Ruto v Kiplagat (Environment and Land Appeal E007 of 2024)
[2025] KEELC 5794 (KLR) (28 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5794 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KABARNET

ENVIRONMENT AND LAND APPEAL E007 OF 2024

L WAITHAKA, J

JULY 28, 2025

BETWEEN

DAVID KIPKORIR RUTO ..... APPELLANT

AND

RAYMOND KIPKEMOI KIPLAGAT ..... RESPONDENT

(Being an appeal from the ruling of Hon. Richard Koech SPM delivered on 8th August 2024 in Eldama Ravine CMCC No.33 of 2008)

JUDGMENT

Introduction

1. By a ruling delivered on 8th August,2024 in Eldama Ravine CMCC Case No.33 of 2008 the lower court dismissed the defendant/appellant's notice of motion application dated 19th February, 2024. Through the application, the defendant/appellant inter alia sought to set aside the default judgment entered against him on 11th December, 2008 together with all consequential orders.

2. In dismissing the application, the Learned Trial Magistrate inter alia stated/held: -

> " Before delving into the application and the response to the application, it is important for this court to summarize the history of this suit. The instant suit was initiated vide a plaint dated 28-7-2008 which was filed in court on the same date. The main prayer for the suit was for the eviction of the defendant from L.R No.498/636 located within Eldama Ravine Township whose ownership the plaintiff was claiming.

On 29th August 2008 the plaint that was filed a request for judgment dated 28th august 2008 supported by a return of service of.....date. One Vincent Oduoi who depones that he is a court process server avers that while accompanied by the plaintiffs who identified the defendants, he served the defendant

on 1st august 2008 at his home situated on the suit property. the defendant is said to have been found in the company of his daughter called Joyce.

The request for judgment was allowed by the court on 29th August 2008 and a default judgment entered against the defendant who had neither entered appearance nor filed a statement of defence. the suit was fixed to formal proof on 16th September 2008 a hearing which did not proceed. it was thereafter fixed to formal proof on 13th November 2008 when the plaintiff testified in support of the case.

On 11th December 2008 the court delivered a judgment for the Plaintiff against the Defendant. on 2nd March 2018 a decree was issued to the Plaintiff.

On 19th November 2020 the court delivered a judgement for the plaintiffs against the defendants. On 2nd March 2020 the plaintiffs filed an application of even date seeking orders that the OCS Eldama Ravine provides security to the eviction of the defendant from the suit property. The court allowed the application on 4th May 2021 noting that the defendant had been served with the aforesaid application but did not file any response.

On 15th December 2021 the defendant filed an application seeking orders of stay of execution of the decree issued on 2- 3- 2018 and that the status quo at 14th December 2021 he maintained the defendant also sought the setting of the default judgment and all consequential orders.

The Defendant acknowledge in the grounds in support of the application that the decree had been executed and he had a good defence but states that he has a good defence which disclose reliable issues which should be heard on merits. in the supporting affidavit dated 13-12-2021 the defendant annexed an allotment letter dated 20th June 1997 for plot number E at Eldama Ravine township. However, the good defence which raises triable issue was never annexed the application dated 15th December, 2021 was never prosecuted until it was withdrawn by the defendant's counsel on 15-12-2021 was never prosecuted until it was withdrawn by the defendants counsel on 15th February 2024.

From the above history it is apparent that the defendant has been aware of the existence of this suit as per his acknowledgement he was aware of existence of the suit as early as 14th December 2021. If I take 14-12-2021 as the just time when the defendant was made aware of the suit, it translate to a period of about (2) years and (7) seven Months.

In the defendants supporting affidavit dated 13th December 2021 he depones that he has evicted on the same day and his building demolished by the plaintiffs. That it has taken the defendant more than two (2) years to seek the setting aside of the judgment that caused his eviction is telling. He said that he filed a similar application dated 15-12- 2021 under certificate of urgency which he failed to prosecute until it was withdrawn on 15-2-2024 speaks volumes on the defendant's attachment to the suit property which he claims to own.....am not convinced that the defendant was not served with pleading and court process since the interception of suit between the parties.

