Ikiara v Mbaya & another (Environment and Land Appeal 36 of 2019)
[2022] KEELC 13318 (KLR) (5 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13318 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 36 OF 2019

CK NZILI, J

OCTOBER 5, 2022

BETWEEN

JULIUS MBURUGU IKIARA ..... APPELLANT

AND

JOHN GIKUNDA MBAYA ..... 1ST RESPONDENT

SALESIO MUTWIRI IKIARA ..... 2ND RESPONDENT

(Being an appeal from the ruling and order of the Hon. J. Irura – P.M delivered on 21.12.2018 in Nkubu PMC No. 11 of 2006)

JUDGMENT

A. Grounds of Appeal

1. Through a memorandum of appeal dated February 5, 2019 the appellant attached a ruling delivered on December 21, 2018 on the grounds that:-

> the trial court by condemned him unheard in a land dispute contrary to the rules of natural justice; considered earlier pleadings unrelated to the issue at hand which prejudiced him; it condemned him out of mistakes of his former counsel on record; failed to exercise discretion and erroneously assumed erroneously that by the 2nd respondent conceding to the claim it automatically bound him; erroneously misconstrued the concept of and directive on the hearing of old matter on priority and lastly went against the law and evidence tendered.

2. This being a first appeal, the court's mandate as set out in *Peters v Sunday Post Ltd* (1958) EA 424 is to rehearse, rehear and reappraise itself on the record of the lower court and come up with independent findings and conclusions on both facts and the law.

B. Pleadings

3. Through a plaint dated February 6, 2006 the 1st respondent sued the 2nd respondent and the appellants as the 1st & 2nd defendants claiming that on July 28, 2004 he bought ¼ an acre of land from their defendants' father who was then owner of LR Nkuene/Kithangari/76, which land was subdivided into LR Nos 1311-1314 and distributed as LR No 1311 in his favour LR No 1312 in his name. Further he averred that he bought an additional 0.04 ha out of LR Nos 1313 and 1314 in the name of the 2nd respondent and the appellants father.

4. The 1st respondent averred the 2nd respondent had failed to subdivide LR No 1312 so that he could get his share. He claimed that instead on 17.5.2005 without any justification, the appellant chased him together with his servants from LR No 1312, denied him access and possession of his portion despite him being a non-party to the sale agreement.

5. The 1st respondent sought for an order for subdivision of LR No 1312 in order to excise his 0.04 ha acre of land and a permanent injunction against the appellant from interfering with his quiet possession of LR No Nkuene (Kithangari) 1311 & 1312 respectively.

6. In support of his claim, the 1st respondent filed a list of documents dated September 20, 2011 and attached, a copy of the sale agreement dated July 28, 2004, copy of records for LR Nos Nkuene/Kithangari/76 & 1311, 1312 & 1314, sale agreement and the addendum, title deeds for LR 1311, 1312, 1313 & 1314 and letter of consent dated October 12, 2014. Alongside the plaint, the 1st respondent also filed an application for temporary orders of injunction issued supported by an affidavit sworn by M'Ikiara Karinga on February 6, 2016.

7. Through a defence dated March 21, 2006, the appellant denied the alleged sale of his father's land to the 1st respondent and insisted he was opposed to any subdivision of his father's land in favour of the 1st respondent since the subdivisions were done secretly, irregularly, unprocedurally and illegally hence was a nullity. Further, he averred that any such sale was indicrious, preposterous and outrageous since the 1st respondent had acquired 0.2 ha of land over and above the ¼ an acre in the sale agreement.

8. As regard the amended agreement, the appellant denied its existence and or authenticity so as to increase the acreage to 0.40 acres with no provision for any consideration payable to the seller.

9. The appellant averred that he 1st respondent claim was a monstrous subterfuge aimed at dispossessing them of their land which was untenable in law.

10. The record of appeal indicates that on March 21, 2018, the matter came for the main hearing in the absence of the advocate for the 2nd defendant. Counsel for the 1st respondent told the court that a consent dated March 21, 2018 had been reached with the 1st respondent. He urged the court to adopt it as an order of the court and for the matter to proceed as against the appellant herein. The 2nd respondent herein confirmed the contents of the consent. Eventually the consent was adopted as the order of the court.

