Chemao v Maina (Environment and Land Appeal E036 of 2024)
[2025] KEELC 4967 (KLR) (24 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4967 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL E036 OF 2024

EC CHERONO, J

JUNE 24, 2025

BETWEEN

BENARD MICHEAL CHEMAO ..... APPELLANT

AND

WILSON GESHE MAINA ..... RESPONDENT

JUDGMENT

Introduction

1. Vide a Memorandum of Appeal dated 09/08/2024, the Appellant who was the Defendant in the trial court (hereinafter referred to as the 'former suit') appeals to this Honourable Court challenging the Ruling by Hon. R.K.Langat in Sirisia PMC ELC Case No. 18 of 2021 delivered on 08/08/2024 dismissing the application dated 0307/2024.

2. The brief facts of the case are that the Respondent commenced the former suit vide a plaint dated 15/10/2021 wherein he averred that he was the registered proprietor of L.R. No North Malakasi/South Wamono/1653 measuring 0.13ha which he purchased from one John Wasike Wamono(deceased). That the deceased had also sold L.R. No. North Malakasi/South Wamono/1355 to one Timothy Omutoko who had in turn sold to Agnes Cheseto who later sold to the Appellant herein though the registration was still in the name of the deceased. That the two parcels of land are resultant sub-divisions of L.R. No. North Malakasi/South Wamono/951 which borders L.R. No. North Malakasi/South Wamono/950

3. That in the 1960 or thereabouts, the proprietors of L.R. No. North Malakasi/South Wamono/951 and 950 resolved to create a 4-Meter-wide access road with each owner giving up 2 meters each. That the said access road connects the parcels to the tarmac and has been in use by the Respondent and others. He alleged that the Appellant had encroached into the access road and built a permanent structure thereon thus blocking it and preventing the use of the said access road. That the issue was reported to the Land Registrar who directed the Appellant to remove the said structure. That despite the said

directions by the Land Registrar, the Appellant has refused to remove the structure. The Respondent sought for the following orders against the Appellant;

a. An order compelling the defendant to demolish the building on the 4-meter-wide access road between L.R. No. North Malakasi/South Wamono/1355 and L.R. No. North Malakasi/ South Wamono/1651 within a period to be set by the court.

b. That in default of (a) above, the plaintiff to appoint a court bailiff to demolish the illegal building.

c. That the OCS Sirisia Police Station to offer security to appointed Court bailiff during the demolition exercise.

d. The defendants to bear the costs of such demolition.

e. Costs of the suit and interests.

4. After the Appellant was served with summons to enter appearance, he failed to enter appearance or file defence leading to the Respondent requesting for entry of an interlocutory judgment. The application was allowed and the matter was later fixed for formal proof hearing on 23/02/2022. Before the hearing date, the Appellant moved the trial court vide a Notice of Motion application dated 07/02/2022 seeking to set aside the ex-parte Judgment and for leave to file Statement of Defense out of time. That application remained unprosecuted prompting the Respondent to file an application dated 18/09/2023 seeking orders for the dismissal of the said Notice of Motion application dated 07/02/2022. When the above Notice of Motion application came up for hearing on 18/10/2023, the Appellant sought for more time to file a replying affidavit which was allowed. Despite being allowed more time to file a response, the Appellant failed to do so and on 31/01/2024, the Respondent's Notice of Motion application was allowed and the suit set down for hearing on 12/06/2024.

5. During the hearing on 12/06/2024 one, Komora Advocate informed the trial court that She was holding brief for Atenya Advocate for the Appellant and requested for time to come on record and file Statement of Defence. The court, declined the request for adjournment and the matter proceeded ex-parte. The plaintiff thereafter closed his case and judgment was fixed for delivery of Judgment on 19/06/2024. The Appellant moved the trial court vide an application dated 03/07/2024 seeking the following orders;

a. That this application be certified as urgent and be heard ex parte in the first instance

b. That the defendant/applicant be granted leave to act in person in the place of the firm of M/ S AK Advocates LLP.

c. That this honourable court be pleased to stay the execution of the judgment/decree herein pending the hearing and determination of this application ex parte.

d. This honourable court be pleased to set aside, vary and or review the judgment entered in this case on the 19th June, 2024 and all consequential orders thereto.

e. This honourable court be pleased to grant leave the defendant to file defence out of time.

f. This honourable court be pleased to make such further orders that are just and expedient in the circumstances.

g. That the plaintiff be ordered to meet the costs of this application.

