



**Odhiambo v Sarman Group Company Limited (Environment and Land
Appeal 26 of 2021) [2022] KEELC 13393 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13393 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 26 OF 2021
GMA ONGONDO, J
OCTOBER 4, 2022
(FORMERLY MIGORI ELC APPEAL NO.17 OF 2021)**

BETWEEN

TOM MBOYA ODHIAMBO APPELLANT

AND

SARMAN GROUP COMPANY LIMITED RESPONDENT

(Being an appeal from the ruling of Honourable Nicodemus N. Moseti, Senior Resident Magistrate delivered on 17th March 2021 in the Senior Principal Magistrate's Court, Mbita in the Environment and Land case No. 15 of 2019)

JUDGMENT

1. On 17th March 2021, the trial court (Honourable Nicodemus.N.Moseti, Senior Resident Magistrate) rendered a ruling regarding the respondent's preliminary objection dated 26th November 2020 raised against the appellant's notice of motion dated 20th November 2021. The learned trial magistrate held that the preliminary objection was meritorious. Thus, he upheld the same.
2. The appellant, Tom Mboya Odhiambo through the firm of G.S Okoth and Company Advocates being aggrieved by the trial court's reasoning, mounted the present appeal by way of a memorandum of appeal dated 12th April 2021 based on the following seven (7) grounds;
 - a. The Learned Trial Magistrate misdirected himself on several matters of law and fact.
 - b. The Learned Trial Magistrate erred in law of practice and procedure in holding that the doctrine of res-judicata was applicable whereas the issue as to whether the mistakes, errors or negligence of an advocate should not be visited upon his client had not been previously adjudicated upon.



- c. The Learned Trial Magistrate erred in law of practice and procedure in construing that an order of refusal to adjourn a case and refusal to give leave to file a defence out of time is equivalent to an application to set aside an ex-parte judgment and that therefore the latter application is res-judicata the earlier application.
 - d. The learned Trial Magistrate erred in law in holding that by holding brief for another advocate for purposes of seeking an adjournment only means that the party is represented for all purposes.
 - e. The Learned Trail Magistrate erred in law in holding that refusal to grant leave to file the defence before judgment is entered renders the court not to have jurisdiction to grant the prayer for setting aside ex-parte judgment.
 - f. The Learned Trial Magistrate erred in law in deciding the application on the basis of a preliminary objection when several matters of evidence were used to arrive at the decision such as the fact that an advocate held brief for the advocate then on record.
 - g. The Learned Trial magistrate erred in misinterpreting the doctrine of state decisis and in misapplying the decided authorities to situations which were inapplicable to the instant case.
3. So, the appellant has urged this court to quash the decision of the trial Magistrate, set aside the ex-parte judgment and reinstate the suit for hearing inter-partes.
 4. Originally, the appeal was lodged at Migori Environment and Land Court. On 5th October 2021, it was transferred to this court, upon it's establishment, for hearing and determination.
 5. The appeal was heard by way of written submissions following an agreement between the parties and further to this court's directions of 12th May 2021.
 6. The appellant's submissions dated 13th May 2022 and filed herein on 18th May 2022 contain brief background facts including this court's guiding principles under section 18 of the [Environment and Land Court Act, 2015](#) (2011) and the grounds of appeal in respect of res judicata and the issue of preliminary objection, among others. His counsel discussed the grounds of appeal in favour of the orders sought in the appeal and relied upon *Patel-vs-E.A Cargo Handling Services Ltd* (1974) EA 75 as regards filing of a defence and *Mukisa Biscuit Manufacturing Co.Ltd-vs-West End Distributors Ltd* (1969) EA 696 in respect of a preliminary objection, among other authorities, to buttress the submissions.
 7. The respondent, Sarman Group Company Limited through the firm of Oguttu Mboya, Ochwal and Partners Advocates, filed submissions dated 22nd June 2022 setting out the background of the case, inter alia, the preliminary objection. Counsel analysed the grounds of appeal against the appellant and supported that position by authorities including [Tana and Athi Rivers Development Authority-vs-Jeremiah Kimigbo Mwakio and 3 others](#) (2015) eKLR and Mukisa Biscuit case (supra).
 8. By further submissions dated 29th June 2022 and filed in court on 1st July 2022, the appellant's counsel stated that the appellant was not given a chance to participate in the hearing of the suit at the trial court. Counsel relied upon Order 9 Rule 1 of the Civil Procedure Rules, 2010 on notice of change of advocate and Rules 8 and 9 of the Probate and Administration Rules in respect of appointment of an advocate.
 9. Notably, the original record from the trial court was availed on 19th July 2022 as discerned in the proceedings of the same date herein.



