



**Namwiba v Wafula ((Suing on his own behalf and on behalf of)
Victor Kanenje Wafula) (Environment and Land Appeal 7 of 2019)
[2022] KEELC 12787 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 12787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 7 OF 2019
DO OHUNGO, J
OCTOBER 4, 2022**

BETWEEN

FRANCIS LUCAS NAMWIBA APPELLANT

AND

**VICTOR KANENJE WAFULA RESPONDENT
(SUING ON HIS OWN BEHALF AND ON BEHALF OF) VICTOR KANENJE
WAFULA**

*(Being an appeal from the ruling and order of the Senior Principal Magistrate's Court
at Mumias (T A Odera, Senior Principal Magistrate) delivered on 12th March 2019
in Mumias MCELC No 8 of 2018 Kevin Martin Wafula v Francis Lucas Namwiba)*

JUDGMENT

1. The backdrop of this appeal is that the respondent sued the appellant claiming general and special damages, eviction of the appellant from the parcel of land known as East wanga/Mung'ang'a/1431 (the suit property) as well as removal of a caution registered against the suit property. When the matter came up for hearing on 30th August 2018, the appellant sought and was granted an adjournment. A new hearing date of September 4, 2018 was scheduled in the presence of all parties and the appellant was condemned to pay adjournment costs to the respondent before the next date. Come September 4, 2018, neither the appellant nor his counsel attended court and the adjournment costs had not been paid. Instead, the appellant's counsel wrote a letter to the court seeking an adjournment. The respondent's counsel objected to the application for adjournment being granted. Upon considering the matter, the subordinate court declined to grant adjournment and ordered the hearing to proceed.
2. The respondent's case was heard and closed, the appellant's case was closed owing to non-attendance and judgment was scheduled for delivery on October 5, 2018. There was a delay in its preparation,



and it was ultimately delivered on January 4, 2019. The subordinate court found in favour of the respondent and warded him KShs 50,000 exemplary damages and KShs 196,038 special damages. The court also granted an eviction order, an order for removal of the caution and a permanent injunction restraining the appellant.

3. In an effort to reverse that state of affairs, the appellant filed an application by way of Notice of Motion dated January 17, 2019, seeking in the main, review or setting aside of the judgment and the proceedings that led to it. The subordinate court considered the application and dismissed it in a ruling delivered on March 12, 2019. The reasons for the ruling were given on March 19, 2019.
4. Dissatisfied with the order and the reasons, the appellant filed this appeal on March 27, 2019, listing the following grounds in the memorandum of appeal:
 1. The trial Magistrate erred in law and fact in failing to appreciate the ingredients for settling aside ex parte judgment.
 2. The trial Magistrate erred in law and fact in entering the arena of the case and relying on evidence from the bar.
 3. The trial Magistrate erred in law and fact in failing to appreciate that when the matter came up for hearing, the Appellant was indisposed despite the evidence of being indisposed being given.
 4. The trial Magistrate erred in law and fact in proceeding to hear the case when a preliminary objection filed by the Appellant had not been determined.
 5. The trial Magistrate erred in law and fact in failing to appreciate that there existed an order in Kakamega High Court Succession Cause NO. 263 of 2002 which directly affected the case as it involved the same parties and the subject matter.
 6. The ruling was against the weight of evidence on record.
5. Based on the foregoing grounds, the appellant prayed that the appeal be allowed, the subordinate court's ruling be set aside and that in its place an order be made allowing Notice of Motion dated January 17, 2019.
6. The appeal was canvassed through written submissions. The appellant argued that the driving factors while exercising discretion are fairness and principles of law. He added that he had put forth sufficient reasons and grounds for setting aside the ex parte judgment including that he was indisposed and thereby unable to attend court as well as his then advocates' letter. That the learned magistrate failed to appreciate ingredients of setting aside an ex parte judgment. He further argued that the trial court entered into the arena of the dispute by going deep into the nature of the defence and counterclaim and concluding that the defence raised no triable issues. Further, that the suit was not ripe for hearing since there was a preliminary objection which had not been disposed of. He therefore urged the court to allow the appeal and cited some three decided cases but did not avail copies of the decisions.
7. In reply, the respondent argued that the record of appeal is incomplete since it does not include the order appeal against and the respondent's supplementary list of documents. That the appellant was in court when the hearing date was taken, had not paid court adjournment fees and adjournment costs and failed to instruct an advocate to attend court and seek for an adjournment. That in allowing the hearing to proceed, the trial court was fully aware that the appellant was deliberately seeking to delay the matter and to obstruct justice. Regarding the letter from Alwanga Advocates dated September 3,



