Kenya Power and Lighting Company PLC v Wanyonyi (Environment and Land Appeal E019 of 2024) [2025] KEELC 4569 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4569 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL E019 OF 2024

EC CHERONO, J

JUNE 12, 2025

BETWEEN

KENYA POWER AND LIGHTING COMPANY PLC ..... APPELLANT

AND

RACHIEL NELIMA WANYONYI ..... RESPONDENT

(Appeal dated 29/04/2024 preferred this appeal against the ruling of Hon. P.Y.Kulecho, delivered on 23/04/2024 in Webuye CMC ELC No. E030 of 2021.)

JUDGMENT

Introduction

1. The Appellant, vide a Memorandum of Appeal dated 29/04/2024 preferred this appeal against the ruling of Hon. P.Y.Kulecho, delivered on 23/04/2024 in Webuye CMC ELC No. E030 of 2021. Various grounds of appeal have been raised, but before I address them, I think it is necessary that I give the background leading to this appeal.

2. The former suit was commenced by way of a plaint dated 01/07/2021, with the Respondent as the plaintiff who averred that she was the registered owner of land parcel Ndivisi/Muchi/804 located within Webuye sub-county. She further averred that on 21/11/2020, the Appellant, without any colour of right or consent trespassed into the said land and damped electrical poles changing the land into an arena of loading and offloading electric poles thus disrupting her peaceful enjoyment of the suit land. She sought for declaratory orders to the effect that she was the registered owner of the suit land, that the Appellants are trespassers and order directing the Appellants to remove the said electrical poles. She also sought for general damages for trespass and loss of user.

3. The Appellants entered appearance and filed a statement of defence dated 27/09/2021 in which they denied the Respondent's claim and put her to strict proof thereof. The Respondents averred that ownership of the suit land was denied. They averred that the Respondent had not exhausted the

mechanisms for her claim and that if anything, their actions were in line with the provisions of the *Energy Act*. They further averred that this court lacks jurisdiction and that the claim was in the first instance the preserve of the Energy and Petroleum Regulatory Authority of the Energy and Petroleum Tribunal. They accused the respondent of fraud and set out particulars of fraud thereunder. It was also their argument that the suit did not disclose any reasonable cause of action against them and therefore the same was fatally defective and sought to have it dismissed with costs.

4. Accompanying the statement of defence was a Notice of Preliminary objection challenging this court's jurisdiction.

5. This Court gave directions that the preliminary objection be heard first and fixed a hearing date. During the hearing date, the Appellant was absent and the trial Magistrate dismissed the Preliminary Objection. Thereafter, the Respondent took a date for the hearing of the suit and when the case was called out, the Appellant was not present and the hearing proceeded ex-parte with the Appellants case also being closed for non-attendance. The Respondent filed submissions and a judgment was subsequently delivered in favour of the Respondent on 04/08/2023. The Respondent thereafter engaged auctioneers who proclaimed the Appellant's movable assets in a bid to realise the decretal sum.

6. That necessitated an application by the Appellant dated 08/12/2023 in which they contested service of the mention and hearing notices pertaining the former suit and sought for the following orders;

    a. That this honourable court be pleased to issue orders for stay of execution of the warrant of attachment dated 16.11.2023 and proclamations dated 07.12.2023 pending hearing and determination of the application herein.

    b. That this Honourable court be pleased to issue orders for setting aside the decree and judgment passed on 04.08.2023 pending hearing and determination of the application herein.

    c. That leave be granted to the Applicant to defend this suit on merit.

    d. That costs of this application be provided for.

7. After hearing the said application, the trial court rendered itself vide a Ruling delivered on 23/04/2024 in which the said application was struck out on grounds that the prayers sought could not be granted. Aggrieved by that decision, the Appellant preferred the present appeal on the following grounds;

    a. That the Learned Trial Magistrate erred in law and facts by completely disregarding the provisions of Order 21 Rules 9A-9D of the Civil Procedure (Amendment) Rules, 2020.

    b. That the Learned Trial Magistrate erred in law and facts by ignoring the submissions tendered by the appellant but irregularly relied on the Learned Trial Magistrate's own misdirection by maintaining that there was proper service.

    c. That the Learned Trial Magistrate erred in law and facts by ignoring the binding authorities-20 of the superior Courts adduced in the Appellant's submissions.

    d. That the Learned Trial Magistrate erred in law by ignoring the evidence and submissions tendered by the Appellant.

    e. That the learned trial magistrate erred in law and in facts by taking into account irrelevant considerations.

    f. That the Learned Trial Magistrate erred in law and fact by denying the Appellant an opportunity for a fair trial.

8. The Appellant sought for the following orders: -

   a. The appeal be allowed and the lower court's ruling dated 23rd April 2024 be set aside.

   b. That the judgment and decree of the lower court passed on the 4th day of August 2023 be set aside. That the Appellant be granted leave to defend the suit on merit.

   c. That the costs of the appeal and the lower court be borne by the respondent.

