



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 46 OF 2019

JOEL KILAMBU.....1ST APPELLANT

PATRICK MWITI.....2ND APPELLANT

JOSHUA KIMATHI.....3RD APPELLANT

VERSUS

SHADRACK NKUBITU MUGWIKA.....RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (P.M.)

delivered on 31st January, 2019, in Tigania PMCC. No. 98 of 2011)

JUDGMENT

1. The appellants fault the lower court ruling on the grounds that: the application had merits and being on land, they ought to have been heard on merits and not on technicalities; they were denied fair hearing; failure to be heard has occasioned them injustice loss of land and untold suffering; the matter proceeded despite the 1st defendant having passed on and without substitution and lastly an error of counsel on record was unfairly visited upon him.

2. This being a first appeal, the court is required to rehear, review and re-visit the lower court record, come up with its own conclusions and findings as held in *Selle –vs- Motor Boat Co. Ltd & Others [1968] E.A 123.*

PLEADINGS

3. The respondent had sued the appellants as 2nd, 3rd and 4th defendants together with one **Philip Mutuamwari Muki** as 1st defendant claims that as a recorded owner of **Parcels No's 11786 and 1317 Antuamburi Adjudication Section** they were interfering with his possession and occupation yet he had been awarded the land on **14.7.2011** through **A/R Objection No. 3860**. He sought for permanent injunction in alternative eviction orders, pursuant to a consent to sue dated 26.8.2011.

4. Alongside the plaint, the respondent filed a notice of motion dated 4.9.2011 seeking for temporary orders of injunction. The record in the lower court indicates an affidavit of service sworn by Josephat Ndubi advocate on 3rd November, 2011 was filed on 3.11.2011 indicating service of the summons to enter appearance, notice of motion, list of witnesses, witness statements and list of documents, plus the order issued on 31.10.2011.

5. At the back of the summons there was a signature by Margaret Mwari Wa Philip the wife to the 1st defendant and mother to the 2-4th defendants at Kingoo village Mikinduri. The deponent stated he made service to the defendants at their houses who were pointed out to him by the respondent.

6. Following proof of service, a request for an interlocutory judgment was filed on 15.11.2011. The same was allowed and the matter listed for formal proof on 24.3.2012 when it proceeded with one witness and a judgment delivered in favour of the respondent on 8.5.2012.

7. On 6.6.2012, the respondent's lawyer served the appellant a notice of entry of judgment and a decree subject was issued on 26.4.2018.

8. By a notice of motion dated 26.3.2013 the respondent sought for enforcement orders of decree through O.C.S Mikinduri.

9. On 25.11.2012 the firm of M.G. Kaume & Co. Advocates filed a notice of motion under **Order 10 rule 11 Civil Procedure Rules** seeking to set aside the ex parte judgment entered on 10.12.2011 and for leave to defend the suit. The basis of the application was that service of summons had not been effected and the 1st plaintiff had an arguable defence.

10. In the supporting affidavit sworn on 25.11.2013 by the 1st defendant, there was no authority to plead or swear the affidavit on behalf of the defendants. He disputed any service of summons; claimed his advocate heard of the matter in court since there was another suit **No. 78 of 2011 at Tigania Law Courts** where the respondent was a defendant and he was the plaintiff involving the respondent's counsel on record. He attached a draft defence raising an issue of subjudice and res judicata. The firm of M/s M/G. Kaume & Co. Advocates failed to file any notice of appointment before lodging the application. Similarly they did not specify who was acting for: one applicant or four applicants/defendants.

11. The respondent opposed the application through a replying affidavit sworn on 10.3.2014 claiming Civil Suit No. 78 of 2011 was dismissed on 6.9.2013 for want of prosecution; service of summons and pleadings was not disputed; the draft defence raised no triable issues; the application was defective in law and was at most a delaying tactic.

12. While the aforesaid application was still pending, the respondent filed another application dated 12.4.2015 claiming the 1st defendant had passed on and was being buried by the appellants on the suit land contrary to the decree. Interim orders granted on 13.2.2018 were to be enforced by O.C.S. Mikinduri with an interpartes on 10.3.2015.