A number of returns of services including the one dated 28/8/2008 are so specific about where the defendant was at the time of service and how he was identified for service. it apparent that the defendant was not ready to defend the suit, even after he was evicted on 13/12/ 2021 he failed to take any tangible action to defend the suit.

Even the instant applications it is in the specific on what the suit property in which he was seeking an instruction I am satisfied that the applicant was served with all court process which he chose to ignore. He is stopped from seeking to set aside a judgment delivered on 11/12/2008, which is more than 15 years ago.

The upshot of all this is that I do dismiss the application dated on 19/2/ 2024 with costs to the plaintiff respondent.

3. Dissatisfied with the decision of the trial court, the defendant appealed to this court on the grounds that the learned trial magistrate erred by: -

    1. Finding that he was aware of the suit; Eldama Ravine CMCC No. 33 of 2008;

    2. Failing to take into consideration his draft defence and counterclaim;

    3. Dismissing the application.

    4. The appellant prays that the appeal be allowed; that he be given leave to file his defence and counterclaim, that the suit in the lower court be heard and determined on merit and that costs of the appeal be borne by the respondent.

    5. During pendency of the appeal, the respondent filed an application dated 2nd May 2024 seeking an order that the appellant be directed to furnish security for costs to the tune of 583,235/= in cash deposit, failing which the appeal be dismissed with costs to the applicant.

    6. Pursuant to directions given on 2nd April, 2025 and 9th June 2025, the appeal and the application were to be disposed off together by way of written submissions.

Submissions

Appellant's submissions

7. In his submissions filed on 9th May, 2025 and 11th June 2025, the appellant gives a detailed account of the circumstances leading to filing of the appeal and points out that in its application before the lower court, he had sought an order of temporary injunction to restrain the plaintiff/respondent from dealing with the suit property, among other orders. The appellant faults the trial court for having failed to consider the issue of injunction. It is the appellant's case that because of failure to consider the issue of injunction, the trial court arrived at an erroneous decision. The appellant urges this court to consider that issue/prayer and make a determination on it.

8. Concerning the prayer for setting aside the judgment, the appellant points out that it was his case that he was not served with summons to enter appearance, pleadings or any other supporting documents hence he was unaware of the existence of the suit. The appellant avers that he only became aware of the suit in court, which had proceeded to conclusion and judgment delivered on 13th December, 2021 when the respondent caused the units on the suit property to be demolished.

9. The appellant explains that his failure to enter appearance, file defence and counterclaim and wholly take part in the proceedings was on account of non-service of the summons to enter appearance and pleadings as required by law.

10. The appellant asserts that he was not privy to any correspondences that allegedly took place between him and the respondent and states that he never received any correspondence from any office whatsoever in relation to alteration of the suit property in order to act upon the same.

11. The appellant maintained that he is the owner of the suit property and states that he had dutifully complied with obligations of paying rates for the suit property.

12. Arising from the foregoing, the appellant submits that failure to enter appearance and file a defence within the timelines provided by law was not deliberate on his part. The appellant submits that the judgment on record is irregular and that it ought to be set aside.

13. It is the appellant's case that the omission by the respondent to serve him drove him from the seat of justice because he was condemned unheard against the rules of natural justice.

14. Concerning the respondent's contention that the appellant was out of time in seeking to set aside the judgment, the appellant maintains that he was unaware of the judgment and only became aware of it in 2021.

15. The appellant faults the respondent for having failed to notify him of the judgment delivered on 11th December 2008 and sitting on it until the year 2018, 10 years later, when he began execution in respect thereof.

16. The appellant points out that he contended that he was never served with any eviction notice and states that he was surprised when the respondent caused the demolition of the units on his parcel of land in his absence.

17. The appellant states that he immediately took action upon finding out about the proceedings and filed an application dated 15th December 2021 seeking to set aside the judgment. The appellant states that he filed the application in person and for that reason there were annextures that were left out. Upon his advocates coming on record and discovering the omission/defect in his application, they withdrew the application with a view of regularizing it.