9. After filing the record of appeal, directions were taken that this appeal be canvassed by way of written submissions.

10. The Appellant filed submissions dated 15/04/2025 and submitted that the Respondent did not serve any notice for taxation as directed by the trial court. He submitted that there was no service and that both the trial court and the Respondent contravened the provisions of Order Order 21 rule 9A-D of the Civil Procedure (Amendment) Rules, 2020. The Appellant also faulted the trial Court for failing to consider the inconsistencies in what they referred to as the correct email address and the email address the Respondent used to serve the disputed notices. They relied on the case of Andrew Nthiwa Mutuku v Court of Appeal & 3 others [2021] eKLR. It was argued that the procedure for service cannot be sacrificed as mere technicalities and relied in the case of Law Society of Kenya v Martin Day & 3 others [2015] eKLR.

11. It was also submitted that the trial court denied them their right to a fair trial as guaranteed under Article 25, 50 and 159of *the Constitution*. They cited the case of SM v HGE [2019] eKLR which was cited with approval in the case of The court in Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR. The Appellants also contend that the trial court lacked jurisdiction to determine the case before it and referred to the provisions of Sections 3(1), 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42 and 224(2)(e) of the *Energy Act*, 2019 together with Regulations 2, 4, 7, and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with Article 159(2)(c) and 169 (1)(d) and (2) of *the Constitution* of Kenya, 2010 and sections 9(2) and (3) of the Fair Administration Action Act 2015, Civil Appeal No. 42 of 2021, Abidha Nicholus vs. Attorney General & 7 others, National Environmental Complaints Committee (NEEC) & 5 others (Interested Parties)(unreported)

12. The Respondent filed her submissions dated 01/4/2025 in which she submitted that the court was proper in disregarding the provisions of Order 21 Rules 9A-9D of the Civil Procedure (Amendment) Rules, 2020. The Respondent further submitted that the trial Court properly directed itself in reaching its conclusion. Reliance was placed in the case of Daniel Otieno Migore vs. South Nyanza Sugar Co. Ltd (2018) eKLR.

Legal Analysis And Decision

13. I have considered the Memorandum of Appeal, the record of Appeal and the submissions by the parties as well as the applicable law. What was before the trial court which has given rise to the present appeal was an application for stay of execution, setting aside an ex-parte judgment and an order for leave to allow the Appellants to defend the former suit. In such case, a court needs to first determine whether the judgment sought to be set aside is a regular or irregular judgment. An irregular judgment is a judgment entered where the defendant was not properly served with summons. Where an irregular judgment is entered, the same may be set aside ex debito justitiae (as of right) upon an application by the Defendant. Where the judgment is a regular judgment, the same may set it aside at the discretion of the court. The distinction between a regular and an irregular judgment were set out by the Court of Appeal in the case

of James Kanyiita Nderitu & Another vs. Marios Philota Ghikas & Another (2016) Court of Appeal at Mombasa, Civil Appeal No. 6 of 2015 [2016] eKLR where the Court observed as follows :

> " We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see Mbogo & Another v Shah (supra); Patel v EA Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioki [2004]1 KLR 173).In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiciae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

14. In the instant case, the trial Court struck out the application on the grounds that it was fatally defective and held that the service of the mention and hearing notices upon the Appellants was proper and considered whether the Appellant had invoked the court in a manner that he would exercise his discretion by allowing the application. While making this consideration, the trial Court took issue with the wording of prayer two of the application which was to the extent: That this Honourable court be pleased to issue orders for setting aside the decree and judgment passed on 04.08.2023 pending hearing and determination of the application herein.

15. The court emphatically noted that while it was inclined to grant the application particularly prayer three, it was legally hamstrung by the defective and ambiguous drafting of prayer two which had become spent without being granted. In my view, it was untenable to allow the Appellant to defend the suit without first setting aside the ex-parte judgment. The trial court faulted the inept drafting of the application by the Appellants' counsel and ultimately finding no alternative but to strike out the application in its entirety

16. This brings me to the question whether an order striking out an application can be deemed to have determined the issues in controversy to finality? It is my considered view that the striking out of an application does not amount to a determination of the issues raised therein on the merits. Rather, it is a procedural order, which does not preclude a party from filing a fresh application on the very issues

before the same court, provided that procedural and statutory law is followed. Moreover, the issues in the application which was struck out were not definitively adjudicated by the court. It is therefore my considered view that this appeal is pre-mature.I note that the parties herein misinterpreted the trial court's order striking out the impugned application as a dismissal, whereas the said decision do not amount to a dismissal in law.

17. The upshot of my finding is that this appeal is not merited for being pre-mature. Consequently, the same is hereby dismissed with each party to bear their own costs.

18. Orders accordingly.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF JUNE, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Ododa for the Appellant.

Respondent/Advocate-absent

Bett C/A.