Bodo v Owili (Civil Appeal E113 of 2024) [2025] KEHC 10071 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10071 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E113 OF 2024

A MABEYA, J

JULY 11, 2025

BETWEEN

JASON ONYANGO BODO ..... APPELLANT

AND

REUBEN OREM OWILI ..... RESPONDENT

(Being an appeal from the ruling of Hon. Nyigei P.M. delivered on the 21/8/2023 in the Kisumu CMCC Misc Case No. 55 of 2020, Reuben Orem Owili v Jason Onyango Bodo)

JUDGMENT

1. The appellant moved the trial court vide its application dated 22/12/2022 seeking to set aside the orders made on 7/8/2020 in favour of the respondent that ordered that one Owili Ochung be presumed dead.

2. The respondent opposed the application vide his replying affidavit sworn on the 22/5/2023 in which he deposed that an application for presumption of death was ex—parte in nature. That the appellant ought to produce evidence that the deceased was alive and that the application was an afterthought as it was brought with inordinate delay.

3. In its ruling, the trial court found that there was no foreseeable prejudice that the appellant stood to suffer if the court allowed the presumption of death to stand as the appellant had failed to prove that the deceased was still alive. That as such, granting the orders sought would be an exercise in futility.

4. Being dissatisfied with the said ruling, the appellant lodged this appeal vide the Memorandum of Appeal dated 3/6/2024 and raised six (6) grounds of appeal as follows: -

    a. That the learned trial magistrate erred in law and fact by failing to give the appellant an opportunity to defend himself yet he had been cited as a party but not served with the application.

b. That the learned trial magistrate erred in law and fact by misdirecting herself to the merits of the case yet the application before her was to allow the appellant to file a response to the application.

c. That the learned trial magistrate erred in law and fact by dismissing the appellant's application on merits of the case which was not in question at the time.

d. The learned trial magistrate erred in her analysis and appreciation of the law and fact thereby arriving at a wrong decision.

e. The learned trial magistrate erred in law and fact by failing to read and analyze the evidence and submissions by the appellant thereby arriving at a wrong decision.

f. The learned trial magistrate erred in law and fact by failing to properly analyze and appreciate all the issues that were before court as per the pleadings thereby arriving at a wrong decision.

5. The appeal was disposed of by written submissions. The appellant submitted that the trial court failed to consider that the application was not served on him but instead delved into the merits of the case thereby shifting the burden of proof erroneously to him.

6. That the irregular judgment entered against him ought to have been set aside as of right and not as a matter of discretion as the appellant was condemned unheard

7. In response, the respondent submitted that the application for presumption of death is ex-parte in nature as was held in the case of In Re Estate of Heinz Gerd Meyer (Deceased) [2008] eKLR. That the appellant was merely an interested party and not a necessary party in the application and will not be adversely affected if the ruling on the presumption of death is not set aside.

8. That setting aside the ruling issued on the 21/8/2023 will prejudice the respondent as the application was made to enable the respondent sue the appellant for fraud whereas the appellant stands to suffer no prejudice if the ruling is upheld.

9. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.

10. The appellant's case before the trial court was that he was never served with the application for presumption of death despite being an interested party and as such he was condemned unheard.

11. That it was only a confirmation from Tanzania where the alleged deceased was staying that can confirm the deceased's death and not one from an administrator in Kenya.

12. That the respondent did not follow the right procedure and or avail the requisite documents to obtain such orders.

13. The respondent on his part advanced the case that there was no need to serve the appellant due to the ex-parte nature of applications for presumption of death. That the appellant's application was an afterthought and there had been inordinate delay in its lodgment. That an application for presumption of death does not require providing letters from an administrator of where the deceased disappeared to as this would beat the logic of such an application.

14. That the trial court was functus officio having issued orders of presumption of death and the only thing that would reverse such an order was prove of life of the deceased.

15. I have considered the record and the submissions made before me. The law on setting aside of ex parte orders is found under Order 12 Rule 7 of the Civil Procedure Rules, 2010 which provides thus: -

> " Where under this Order, judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

16. This provision is amplified by Order 51 Rule 15 which provides that the court may set aside an order made ex parte. In setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served or that the respondent failed to appear in court at the hearing due to sufficient cause.

17. Setting aside an ex parte order is a matter of the discretion of the court. In Esther Wamaitha Njihia & two others v Safaricom Ltd [2014] eKLR, the court held, inter alia, that: -

> " "The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel v E.A. Cargo Handling Services Ltd.) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah v Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration v Gasyali.) It also goes without saying that the reason for failure to attend should be considered."

18. It then follows that the decision whether or not to set aside an ex parte order is discretionary. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See Shah v Mbogo & Another [1967] EA 116.

19. The appellant's main contention was that the application to declare Owili Ochung deceased was never served on him despite being an interested party. The respondent countered by stating the nature of such applications are that they are ex-parte and further that, there was no need to serve the appellant as he was not a necessary party to the application but merely an interested party.

20. The Black's Law Dictionary, 9th Edition at page 1232 defines an interested party as: -

> " A party who has a recognizable stake (and therefore standing) in the matter"

21. While at the same time it defines a "Necessary Party" as being: -

> " A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings"

22. In the case of Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR, the Supreme Court of Kenya held that;

> "(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:
>
> "[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."
>
> (23) Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:
>
> "(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
>
> (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
>
> (iii) joinder to prevent a likely course of proliferated litigation."

23. The respondent on his own volition cited the appellant as an interested party in his Motion to have Owili Ochung declared dead. I do not see any necessity of having cited the appellant as to an application that is ordinarily meant to be ex-parte. By citing the appellant as an interested party", that per se did not make the appellant a 'necessary party' to the proceedings.

24. It should be noted that in applications to set aside an ex-parte judgment or order, one of the issues to be considered is whether an applicant or defendant has a defence to the claim. The court has to consider what the setting aside will achieve. In re E N K [2017] eKLR, it was held that: -

> " The presumption of death is a rebuttable presumption which can be reversed if sufficient evidence is adduced to the contrary. Therefore, before this presumption is made, sufficient evidence has to be adduced in court to prove presumption of death."

25. The failure to serve the appellant did not deny the appellant any opportunity to prove that the provisions of section 118A of the *Evidence Act* had not been proved. That section provides: -

> " Where it is proved that a person has not been of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead".

26. All that the appellant needed to show the trial court is that, the respondent was not a close relative to Owili Ochung, that he the appellant was a close relative and had either heard of him or he knew of a close relative who had heard of the said Owili Ochung or he produces evidence that the said person was alive and not dead.

27. In my view, cases are not heard for the sake of it. Judicial resources are very scarce and every litigant who seeks the exercise of judicial discretion must demonstrate that the orders sought are not for the sake

of it. That they are meant to secure fairness, justice and will achieve a purpose at the end of it. That is the overriding objective set out under sections 1A and 1B of the *Civil Procedure Act* and is an intrinsic constitutional imperative under Article 159(2) of *the Constitution*.

28. In the present case, to the extent that there was no allegation that the appellant was to prove otherwise than that Owili Ochung was dead, any orders to set aside the earlier order made by the court will be in futility. It would serve no purpose and it is trite that courts do no act in futility.

29. Accordingly, I find no reason to disturb the decision of the trial court dated 21/8/2023. The appeal is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE