REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO 61 OF 2019

MOHAMMED ADAN ISSAK.....1ST APPELLANT

ANTHONY NYONGESA WAFULA.....2ND APPELLANT

VERSUS

CHRIS NDOLO MUTUKU.....RESPONDENT

(Being an appeal from the Ruling and Orders of Hon. P. N. Gesora at Nairobi in CMCC No 1020 of 2018 dated 26th August 2019).

JUDGEMENT

1. This matter arises out of the ruling and orders of Honourable P. N. Gesora, Chief Magistrate, Nairobi in CMCC No 1020 of 2018 delivered on 25th August 2019. The learned trial magistrate made the following observations:-

> ***"….I have also had occasion to peruse the entire court record. There is no evidence of there being a formal defence filed herein. The annexed defence annexed to the application herein is not authentic as it lacks the requisite court stamp and there are no receipts to signify payment of requisite court charges. This in my view informs why the court entered judgment and ordered that this matter be set down for hearing by way of formal proof. The defendants have on several occasions appeared in court and are therefore aware of these proceedings…….".***

> ***"……It is my view that the application herein lacks merit and I proceed to dismiss it with costs to the respondent".***

2. Together with the Appeal the Applicant filed a Notice of Motion dated 4th September 2019. The said application was dismissed by this court on 16th December 2020.

3. The appellants being dissatisfied with the ruling of the learned trial magistrate (Hon. P. N. Gesora) dated 26th August 2019 filed an appeal dated 4th September 2019 to this court on the following grounds:-

> ***1. The learned magistrate erred in fact and law and misdirected himself in finding that the appellants had never filed defences to the plaint.***

> ***2. The learned trial magistrate erred in law and fact by ignoring that the appellants had filed defences dated 17th March 2016.***

> ***3. The learned trial magistrate erred in law and fact by failing to appreciate that the appellants were not given an opportunity to be heard whereas they had previously filed defences and yet an interlocutory judgment was entered against them.***

> ***4. The learned magistrate failed to appreciate that by failing to set aside the judgment, he was denying the appellants the right to be heard and going against the overriding objective of the Civil Procedure Act in respect of facilitating a just resolution of disputes.***

> ***5. The learned magistrate erred in law and fact by failing to set aside the judgment dated 4th April 2019 amounted to condemning the appellants unheard which is contrary to the right to fair administrative action under Article 50 of the Constitution of Kenya.***

> ***6. The learned magistrate erred in law in failing to appreciate that land matters are sensitive and judicial officers are required to***

hear all parties in a full trial for justice to be seen to be done.

7. The learned magistrate erred in law in failing to exercise his discretion in favour of the Appellants.

8. That the learned trial magistrate erred in law and fact in holding that the Appellant's director personally be held liable to paying the respondent.

4. REASONS WHEREFORE:-

1. The appeal be allowed.

2. The Ruling and orders of Hon. P. N. Gesora dated 26th August 2019 be set aside in its entirety.

3. The application dated 10th May 2019 be allowed as prayed and the suit be heard afresh before the Chief Magistrate Court.

4. Costs of the suit in the Superior Court and in this Appeal be to the Appellants.

5. On the 16th December 2020, the court with the consent of the parties directed that the appeal be canvassed by way of written submissions.

The Appellants' Submissions

6. They are dated 28th January 2021. They raise five issues for determination:-

i. Whether the Appellants' defences were filed.

ii. Whether the Appellants have a good defence.

iii. Whether the trial court violated the Appellants' right to a fair hearing and right to property by condemning them in absentia.

iv. Whether the learned trial magistrate erred in law and fact by not setting aside the judgment.

v. Whether the application dated 10th May 2019 should be allowed and suit be heard afresh.

7. The suit was instituted by the respondent through a plaint dated 9th February 2016. The suit was filed in the Environment and Land Court and registered as ELC 107 of 2016. The appellants instructed their former advocates M/S Said Wanja & Nyangayo Advocates to entered appearance on their behalf and filed defences. The appellants served their replying affidavits and defences on the respondent on the 18th March 2016 and the respondent duly acknowledged receipt of the pleadings.

8. That subsequently, the respondent applied that the file be transferred to the lower court without the appellants' former advocates knowledge. He proceeded to file a request for judgment dated 28th February 2018 citing that the appellants had not filed defences to the matter and the interlocutory judgment was granted on 9th July 2018.

