Waturi v Murimi (Civil Appeal E003 of 2023)
[2025] KEHC 8880 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8880 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E003 OF 2023

AK NDUNG'U, J

JUNE 20, 2025

BETWEEN

BERNARD KIMWERE WATURI .... APPELLANT

AND

KENNEDY KEHANYA MURIMI .... RESPONDENT

JUDGMENT

1. I start by noting that this appeal is not the epitome of elegance in legal draftsmanship. The flaws transcend both the setting out of the grounds of appeal and the prayers sought. Perhaps this could be attributed to the fact that the same is drawn by a pro se litigant whose depth in the understanding of the law and legal procedures is discernably limited. In days gone by, this pleading would be one for striking out. Thankfully, the Appellant can take refuge in Article 159 (d) of *the Constitution* to breathe live to this mongrel of a pleading that presents a mix of an appeal and an invite to the court to exercise original jurisdiction on the matter.

2. By way of a plaint dated 29/8/2018, Kennedy Kehanya Murimi (the respondent) sued Bernard Kimwete Waturi (the respondent) for orders;

    a. A declaration that the defendant having sold the motor vehicle Registration No. KBJ 017 A Toyota Station Wagon on 8th January, 2015 title of the said motor vehicle passed on to the Plaintiff as a bonafide purchaser for valuable consideration.

    b. A declaration that the investigation by Chief Inspector Richard Njoroge Inspector Benson Musyoka of Nairobi area Flying Squad Unit or any other officer at the instigation or instruction of the Defendant is illegal, unjust, oppressive and without any colour of right as the Defendant is legally bound by the terms of the contract.

    c. An order of permanent injunction restraining the Defendant, his servants, agents or anybody claiming under him or at his instigation or instruction from repossessing, alienating,

impounding, harassing, intimidating, threatening or arresting or oppressing or in any manner whatsoever abusing the criminal process of dealing with the plaintiff over the subject motor vehicle.

d. Costs and interest of the suit.

e. Any other relief as the Honourable Court may deem necessary.

3. By a judgment dated 21/2/2023, the court allowed orders (a) (b) (c) and (d) against the Appellant.

4. Aggrieved by the judgment, the appellant lodged through appeal premised on 25 grounds majority of which fault the findings on merit by the trial magistrate and challenging the court's refusal to arrest its judgement.

5. The Appeal was canvassed by way of written submission.

6. In his submission the Appellant largely reiterated the grounds of appeal.

7. For the Respondent 3 issues are flagged for determination;

   i. Whether the judgment by the trial court should be set aside.

   ii. Whether the Appellant is entitled to reliefs sought.

   iii. Who is entitled to costs.

8. Both parties filed written submissions which submissions I have considered in totality even on areas I may not advert to directly.

9. I have considered the grounds of appeal, the submission made and the record of the trial court including the ruling of the court dated 22/11/22 and the judgment of the court dated 21/2/2023.

10. It is manifestly clear from the grounds and the submissions raised by the Appellant that the appeal seeks the setting aside of the judgment of the trial court.

11. There is a total mix up of facts in the grounds and the submissions thus obscuring what exact jurisdiction this court is to exercise. As I understand it, the Appellant's grouses are that the trial court failed to arrest the judgment of the trial court upon his application and secondly, that on the facts of the case the court fell into multiple errors thus arriving at a wrong judgment.

12. Indeed, the Appellant has gone to great lengths to discredit the findings of the lower court and in the process adduced voluminous evidence in his favour in the grounds and submissions made.

13. In doing so, the Appellant has failed to appreciate that as things stand, the findings of the trial court were based on evidence taken Exparte since the Appellant neither filed defence and/or appeared at the formal proof hearing to cross-examine the Respondent.

14. Suffice it to note that it is not open for the Appellant to adduce evidence at the appellate stage.

15. In a nutshell therefore, the appeal herein ought to have been specific against the trial court's finding on the application dated 5th April 2022.

16. It is apparent that even the Respondent has been sucked into the confusion arising from the manner of the presentation of this appeal since after correctly putting a cross the law on instances where the court can set aside an Exparte judgment under Order 10 Rule 11 of the Civil Procedure Rules or reviewed under Order 45 of the Civil Procedure Rules, counsel proceeds to submit at length on the principles of setting aside as though this court was exercising its original jurisdiction.