11. Similarly, the trial court proceeded to hear the case as against the appellant after being satisfied that he had been duly served with a hearing notice through his advocate on record.

12. The 2nd respondent testimony before the court was that the appellant as the brother to the 2nd respondent evicted him from parcel No's 1311 and 1312. He produced the agreement dated July 28, 2004 as P exh No (1) the addendum dated August 6, 2004 P exh (2) an acknowledgment receipt dated August 6, 2004 as P exh No (3) copy of title deeds for LR No 1311, 1312, 1313, 1314 as P exh Nos (4), (5), (6) & (7) respectively and the letter of consent dated October 12, 2004 as P exh No (8) respectively.

The 2nd respondents asked the court to order the appellant to give him vacant possession since LR No 1311 was already registered under his name and secondly for an order that the 2nd respondent to hand over vacant possession for the portion of LR No 1312 he had bought registered under the name of his father.

13. By a judgment dated May 30, 3018, the trial court found the documents evidence produced by the 1st respondent unchallenged and entered judgment in his favour with costs and interests.

14. The appellant by an application dated June 25, 2018 under order 12 rule 7 of the *Civil Procedure Rules* sought for the setting aside of the exparte judgment and the proceedings therein to be re-opened so that he could be accorded an opportunity to defend the suit by ventilating his defence.

15. The application was supported by an affidavit sworn on June 25, 2018. The reasons given were that on June 10, 2018 the 2nd respondent came to his home ready to demolish his house alleging that he had lost the case. That he perused the court file the following day and established that judgment had been delivered without being not been notified of the hearing by his former lawyer on record. That he visited the said law firm on June 12, 2018, who became uncooperative hence changed advocates on June 19, 2018. That though his former advocates had been served with the hearing notice they did not inform him. That mistake of his former lawyers should not be visited upon him and that the non-attendance was not deliberate but out for lack of notification.

16. The 1st respondent opposed the application by a replying affidavit sworn on August 14, 2018 stating that the appellant had severally delayed the suit for lack of appearance together with his former lawyers by requesting for unnecessary adjournments. That he was guilty of laches and was in deep slumber, was indolent, had denied him use of the land for 14 years and that the delay had not been explained at all. That the suit belonged to him, the failure to appear could only be on him and that he did not deserve the courts discretion.

17. Through written submissions dated November 27, 2018 the appellant reiterated the contents of his application and reiterated that had been let down by his former lawyers who forgot to inform him of the hearing date and the progress. Therefore, he was innocent of the mistake, his right to fair trial under article 50(1) of the *Constitution* should be upheld, he regretted the mistake, which was inadvertent and in the interest of justice, the court should allow him an opportunity to be heard on merits.

18. The 1st respondent by written submissions dated December 4, 2018 submitted that after entering appearance on March 7, 2006 and filing a defence on March 22, 2006, the appellant never attended a hearing as per the court's record and that his former advocates would also absent themselves even when the hearing notice had been served, upon him that his former advocate had not sworn any affidavit to explain the alleged inadvertent mistake, that the delay and lack of interest in the case had not been explained of over 12 years; that the case belonged to him and not the lawyers, that his behavior did not deserve any grant of equitable orders, that the Hon Chief Justice had issued directives that matters pre-2013 concluded by December 17, 2018 to unclog the courts so as to weed out indolent litigants and make the delivery of justice efficient, that the 1st respondent should be left to enjoy the fruits of his judgment and that article 50(1) of the *Constitution* was not a panacea for an indolent litigant who had refused to participate in a hearing and therefore was of no assistance to the applicant.

19. By a ruling dated December 12, 2018 the trial court that held the appellant had failed to meet the required standards for the setting aside the judgment.

