REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LAND APPEAL NO.E101 OF 2024

PAUL BUGI (Suing as the Administrator or the estate of
MAURICE ONYANGO BUGI ..... APPELLANT

VERSUS

FREDRICK OMOLLO OCHANG (Suing as the legal
Representative of the estate of
PATRICK ONYANGO OCHANG ..... RESPONDENT

(Being an appeal from the Ruling of the Honourable Magistrate V. Adhiambo issued on 3rd December, 2024 in Kisumu Chief Magistrate's Court ELC NO.384 of 2018)

BETWEEN

THE REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KISUMU

ELC CAUSE NO.384 OF 2018

FREDRICK OMOLLO OCHANG (Suing as the legal Representative of the estate of PATRICK ONYANGO OCHANG .....PLAINTIFF

VERSUS

MARY ACHIENG ANYANGO ..... 1ST DEFENDANT
PAUL BUGI (Suing as the Administrator or the estate of
MAURICE ONYANGO BUGI ..... 2ND DEFENDANT
PAUL OTIENO OLOO ..... 3RD DEFENDANT
SIMEO ODHIAMBO GOYO ..... 4TH DEFENDANT
COUNTY LAND'S REGISTRAR, KISUMU ..... 5TH DEFENDANT
COUNTY LAND'S SURVEYOR, KISUMU ..... 6TH DEFENDANT

J U D G E M E N T

Introduction

The appeal herein challenges the ruling dated 3rd December, 2024, by the trial court in KISUMU CMC ELC CASE NO.384 OF 2018 (the suit) and seeks for orders that the appeal be allowed, the ruling and decree of the trial court be set aside, the judgement and decree dated 14th October, 2020 be set aside and the costs of the appeal be borne by the Respondent.

Although the suit had many defendants, the appeal is only brought on behalf of the 2nd Defendant against the Respondent who was the Plaintiff in the suit. So, there are only 2 parties in the appeal namely; Paul Bugi, the administrator of the estate of Maurice Bugi who was the 2nd Defendant in the suit and the Respondent herein.

A brief background of the appeal is that the Respondent sued the 7 Defendants listed in the plaint dated 19th July, 2017 over a parcel of land known as KISUMU/KONYA/3017 (the suit land). His claim was that the Defendants in the suit had colluded to fraudulently sub-divide the suit land without regard to a court order in KISUMU CMC Land Case No.83 of 2011 and in the process deprived him (Respondent) of a portion of the land measuring 0.5 Ha. He therefore sought for a declaration that he was entitled to 1.2 Ha of the suit

land and that all sub-divisions done on the suit land to create parcel numbers KISUMU/KONYA/6920 to 6933 be cancelled and the register be rectified to comply with the court order dated 22nd December, 2011 issued in Kisumu CMC LAND CASE NO.83 OF 2011, a permanent injunction, general damages, costs and interest.

The record shows that the suit proceeded undefended by 2nd Defendant on the strength of service of Summons to Enter Appearance by way of substituted service by advertisement in the Newspaper.

The Respondent's case was heard and vide its judgement dated 14th October, 2020, the trial court found that the Respondent had proved his case on a balance of probabilities and entered judgement in his favour and issued the declaration, permanent injunction and awarded costs of the suit to the Respondent.

The 2nd Defendant in the suit Maurice Bugi Onyango, deceased, died subsequently. A copy of death certificate on record dated 18th March, 2024 shows that he died on 9th February, 2024 so the Appellant herein was substituted for the 2nd Defendant, deceased.

The Appellant upon substitution filed an application dated 3rd July, 2024 seeking for orders that;

1) the application be certified as urgent and be heard ex parte in the first instance.
2) the honourable court be pleased to temporarily set aside the judgement dated 14th October, 2020.
3) the court be pleased to stay the orders issued on 17th November, 2020 pending hearing of the application and the suit.
4) the honourable court be pleased to grant an inter parte hearing of the application.
5) in case the application is granted, the annexed statement of defence be allowed as the 1st Defendant's defence against the claim.
6) the costs of the application be awarded to the 1st Defendant/Applicant.