9. The appellants have maintained that the defence were filed and paid for. The appellants when prosecuting their application dated 10th May 2019 filed a supplementary affidavit dated 30th May 2019 attaching the defences. The defences were filed and the evidence of filing was produced at the lower court and in this court through the supplementary affidavit dated 26th September 2019 filed on 27th September 2019. The learned trial magistrate misdirected himself when he stated that there were no defences filed which was not the correct position therefore declining to review and or set aside the judgment dated 4th April 2019. The appellants are ready and willing to produce to court the original defences and receipts for scrutiny purposes.

10. The appellants state in their defences that they are the owners of the suit properties whose names is allotment letters were issued. That they have been in occupation of the suit property since 2009 to date as the bonafide allottees of the properties. The appellants have a strong defence and this honourable court should grant them their day in court.

11. Fair hearing as employed by Articles 50(1) of the constitution is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law or facts. They have put forward the case of **Adan Samow Eymoi vs Republic [2016] eKLR.** The promulgation of the Constitution of Kenya 2010 meant that the right to be heard is no longer just a rule of natural justice. The right to be heard is now a constitutional principle in Kenya which applies in equal measure to all proceedings, investigations and hearings whether judicial or administrative.

12. It is not in dispute that the appellants were never heard at the lower court and judgment was delivered against them even though they had counsel on record and had filed their defences in the matter. They have put forward the case of **Madalina Mwari & Another vs Jane Kathure Ezekiel [2017] eKLR** where the court relied on the case of **Thomas Mung'ira & 9 Others vs Joseph Mutuma & 4 Others**. The applicants were denied the opportunity to be heard when the learned magistrate shut the door of justice when he delivered the ruling dated 26th August 2019.

13. The appellants upon realizing that execution was imminent approached the trial magistrate and filed an application for review and setting aside of the judgment dated 4th April 2019. They adduced evidence that the court file was tampered with where the defences were removed and further stated that they were not aware when the matter was transferred from the Environment and Land Court to the Chief Magistrate's Court for hearing and determination. They attached original defences and receipts clearly showing that they had filed their defences but the trial magistrate declined to exercise discretion to set aside the ex parte judgment. They have put forward the cases of **Mbogo vs Shah & another [1968] EA 93; Harrison Wanjohi Wambugu vs Felista Wairimu Chege & Another [2013] eKLR; Richard Ncharpi Leiyagu vs IEBC & 2 Others [2013] eKLR.** This court has the power to interfere with the magistrates court's discretion when it is established that wrong principles of law were applied.

14. The application dated 10th May 2019 should be heard afresh for reasons that the trial court did not consider the evidence that was presented before it by the appellants. They pray that the appeal be allowed.

The Respondent's Submissions

15. They are dated 30th January 2021. The appellants' claim is not based on beneficial ownership but on purported allotment. Nothing would be easier than to produce such evidence. If this is not possible, then the obvious question that begs answer is; what purpose will be served by a retrial? The appellants' claim to the land is based on what they purport to be an allotment letter issued by the City Council of Nairobi. They were accorded three opportunities to produce the documents. They have failed to do so. The appellants are aware that the respondent has all along maintained the said allotment letters to be forgeries. As an established rule photocopies are secondary evidence. On what basis is secondary evidence admissible? He has put forward the case of **re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu (Deceased) [2016] eKLR.** The appellants have failed to produce the original of both the allotment letters and the receipts in payment of the monies conditional to the said allotments. The receipts produced by the appellants as evidence of payment pursuant to the letter of allocation are for Kshs.2,000/- paid on 4th March 2016. Seven years after the allocation lapsed.

16. It is now settled law that setting aside a default judgment is a discretionary power and the party asking the court to exercise this discretion in his favour must meet the basic criteria set out in **Evans vs Bartlam.** The appellants have not demonstrated that they have a prima facie defence to the respondent's claim. They can only do this by producing documentary evidence in support of their alleged title to the properties.

17. All parties were given an opportunity to be heard. After the appellants filed an application to set aside the judgment of the lower court, the learned magistrate on 24th May 2019 gave the appellants an opportunity to produce documentary evidence in support of their claim. They failed to do so. The appellants and their advocates were at all times aware of the hearing of the formal proof, the entry of judgment but they did nothing. The defences exhibited in the 1st appellants supporting affidavit in the lower court are different from those exhibited in this court. The respondent's official rubber stamp is missing from the first document while those now being produced have super imposed upon them an impression of my official rubber stamp. This is not the same document.