20. The 1st respondent moved the court by an application dated February 11, 2019, seeking for the OCS Nkubu police station to offer security during the partitioning of LR No Nkuene/Kithangari/1312 on the basis that a consent had been entered between the 2nd respondent and himself on March 21,

2018 which needed to be implemented on the ground which exercise on February 8, 2019 was allegedly blocked by the appellant. He attached annexures marked JAM "1" 4(a) & (b) respectively in support of the application.

21. The appellant also filed an application dated February 19, 2019 seeking for stay of the decree which was supported by an affidavit sworn on February 19, 2014 attaching a filed memorandum of appeal. Similarly, the appellant filed a replying affidavit sworn on February 27, 2019 to the application dated February 11, 2019 stating there was a pending appeal against the decree and an application for stay otherwise the substratum would be affected and that he was not aware of the surveyors visit or the averments regarding the title deed and the consent order allegedly adopted in court.

22. On his part, the 1st respondent opposed the application for stay by a replying affidavit sworn on March 1, 2019 where he attached a consent and the final decree as Jam "1" & "2". In his view the consent had not been set aside and since the appellant was not the owner of LR No 3112, therefore no substantial loss could occur when joint owners were partitioning their land after a decree. He urged the court be allow him to proceed with the partition so that each of them could have individual title deeds.

23. Parties once again filed written submissions for the two applications.

24. The trial court delivered a ruling on June 12, 2019 in which it granted a stay of execution to preserve the suit property pending the appeal and deferred the 2nd application to abide by the outcome of the appeal.

C. Written Submissions to the Appeal

25. With leave of court parties opted to canvass this appeal through written submissions dated December 3, 2020 and May 3, 2021 respectively.

26. The appellant has submitted he had met the test for the setting aside under order 12 rule 7 of the *Civil Procedure Rule*s and by failing to follow the said tests that the trial court failed to exercise its discretion correctly going by the decision of *Shah v Mbogo* (1967) EA 166 and *Wachira Karani v Bildad Wachira* [2016] eKLR. The appellant took the view that he was a mere innocent litigant who had shown sufficient cause for the non-attendance. The court was therefore urged to look at the wider justice of condemning him unheard in a land matter, whose the consequence will resort to eviction from the suitland when he has lived all his life. Reliance was placed on *Philip Chemwolo & another v Augustine Kabende* [1982-1988] KAR 103 on blunders by advocates vis a vis rights of parties.

27. Concerning past pleadings and the effect of the consent between the respondents over the rights of the appellants it was submitted that it was wrong for the trial court to state that the appellant ought to have conceded to the consent yet he has a right to defend himself irrespective of his co-defendant.

28. On the other hand, the respondents have submitted there was no denial of service of the hearing notices to the appellant through his former lawyers which goes to show that the appellant may have been informed of the hearing but ignored the same hence his behaviors or conduct was that of an indolent party. Reliance was placed on in *Matthew Sankok Shmpa v KCB & others* Civil appeal No 529 of 2004 for the proposition that a party who should not blame his lawyer and *Ajit Sirgh Virdi v JF Mcloy* [2014] eKLR on the concept of prejudice to the administrative of justice in wasting court's time and impending a court in the delivery of its overriding objectives of fair, just, affordable, preferable and expeditious resolutions of disputes.

29. The respondents submitted that the appellant had a duty to convince the court that he did not contribute to the delay or entry of the judgment against him. Reliance was placed on *Amos Munyi Njue v Dennis Murithi Mutegi & another* [2017] eKLR, *Savings & loan (K) Ltd v Susan Wanjiru Marutu*

(NRB) Milimani HCCC No 397 of 2002 on the duty of the appellant to prosecute his case and not his advocate, *Karuru Munyororo v Joseph Ndumia Muruge & another Nyeri* HCCC No 95 of 1988 on credibility of the 1st respondent's evidence, *Fran Investment Ltd v G4S Security Services Ltd* [2015] eKLR on balancing the appellant's interests vis a vis the constitutional imperative of justice delayed is justice denied and lastly on *Shah v Mbogo* (1967) EA 166 on the proposition that the discretion to set aside judgment was not aimed at assisting a party who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.