17. Yet the concern of both parties in this appeal would and indeed should have been concentrated on urging this court on the wrong exercise of discretion by the trial court in refusing the application to set aside the proceedings and allow the Appellant to file a defence.

18. As it were the judgment of the trial court is a regular one based on the evidence offered Exparte before the trial court.

19. Thus the matters of evidence populated in the grounds of appeal and in the submission by the appellant do not aid his cause at all.

20. I have reviewed the application dated 5/4/22 and the ruling of the trial court thereto. In declining the prayer to set aside its proceedings and arrest judgement, the record shows that the trial court broached several salient features of the trial that militated against the grant of the order sought. The court considered the dictates of *the constitution* under Article 159(b) that justice shall not be delayed. The court set out in ex tenso the provisions in Sections 1A and 1B of the *Civil Procedure Act* that provide for the overriding objective of the Act and the rules made thereunder and the duty of the court and the obligations of parties to ensure expeditious disposal of matters.

21. The mainstay of the Appellant's application was that his counsels had not been served and there were other existing cases over the same subject matter hence the need to set aside the proceedings and allow the applicant to file a defence.

22. Addressing these concerns, the court observed the participation of the Applicant in this trial before. Instead of filing a defence in the matter, the Applicant had filed a preliminary objection to the suit, an objection that he did not prosecute and the same was dismissed. The record bears witness that the Applicant's Advocates were all along served as the matter progressed. It is telling that the Advocates did not respond to this fact by way of an affidavit or otherwise and it is important to note that the Applicant was not competent to answer this issue on their behalf.

23. Regarding the existence of the other alleged cases over the same subject matter, I note that the finding of the trial court was that, that information was only privy to the Appellant and he had never served the mentioned order of the High Court on the trial court. The court found no sufficient grounds to exercise discretion in favour of the Appellant.

24. Of determination is whether good grounds are laid in this appeal warranting this court's interference with the trial court's exercise of discretion in this matter.

25. The principles on interfering with judicial discretion were laid down in the case of Price and Another v Hilder [1996] KLR 95 as follows:

> " In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."

26. The law on the matter was earlier addressed in the case of Mbogo & Another v Shah [1969] EA 93, where it was held, inter alia, that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

27. The Supreme Court of Kenya in the case of Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others [2019] eKLR stated:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v Bashir [2010]NZSC 112; [2011]2 NLRI (Kacem) where it was held para 32]:"In this context a general appeal is to be distinguished from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

28. From the facts of the case, we have an Appellant who did not find it fit to file a defence in the matter opting to file a preliminary objection that he never prosecuted leading to its dismissal. That preliminary objection was predicated on the fact that the issue canvassed in the subject proceedings had been directly and substantially in issue in HCCC No. 186 of 2015. He now raises the same issue as part of his support in the application to set aside proceedings and arrest judgement. Having failed to substantiate this issue in his preliminary objection, his bona fides are put into question.

29. This was a party who was aware of the proceedings herein and had participated. There is evidence of service which is not effectively challenged. There is no defence on record. No explanation is given why defence was not filed yet the opportunity was there when the preliminary objection was filed. The facts and circumstances of the case put the Appellant in bad light and render his failure to file defence and participate in the proceedings inexecusable.

30. In reaching this finding, I take refuge in the decision in Wachira Karani v Bildad Wachira [2016] eKLR as was quoted in the case of David Gicheru v Gicheha Farms Limited & another [2020] eKLR where the Court held that:

> " The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is an unfettered discretion, although it is to be used with reason, and so a regular judgement

would not usually be set aside unless the court is satisfied that there is a defense on the merits, namely a prima facie defense which should go to trial or adjudication.

31. I reiterate the words of the Supreme Court in Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others (supra) that in a matter like the one presented in this appeal being an appeal against a decision made in exercise of discretion, it must be distinguished from a general appeal. In that kind of case, the criteria for a successful appeal are stricter:

    (i) error of law or principle;

    (2) taking account of irrelevant considerations;

    (3) failing to take account of a relevant consideration; or

    (4) the decision is plainly wrong. The trial magistrate offended none of these criteria.

32. On the whole, I find no infractions on the part of the trial court in its exercise of discretion.

33. With the result that the appeal herein fails and is dismissed with costs to the Respondent.

DATED AND DELIVERED AT NANYUKI THIS 20TH DAY OF JUNE, 2025.

A. K. NDUNG'U

JUDGE