Mbugua v Mbugua alias Meja Mbugua Samuel Munyua Mbugua Wilson Njenga Mbugua & 6 others (Land Case Appeal 10 of 2023) [2025] KEELC 3919 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3919 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

LAND CASE APPEAL 10 OF 2023

OA ANGOTE, J

MAY 15, 2025

BETWEEN

SUSAN NYAKIBIA MBUGUA ..... APPELLANT

AND

PETER MBUGUA NG'ANG'A WAIHUMBU MBUGUA ALIAS MEJA MBUGUA SAMUEL MUNYUA MBUGUA WILSON NJENGA MBUGUA ..... 1ST RESPONDENT

DAVID NJONJO ..... 2ND RESPONDENT

AVID HOLDINGS LIMITED ..... 3RD RESPONDENT

GILBERT KINYUA ..... 4TH RESPONDENT

EMBAKASI RANCHING COMPANY LTD ..... 5TH RESPONDENT

NANCY WAMBUI KANG'ETHE ..... 6TH RESPONDENT

HON DENNIS MBICHI MBOROKI ..... 7TH RESPONDENT

JUDGMENT

1. The Appellant in this suit has challenged the ruling of the Honourable Magistrate dated 19th March 2021. She has sought that the interlocutory judgment be set aside and be allowed to file her Defense and witness statement out of time. The grounds of the appeal are that:

    a. The Learned magistrate erred in law and in fact in finding that the reason for delay was insufficient and unreasonable and further that the delay was intended despite agreeing that litigation can sometimes be contentious and complex.

b. The Learned Magistrate erred in fact and in law by failing to grant leave to the appellant to file its Defence and witness statement out of time despite acknowledgement that it raises triable issues.

c. The Learned Magistrate erred in fact and in law by finding that the appellant was aware of the progress of the matter despite acknowledging that there is no evidence on record indicating service of a pre-trial date.

d. The Learned magistrate misdirected himself in denying the appellant an opportunity to be heard despite finding that there were issues for determination.

e. The Learned magistrate erred in fact and in law by failing to consider that an injustice would be occasioned on the appellant by dismissing the application as the appellant stands to suffer great loss.

f. The Learned magistrate erred in fact and in law by failing to consider that in dismissing the application an injustice would be visited upon the appellant for a mistake made by her advocate.

g. The Learned magistrate erred in fact and in law by failing to exercise his discretion judiciously by not setting aide the interlocutory judgement whilst knowing that it was in the interest of justice to set aside the interlocutory judgement.

2. This appeal was canvassed through written submissions.

Submissions

3. Counsel for the Appellant submitted that the Respondents filed the suit; that the Appellant entered appearance through her advocates on record on 21st February 2018 and filed a response to the application through a Replying Affidavit dated 13th May 2018 and that they later realized after the application was allowed that due to an oversight, they had failed to file a Defence to the main suit.

4. The Appellant's Counsel submitted that they were never served with a pre-trial notice which would have given them adequate time and the opportunity to comply with Order 11 of the Civil Procedure Rules and that Judgment was thereafter entered against the Appellant for failure to file a Defence which necessitated the filing of this application to have the same set aside and subsequently have the Appellant's pleadings deemed as duly filed and admitted on record.

5. Counsel submitted that the Honourable Magistrate in denying her the opportunity to her defense and accompanying documents out of time, despite finding that her defense did raise triable issues, was in contravention of Article 48 of the *Constitution*, which guarantees the right to all persons to access justice. Counsel also relied on Article 159(2) of the *Constitution* which prescribes the principles that should guide courts, tribunals and any other judicial authority.

6. It was the Appellant's counsel's submissions that while the law has empowered court to enter judgement in default of appearance and filing of a defense, it has equally provided for judicial discretion to set aside such judgment, under Order 10 Rule 11 of the Civil Procedure Rules.

7. It was submitted on behalf of the Appellant submitted that the delay and subsequent omission by her advocates in filing the defense was due to the complexity of the suit as there are several parties who entered appearance and filed responses, further responses and submissions, which caused the Appellant's advocates to lose sight of the fact that the Defense had not been filed and that the Plaintiff's

advocates also failed to serve the Appellant's advocates with a pre-trial notice which would have prompted the Appellant's advocates to ensure compliance.

8. Counsel for the 1st Respondent submitted that the default judgment entered against the Appellant on 31st October 2019 remains unchallenged as the application before the lower court did not seek orders to set aside the default judgment under Order 10 Rule 11 of the Civil Procedure Rules.