30. Further the respondents relied on Meru ELC Appeal No 92 of 2019 *Lydia Cianjuki M'Riba v Elizabeth Riungu*, *Amos Munyi Njue v Dennis Murithi Mutegi & another* [2017] eKLR, *Josephine Lunde Matheka v Gladys Muli* [2018] eKLR, *Motex Knitwear Ltd v Gopitex Knitwear Mills Ltd* [2009] eKLR, the proposition that on a party missing in action during the lifespan of a suit denies him a compelling reason to set aside,

D. Issues For Determination

31. The issues falling for my determination are:-

    i. If the appellant gave valid reasons and justification for not attending court and for the setting aside the judgment.

    ii. If the consent order between the respondents ought to have been a consideration by the trial court in determining whether to exercise discretion in favour of the appellant.

    iii. If in determining the relevance of the consent to the appellants defence amounted to a breach of the appellants rights to fair hearing and rules of natural justice.

    iv. If the appeal has merits.

32. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. See *Mule Mutinda v IEBC & another v Stephen Mutinda Mulei & 3 others* [2014] eKLR. In this appeal the parties herein set out the contours of their pleadings vide the plaint dated February 6, 2006 and the supporting documents in line with order 11 of the *Civil Procedure Rules* namely; the list of documents dated September 20, 2011 and the defence dated March 21, 2006.

33. As indicated above the 1st respondent filed an application dated February 6, 2006 for temporary orders of injunction supported by his affidavit and that of the appellant's and 2nd respondent's father M'Ikiara Karinga. In the said affidavit which the said father thump stamped, he confirmed to have been the original owner of LR No 76 which he subdivided and sold to the 1st respondent as parcel No 1311 and later on sold an additional 0.04 ha of land which was to be excised from LR No 1312. He further averred that he had reserved LR No 1412 exclusively for the appellant was unfortunately was preventing the 1st respondent from marking the boundaries regarding the additional land sold to him ha and taking vacant possession of parcel No 1311. This is contained at page 133 of the record of appeal.

34. While aware of this affidavit, the appellant filed a defence dated March 21, 2006 and denied the existence of any sale of land by his father or the ownership of the subject parcels of land by the respondents.

35. Further, even though the appellant alleged improprieties, irregularities, illegalities and the unprocedural manner of the sale and transfer of the suit no particulars of fraud, illegality and forgery were pleaded in his defence.

36. Additionally, the appellant failed to counterclaim or assert any ownership or occupation rights over either LR No 1312 or 1311 and seek for the cancellation, invalidation titles to the said parcels of land.

37. Even after the order were made on November 30, 2011 and April 18, 2012, for compliance with order 11 *Civil Procedure Rule*s after which the 1st respondent filed a list of documents dated September 20, 2011 and included the title deeds for LR Nos 1311, 1312, 1313 & 1314 together with the land control board consent dated October 12, 2004, the appellant failed to file his set of compliance documents by way of witness statements and list of documents in readiness for the hearing of the suit.

38. It is also notable that vide a receipt No 0565852 dated February 8, 2006, a consent was filed before the trial court through a letter dated February 7, 2006 between the 2nd respondent which was similar to the one later on recorded before the court.

39. The record of appeal shows that on August 1, 2006, November 3, 2006, August 30, 2007, October 3, 2007, March 19, 2008, August 13, 2008, December 10, 2008, January 22, 2009, March 30, 2009, May 3, 2009, September 9, 2009, December 2, 2009, June 9, 2010, February 16, 2011, June 15, 2011, December 21, 2011, February 8, 2012, April 18, 2013, June 5, 2013 and March 21, 2018 the appellant's advocates on record failed to attend court or give any explanation for non-attendance.

40. In most if not all of these instances, the respondents were in attendance before court and orders were being made for the appellant to comply with the court orders and or file compliance documents. Even despite the respondents documents especially the title deed the appellant failed to amend his defence, stake any claim over the suit parcels and or seek for the cancellation or invalidation of the said title deed.

41. This is the context which was before the trial court at the time it handled then the application dated August 2, 2018 and rendered its ruling now appealed against before this court.