10. The subject matter of this appeal is land reference number Kasgunga/Kamreri/4021 (The suit property herein).
11. It is important to note that the respondent who was the plaintiff before the trial court, originated the suit by way of a plaint dated 5th September 2016 seeking the orders infra;
 - a. Declaration that the plaintiff is the lawful; bona-fide and Registered owner of the suit-property herein.
 - b. An order of eviction against the defendant, his agents and or servants from the suit property.
 - c. Permanent injunction restraining the defendant by either by himself, agents, servants and/or anyone claiming under the defendant from entering, re-entering upon, trespassing onto, laying a claim to, Leasing, building onto, interfering with and /or in any other manner, whatsoever dealing with the suit property or any portions thereof, in any manner prejudicial and or adverse to the rights and interest of the plaintiff.
 - d. General damages for Trespass.
 - e. Costs of this suit be borne by the Defendants.
 - f. Such further and /or other relief as the Honourable Court may deem fit and expedient so to grant.
12. The appellant who was the defendant before the trial court through D.E.O Anyul and Company Advocates, filed a memorandum of appearance dated 4th November 2016 on 11th November 2016. Be that as it may, the appellant failed to file any defence within the prescribed period of time or at all.
13. On that score, I proceed to re-evaluate and re-assess the entire record herein and reach my independent conclusions; see the case of *Selle and another-vs Associated Motor Boat Co. Ltd and others* (1968) EA 123.
14. It is therefore, my considered opinion that the issues for determination herein emerge from the grounds of appeal and to a great extent, as framed in the appellant's submissions. They relate to;
 - a. Res judicata,
 - b. Jurisdiction of this court,
 - c. Legal representation and mistake of counsel,
 - d. Preliminary objection and
 - e. The final just orders herein.
15. On the first issue, by the notice of motion dated 20th November 2020, the appellant sought to set aside the trial court's ex parte judgment delivered on 18th November 2020 and reinstate the suit for hearing inter-partes. Further, he sought leave to file a statement of defence out of time; see Patel case (supra).
16. The respondent opposed the said motion by way of a replying affidavit as well as a preliminary objection dated 26th November 2020 premised upon seven (7) grounds which include;
 - a. The issue of filing statement of defence out of time having been addressed and/or pronounced on the 14th day of October 2020, the Honourable court is Functus Officio.



- b. On the other hand, the subject application is barred by the doctrine of Res-Judicata. Consequently, the Application offends and/or is otherwise an affront to the provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.
- c. The Honourable court is devoid and/or bereft of jurisdiction to entertain and/or adjudicate upon the subject dispute, whatsoever and/or howsoever.
17. Upon hearing the preliminary objection, the trial court determined the same in favour of the respondent against the appellant as noted in paragraph 1 hereinabove. The learned trial Magistrate held that the motion was res-judicata in light of the relief sought therein and the court record. He remarked;
- “The court’s record of 14th October 2020 shows that an application for leave to file a defence and the accompanying documents was declined.”
18. In reaching his findings on the preliminary objection, the learned trial magistrate noted that the dismissed the issue of leave cannot be re-litigated That the same was res judicata.
19. The trial court declined the adjournment for reasons that the matter had been pending in court since 2016 hence, need to expedite it to meet the ends of justice. That the defendant had failed to file pleadings within the prescribed period of time.
20. This court is guided by the meaning of the term “Res judicata” and it’s three essential elements as formulated in the Black’s Law Dictionary 10th Edition at page 1504. Moreover, section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya on res judicata, is quite instructive;
21. As regards the second and fourth issues, the trial court held that it lacked jurisdiction over the application since it had determined the same hence the matter was res-judicata. In the case of *Republic-vs-Karisa Chengo and 2 Others* (2017) eKLR, the Supreme Court of the Republic of Kenya held ;
- “.....Lack of jurisdiction thus renders a court’s decision void as opposed to it being merely voidable.....”
22. Halsbury’s Laws of England, 4th Edition Volume 9 at page 350, defines the term “Jurisdiction” and the same is noted accordingly.
23. In the case of Mukisa Biscuit case (supra), the Court of Appeal observed, inter alia;
- “.....a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation.....”
24. It is established law that a preliminary objection is a threshold question best taken at inception. It calls for a definitive, determinative and prompt pronouncement; see *Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko and 2 others* (2013) eKLR.
25. The third issue is in respect of the events of 14th October 2020 when Mr Rodi, learned counsel instructed by the appellant’s counsel appeared before the trial court and applied for an adjournment thus;
- “Mr. Anyulo is indisposed and he will be seeking leave of the court to file a further list of documents which they have not been able to file owing to covid-19 and the defendant has