13. By a notice dated 15.2.2017 the firm of C.P. Mbaabu sought leave to come on record in place of M/s Ndubi & Co. advocates. The same was allowed and a statutory notice of entry of judgment was issued dated 11.4.2017. Costs were assessed and a decree issued on 26.4.2018.

14. Subsequently by notice of motion dated 21.6.2018 a request was sought and obtained for the enforcement of eviction orders. The orders were granted by the court on 21.6.2018. The firm of M.G. Kaume & Co. advocates once more acting for the defendants filed a notice of motion dated 10.12.2018 for stay of execution, supported by the affidavit of Joel Kilambu. In the said affidavit, he alleged non-service, sought for the setting aside of the ex parte judgment and denied any service of court processes by M/S C.P. Mbaabu advocates. Interim orders were granted on 17.12.2018 with interpartes hearing on 20.12.2018.

15. The respondent filed a replying affidavit on 14.12.2018 claiming a similar application dated 25.11.2013 was still pending, there was inordinate delay which was unexplained since 2012, no appeal was made against the A/R objection, it was a way of obstructing justice and that justice delayed is justice denied.

16. The 2nd defendant filed a supplementary affidavit on 15.1.2019 claiming the case was still at A/R stage, orders granted were drastic and they should be granted an opportunity to be heard. The deponent did not deny or admit there was a similar pending application since 2013.

SUBMISIONS

17. With leave of court the appellants submit the lower court should have set aside the ex parte judgment for there was sufficient cause, due consideration of the relevant principles were not considered as set out in Maina -vs- Mugira [1983] KLR 78, Waweru -vs- Ndinga Nairobi 64/82 unreported, Philip Keiptoo Chemwollo & Mumias Sugar Co. Ltd -vs- Augustene Kubende [1986] eKLR, Appollo Muinde & 2 Others -vs- Ernest Oyaya Okemba [2019] eKLR, Ibrahim Gatobu -vs- Mwichwiri Farmers Co. Ltd [2020] eKLR, Nicholas Kiptoo Arap Korir Salat -vs- IEBC [2013] JELR 98431 (CA) and Abdirahman Abdi -vs- Safi Petroleum Products Ltd. & 6 others [2011] eKLR

18. The court is therefore urged to find the appeal meritorious guided by **Sections 1A & 1B of the Civil Procedure Act** as read together with **Article 159 (2) of the Constitution**.

19. On the other hand the respondent urges the court to find service of summons was not disputed a, case for the setting aside had not been made as per SMR Ltd -vs- Michael Ezra Mulwooya [2019] eKLR, Thomas Odhiambo Okello-vs- Peter Wanyama [2019] eKLR and Mbogo & Another -vs- Shah [1968] eKLR E.A 93.

20. Further it is submitted the appellant did not assist the court to further the overriding objective in line with **Sections 1A & 1B of the Civil Procedure Act** as held in Haruun Rashid Khator suing as the legal representative of Rashid Khator deceased -vs- Sudi Hamisi & 11 Others [2014] eKLR & Bi-Mach Engineers Ltd -vs- James Kahoro Mwangi [2011] eKLR on inaction by the appellant.

21. Additionally the respondent submits the delay was inordinate and unexplained for over 6 years which is against **Sections 1A & 1B of the Civil Procedure Act**.

22. Counsel for the respondent went on to submit the firm of M.G. Kaume & Co. Advocates was improperly before court for the second time and failed to prosecute the application for 6 years and that there was no draft defence on record.

23. Similarly, counsel submitted that the case was properly before the court in line with **Sections 19, 26 and 27 of Land Consolidation Act** as read together with **Section 29 of the Land Adjudication Act** given that the appellants should have filed the appeal before the Minister if aggrieved by the A/R decision in favour of the respondent.