6. The application was based on the grounds set forth on the face of the said application supported by the affidavit of the Appellant sworn on 03/07/2024 in which he averred that he has since fallen out with his counsel and therefore wished to act in person. He argued that the Respondent's suit was fatally defective and that he should be given a chance to defend the suit. He confirmed being served with summons to enter appearance and thereafter instructed an advocate to act for him. He argued that all along, he was meant to believe that his appointed counsel was prosecuting his interests only to discover from a neighbour later that there was a judgment on record entered in favour of the Respondent.

7. He averred that he has a defence which raised triable issues and urged the court to be guided by the principles of natural justice. He also urged the court not to visit on him the mistakes of his counsel as he was an innocent litigant. He deposed that the application had been filed timeously and that he was ready to abide by any terms the court would impose.

8. In response, the Respondent filed a replying affidavit sworn on 16/07/2024 in which he deposed that the Appellant was all along aware of the court process and he was duty bound to attend court personally and therefore, he cannot blame his advocate. He argued that the application was an afterthought and should not be allowed. It was his argument that he will suffer prejudice and injustice if the Appellant was allowed to further delay the matter. He urged the court to dismiss the application with costs.

9. As stated elsewhere in this judgment, upon hearing the said application, the trial court rendered itself by dismissing the same with costs. Aggrieved by the said ruling, the Appellant preferred the present appeal on the following grounds;

    a. The learned trial magistrate erred in law and fact when he failed to apply the overriding objectives, principles of natural justice and fair hearing hence arrived at a wrong conclusion.

    b. The learned trial magistrate erred in fact and in law when he failed to appreciate that the impact of the ruling would render the Appellant being condemned unheard.

    c. The learned trial magistrate erred in law and in fact when he took the negligence of counsel and visited the same upon the innocent Appellant.

    d. That the learned trial magistrate erred in fact and in law when he failed to consider the draft annexed defence in his ruling which defence raises triable issues hence causing a miscarriage of justice.

    e. The learned trial magistrate erred in fact and law in failing to appreciate that the Appellant application dated 03/07/2024 had met the threshold for allowing the prayers sought and hence the ruling cause miscarriage of justice.

    f. The learned trial magistrate erred in fact and law when he failed to appreciate the good reasons advanced by the Appellant when the same were glaring in the supporting affidavit.

10. The Appellant sought to have the ruling of the trial magistrate set aside and substituted with an order granting the orders sought in the said application.

11. After taking directions, the parties agreed that this appeal be canvassed by way of written submissions.

12. The Appellant filed submissions dated 28/03/2025 on issues not raised in his memorandum of appeal

13. The Respondent filed submissions dated 25/04/2025 whereby he begun by giving a background of the proceedings before the trial court. He raised three issue for determination and submitted that the Appellant has not establishing any of the grounds against the learned trial magistrate and therefore failed to meet the requirements for upsetting a discretionary order/decision of the trial court. He relied

on the case of Apungu Arthur Kibira v. Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR. He further submitted that the application in question was res judicta for raising issues that had previously been raised and decided upon and even so, the Appellant had not established sufficient cause for setting aside of the regular judgment entered by the trial court. Reliance was place inter alia in the case of Wachira Karani v Bildad Wachira [2016] eKLR. He also submitted that the draft defence does not therefore raise any triable issues that the honourable trial Magistrate would be called upon to ventilate and thus, the trial court properly directed herself in dismissing the application. He asked the court to dismiss the application with costs.