18. Even assuming that the statements of defence were properly on record and had been indeed been duly filed and the requisite court fees paid, in the absence of evidence that the said documents were served upon the respondent within fourteen (14) days of their filing as required by law then the court is mandated in law to strike out the defences and enter default judgment in favour of the plaintiff. He has relied on order 7 rule 1, order 10 rule 3 of the Civil Procedure Rules. The finding by the learned magistrate cannot be interfered with. He has put forward the case of **Mwangi vs Wambugu [1984] KLR 453** which was cited in the case of **Patrick Sasio Lekakeny vs Alex Tampushi & 3 Others [2018] eKLR.**

19. This is a court of Equity. Anyone who seeks redress from a court of equity must come to the court with clean hands. Despite the existence of the status quo orders the appellants breached the orders of the court by undertaking some developments. They also chose not to attend any further proceedings in court. The court will not aid those who do not respect it. Before the default judgement was entered against the defendants, the Environment and Land Court had certified the matter as ready for hearing and directed the parties to set it down for hearing. The appellants were invited for fixing of a hearing date, notified of the hearing of the formal proof and the entry of judgment. They chose to ignore all these. Equity does not aid the indolent. The appellants have no arguable case that would warrant the court to exercise any discretion in their favour.

20. It appears that the appellants are not appealing against the judgment of the court dated 4th April 2019 but against the ruling on the first application for review. The appellants are not seeking that the judgment be set aside. They are seeking that their application dated 10th May 2019 be heard a fresh. He has put forward the case of **Serephen Nyasani Menge vs Rispah Onsase [2018] eKLR**. The appellants previously filed two applications for review with the one dated 28th August 2019 seeking to review the ruling of 26th August 2019. It was after the dismissal of this second application for review that the appellants sought to try their luck in this court.

21. The memorandum of appeal dated 4th September 2019 is in reality an appeal against the judgment of the court dated 4th April 2019. No leave to file this appeal out of time was sought and obtained. The said appeal has been lodged 153 days after entry of judgment, whilst the right of appeal terminated on 3rd May 2019. No such enlargement of time has ever been sought. A delay of 153 days is not excusable. He has put forward the case of **Sound Entertainment Ltd vs Antony Burugu & Co. Advocates [2014] eKLR.** The appellants should not be allowed to hide the real import of their appeal under the guise of the claim that what they are appealing is against the ruling of the court made on 25th August 2019. The fact of the matter is that their grievance is with the decree of the court issued on 4th April 2019. Where the law provides for a particular procedure for seeking redress, that procedure must be followed. He has put forward the case of **Republic vs Public Procurement Administrative Review Board & Another (Interested Party Optic Technologies Kenya Ltd) Exparte County Assembly of Busia [2017] eKLR; Abraham Lenauma Lenkeu vs Charles Katekeyo Nkaru [2016] eKLR.**

22. An appeal has the same effect as an application for review which renders the defective appeal currently before the court the third application for review. Consequently, the appeal, the two applications dated 4th September 2019 are a nullity in law as they offend he express provisions of order 45 rule 6 of the Civil Procedure Rules.

23. The appellants have no defence to the respondents claim and a retrial would be waste of judicial time. The appeal offends the provisions of section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure Rules to the effect that a party cannot seek a review of an order and at the same time appeal against the order. The appeal is the third attempt at reviewing and/or setting aside the decree of the court issued on 4/4/2019 and therefore offends order 45 rule 6 and is, in a nut shell a wanton and reckless abuse of the process of the court. He prays that the appeal be dismissed with costs.

24. I have considered the grounds of appeal, the response, the written submissions filed on behalf of the parties, the oral highlights and the authorities cited. The issues for determination are:-

i. Whether the appellants' defences were filed.

ii. Whether the appellants' have good defences.

iii. Whether the honourable learned trial magistrate erred in law and in fact by not setting aside the judgment and if so, whether the application dated 10th May 2019 ought to be allowed.

iv. Who should bear costs of this appeal?

25. It is not in dispute that the respondent herein instituted a suit through a plaint dated 9th February 2016 in the Environment and Land Court. It was registered as ELC NO 107 of 2016. Upon being served, the appellants instructed their advocates to enter appearance and file defences. There is a memorandum of appearance dated 29th February 2016 field by M/S Said Wanja & Nyangayo Advocates. There is also a defence filed on behalf of the 1st defendant dated 17th June 2016. The date of filing is not visible as it appears to be a photocopy. I have not had the opportunity of seeing the lower court record so I cannot say for certain when the same was filed. In paragraphs 4 and 5 of the said defence the 1st defendant states that he is the owner of plot number 220 and 221 on LR 5908/10 as he was allotted the same. He also states that he has been in occupation of the suit property from the year 2009 to date as the bonafide allotee of the properties. The defence filed by the 2nd defendant states the same as the 1st defendant's.