ANALYSIS AND FINDINGS

24. The application which was struck out by the trial court is the one dated 10.12.2018 and not the one dated 25.11.2013. The difference between the two applications was that the former was brought under **Sections 2 and 3A, Section 63, Order 51 Rule 1 of the Civil**

Procedure Rules seeking for stay of execution of the decree and consequential orders and secondly the court be pleased to vacate/set aside the judgment herein and the defendants be allowed to defend the suit.

25. The second application was brought under **Order 10 rule 11 of Civil Procedure Rules** seeking to set aside the exparte judgment entered on 8.12.2011 and leave to the applicant to defend the suit.

26. In the two applications, the firm of M.G. Kaume did not file any notice of appointment to specify whom he was acting for. Similarly as can be clearly seen in the 2nd application dated 10.12.2018 the deponent to the affidavit does not attach any authority to swear on behalf of the rest of the defendants. That notwithstanding the two applications talk of both exparte and judgment to be set aside.

27. Third, the application dated 10.12.2018 sought for stay of execution. The same was not brought under **Order 22 of the Civil Procedure Rules** and did not specify the stay sought was for what purpose or pending what action.

28. In my considered view the appellants had a duty to explain why the court ought to have exercised discretion to grant stay of execution and set aside the judgment given the serious issues as to inordinate delay, inaction on the part of the appellants and their counsels on record and more importantly failure to prosecute the application filed in 2013.

29. Further when the same firm filed the 2nd application it knew the previous application was still pending and was being challenged on account of lack of compliance with basic tenets of legal representation. The appellants chose to file a second application in flagrant disregard of the law and once brought to their attention that there was no notice of appointment and no action had been taken to prosecute the earlier application they down-played the issue.

30. The twin issues of non-compliance with appearance and non-prosecution of an earlier application for setting aside of the judgment for over six years cannot in my view be said to be a legal technicality. A party who has taken no action for over six years for reasons known only to him cannot turnaround and claim he was denied a fair hearing by simply being reminded he is unnecessarily and inordinately putting the wheels of justice on stop for far too long.

31. The sword of justice cuts both ways. It cannot be an injustice only when one party is told by the court that all is not in order but not an injustice when there is deliberate and inordinate delay in prosecuting an application for 6 years. Instead of prosecuting the earlier application and or seeking consolidation of the two applications, the appellants did not bother and or see the implications for not seeking the court's directions.

32. On the issue that the court proceeded while the 1st defendant was deceased, the record of the lower court as alluded above is clear the judgment was entered prior to the death of the 1st defendant following which the respondent brought it to the attention of the court when the appellants were seeking to have his remains interred on the suit land.

33. The appellants submit they were denied an opportunity to ventilate their defence and should not suffer out of mistakes of their counsel. Whilst that may be true, the appellants not once but twice repeated the same mistake and in an interval of six years.

34. The appellants must shoulder the blame for it is them who ought to have been vigilant to prosecute the application for setting aside on time especially when they knew the decree was aimed at evicting them. They did not take any remedial action.

35. The application which was struck out was brought under **Order 51 Rule1 of the Rules**. As per **Order 43 of the Rules**, any appeal against such an order is not appealable to this court as of right but through leave of the court. I have not seen such leave to appeal.

36. Further parties have submitted on various other issues which in my view do not touch on the twin issues in the ruling appealed against namely failure to file a notice of appointment and bringing of a similar application seeking similar orders or setting aside.

37. Given that the trial court did not go to the merits of the application which in my view was not necessary one would have expected the appellants to withdraw the earlier application, regularize the position and submit themselves to the jurisdiction of the court for the appropriate orders on merit.

38. Given that the previous application is pending, it is only appropriate for this court to exercise judicial restraint on the merits and demerits of the appellants intended defence given that contrary to the submission by counsel for the respondent there was an attached draft defence dated 26.11.2013 to the affidavit in support sworn on 25.11.2013 by Philip Mutuamwari Mukira.

39. The upshot is the appeal lacks merits and is dismissed with costs.

40. The file is remitted to the trial court for appropriate directions on the pending application once the appellants regularize their appearance before the trial court.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 1ST DAY OF DECEMBER, 2021

In presence of:

Mbogo for appellants

C.P. Mbaabu for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE