REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 25 OF 2018

MOSES NGARE.....APPELLANT

VERSUS

LEONARD KAIBUNYA .....RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of **Hon. G. Wakihiu (Chief Magistrate)** dated and delivered on 26th July, 2018 in *Maua CMCC No. 141 of 2010 – Moses Ngare v Leonard Kaibunya.* By the said ruling the trial court declined to set aside its order dated 14th September, 2017 dismissing the Appellant's suit for non-attendance.

2. The material on record shows that when the Appellant's suit was listed for hearing on 14th September, 2017 neither the Appellant nor his advocate attended court. The date had been taken *ex parte* by the Respondent's advocate. It would appear from the record that the Appellant had two law firms acting for him at the material time. The Respondent's advocates apparently served the firm of Kiogora Mugambi & Co Advocates which came on record in the course of the proceedings and not the firm of Elijah Ogoti & Co Advocates which had filed the suit.

3. When the suit was called out for hearing the Respondent was present and he did not admit any part of the claim. As a consequence, the trial court dismissed the Appellant's suit with costs under **Order 12 Rule 3 of the Civil Procedure Rules.**

4. When the Appellant learnt of the dismissal order, he filed an application dated 6th October, 2017 seeking the setting aside of the dismissal order and reinstatement of his suit. The said application was canvassed on merit and vide a ruling dated 26th July, 2018 the trial court dismissed the said application. The trial court was of the opinion that service upon one of the two law firms on record was sufficient service; that the Appellant ought to have sworn the supporting affidavit himself instead of his advocate; that the court had become *functus officio;* and that the matter could not be re-opened other than by way of review or appeal.

B. THE GROUNDS OF APPEAL

5. Being aggrieved by the said ruling and order, the Appellant filed a memorandum of appeal dated 2nd August, 2018 raising the following 12 grounds of appeal:

> *(a) That the learned Magistrate erred in law and in fact in finding that the firm of Kiogora Mugambi & Co Advocates were on record thus duly served yet the defendants exhibits are not in court record thus forged (sic).*
>
> *(b) That the learned Magistrate Chief Magistrate erred in law and in fact in misinterpreting* ***Order 9 of the Civil Procedure Rules.***
>
> *(c) That the Chief Magistrate erred in law in finding that the court was functus officio.*
>
> *(d) That the learned Chief Magistrate erred in law and fact in not finding that there was mischief in not serving Ogoti Advocate on record since both advocates on record must be served.*
>
> *(e) The learned Chief Magistrate erred in law and fact by not applying Article 159(2) (d) of the Constitution to the benefit of the Appellant bearing in mind that this is a land case.*

*(f) The learned Chief Magistrate erred in law and fact by penalizing the Appellant (in dismissing his application) for the mistakes made by the counsel (if at all **Order 9 Civil Procedure Rules** was complied with) since still Ogoti Advocate was the one who filed this suit ought to have been served.*

(g) The learned Chief Magistrate erred in law and fact in not taking into consideration the disputed ownership of the disputed suit land coupled with the fact that it was done during the infamous tribal clashes.

(h) The learned Chief Magistrate erred in law and fact in not finding that a Charlatan had penetrated the proceedings.

(i) The learned Chief Magistrate erred in law and fact in not finding that on 14th September, 2017 even the counsel for the Respondent was not ready to proceed because the scene visit report by the lands office and surveyor had never been brought to court and in fact it is the court which forced the counsel to apply for dismissal of this case.

(j) The learned Chief Magistrate erred in law and fact by not finding that the 13th June 2017 registry records are full of confusion and alteration which proves that the Respondents acted mala fides ab initio.

*(k) The learned Chief Magistrate erred in law and fact in misinterpreting **Order 9 of the Civil Procedure Rules.***

(l) The learned Chief Magistrate erred in law and fact by not finding that Ogoti Advocate cannot be in Malindi and be in Meru to prosecute this application thus this was a fertile imagination of the Defendant.

(m) The learned Chief Magistrate erred in law and fact in giving the ruling against the weight of the arguments/submissions.

6. As a result, the Appellant sought the following reliefs:

(a) That the appeal be allowed.

(b) That the ruling and order of the trial court dated 26th July, 2018 be set aside; the dismissal order of 14th September, 2017 be set aside and the suit reinstated for hearing before a different magistrate.

(c) That costs of the appeal be awarded to him.

C. DIRECTIONS ON SUBMISSIONS

7. When the appeal was listed for directions on 29th January, 2020, it was directed that it shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed his submissions on 29th January, 2020 whereas the Respondent filed his on 7th July, 2020.

D. THE ISSUES FOR DETERMINATION

8. Although the Appellant raised 12 grounds in his memorandum of appeal, the court is of the opinion that the appeal may effectively be determined on the basis of the following issues:

(a) Whether the trial court erred in fact and in law in declining to set aside the dismissal order dated 14th September, 2017.

(b) Who shall bear costs of the appeal.

