REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC APPEAL No. E003 OF 2020

CHARLES ONGARO KIAGE ....APPELLANT

VERSUS

GEOFFREY MIRABA ABEL...1ST RESPONDENT

NANCY B ONDICHO ....2ND RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Nakuru (Hon. K. I. Orenge, Senior Resident Magistrate) delivered on 15th October 2020 in Nakuru CMCC No. 1835 of 2005 Geoffrey Miraba Abel v Charles Ongaro Kiage & Another)

JUDGMENT

1. This appeal traces its roots to two applications which the appellant had filed in the subordinate court: Notice of Motion dated 11th August 2020 and Notice of Motion dated 20th August 2020.

2. Notice of Motion dated 11th August 2020 sought the following orders:

> *1. The service of the application be dispensed with in the first instance and the same be heard ex-parte.*
>
> *2. THAT pending the inter-parties hearing of this application, the Honourable Court be pleased to grant an order of stay of execution of the judgement of 17th June, 2020 entered against the Defendant/Applicant herein together with all the consequential decree dated 22nd June 2020.*
>
> *3. THAT pending the hearing and determination of this application, the Honourable Court be pleased to grant an order of stay of execution of the judgement of 17th June, 2020 entered against the Defendant/Applicant herein together with all the consequential decree dated 22nd June 2020.*
>
> *4. THAT pending the hearing and determination of this application, the Honourable Court be pleased to stop the eviction of the Applicant from the portion Nakuru/Kapsita/588.*
>
> *5. THAT the Honourable Court be pleased to set aside the proceedings of February 12, 2020 and the judgement entered against the Defendant/Applicant herein.*
>
> *6. THAT in the alternative the Honourable Court be pleased to set aside part of the proceedings of February 12, 2020 and reopen the same to enable the defendants cross examine the plaintiff and tender their evidence before the final judgement can be entered herein.*
>
> *7. THAT cost of this application be provided for.*

3. On the other hand, Notice of Motion dated 20th August 2020 sought the following orders:

> *1. THAT the service of the application be dispensed with in the first instance and that the same be heard ex-parte.*
>
> *2. THAT pending the hearing and determination of this application, the Honorable Court be pleased to grant an order of injunction stopping the Plaintiff/Respondent from continuing with their unlawful acts against the Defendant/Applicant which include harassing, intimidating, threatening, provoking, inciting, trailing the Applicants, his agents and servants and also interfering with the quiet and peaceable enjoyment of their land portion Nakuru/Kapsita/588.*

3. THAT pending the hearing and determination of this application, the Honorable Court be pleased to issue an injunction order restraining the Plaintiff/Respondent by themselves, their servants, agents or otherwise howsoever be restrained from interfering with the Applicant quiet and peaceable enjoyment of land portion NAKURU/KAPSITA/588.

4. THAT, the OCS Elburgon station do ensure compliance with the orders by ensuring that that each party maintains their portion of the land.

5. THAT cost of this application be provided for.

4. Upon hearing both applications, Hon. K. I. Orenge, Senior Resident Magistrate, delivered a ruling on 15th October 2020 dismissing both with costs for want of merit. Dissatisfied with the outcome, the appellant filed this appeal. The following grounds of appeal are listed on the face of the Memorandum of Appeal:

1. *That the learned trial magistrate erred in law and fact in finding that there was no sufficient cause why the appellant advocate did not attend court on 12th February 2020, against all the documents presented before court in proof of the same thereby failing to set aside the proceedings of that day.*

2. *The learned trial magistrate erred in law and in fact in making a finding that the appellant was not in court against the averment and admission by the parties.*

3. *The learned trial magistrate erred in law and in fact in misapplying various facets of the law on injunctions and stay thereby arriving at an erroneous finding.*

4. *The learned trial magistrate erred in law and in fact on the law on evictions and applied a different set of facts apart from those presented before him hence arriving at an erroneous finding.*

5. *That the trial magistrate erred in law and fact on law on setting aside ex-parte judgement by failing to consider the defence on record.*

6. *That the learned trial magistrate erred in law and fact by demonstrating ignorance of the law in totality.*

5. Based on those grounds the appellant prayed that this court finds that both applications were merited, that this court sets aside the said ruling and further sets aside the proceedings of 12th February 2020 as well as the ex-parte judgement so that the matter is heard and determined on merit. He also prayed for costs of the appeal.

