated in the hearing and cross examined the plaintiff and his witness. The appellant further submitted that having closed his case, he will not be accorded an opportunity to cross examine based on the new documents thereby infringing his right to a fair hearing. He further contended that the application dated 2<sup>nd</sup> November 2020 was allowed on the erroneous ground that it was undefended, yet the learned magistrate later acknowledged that it was opposed. That the error or mistake on the face of the record went to the substratum of the suit, the Subordinate Court ought to have considered the prejudice to be suffered by allowing the documents at that late stage. Arguing that there was a miscarriage of justice, he urged this court to allow the appeal.
8. I have carefully considered the grounds of appeal and the submissions. The only issue for determination is whether Notice of Motion dated 9<sup>th</sup> September 2021 was merited.
9. The principles that guide an appellate court while considering an appeal against an order made in the exercise of discretion are settled. The Court of Appeal recently reiterated in the case of *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment) 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 due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion.
10. The principal relief that the appellant sought in Notice of Motion dated 9<sup>th</sup> September 2021 was review of the orders made on 6<sup>th</sup> April 2021 so that the grounds of opposition, replying affidavit and submissions which he had filed in response the application dated 2<sup>nd</sup> November 2020 be considered.
11. The law on review is found at Section 80 of the *Civil Procedure Act* which provides:  
Any person who considers himself aggrieved -
  - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
12. Further, Order 45 Rule 1 of the *Civil Procure Rules* provides:  
Any person considering himself aggrieved—
  - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or



(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

13. The thrust of the appellant's case both in this appeal and in Notice of Motion dated 9<sup>th</sup> September 2021 is that there was an error apparent on the face of the record in that his grounds of opposition, replying affidavit and written submissions were not placed on record despite being filed and were therefore not considered.

14. The Court of Appeal stated in *National Bank of Kenya Limited v Ndungu Njau* (1997) eKLR as follows:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.

15. The record shows that the learned magistrate stated in the ruling dated 6<sup>th</sup> April 2021 that the appellant did not file any response or written submissions in respect the application dated 2<sup>nd</sup> November 2020. In the subsequent ruling delivered on 2<sup>nd</sup> November 2021, the learned magistrate acknowledged that the appellant had filed the grounds of opposition, replying affidavit and written submissions. He faulted the registry for failing to ensure that the documents were in the file. Thus, there is no belabouring that there was a glaring mistake on the record.

16. It is also a requirement of Order 45 Rule 1 of the *Civil Procedure Rules* that an application for review be made without unreasonable delay. That said, what constitutes unreasonable delay varies from case to case as was held by Munyao J. in *Jaber Mohsen Ali & another v Priscilla Boit & another* [2014] eKLR. In the case at hand, the application for review was filed on 14<sup>th</sup> September 2021, some five months after the order sought to be reviewed was made. The appellant contended that the delay is not unreasonable since he did not get notice of delivery of the ruling owing to limited access to the court due to Covid-19 pandemic. The respondents did not controvert that position. The adverse effects of Covid-19 pandemic on access to the courts are well known and I have no reason to doubt the appellant. I am satisfied that the appellant made a case for review.

17. The gravity of the situation that confronted the Subordinate Court was that the second respondent was seeking to introduce new documents after the appellant (the plaintiff) had closed his case and after the first defence witness had concluded her testimony. In the ruling dated 6<sup>th</sup> April 2021, the learned magistrate acknowledged the unique circumstances thus:

The civil procedure Rules provide specific timelines for filing of pleadings. To cap it all Order 11 of the *Civil Procedure Rules* upon being complied with confirms a matter as ripe for hearing and it is not expected that any party would file further documents without the leave of the court. At this time each party through the documents filed by the rival party



would have prepared his/her case based on what was previously filed. Any document filed thereafter would act as an ambush to the rival party.

In the instant case the situation is more dire. The plaintiff has prosecuted his case and closed and 1<sup>st</sup> defendant is underway in prosecution of his case. Clearly therefore these two parties would be prejudiced if the 2<sup>nd</sup> defendant's application is allowed as prayed.

18. Having appreciated what was at stake and the dire situation in which the application placed the appellant, the learned magistrate went ahead to state in his ruling dated 2<sup>nd</sup> November 2021:

The reason I gave allowing the application dated 2.11.2020 was that I had gone through the statement of defence filed by the 2<sup>nd</sup> defendant and I was convinced from the averments which the documents whose leave was being sought to be introduced were in possession of 2<sup>nd</sup> defendant's advocate and the same were actually referred to in the said statement of defence as the same seen to be in consonance with the averments in the 2<sup>nd</sup> defendant's statement of defence.