E. THE APPLICABLE LEGAL PRINCIPLES

9. The court is aware that in determining the Appellant's application dated 6th October, 2017, the trial court was exercising judicial discretion under **Order 12 Rule 7 of the Civil Procedure Rules.** It has been held that an appellate court should be slow in interfering with the exercise of judicial discretion by the trial court unless it is demonstrated that such discretion was not exercised judiciously or that the trial court acted on wrong principles.

10. In the case of **Mbogo & Another v Shah (1969) EA 93,** 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."**

11. The issue was also considered by the Supreme Court of Kenya in the case of **Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others [2019] eKLR** where the court stated as follows in paragraph 39 of the judgment:

"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."

F. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in fact and in law in declining to set aside the dismissal order dated 14th September, 2017

12. The court has considered the material and submissions on record on this issue. It is apparent that there was some confusion on the Appellant's legal representation in that it appeared as though he had two law firms acting for him in the suit before the trial court. The reason why the firm of Elijah K. Ogoti & Co Advocates was not served was that it had allegedly relocated to Malindi.

13. The court has no doubt that the trial court was entitled to dismiss the Appellant's suit for non-attendance under **Order 12 Rule 3 of the Rules.** It is also evident that the trial court had unfettered discretion to set aside the dismissal order **Under Order 12 Rule 7 of the Rules.** The latter rule stipulates that:

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

14. The principles which guide a court in an application for setting aside an *ex parte* judgment or dismissal order have been considered in previous decided cases such as **Patel v E.A Cargo Handling Services Ltd [1974) E.A 75; Girado v Alam & Sons (4) Ltd [1972] EA 448; Chemwolo & Another v Kubende [1986] KLR 492; and Shah v Mbogo & Another [1967] EA 116.**

15. In the case of **Patel v E.A Cargo Handling Services Ltd (supra),** it was held that:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just..."

16. Similarly, in the case of **Shah v Mbogo & Another (supra),** it was held, *inter alia*, that:

"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained *ex parte*. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice..."

17. The court has considered the ruling of the trial court on the Appellant's application for setting aside the dismissal order and reinstatement of the suit. The court is satisfied that the trial court erred in law in holding that it was *functus officio* and that the matter could not be reopened except upon review or appeal. As demonstrated by the provisions of **Order 12 Rule 7 of the Rules** and the cited authorities, the trial court was clearly wrong in holding that the dismissal order could not be revisited.

18. The trial court also erred in law in holding that there was proper service of a hearing notice upon the Appellant when it was clear that the firm of Elijah K. Ogoti & Co Advocates which was still on record for him had not been served. The reason given by the Respondent for failure to serve the law firm was that it had relocated to Malindi. Clearly, that was not a plausible excuse for failure to serve. So far as the court is aware, Malindi falls within the boundaries of the Republic of Kenya. The process server was obliged to serve both the law firms if there was no designated leading firm.

19. The court is also of the opinion that the trial court erred in law in holding that the Appellant should have sworn the supporting affidavit personally and that his advocate ought not to have sworn it. The court is of the opinion that there is no law in Kenya preventing an advocate from swearing an affidavit to state that he was not served with a hearing notice despite being on record for his client. It would be illogical to expect a party to swear such an affidavit and then state that his deposition was based on information provided by the advocate. The golden rule of swearing affidavits is that the deponent should as much as possible depose to matters within his own **knowledge**. Swearing on the basis of information and belief should be the exception.

20. There is no material on record to demonstrate that the Appellant was seeking to evade or obstruct the course of justice. There is no evidence to demonstrate that the Appellant was seeking to delay the course of justice either. The court is of the opinion that the right to hearing is one of the cardinal rules of natural justice and denying a litigant a hearing should be the last resort of the court.

21. The court is thus of the opinion that the trial court did not exercise its discretion judiciously in the instant matter. The trial court also acted on wrong principle by holding that it was *functus officio* hence it could not revisit the default order. Accordingly, the court is inclined to interfere with the discretion of the trial court by setting aside its ruling and order dated 26th July, 2018.

(b) Who shall bear costs of the appeal

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21).** A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful party should not be awarded costs of the appeal. Accordingly, the Appellant shall be awarded costs of the appeal.

G. CONCLUSION AND DISPOSAL

23. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. Accordingly, the court makes the following orders for disposal thereof:

(a) The appeal be and is hereby allowed.

(b) That ruling and order of the trial court dated 26th July, 2018 be and is hereby set aside.

(c) An order be and is hereby made allowing the Appellant's notice of motion dated 6th October, 2017 with the consequence that the dismissal order dated 14th September, 2017 is hereby set aside and the Appellant's suit reinstated for trial and disposal.

(d) The Appellant is hereby awarded costs of the appeal and of the notice of motion dated 6th October, 2017.

(e) The reinstated suit shall be heard before any magistrate competent to try the suit other than Hon. G. Wakihiu.

24. It is so decided.

Judgment dated and **signed** in chambers at **Nyahururu** this **16th** day of **June 2021**.

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Y. M. ANGIMA

ELC JUDGE

Judgment delivered through email this 8th day of July, 2021.

L. N. MBUGUA

ELC JUDGE-MERU