The Respondent's reply to the application was vide his Replying Affidavit sworn on 23rd July, 2024 wherein he deposed that the application ought to have been filed timeously and without unreasonable delay. That the application was brought after 4 years from the date of the judgement.

That if the application is allowed, it will result in absurdity since the Applicant does seek the setting aside of judgement temporarily but does not seek the setting aside of the proceedings leading to the judgement.

That even if the judgement were to be set aside, the proceedings would remain and there would thus be no chance for filing of defence since the case would remain fully heard and closed.

That the Applicant was served. That there was no evidence to show that the applicant is illiterate and that the judgement had already been implemented. That the judgement of the court having been implemented/executed, it would cause tremendous hardship to the Respondent and even other parties to the suit to re-open the proceedings.

The record shows that the application was heard before the trial court by way of written submissions and that vide the ruling dated 3rd December, 2024, the trial court found that the interest of justice will not be served by the court aiding an indolent litigant and consequently dismissed the application. Each party was ordered to bear own costs of the application.

The appeal

Dissatisfied with the ruling, the appellant preferred the present appeal vide the Memorandum of Appeal dated 10th December, 2024 on the grounds that: -

(1) the learned Magistrate erred in both the law and fact in finding that the Honourable W. Onkunya's judgement delivered on 14 October, 2020 was regular without proof of service on record, by way an affidavit of service duly sworn by competent and registered process server.

(2) the learned Magistrate erred in law and in fact in allowing herself to rely on hearsay evidence without any documentary evidence or tangible proof.

(3) the learned Magistrate erred in law and in fact by failing to satisfy herself that the service was full proof and free from error and irregularities.

(4) the learned Magistrate erred in both the law and fact by failing to direct the parties to proceed by way of viva voce evidence thus denying the Appellant the opportunity of cross examining the Respondents on their claims.

(5) both the judgement on Hon. W. Onkunya and this ruling violated the Appellant's right to fair hearing under Article 50 of the Constitution.

(6) the learned Magistrate misdirected herself in law and in fact in failing to find that she had discretion to set aside an ex parte judgement where no service was effected.

(7) even if the court was to find that the judgement was regular, the honourable Court erred in law and in fact by failing to consider the 2nd defendant's draft defence which raised serious and germane triable issues.

(8) the learned Magistrate erred in law and in fact in finding that the acts complained of by the plaintiff were done by the 1st Defendant, Mary Achieng Anyanga who predeceased the instant suit and law was supposed to be substituted with her legal representative.

(9) the learned Magistrate erred in both law and fact in allowing a judgement against a deceased person to stay even if there was the issue of competency of the Appellant who was sued in his own name in lieu of his capacity as the administrator of the deceased's estate.

(10) the learned Magistrate erred in law and in fact in failing to find that Respondent ought to have substituted the deceased defendant with her legal representative, Maurice Onyango Bugi.

(11) the learned Magistrate erred in law and in fact in holding that the Appellant delayed in coming to court without proof that the same was inordinate or proof of how the setting aside of the ex-parte judgement would prejudice the Respondent rights.

Submissions

Vide directions given on 5th May, 2025 the appeal was heard by way of written submissions.

Written submissions for the Appellant

Written submissions dated 25th June, 2025 were filed on behalf of the Appellant by the firm of JNN Advocates LLP. Counsel submitted that the trial court erred in finding that the judgement was regular yet the judgement was irregular as personal service was not effected upon the 2nd Defendant in accordance with Order 5 Rule 8 of the Civil Procedure Rules.

Counsel relied on the case of *Kenya Commercial Bank Ltd -vs- Kenya Planters Cooperative Society (2005)eKLR* and submitted that the Appellant was not aware that the Respondent was proceeding against him, that there was no demonstration of the attempts made to serve the 2nd Defendant before substituted service was effected. That the court will only allow substituted service when it is satisfied that the personal service cannot be effected. That substituted service by way of advertisement in the newspaper was ill-suited and ineffective in reaching the Applicant.

