



Koinange & 2 others (Suing as administrators of the Estate of Dinah Muthoni Mbutia) v Associated Construction Company (Kenya) Limited (Civil Appeal E771 of 2021) [2024] KEHC 4595 (KLR) (Civ) (16 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E771 OF 2021

DAS MAJANJA, J

APRIL 16, 2024

BETWEEN

JUNE WANJUGU KOINANGE 1ST APPELLANT

JANE NJERI NGURE 2ND APPELLANT

SAMULE GITAU MBUTHIA 3RD APPELLANT

**SUING AS ADMINISTRATORS OF THE ESTATE OF DINAH MUTHONI
MBUTHIA**

AND

ASSOCIATED CONSTRUCTION COMPANY (KENYA)

LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of Hon. L. Gicheba, CM dated 29th October 2021 at the Nairobi Magistrates Court, Milimani in CMCC No. 4639 of 2014)

JUDGMENT

1. The Appellants appeal against the ruling and order of the Subordinate Court dated 29.10.2021 allowing the Respondent to cross examine the Appellants at the formal proof. The Appellants have filed this appeal contesting the order based on the memorandum of appeal dated 26.11.2021. The memorandum is rather prolix but the singular issue for determination is whether the Respondent was entitled to cross-examine the Appellants in light of the existing interlocutory judgment.
2. The facts leading upto this appeal are not in dispute. The Appellants sued the Respondent and in due course obtained interlocutory judgments. The Subordinate Court declined to set aside the judgment precipitating an appeal to this court; *Associated Construction (K) Limited v June Wanjugu Koinange*



- § 2 Others suit as Administrators of the Estate of Dinah Muthoni Mbutia [2020]eKLR. The High Court held that the default judgment was proper as the appellant had failed to enter appearance and file defence within the stipulated time after service of summons. It dismissed the appeal on 20.02.2015 setting the stage for formal proof before the Subordinate Court.
3. The formal proof proceeded ex-parte whereupon the Respondent lodged an application dated 02.06.2021 seeking, inter alia, an order that, “the ex-parte formal proof proceedings and resultant judgment of 12th May 2021 be set aside and the Defendant/Applicant be allowed to participate fully in the trial and/or formal proof process/proceedings including cross-examination of the Plaintiff’s witnesses, production of documents and calling of witnesses.”
 4. The Subordinate Court considered the application and relying on the decisions in Peter Njoroge Kamau v Attorney General [2017]eKLR and Emfil Limited v Attorney General § 413 Other [2019]eKLR, the court held that, “the Defendant have (sic) a right to cross examine witnesses during formal proof and for this reason ought to have been served with the hearing notice to enable them do so.” It therefore allowed the application thus precipitating this appeal.
 5. As I stated earlier, the singular issue for determination is whether the Respondent has a right to cross-examine the witnesses and call evidence in the formal proof. The Appellants argue that a party who has failed to enter appearance, like the Respondent in this case, is not entitled to participate in the formal proof as a party who has failed to enter appearance is legally absent from the process. They further argue that a party who has failed to enter appearance cannot purport to turn the formal proof into a full blown contested trial. The Respondent contends that having filed the Notice of Appointment, it was entitled to be heard at the formal proof. It maintains that it was not legally absent from the proceedings and was entitled to be served with court process.
 6. I am of the view that the Respondent, having filed a Notice of Appointment and participated in the proceedings, was entitled to be served with process. For all intents and purposes a Memorandum of Appearance is the same as a Notice of Appointment. Order 6 Rule 3(1) of the Civil Procedure Rules provides that, “The Advocate of the Defendant shall state in the Memorandum of Appearance the address for service being the place of business within Kenya and postal address.” A Notice of Appointment, which Notice had the full address of the Advocate’s serves the same purpose (see Simba Commodities Limited v Kenya Ports Authority [2015] eKLR). Once a party had notified the address of service in proceedings, the party ought to be served with court process at all times.
 7. The fact that there was a default judgment in place did not bar the Respondent from attending the formal proof proceedings. It ought to have been served with the hearing notice. I would however add that following the default judgment, the Respondent cannot present any evidence, call witnesses or produce documents as there is no defence to be presented. Its appearance and participation is limited to cross-examination of the witness and nothing more.
 8. The trial magistrate therefore came to the correct decision to the extent that the Appellant was entitled to be served with process. The order dated 29.10.2021 is however set aside to the extent that it permits the Respondent, “to participate fully in the trial and/or formal proof process/proceedings including cross-examination of the Plaintiff’s witnesses, production of documents and calling of witnesses.” The Respondent’s participation in the formal proof shall be limited to cross-examination of the witnesses.
 9. The Respondent shall pay costs of the appeal assessed at Kshs. 10,000.00

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF APRIL 2024.

D. S. MAJANJA



JUDGE