42. In the said application dated August 2, 2018 other than alleging condemned unheard over mistake of former counsel, the appellant alleged that he had a good defence to offer and was at the verge of being evicted from the land which he had lived since he was born.

43. The appellant at paragraphs 2 & 3 of the supporting affidavit stated that his brother, the 2nd respondent had come ready to demolish his home where he had lived for over 62 years.

44. In the said defence the appellant had never pleaded anything to do with his occupation of parcel Nos 1311 and 1312 let alone staking a claim over the said parcels of land.

45. At the time the application was made, already there was a decree incorporating the consent order between the respondents. The appellant was seeking for the setting aside of the judgement. However, he appears to have been extremely silent on impeaching the consent order between the respondents at that point in time.

46. As demonstrated above, the issue of the consent order was only raised after the subsequent application which sought for the enforcement of the decree by partitioning the suit land.

47. The grounds to set aside a consent order or judgment are similar to those of setting aside a contract namely on account of fraud, misrepresentation, illegality, public policy and insanity. See *Benjoh Amalgamated v KCB Ltd & another* [2018] eKLR.

48. Before this court, the appellant has not raised anything as regard the impeachment of the consent judgment the respondents had unfettered freedom to contract and settle the claim. This settlement was independent of the appellant particularly going by the pleadings and the list of documents which

were before the trial court. The 1st respondent had filed title deed and the attendant land control board consent in favour of the 2nd respondent and himself as well as the appellant's father.

49. After the said documents were filed and served upon the appellant, he did not question their authenticity, legality and or seek for their invalidation on account of fraud, forgery or illegality.

50. The appellant's father had categorically stated on oath that he willingly and consensually sold and transferred his interests in parcel No LR 1311 and a portion of LR No 1312 to the 1st respondent's. all what was therefore remaining was the partitioning of LR No 1312 to excise 0.04 ha in favour of the 1st respondent. The appellant did not plead that the mother land namely parcel No 76 belonged to him entirely or that his father had no capacity to sell or transfer or subdivide the mother land and its subdivisions to whoever he wished to sell and transfer to especially the 1st respondent. The appellant did not allege any trust or possessory rights over the suit parcels of land in his pleadings.

51. Further the appellant's father had made it clear that he was holding in trust LR No 1314 for the appellant as his only entitlement and not the rest of the suit parcels of land.

52. The appellant failed to enlist his father as one of his witness or file a witness statement written by his father in support of his defence despite opportunities which were given to comply with order 11 of the Civil Procedure Rules.

53. In *Patel v East African Cargo Handling Services* (1974) EA 75 Duffus VP held that the main concern of the court was to do justice to the parties and as regards defence on merits, it means a triable issue, which raises a prima facie defence which should go to trial for an adjudication.

54. The appellant has urged the court to find that the trial court should not have taken it that the consent order as signed by the 2nd respondent bound him, yet he had right to be heard and which should not be compromised by the defendant.

55. The trial court had been approached under order 25 *Civil Procedure Rules* to adopt a consent judgment between the 1st respondent as the plaintiff then and the 1st defendant now the 2nd respondent.

56. In my view and given the appellant's pleadings on record, he had not counter claimed for either LR No 1311 or 1312. So, any compromise of the claim between the two respondents was not depended on the appellant.

57. The pleadings before the trial court were that the appellant was unfairly and or unjustifiably impeding the 1st respondent from enjoying his parcels of land. The trial court after establishing that the appellant had been properly served with a hearing notice proceeded to hear the 1st respondent's claim against him. The 1st respondent proceeded to produce documentary evidence especially the title deed which the appellant had not disputed and or sought to impeach under sections 24, 25, 26 and 80 of the *Land Registration Act* which are to be taken as prima facie evidence of ownership of land.

58. In my view the trial court was right in looking at any previous pleadings in the suit, given that in an adversarial system a party, as held in *Raila Odinga v IEBC & others* [2013] eKLR, bound by his pleadings and cannot travel outside the said pleadings.

59. In this appeal, the appellant the court to go beyond his own pleadings which were before the trial court in so far as the averments that he risked or evicted from his land and being condemned unheard in an issue of land which he says emotive and sensitive.

60. Unfortunately, the appellants own pleadings and submissions are wide apart and to say the least contradictory. Submissions however forceful and or powerful cannot replace pleadings. See *Daniel T*

Moi v Stephen Murithi & another [2017] eKLR. The appellant failed to file any supporting documents to the defence so as to counter the respondents claim and the consent, order.

61. The appellant failed impeach the consent order which was part and parcel of the lower court decree. The two are inseparable. The trial court was under a duty over and above the sufficient cause aspect to establish if the appellant had a plausible defence and that it was in the interest of justice to allow the sitting aside. See *Continental Butchery Ltd v Nthiwa* [1978] eKLR, *James Kanyiita Nderitu & another v Marius Phillotas, Chika & another* [2016] eKLR, *James Mogunde Mogunde v Faulu Microfinance Bank Ltd* [2022] eKLR.

62. The appellant has complained that the trial court visited mistakes of his erstwhile advocates on record hence condemning him unheard. Relying on *Philip Chemwolo* (*supra*) the appellant submitted has courts exist not to impose discipline but to do justice to the parties since the mistake was not deliberate at all.

63. In *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR, the Court of Appeal held that the issue to consider in include whether to set aside on order facts, circumstances both prior and subsequent together with all the respective material factors which would not or might not have been present had the judgment not been exparte and whether or not it would be just and reasonable to set aside the judgment.

64. Whereas it is trite law that a party should not be penalized just because there was a blunder particularly by his advocates, the court in *Republic v Speaker Nairobi City Assembly and another ex parte Evans Kidero* [2017] eKLR held that blunders will continue to be made and that just because there was mistake does not mean a party should not have his case heard on merits.

65. The appellant has submitted that under article 50 of the *Constitution* (1) he had a right to be heard whereas the respondents have submitted that such a right should not be a panacea for indolent parties.

66. In *Toshike Construction Co Ltd v Harambee Cooperative Savings and another* [2019] eKLR the Court of Appeal held that a defence need only raise a bonafide triable issue requiring further interrogation by the court during the full trial.

67. Looking at the appellant's defence against the 1st respondent's claim and the consent order which has not been challenged by way of an appeal, the court is unable to find any reasonable defence for that matter one is raising any triable issues to warrant the setting aside of the judgment. See *Tree Shade Motors Ltd v DT Dobie & another* [1995 – 1998] 1 EA 324 and *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR.

68. The court record indicates that the last appearance by the appellant in court in person on November 14, 2012. On June 5, 2013 the case came for hearing but his advocates on record were absent. He was also absent. There was no action taken by the parties between 2013 and January 12, 2018 when a hearing for March 21, 2018 was taken. This was a period of five years. The appellant has not explained whether during the intervening period he was in touch with his erstwhile advocates for the updates. The case belongs to the appellant and not his then advocates on record. See *NBK v EK Kitei* [2006] eKLR and *Ruth Njoki Mwangi & another v Cecilia Nduati* [2010] eKLR.

69. The appellant did not give any explanation for any efforts he made prior to and soon after the hearing of June 28, 2018, when he sought for an interim order stay by an application dated June 25, 2018. The respondents have said that the appellant was in slumber land, has unjustly and without justification denied them entry into the land. The title deed held by the 1st respondent indicates that it was issued in 2004. Under section 7 of the *Limitation of Actions Act*, such a claim for recovery of land expires after

six years. Even if the court was to find the existence on any defence based on recovery of the suitland, still his claim, if any is already time-barred by dint of section 7 of the *Limitation of Actions Act*.

70. Given the foregoing, I find it would not be in the interest of justice to set aside the judgment under the circumstances obtaining. The ruling by the trial court was made on merits and within the law.

71. In the premises, the appeal lacking merits. The same is dismissed with costs to the respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 5TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Kirimi for appellant

Mwirigi Kaburu for respondents

HON CK NZILI

ELC JUDGE