6. The appeal was canvassed through written submissions which both the appellant and the 1st respondent duly filed. The 2nd respondent did not participate in the hearing of the appeal despite being served.

7. It is argued for the appellant that the trial court failed to consider the such annexures to the supporting affidavit as discharge summaries and hospital bills which the appellant had availed in an effort to explain failure of his advocate to attend court on 12th February 2020. It is further argued that authenticity of the said annexures was never challenged by the respondents. The appellant has also argued no eviction took place but he was unlawfully removed from the suit property and that **Section 152E (1)** of the **Land Act** was not complied with. Further, that the court ought to have considered whether the defence and the counterclaim on record raised triable issues, the respective prejudice to be suffered by the parties and whether it was in the interest of justice to grant setting aside. The appellant cites the cases of **Teresia Irungu v Jackton Ocharo & 2 others [2013] eKLR**, **Takaful Insurance of Africa Ltd (Kenya) v County Government of Garissa & 2 others [2020] eKLR** and **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** among others. For those reasons the appellant prays that the appeal be allowed with costs in his favour.

8. For the 1st respondent, it is argued that the appellant was evicted from the suit property following the decree issued by the court on 22nd June 2020, thus the magistrate could not order stay of execution which had already taken place. It is also argued that by the time the application dated 20th August 2020 was filed the appellant had been evicted hence issuing injunctive orders would not have served any useful purpose.

9. As regards whether the subordinate court was justified in dismissing the prayer for setting aside the judgment, the 1st respondent has argued that the appellant and his counsel did not reach out to explain their predicament and that no evidence of illness of the appellant's advocate's family member was availed. Further that the appellant did not move the court until 6 months after the proceedings sought to be set aside. He relied on the cases of **Shah vs Mbogo [1967] EA 11** and **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002** and urged the court to dismiss the appeal with costs.

10. I have carefully considered the appeal and the submissions. The appeal emanates from an order made in exercise of discretion. The circumstances in which this court can interfere with the learned magistrate's exercise of discretion are well circumscribed. In **Mbogo and Another v Shah [1968] EA 93**, the Court of Appeal stated thus:

We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as

a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.

11. I have categorised the grounds of appeal herein into two groups: grounds 1, 2, 5 and 6 which deal with whether or not setting aside ought to have been granted and the remaining grounds which deal with whether or not stay and injunction ought to have been granted.

12. A perusal of prayers 1 to 4 of Notice of Motion dated 11th August 2020 and prayers 1 to 3 of Motion dated 20th August 2020 reveals that all those prayers sought orders pending hearing and determination of the respective applications. In other words, the prayers were spent as at the date the applications were considered and determined on the merits. Further, prayer 4 of Motion dated 20th August 2020 sought orders to assist compliance with any orders that would be granted under 1 to 3 of the said application. To that extent, it was similarly spent as at the date the said application was considered and determined on the merits. The learned magistrate cannot therefore be faulted for not granting prayers which were spent. For that reason, I find no merit in grounds 3 and 4 of the appeal. I dismiss the said grounds.

13. The fundamental question that was placed before the subordinate court through Notice of Motion dated 11th August 2020 was whether or not to grant setting aside of the proceedings of 12th February 2020 and the resultant judgment. The application was supported by two affidavits: one sworn by the appellant and the other by his advocate on record. In particular, the advocate explained that he did not attend court on 12th February 2020 because his wife was admitted into intensive care unit of M P Shah Hospital on 31st January 2020 and gave birth to twins. That the wife was discharged a week later while one of the children remained in ICU for 23 days and the other 35 days. He annexed copies of hospital bills and discharge summaries. There is no dispute that the hearing date of 12th February 2020 was fixed in the presence of all parties.