26. It appears these defences were filed when the matter is still on the Environment and Land Court. It is also not in dispute that the matter was transferred to the Chief Magistrate's Court and given the number CMCC Number 1020 of 2018. It is the appellants' case that they were not aware the matter had been transferred to the Chief Magistrate's Court. The respondent confirms they were not present when the matter was transferred though he had served their advocates.

27. It is the appellants' case that their defences were filed and paid for. That the 1st appellant's defence is dated 17th March 2016 and filed on 18th March 2016. The 2nd appellant's defence is dated 17th March 2016 and filed on 18th March 2016. There are two court receipts serial numbers 3562330 and 3562329 and a copy of KCB cash deposit receipt dated 18th March 2016. I find that this prima facie confirms that the appellants indeed filed their defences while the matter was still in the Environment and Land Court. The respondent on the other hand states that the purported statements of defence exhibited were forgeries and were not genuine. I find that the honourable learned trial magistrate ought to have taken into account the copies of statements of defences attached to the affidavits filed in the application before him.

28. This being the first appeal it is the duty of this court to evaluate the evidence tendered before the trial court. In the case of **Nebert Njeri Murugu vs Nicholas Muriithi Zakaria [2015] eKLR** the court cited the case of **Ephantus Mwangi vs Dancan Mwangi Wambugu [1982-88] IKAR 278** where it held thus:

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is in consistent with the evidence of the case generally".

Similarly in the case of **Mbogo vs Shah & Another [1968] EA 93**, the Court held thus:-

"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself 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 account and consideration and in doing so arrived at a wrong conclusion".

29. I find that the honourable learned trial magistrate erred in finding that no defences had been filed with was not the correct position.

30. The appellants' defence is that they are the bonafide owners of the suit properties based on the letters of allotment in their names. It is also their case that they have been in occupation of the suit properties since 2009. From the foregoing it is my view that the appellants ought to be given an opportunity to present the facts in support of their defences. It has been held that good defence is not necessarily one that will succeed.

31. Article 50 of the Constitution guarantees every person the right to be heard. By declining to review the orders, the learned trial magistrate denied the appellants the right to a fair hearing.

32. I find that the appellants have good defences which ought to be heard on their merits. This can only be possible by way of adducing

evidence which will be tested by cross examination. The appellants will have an opportunity to demonstrate how they acquired the suit properties as well as the respondent.

33. Having said so I find that the honourable learned trial magistrate erred by not setting aside the ex parte judgment. In essence he ought to have allowed the application dated 10th May 2019. In case of **Richard Ncharpi Leiyagu vs IEBC & 2 Others [2013] eKLR** the Court of Appeal held thus:-

> ***"We agree with the noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct the course of justice".***

34. I find that the honourable learned trial magistrate erred by not taking into account the circumstances of the case and that the matter had been transferred to the lower court in the absence of the appellants' advocates. He ought to have considered the reasons advanced by the appellants for failing to participate in the matter leading to the ex parte judgment of 4th April 2019.

35. The memorandum of appeal herein is dated 4th September 2019. It is against the ruling and the orders of honourable P N Gesora dated 26th August 2019. Looking at it this way the appeal is not time barred. It is the respondents' contention that the appellants have filed an appeal after their application was unsuccessful. I find that the appeal is properly before court. What is forbidden is to file an application for review and appeal at the same time. The Court of Appeal **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others [2013] eKLR** held that an application for review and an appeal over the same decision are intended to be alternative remedies. A party cannot file an appeal and later seek review of the same judgement/ruling that is the subject of appeal. In the instant case the appellants only filed this appeal after they were unsuccessful in the application for review in the lower court.

36. The upshot of the matter is that the appeal is merited. The appellants' right to be heard is enshrined on the constitution. The respective parties claims ought to be heard on their merits.

37. In conclusion, I grant the following orders:-

> ***a. That the appeal is allowed.***
>
> ***b. That the ruling and orders of Hon. P. N. Gesora dated 26th August 2019 are hereby set aside in its entirely.***
>
> ***c. That the application dated 10th May 2019 is hereby allowed and it is hereby ordered that the suit be heard afresh before the Chief Magistrates Court.***
>
> ***d. That costs of this appeal be borne by the appellants.***

It is so ordered.

Dated, signed and delivered in Nairobi on this 10th day of June 2021.

…….

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Muoki for Mr. Kanjama for the Appellants

No appearance for the Respondent

Phyllis - Court Assistant