9. According to the 1st Respondent's counsel, the failure to seek orders to set aside the default judgment, was pointed out by the Learned Magistrate in his ruling and that if the lower court were to grant the application as requested, it would have resulted in an irregularity that cannot be remedied by merely granting leave to file a Defense out of time.

10. Further, it was submitted, the lower court could not grant a relief that had not been specifically requested and that the Appellant cannot seek that relief through this appeal as the Appellant ought to have obtained leave from the lower court. Counsel relied on the case of Kenya Women Finance Trust vs Squaredeal Kenya Limited [2023] KEHC 17234 (KLR).

11. The 1st Respondent's counsel submitted that the Appellant did not advance sufficient reasons for the delay of two years in filing the application in the lower court and that the Appellant filed a Notice of Appointment on 22nd February 2018 and pursuant to Order 7 Rule 1 of the Civil Procedure Rules, the Appellant was required to file her Defense within 14 days from that date and to serve the Defense on the 1st Respondent's Advocate within 14 days of filing. Counsel submitted that the application was filed on 23rd October 2020, amounting to a delay of more than two years, which is excessive.

12. The 1st Respondent asserted that the Appellant's argument as to the complexity of the matter is unconvincing as an advocate is expected to comply with Order 11 of the Civil Procedure Rules without requiring guidance from the court. It was further submitted that the Appellant was duly served with every invitation notice for scheduling the hearing and pretrial proceedings.

13. The 1st Respondent's Counsel relied on the cases of Vitalis Omondi Othuon vs National Water Conservation & Pipeline Corporation [2016] eKLR and Amina Karama vs Njagi Gachangua & 3 Others [2020] eKLR.

Analysis and Determination

14. Before this court for determination is an appeal which has been filed against the ruling of the Honourable Magistrate E.M. Kagoni, delivered on 19th March 2021. The said ruling was predicated on the Notice of Motion Application dated 23rd October 2020 filed by the Appellant/1st Defendant herein, in which she had sought the following orders:

    a. That leave be granted to the 1st Defendant to file Defence and witness statement out of time.

    b. That the 1st Defendant's draft Statement of Defence and witness statement attached to the application and filed herewith be deemed as duly filed and served.

    c. That the costs of the application be in the cause.

15. The trial court dismissed the application, noting that interlocutory default judgment had been entered against the 1st Defendant/ Appellant, the 5th Defendant and the 6th Defendant on 31st October 2019. While the learned Magistrate held that a court has jurisdiction to set aside default judgment under Order 10 Rule 11 of the Civil Procedure Rules, he found that the 1st Defendant/Appellant had neglected to seek orders to set aside the interlocutory judgment entered against her.

16. Accordingly, it was the view of the learned Magistrate that even if the court was to enlarge the time for filing the Defence, there would still be a judgment that had not been set aside, and the Defence would be of no use.

17. The trial court held that the reason adduced for the failure to file the Defence, being that the matter was complicated, was not sufficient and that as a matter of public policy, cannot be allowed to stand, as it would allow a deluge of applications also preferring the same reasons.

18. As to the claim that the 1st Defendant/Appellant had not been served with the pre-trial notice, the court noted that the pre-trial conference was conducted on 19th February 2020, after interlocutory judgement had long been entered against the 1st Defendant/ Appellant.

19. While the trial court appreciated that the draft Defence raised triable issues, it noted that there was an inordinate delay of two years in the filing of the application, between 9th February 2018 when the Plaint was filed and 23rd October 2020 when the 1st Defendant's application was filed.

20. The court also found that allowing the 1st Defendant's application would visit prejudice upon the other parties to the suit who may have to file amended pleadings in response to the 1st Defendant's Defence. It is on this basis that the court declined to exercise its discretion in favor of the 1st Defendant, and proceeded to dismiss the application.

21. This matter is before this court as a first appellate court. In effecting its mandate in determining whether or not the trial court was justified in reaching its decision, this court is under a duty to re-evaluate the evidence and the materials that were placed before the trial court and it may, on re-evaluation, reach its own conclusion and findings. This was stated by the Court of Appeal in the case of Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123 as follows:

> " This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect."

22. These principles were reiterated more recently by the Court of Appeal in Paramount Bank Limited vs First National Bank Limited & 2 Others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows:

> " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion."

23. While exercising its appellate mandate, this court is not supposed to interfere with the discretion and findings of the trial court, unless such findings were not based on evidence or there was a

misapprehension of the facts. That is the position as enunciated by the Court of Appeal in Khalid Salim Abdulsheikh vs Swaleh Omar Said [2019] eKLR where it stated as follows:

> " We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings."