Analysis and Determination.

14. I have considered the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and although the Appellant raised six (6) grounds of appeal, it is my view that the only issue to be determined in this appeal is whether the trial court properly directed itself on the facts, applicable principles and the relevant law in making its determination.

15. This being a first appeal, this court is obligated to re-evaluate the evidence adduced and consider arguments by parties and apply the law in reaching my own conclusion of the issues in controversy. In the case of Mbogo and Another vs. Shah [1968] EA 93, the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

16. The essence of this appeal is to set aside the default judgment to give the Appellant an opportunity to be heard. That was the essence of the Appellant's application which was dismissed giving rise to the present appeal. In Wachira Karani vs. Bildad Wachira (2016) eKLR as cited in the case of David Gicheru v Gicheha Farms Limited & another [2020] eKLR the Court held;

> "The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

17. The Appellant's argument was that he instructed an advocate to act for him in the matter and was under the impression that his interests were taken care of until he learnt of the judgment which was in favor of the Respondent. He squarely blames his advocates for neglecting to represent him.

18. The Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173: "In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle... The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if

draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement..."

19. I have in the preceding paragraph discussed the history of this case. From my analysis of the same, I note that the Appellant was made aware of the case preferred against him by the Respondent when he was served with summons to enter appearance. I say so because he was the one who instructed counsel to set aside the interlocutory judgment entered against him vide an application dated 07/02/2022 which application was dismissed for want of prosecution after it remained unprosecuted for close to two years. Before the said application was dismissed, the Appellant's counsel was notified and given a further opportunity to rectify the procedural omission. Further, counsel for the Appellant was present when the matter proceeded for hearing before the trial court. It is my considered view that the Appellant's counsel was at all times aware of the progress of the matter. The Appellant is now blaming his counsel for not updating him on the progress of his case.

20. In Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others [2004] eKLR where he held that: "The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure."

21. The Appellant submitted that he became aware that the case had proceeded for hearing and that judgment had been entered against him from a neighbour. In my considered view, the Appellant ought to have known that having been sued by the Respondent, it was his obligation to ensure that the suit filed against him was expeditiously prosecuted by making all necessary steps to follow up the matter with his advocate. He was not supposed to sit pretty and wait until judgment is entered for him to rush to court with an application to have it set aside. In the case of Savings & Loan Limited –Vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCC NO.397 OF 2002, the court stated thus: -

> "Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favor, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favor of such a litigant." [own emphasis]

22. Likewise, in Duale Mary Ann Gurre –Vs – Amina Mohamed Mahamood & Another [2014] eKLR, Justice Mutungi held as follows: -

> "An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out

the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate."

23. From the foregoing authorities, it is evident that a litigant bears the responsibility of diligently following up and prosecuting his case, even after instructing counsel. As rightly observed by the trial magistrate, the Appellant, having sworn affidavits in support of previous similar applications, was clearly aware of the proceedings but failed to take appropriate steps to prosecute the matter. The Applicant's application seeking to set aside the default judgment was not prosecuted for nearly two years and, upon dismissal, no effort was made to seek its reinstatement. The trial court record reflects that the Appellant was accorded ample opportunity to be heard but instead, adopted delaying tactics, suggestive of an intent to obstruct the course of justice. In the circumstances, the Appellant cannot claim to have been condemned unheard, nor can he shift blame entirely onto his advocate. No evidence of any follow-up or inquiry into the matter has been presented. Equity does not aid the indolent, and the Appellant must bear the consequences of his inaction.

24. Overall, I am unable to disturb the reasoning of the learned magistrate. I find that the trial Magistrate did not misdirect himself but properly directed his mind to the facts of the case, the pplicable principles and the relevant law.

25. In the upshot, I find that the Appellant is not deserving of the orders sought and this appeal is hereby dismissed with costs to the Respondent.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF JUNE, 2025.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Maloba for the Respondent.

Appellant/Advocate-absent

Bett C/A.