



REPUBLIC OF KENYA



KENYA LAW
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**Nyagwoka v Nyamweya (Civil Appeal E010 of 2022)
[2023] KEHC 19028 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E010 OF 2022
WA OKWANY, J
JUNE 15, 2023**

BETWEEN

JARED MOSOTI NYAGWOKA APPELLANT

AND

LILIAN BOSIBORI NYAMWEYA RESPONDENT

(Being an Appeal from the Ruling of the Hon. W. C. Waswa, Resident Magistrate dated and delivered on the 10th day of March 2022 in the original Chief Magistrate's Court Civil Case No. E026 of 2021)

JUDGMENT

Introduction

1. The Respondent herein, who was the Plaintiff before the trial court, sued the Appellant through a plaint dated February 22, 2021 seeking the following orders: -
 - i. An order compelling the Defendant to collect his balance of Kshs 1,100,000/= and let vacant possession and/or refund Kshs 2,800,000/= to the Plaintiff.
 - ii. An order for General Damages for breach of contract.
 - iii. Cost of this suit and Interest at court rates.
 - iv. Any other relief this Honourable Court may deem fit and just to grant.
2. The Appellant filed his statement of defence dated March 17, 2021 and on November 11, 2021 the Plaintiff's case was heard, in the absence of the Defendant and judgment delivered on November 18, 2021.
3. On 17th December, the Appellant/Defendant filed an application before the trial court seeking inter alia, the setting aside of the said judgment of November 18, 2021 on the basis inter alia that he was



served with a hearing notice 2 days to the hearing date thus depriving him of adequate time to prepare for the hearing.

4. The trial court heard the application setting aside the judgment and dismissed it through a ruling delivered on March 10, 2022 thereby triggering the filing of the appeal that is the subject of this judgment.

Appeal

5. Aggrieved by the ruling of March 10, 2022, the Appellant filed the instant appeal and listed the following grounds of appeal in the Memorandum of Appeal: -
 1. The Learned trial Magistrate misapprehended the principles applicable on the right to a fair hearing as envisioned by the provisions of Article 50 (1) of the Constitution by holding that a notice of two (2) days was sufficient to constitute a fair notice.
 2. The Learned trial Magistrate misapprehended the provisions of Order 12 Rule 2 (c) of the *Civil Procedure Rules* by holding that the Hearing Notice served giving the Defendant two (2) days to the hearing date constituted sufficient notice.
 3. The Learned trial Magistrate erred both in law and fact in failing to take into account the provisions of Section 57 (a) of the Interpretation and general provisions Act (Cap 2) on the manner/mode of computing time.
 4. The Learned trial Magistrate erred both in law and fact in failing to take into account and adhere to the provisions of Order 50 Rule 8 of the Civil Procedure Rules on the computation of time of service of the hearing notice.
 5. The decision of the Learned trial Magistrate cuts against the spirit and grain of the rules of natural justice.
 6. The Learned Magistrate erred both in law and fact in making a decision against the weight of the evidence presented by the Appellant.
 7. The Learned trial Magistrate erred both in law and fact in shifting the burden of proof on the issue of sufficiency of the notice relating to the service of a Hearing Notice.
6. The appeal was canvassed by way of written submissions which I have considered.
7. The main issue for determination is whether the trial court arrived at the correct decision in dismissing the Appellant's application to set aside the judgment of November 18, 2021.
8. The Appellant took issue with the trial court's failure to find that the Hearing Notice served on the Appellant on November 9, 2021 for the hearing slated for November 11, 2021 contravened Article 50 (1) of the Constitution on the right to fair hearing under Order 12 Rule 2 (c) of the Civil Procedure Rules.
9. It was the Appellant's case that the trial court did not take into account the provisions of Section 57 (a) of the Interpretation and General Provisions Act and Order 50 Rule 8 of the Civil Procedure Rules.
10. I am cognisant of the duty of the first appellate court to re-evaluate and re-consider the evidence tendered before the lower court and arrive at its own independent findings (see *Peter v Sunday Post Ltd [1958] EA 424*).
11. It was not disputed that the hearing notice in respect for the hearing of November 11, 2021 was served on the Appellant 2 days to the hearing on November 9, 2021.



12. The Appellant explained that the notice given was so short that he was not able to adequately prepare for the hearing.

13. The trial court made the following sentiments when dismissing the Appellant's application: -

' Now, the defendant has argued that the hearing notice was too short. He was served on November 9, 2021 and the matter was for hearing on November 11, 2021. What the defendant and or his counsel is not explaining, is why neither of them appeared in court to explain their predicament on November 11, 2021.

No explanation whatsoever had been adduced by the defendant as to why he failed to attend court on 11th November, 2021 despite the notice being short for him to prepare and be ready for hearing on that day.'

14. I have perused the supporting affidavit to the application whose dismissal gave rise to this appeal and I note that at paragraph 8 thereof, Mr. Richard Bush Obwocha Onsongo, Advocate for the Appellant stated that the notice of two (2) days for a hearing is not sufficient and hence the Defendant was not accorded sufficient time to prepare and attend court for hearing.

15. The trial court held as follows when addressing the issue of the 2 days' notice for the hearing: -

' As stated herein above, neither the defendant nor his counsel explained why none of them attended court on November 11, 2021. In fact, since this matter was allocated to this court, the defendant has never appeared in this court in person. The proceedings of this court clearly show how many times the respective parties have attended court.'

16. Order 12 Rule 2 (c) of the Civil Procedure Rules stipulates as follows: -

' (c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.'

17. Section 57 (a) of the *Interpretation and General Provisions Act* stipulates as follows: -

' (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.'

18. Order 50 Rule 8 of the Civil Procedure Rules, on the other hand, provides as follows: -

' (1) This rule applies to pleadings, notices, summonses (other than summonses on complaints), orders, rules and other proceedings.

(2) Service shall normally be effected on a weekday other than Saturday and before the hour of five in the afternoon.

(3) For the purpose of computing any period of time subsequent to service outside the times specified in subrule (2) — (a) service effected after five in the afternoon on a weekday other than Friday or Saturday is deemed to have been effected on the following day; (b) service effected after five in the afternoon on Friday is deemed to have been effected on the following Monday.'



19. Having regard to the above cited provisions and the enduring provisions of Article 50 (1) of the Constitution that guarantee parties the right to fair hearing, I find that the trial court misdirected itself when it dismissed the application to set aside the judgment in the face of overwhelming evidence that the hearing notice giving the Appellant only 2 days to prepare and appear in court for hearing was too short and inconsistent with the provisions of Order 50 Rule 8 of the Civil Procedure Rules.
20. It is trite that the court's power to set aside ex-parte judgments/orders is discretionary and that such discretion must be exercised only in the most deserving cases.
21. In the instant case, I find that the Appellant deserved to be granted the orders sought in setting aside the application.
22. For the reasons stated in this judgment, I find that the instant appeal is merited and I therefore allow it with no orders as to costs.
23. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 15TH DAY OF JUNE 2023.**

W. A. OKWANY

JUDGE