24. The facts in this suit are that the original suit was instituted in the trial court through a Plaint dated 9th February 2019. As is common practice, the Plaint was filed alongside a Notice of Motion application on even date under a Certificate of Urgency. Through the application, the Plaintiff sought injunctive orders against the Defendants pending the hearing and determination of the application and the suit as well.

25. The 1st Defendant/Appellant then filed a Replying Affidavit dated 17th May 2018 in response to the application. A ruling was delivered by Hon. A.M. Obura on 6th August 2018 granting the injunctive orders, which barred the 1st, 2nd, 3rd, 5th and 6th Defendants, and their agents from dealing or transferring the suit property pending the determination of the suit. It is following this ruling that the 2nd, 3rd and 4th Defendants filed their respective Defences to the Plaintiff's suit.

26. From the record of the trial court, it is clear that on 8th February 2019, the court entered default judgement against the 1st Defendant/Appellant, Susan Nyakibia Mbugua, the 5th Defendant, Embakasi Ranching Co. Ltd and the 6th Defendant, the Chief Land Registrar.

27. This was preceded by the Plaintiff's request for judgment against these parties pursuant to Order 10 Rule 4 of the Civil Procedure Rules. It was after the entry of the interlocutory Judgment that on 23rd October 2020, the 1st Defendant applied to file a Defence and witness statement out of time, which request was declined by the trial court.

28. Order 10 Rule 4 of the Civil Procedure Rules provides as follows:

> "(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
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> (2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim."

29. Order 10 Rule 10 extends the application of this rule to any Defendant who fails to file a Defence. Under Order 10 Rule 11, a court has the discretion to set aside or vary any judgement made under Order 10, upon such terms as are just.

30. It is inescapable that the Appellant's application before the trial court was not an application to set aside the interlocutory judgement, and was not made under Order 10 Rule 11. In its prayers, the Appellant did not seek the setting aside of the interlocutory judgment entered on 8th February 2019.

31. It is a trite principle of law that parties are bound by their pleadings and that the court is limited to address the issues as crafted by the parties in their pleadings. The Court of Appeal in Independent Electoral and Boundaries Commission & Another vs Mule & 3 Others [2014] KECA 890 (KLR) quoted with approval the Malawi Supreme Court of Appeal in Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, in which the learned judges quoted an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems, at pg 174 whereof the author states as follows;

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves.
>
> It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

32. The failure by the 1st Defendant/Appellant to include a prayer for setting aside of the interlocutory judgment was fatal to her application, and one from which she could not be rescued by the court exercising its discretionary powers. Indeed, it is a well-accepted legal principle that courts must be slow to interfere with the discretion exercised by the trial court unless such discretion was not exercised judiciously or the trial court made an error of principle. In Mwangi vs Wambugu [1984] KLR 453 the court stated as follows:

> " 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 principle 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 demeanour of a witness is inconsistent with the evidence in the case generally."

33. This was similarly held by the Court of Appeal in Mkube vs Nyamuro [1983] LLR at 403 as quoted in Kenya Women Finance Trust vs Squaredeal Kenya Limited [2023] KEHC 17234 (KLR).

34. The trial court in this matter found that other than not praying for setting aside the interlocutory judgment, there was a delay of two years in filing the application to file the Defence and witness

statement outs of time. The court opined that the delay was inordinate, and the reason given, that the suit was complex, was insufficient.

35. The Appellant has however not claimed or presented any argument or evidence to show that the trial court misapplied the law or misunderstood the facts or evidence that was presented before it.

36. While under Article 159 of the *Constitution* courts are required to deliver justice without undue regard to procedural technicalities, this provision is not meant to whitewash every procedural failing, as rules are meant to serve as a handmaiden of justice. As stated by the Court of Appeal in Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR):

> "The respondents are seeking umbrage under Article 159 (2) (d) of the *Constitution* which provides that justice shall be administered without undue regard to procedural technicalities. It does not avail them. We are content to state that the constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been said before, the rules serve as handmaidens of the lady Justice."

37. In any case, while the Appellant claims that the errors were made by her advocate and the same should not be visited upon her, the courts have held that a case belongs not to an Advocate but to a Client. If this ground was legitimate, the Appellant ought to have presented evidence of the steps that they took to follow up with their counsel to ensure that their matter was prosecuted efficiently. This was held in Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR as follows:

> "It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter."

38. The upshot of the foregoing is that the Appeal herein has not raised cogent grounds to enable this court to disturb or set aside the ruling delivered by the trial court on 19th March 2021. This appeal is hereby dismissed.

39. As costs follow the event, the costs of this appeal shall be borne by the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MAY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Wanjala holding brief for Ms Takimeru for Appellant

Ms Akonga for 1st Respondent.

Court Assistant: Tracy