14. The principles applicable while considering an application for setting aside in a situation where a party was aware of the proceedings sought to be set aside are well settled. They were laid down in **Mbogoh & Another v. Shah** (supra) and were reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR:**

> ***… 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. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).***

15. Thus, the subordinate court had unfettered discretion when considering Notice of Motion dated 11th August 2020 and was required to take into account such factors as the reason for the failure of the appellant's counsel to attend court, the length of time that had elapsed between 12th February 2020 and the date the application was filed, whether the appellant's defence and counterclaim raises triable issues, the respective prejudice that the parties were likely to suffer if setting aside was not granted and whether it was in the interest of justice to grant setting aside. Further, the subordinate court must have been aware of its duty under **Sections 1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2) (d)** of the **Constitution** to see to it that the just, expeditious, proportionate and accessible resolution of disputes is attained and that substantive justice prevails.

16. A perusal of the ruling shows that the learned magistrate properly guided himself on the principles applicable and even referred to the relevant authorities of **Mbogoh & Another v. Shah** (supra) and **Patel v EA Cargo Handling Services Ltd [1974] EA 75**.

17. In a rather summary analysis of the reasons advanced for setting aside, the learned magistrate stated as follows:

> ***In the instant case the defendant advocate submitted that he had a sick relative there was no evidence had been annexed to show that the defendant was had sick relative there are no treatment notes. The defendant was not present in court contrary to the submission that the he was present in court. The present application by the defendant has not persuaded the court to exercise discretion in its favor. The application is aimed at casing (sic) delay and obstruction of justice. I therefore find no merit in the application dated 11th August 2020 the same is dismissed with costs.***

18. It immediately becomes clear that the learned magistrate did not address the reasons that the appellant's advocates had raised for failure to attend court. His conclusions that there was no evidence of sickness and that no treatment notes had been availed run counter to the record that was before him. Had he analysed the reasons advanced on behalf of the appellant, he would have probably come to a different conclusion as to whether failure to attend court was excusable. My own conclusion is that the advocate had a valid explanation: his new-born children were still in the ICU as at the date of the hearing. Whereas I agree with counsel for the 1st respondent that counsel for the appellant ought to have communicated his difficulties, such a failure alone does not detract from the fact that there were real difficulties which the advocate went out of his way to display and explain in detail. There was some argument as to whether or not the appellant was personally in court. To the extent that he had an advocate on record it really doesn't matter whether or not the appellant was present.

19. Counsel for the 1st respondent also argued that the application was made some 6 months after the date of hearing. I agree that there was considerable delay. Nevertheless, I take into account that the year 2020 was a unique one in so far as life generally and court operations were concerned. The COVID-19 pandemic was declared in Kenya hardly a month after 12th February 2020 with the result that court operations were drastically affected. I view the delay in that context. Any prejudice that the respondents may have suffered by the delay could be compensated by an award of costs.

20. A perusal of the amended plaint and the amended defence and counterclaim reveals that the dispute between the parties is over ownership of the suit property. The 1st respondent is seeking eviction of the appellant and the 2nd respondent from the suit property while the appellant and the 2nd respondent are seeking cancellation of certain entries in the register of the suit property and an order that the said property be registered in the name of the appellant. It is the kind of dispute that needs to be resolved by going to its roots, through hearing the parties as is indeed the duty of the subordinate court under **Sections 1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2) (d)** of the **Constitution**. Through the application, the appellant had expressed a desire to be heard.

21. The mission of the court is always to do justice. That mission comes into sharp focus in an application for setting aside where the court is called upon to delicately balance the interest of justice as between the parties. In the circumstances of this appeal, justice would have been better served by giving the appellant an opportunity to present his case. By dismissing the application in view of the circumstances already adverted to above, the subordinate court effectively shut the appellant out.

22. I have said enough to demonstrate that I am persuaded that the learned magistrate misdirected himself in exercising his discretion and as a result there has been mis-justice to the appellant. The appeal has merit.

23. In the result, I allow the appeal and make the following orders:

a) The proceedings of 12th February 2020, the judgement, the decree and all consequential orders are hereby set aside.

b) Costs of Notice of Motion dated 11th August 2020 are awarded to the 1st respondent.

c) The appellant shall have costs of this appeal. The said costs shall be borne by the 1st respondent.

Dated, signed and delivered at Nakuru this 3rd day of May 2021.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the appellant

Ms Wangari for the 1st respondent

No appearance for the 2nd respondent

Court Assistants: B. Jelimo & J. Lotkomoi