In all fairness therefore it can reasonably be said that the plaintiff had notice of these documents and will not be prejudiced if the same documents are introduced in evidence. In any case the plaintiff will have an opportunity to cross examine on the said documents.

19. While it is true that the appellant has a right of cross examination, cross examination based on documents supplied after a party has closed his case is not the same thing as framing one's case and preparing for trial with the documents at hand. A plaintiff who is forced to make do with cross examination in such circumstances is certainly put in a potentially prejudiced position. Litigation is conducted on evidence adduced, as opposed to evidence that could potentially be adduced. The appellant could not be expected to address documents that had not been introduced by the time he conducted his case. It is for good reason that Order 7 rule 5 of the *Civil Procedure Rules* requires that a defendant files his list and bundle of documents together with his defence. Similarly, parties go through pre-trial so that they confirm readiness for trial.
20. In her Notice of Motion dated 2<sup>nd</sup> November 2020, the second respondent essentially sought extension of time to file his list and bundle of documents. The principles applicable to an application for extension of time were identified by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court held that extension of time is an equitable remedy that is only available to a deserving party at the discretion of the court and that the applicant has the burden of laying a basis to the satisfaction of the court. The court went on to hold that the delay should be explained to the satisfaction of the court and that consideration should be given to whether there would be any prejudice suffered by the respondent if extension is granted. The application must be brought without undue delay.
21. The reason offered by the second respondent for not filing her documents earlier was inadvertence on the part of her advocate. In fact, the supporting affidavit was sworn by Mr Abel M. Momanyi, her advocate. He stated that the documents were given to him at the time of drafting the defence, but he forgot to file them. The record shows that Mr Momanyi attended court for pre-trial on 6<sup>th</sup> November 2018 and confirmed readiness for trial. The matter came up on 4<sup>th</sup> June 2019, 28<sup>th</sup> February 2020, and 25<sup>th</sup> August 2020. The second respondent was represented on all those occasions and her advocate expressed readiness for trial. The trial took off on 23<sup>rd</sup> October 2020 with Mr Momanyi personally present. The plaintiff's case was heard and closed and DW1 testified. The matter was then adjourned to 27<sup>th</sup> January 2021, upon an application by the first respondent. No explanation was offered as to



how the second respondent and her counsel failed to notice the omission, if at all it was an omission, while preparing for and even conducting the trial.

22. Going by its date, Notice of Motion dated 2<sup>nd</sup> November 2020 was certainly prepared not later than the beginning of November 2020. It was however filed on 23<sup>rd</sup> November 2020. There is uncontroverted evidence on record that even after that late filing, it was not served until 26<sup>th</sup> January 2021, on the eve of further defence hearing. The late service notwithstanding, counsel for the appellant scrambled and filed grounds of opposition and a replying affidavit. Even after taking directions that the application be canvassed through written submissions, it is on record that the second respondent did not file any submission in respect of her own application. As I noted earlier, she did not participate in this appeal either, despite service of notices.
23. I have highlighted all the foregoing to show that for a party seeking equitable and discretionary relief, the second respondent's conduct has all along been consistent with a party who is not keen to actively play their part in the litigation. Whether that is attributable to the second respondent personally or her advocates on record is a matter for both to do introspection on.
24. I have said enough to demonstrate that the learned magistrate failed to properly exercise discretion with the result that there was miscarriage of justice. I find that the second respondent did not sufficiently lay a basis for extension of time and did not satisfactorily explain the delay in filing her documents. Equally, there was unreasonable delay in both filing and serving the application upon the appellant. Further, although the Subordinate Court acknowledged the prejudice likely to be caused to the appellant, no measures of redress were offered. In those circumstances, Notice of Motion dated 9<sup>th</sup> September 2021 ought to have been allowed while Notice of Motion dated 2<sup>nd</sup> November 2020 was for dismissal. In sum, I find merit in this appeal.
25. In view of the foregoing, I make the following orders:
  - a. The ruling and order of the Subordinate Court made on 2<sup>nd</sup> November 2021 is hereby reviewed.
  - b. Notice of Motion dated 2<sup>nd</sup> November 2020 is dismissed.
  - c. The second respondent shall bear costs of both this appeal and Notice of Motion dated 2<sup>nd</sup> November 2020.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 3<sup>RD</sup> DAY OF OCTOBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Amalemba for the appellant

Mr Okali holding brief for Mr Getanda for the first respondent

No appearance for the second respondent

Court Assistant: E. Juma