- 2018, the respondent submitted that although it indicates the said advocate had been instructed, when the same advocates were served with a notice of judgement they denied having been instructed in the matter.
8. The respondent further argued that the medical reports vailed by the appellant indicate that the appellant received treatment at Jumuia Kaimosi Hospital while the other treatment documents show that the appellant was treated at Kakamega General Hospital on September 3, 2018. That the document from Jumuia Hospital claims that the appellant attended the said hospital on August 30, 2018 yet on that very date the appellant was in court. According to the respondent, the appellant did not attend Jumuia Hospital on August 30, 2018. That in the circumstances, the appellant did not deserve setting aside. Regarding the interim orders in Kakamega High Court Succession Cause NO. 263 of 2002, the respondent argued that they lapsed when a certificate of confirmation of grant was issued. The respondent therefore urged the court to dismiss the appeal with costs.
 9. I have considered the memorandum of appeal and the parties' submissions. The sole issue for determination is whether Notice of Motion dated January 17, 2019 should have been allowed.
 10. The appeal is against an order made in exercise of discretion. The circumstances in which an appellate court can interfere with exercise of discretion were discussed by the Court of Appeal in *Mbogo and another v Shah* [1968] EA 93. Simply put, an appellate court should not interfere with the exercise of discretion unless it is satisfied that the court appealed from has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest that the court appealed from was clearly wrong in the exercise of discretion and that as a result there was injustice.
 11. The circumstances in which judgment was entered against the appellant are not disputed. What is contested is the reason for failure by the appellant to attend court. The record shows that the suit was initially fixed for hearing on August 30, 2018. On that date, the appellant who was present in court in person sought an adjournment on the twin grounds that he was unwell and that he needed to instruct an advocate. Counsel for the respondent opposed the application and indicated that he was ready with five witnesses. Upon considering the application and the objection, the court granted adjournment and condemned the appellant to pay adjournment costs of KShs 7,000 to the respondent before the next date. A new hearing date of September 4, 2018 was then scheduled in the presence of the appellant.
 12. The appellant was therefore aware of the hearing date of September 4, 2018. When dealing with an application seeking to set aside an order made in such circumstances, the court is called upon to exercise discretion pursuant to the principles laid down in *Mbogob & another v. Shah (supra)*. The discretion is to be exercised to avoid injustice and hardship resulting from accident, inadvertence, or excusable mistake, but is not designed to assist a person who has deliberately sought to obstruct or delay the course of justice. The principles were reiterated in [*James Kanyiiita Nderitu & another v Marios Philotas Gbikas & another*](#) [2016] eKLR as follows:

From the outset, it cannot be gainsaid that a distinction has always existed between a 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 appearance 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 factors 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other.