Counsel relied on the case of *Philip Chemwolo & Another -vs- Augustine Kubende [1986]eKLR* where the court held that;

> Substituted service must be tailored to personal circumstances of the person served. Where it is known or ought to be known that newspaper service will not reach the person, such service cannot be said to amount to due process.

Counsel submitted further that the trial court erred in failing to set aside the irregular judgement. That the guiding test is not whether the court may set aside an irregular judgement, but that it must do so to uphold the right to fair hearing under article 50(1) of the Constitution.

Counsel further faulted the court for failing to find and hold that a judgement entered into against a deceased party is a nullity. That the 1st Defendant was already deceased at time of filing suit.

Counsel submitted that the trial court failed to judiciously exercise discretion. That by dismissing the application and upholding a judgement obtained through an invalid process, the trial court sanctioned a miscarriage of justice.

Counsel urged the court to allow the appeal.

Submissions for the Respondent

Written submissions dated 17th November, 2025 were filed on behalf of the Respondent by the firm of Olel Onyango Ingutiah Advocate LLP.

Counsel submitted that it is instructive to note that in the 4 years that the original 2nd Defendant lived after the judgement, he never applied to set aside the judgement. That the application for setting aside the judgement was only filed by the Appellant herein after he obtained grant to the estate of the deceased. That this is an indicator that the original 2nd Defendant did not intend to challenge the judgement that had been entered against him and others. That the application was filed by the administrator who is essentially chasing a property which is no longer part of the estate of the deceased.

That the 2nd Respondent having been served, there can be no more room for the Appellant to claim as he does, that the deceased 2nd Defendant was never served.

Counsel relied on the case of *Shah -vs- Mbogo & Another (1976) EA 116* and submitted that the trial court was right to order rectification of the title back o the name of the deceased as the original 2nd Defendant chose not to enter appearance.

Counsel submitted further that the Appellant must demonstrate that the exercise of discretion by the trial court was wrong when considered in light of set principles. Counsel relied on the case of *Rajesh Rughani -vs- Fifty Investments Limited & Another [2016] KECA 829 (KLR)* to support this submission. Counsel submitted that the Appellant seeks from this court an order to overturn the exercise of discretion by the court below but has not established the principles established to warrant such interference.

Counsel referred the court to the averment in the Replying Affidavit filed by the Respondent in opposition to the application and submitted that the inordinate delay in making the application for setting aside of judgement meant that the judgement had been fully implemented. That there is no more suit property that can be

adjudicated by the original action. That the application before the trial court and the appeal have been overtaken by events.

Counsel urged the court to dismiss the application with costs.

Issues for determination

From the grounds of appeal raised, the submissions made and the record of appeal generally, the following are the issues that emerge for determination herein: -

(a) whether or not the trial court erred in dismissing the application dated 3rd July, 2024.

(b) whether or not the appeal has merit.

(c) costs of the application.

Analysis and determination

This being a first appeal, this court is obligated to re-analyse and reconsider the evidence and material placed before the trial court and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123* it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated that

> "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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect."

Whether or not the trial court erred in dismissing the application dated 3rd July, 2024.

The application dated 3rd July, 2024 had been brought pursuant to the provisions of article 50(1) of the Constitution sections 1A, & 1B of the Civil Procedure Act and Order 24 of the Civil Procedure Rules, article 50(1) provides for the right to fair hearing, section 1A provides for the objective of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. The section places a duty on the court, parties and Advocates to give effect and further the overriding interest in handling disputes under the Act. Section 1B places a duty on the court to handle all matters presented before it for the purposes of attaining just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resource, the timely disposal of the proceedings and all other proceedings in the court at a cost

affordable by the respective parties and the use of suitable technology. Order 24 of the Civil Procedure Rules make provisions related to death and bankruptcy of parties.

The substantive prayer in the application was prayer 2 that;

> "this honourable court be pleased to temporarily set aside the judgement dated 14th October, 2020."