not been given instructions to enable them put their house in order. I pray for another date. Ill health is something that is unpredictable.”

26. In the case of *Bi-Mach Engineers Ltd-vs-James Kaboro Mwangi* (2011) eKLR it was held that it was a client’s duty to pursue his counsel to find out the position of his case. I bear in mind Order 6 Rule 2 of the *Civil Procedure Rules*, 2010 on mode of appearance and Order 9 (supra) regarding recognized agents and advocates.
27. Clearly, the reasons advanced by the appellant’s counsel as stated in paragraph 25 herein above, were sufficient to grant leave sought thereof in the spirit of fair hearing as noted infra.
28. A fair opportunity to be heard is a fundamental principle of justice; see Halsbury’s Laws of England, 5th Edition 2010 Volume 61 paragraph 639.
29. In the case of *Kanwal Sarjit Singh Dhiman-vs-Kashuji Jivraji Shah* (2015) eKLR, the Court of Appeal observed that:

“The courts exist for the purposes of dispensing justice and that the sword of justice cuts both ways.....Further, it has been said that a technical judgment is not the best judgment...”
30. On 18th November 2020, the trial court entered ex-parte judgment for the respondent against the appellant. On the face of the judgment, the court observed as noted in paragraph 12 hereinabove. Nonetheless, the judgment is a technical one as held in Dhiman case (supra).
31. I bear in mind the meaning of fair hearing and hearing on the merits as per Black’s Law Dictionary (supra) alongside Order 7 Rule 1 (supra) relating to defence. The import of the trial court’s record including the proceedings of 14th October 2020 is that the appellant deserved access to justice and fair hearing of the suit on merits without delay as premised on Articles 48, 50 (1), 25(c) and 159 (2) (b) of *the Constitution* of Kenya, 2010 and the Court of Appeal decision in the case of *James Kanyitta Nderitu-vs-Marios Philotas Ghikas and another* (2016) eKLR. Quite clearly, the trial court did limit the appellant’s rights in the circumstances. So resjudicata and jurisdiction of the court ought to have been none issues at that stage of the suit.
32. Thus, this appeal is full of merit. The same is hereby allowed in terms of the orders sought in the memorandum of appeal and as stated in paragraph 3 hereinabove.
33. For clarity, this court renders the following final orders:
 - a. quash the decision of the trial Magistrate rendered on 17th March 2021,
 - b. set aside the trial court’s ex-parte judgment delivered on 18th November 2020 and
 - c. reinstate the suit for hearing inter-partes before another court of competent jurisdiction namely the Chief Magistrate’s court at Homa Bay to meet the best ends of justice.
 - d. Costs of the appeal and the court below shall be borne by the appellant.
34. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 4TH DAY OF OCTOBER, 2022.

G .M .A ONG’ONDO

JUDGE

Present;



- a) Ms Odhiambo holding brief for G.S Okoth, learned counsel for the appellant.
- b) Ms Odera holding brief for Ms. Ochwal, learned counsel for the Respondent
- c) Angella and Fiona, Court Assistants.