13. The reasons that the appellant gave for failure to attend court for the hearing date on September 4, 2018 were that he was indisposed and that his advocate was held up elsewhere. It will be noted that when he appeared in court on August 30, 2018, his then advocates M/s E.M. Masheti & Company were not present. The appellant did not offer any explanation as to the whereabouts of the said advocates. Shortly after attending court, he instructed Alwanga & Company Advocates who filed notice of change of advocates and a notice of preliminary objection on September 3, 2018, the eve of the hearing. On the same September 3, 2018, the advocates wrote a letter to the court stating that the appellant was scheduled to be reviewed by a surgeon on September 4, 2018 at Kaimosi Jumuiya Hospital and that the advocates would not be able to attend court since they were engaged in several matters which were fixed earlier in Eldoret. The details of the matters were not given. Even assuming that the advocates were held up in Eldoret, no explanation has been offered as to why they did not instruct another advocate to hold their brief and seek an adjournment. The letter also stated specifically that the appellant's "medical condition has aggravated due to failure to attend his clinic on August 30, 2018 as scheduled when he was not allowed to do so by the court...."
14. I have perused the referral slip from Jumuiya Friends Hospital. I note that it is dated August 30, 2018, yet the advocates claimed in their letter that the appellant did not attend his clinic on that date. Further, the slip does not mention any need for an urgent surgery. On the contrary, it stated that the appellant was scheduled for a review on September 4, 2018, which was once again a scheduled hearing date in the matter. The coincidence is not surprising.
15. I have equally perused the medical notes from Kakamega County General Teaching and Referral Hospital, which the appellant also provided. They include an attendance card with appointments for January 30, 2019 and February 13, 2019 only. There is no evidence of any appointment for September 4, 2018. There is also a letter dated January 30, 2019 from the said hospital addressed to "whom it may concern" and a discharge to the effect that the appellant was operated on September 3, 2018 and discharged on September 6, 2018. It will be noted that M/s Alwanga & Company Advocates neither mentioned Kakamega County General Teaching and Referral Hospital nor any surgical procedure in their letter dated September 3, 2018. More importantly, the appellant did not avail any evidence of payment to support the alleged treatment and procedures at Jumuiya Friends Hospital and Kakamega County General Teaching and Referral Hospital. In the circumstances, I am not persuaded that any medical evidence had been availed to justify non-attendance by the appellant.
16. There is one more reason that casts grave doubt on every explanation the appellant offered, through M/s Alwanga & Company Advocates, for failing to attend court. Despite M/s Alwanga & Company Advocates filing notice of change of advocates and a notice of preliminary objection on September 3, 2018 and writing a letter to the court on the said date, there is on record a notice of delivery of judgment dated September 4, 2018, which was served on M/s Alwanga & Company Advocates on September 26, 2018. They stamped it and endorsed it with the following: "We have never been instructed in this matter. The case is alien and we have never been on record."
17. When he was granted an adjournment on August 30, 2018, the appellant was condemned to pay costs of KShs 7,000 to the respondent before September 4, 2018. He neither complied with that order nor offered any explanation as to the non-compliance.
18. I further note that Notice of Motion dated January 17, 2019 was filed on January 18, 2019, over four months after the hearing of September 4, 2018. Having been aware both of the hearing date and his



failure to attend court, the appellant was duty bound to move the court immediately. A delay of four months is in the circumstances inordinate.

19. The appellant also faulted the learned magistrate for proceeding to hear the case despite interim orders of maintenance of status quo issued in Kakamega High Court Succession Cause NO. 263 of 2002 and in disregard of pendency of the preliminary objection which he had filed on September 3, 2018. Suffice it to state that this appeal is not against the judgment but against the ruling delivered on March 12, 2019. Further, I have perused the order in question, and I note that it did not in any way address the case that was before the learned magistrate. As for the preliminary objection, if the appellant thought that it ought to have been dealt with prior to the hearing, he ought to have attended court and sought its hearing.
20. In view of the foregoing, the learned magistrate properly identified and applied principles applicable and exercised her discretion correctly. The appellant has not shown any basis to warrant interfering with the exercise of discretion. It is clear to me that the appellant deliberately sought to obstruct or delay the course of justice.
21. In the circumstances, I find no merit in this appeal. I dismiss it with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 4TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Athunga for the appellant

No appearance for the respondent

Court Assistant: E. Juma