This prayer as framed is ambiguous as it seeks for judgement to be set aside temporarily. It is not clear what the Appellant sought from the trial court. Nevertheless, it appears that both the trial court and the Respondent treated the prayer as a prayer for setting aside of the judgement.

The grounds for setting aside ex parte judgements are generally that the Applicant must explain to the court why he/she did not participate in the proceedings, demonstrate that he/she has a good defence that raises triable issues to the claim and that prejudice will not be occasioned to the Respondent if the judgement is set aside.

The applicant's explanation for non-participation in the proceedings was that the 2nd Defendant was not served with summons to Enter Appearance and hence was not aware that there was a case going on against him.

Regarding service of summons to Enter Appearance upon the Appellant, the record shows that upon filing of the plaint, the court issued summons to Enter Appearance dated 20th July, 2018. The record further shows that the trial court vide the order dated 10th May, 2019 allowed service of the Summons to Enter Appearance to be effected upon the 1st to 4th Defendants in the suit by way of substituted service by advertisement in a Daily Newspaper with wide circulation.

The record further shows that an Affidavit of Service was filed sworn by Francis R. Olel Advocate on 27th June, 2019 to the effect that on 28th May, 2019 he had caused Summons together with Plaint to be served upon the 1st, 3rd and 4th Defendants by way of substituted service through advertisement pursuant to leave of court granted 10th May, 2019. To the Affidavit of Service was attached a copy of the Standard Newspaper for Tuesday May, 28th 2019 at page 39 bearing a copy of the Summons to Enter Appearance addressed to Mary Ochieng Onyango Maurice Bugi Onyango, Paul Otieno Oloo and Simeo Odhiambo Guyo. The order allowing substituted service has not been appealed against and is not the subject of this appeal. The Respondent served the Summons in compliance with the court order. Order 5 Rule 17 Civil Procedure Rules provides that substituted

service under an order of the court shall be as effectual as if it had been made on the Defendant personally.

I find that service of Summons to Enter Appearance was properly effected upon the Defendant in according with the provisions of Order 5 Rule 17 of the Civil Procedure Rules.

The trial court did not therefore err in finding that the 2nd Defendant/Appellant herein had been properly served with Summons to Enter Appearance.

To the application was also attached a draft defence dated 3rd July, 2024; being the intended defence to the Respondent's claim and prayed in prayer 5 of the application that if the application is granted, the said draft defence be allowed as the 1st Defendant's defence against the claim.

Perusal of the draft defence shows that the 2nd Defendant has raised the issue of what exactly was the decision of the Tribunal which decision was adopted by the court in Kisumu CMC Land Case No.83 of 2011 and whether the size of land awarded to the Respondent by the Tribunal was smaller among other issues.

I find that the draft defence raised triable issues for which the Appellant should have been given opportunity to be heard.

A reading of the ruling shows that the trial court did not address its mind to the issue of whether or not the Appellant had a good defence that raised triable issues.

On whether prejudice will be occasioned to the Respondent if the application was allowed, the trial court found that indeed prejudice would be occasioned to the Respondent and dismissed the application.

I have carefully considered all the material placed before the trial court. Having found that the applicant has a good defence that raises triable issues and taking into account all the facts of the case, I find that the trial court erred in ultimately dismissing the application. I find that the appeal has merit. Noting the delay in bringing the application and the finding that the applicant was properly served with Summons to Enter Appearance, I find that the respondent is entitled to thrown away costs.

The result is that the appeal is allowed in the following terms

a. the ruling of the trial court dated 3rd December 2024 is hereby set aside.
b. the judgement and the proceedings in the lower court are hereby set aside.

c. The draft defence annexed to the application to be deemed to be the duly filed defence upon payment of the requisite court fees.
d. thrown away costs of Kshs 20, 000/= are awarded to the respondent.
e. Each party to bear own costs of the appeal.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 27th day of November, 2025.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Jumba for the Appellant

C. Onyango for the Respondent.