18. It is pointed out that another application dated 19th February, 2024 was filed in court seeking to set aside the judgment among other orders. According to the appellant, he acted promptly.

19. It is the appellant's case that the provisions of the *Limitation of Actions Act* he is said to have violated do not suffice.

20. The appellant submits that by setting aside the impugned judgment, this court would bring him back to the seat of justice and be in a position to determine the rights of the parties before it.

21. The appellant faults the trial court for determining that he had been served with all court processes, was aware of the suit and had not taken any action to defend the suit, even after finding out about the suit on 13th December, 2021.

22. The appellant points out that he had annexed to his application for setting aside the impugned judgment a draft defence and counterclaim which, according to him, raises triable issues.

23. The appellant identifies the triable issues in his draft defence and counterclaim as his contention that he was not aware of the proceedings before the trial court; his contention that he is the owner of the suit property and had enjoyed quiet possession of the same for over 12 years from the time it was allocated to him; and that he had carried his obligations owed by the government by paying rates.

24. The appellant faults the trial court for having failed to consider the draft defence and counterclaim and placing reliance on the application that had been withdrawn.

25. The appellant further faults the trial court for determining that he was not specific on the parcel of land he was claiming when it is clear from the record that the parcel in question is the one known as Eldama Ravine Town Commercial Plot No. D (LR. NO. 498/920) and Eldama Ravine Town Commercial Plot No. E (LR. No.498/921) which the respondent was not able to ascertain how it came to be known as Plot No. LR No.498/636 Eldama Ravine Township Koibatek District.

26. The appellant submits that the trial court relied on an application that was not the subject matter of the ruling without delving into the contents and annextures of the subject application thereby arriving at an erroneous ruling.

27. The appellant urges this court to re-look at the application that was placed before the trial court and render its decision on the same.

28. Terming the evidence before this court sufficient to warrant granting of the orders sought, the appellant urges this court to allow the appeal as prayed.

29. On the application for security for costs, the appellant filed a replying affidavit sworn by the appellant on 3rd June, 2025. He filed submissions on 11th June 2025 and submitted that the applicant, (respondent) in the appeal was out to frustrate and delay the expeditious disposal of the appeal having obtained a decree and certificate for costs in 2023 and failed to act on it. He submitted that the power to order provision of security for costs is discretionary. He relied on the case of Indemnity Insurance of North America, Phoenix Assurance Company of New York & Marine Office of America Corporation vs Kenya Air freight Handling Limited (2001)eKLR

Respondent's submissions

30. In his submissions filed on 9th June, 2025 the respondent identifies three (3) issues for the court's determination. These are:-

    i. Whether the appeal as filed is merited;

    ii. Whether the judgment of the court dated 11th December 2008 should be set aside and the appellant allowed to file his defence and counterclaim in Eldama-Ravine SPMCC No. 33 of 2008;

    iii. Who should pay for the costs of the appeal.

        i. On whether the appeal as filed is merited, the respondent gives a background of the facts and/or circumstances giving rise to the appeal and submits that the appellant is not specific on the exact suit property which was the subject of the suit. Contending that the application is bad in law, offends the provisions of Section 4(4) of the *Limitation of Actions Act* Cap 22 Laws of Kenya, the respondent submits that the right to challenge the judgment has lapsed. In that regard, the respondent has made reference to Section 4(4) of the *Limitation of Actions Act* Cap 22 Laws of Kenya aforementioned and the cases of M'Ikiara M'Rikinkany & Another vs Gilbert Kabeere M'Mbijiwe (2007)e KLR; Isaac Olang Solongo v. Gladys Nanjekho Makokha (Being the administrator of the Estate of Antonina Makokha (Deceased) & Another (2021)e KLR.

        ii. Maintaining that the proceedings intended to be instituted by the appellant are statute barred by dint of the provisions of Section 4(4) of the *Limitation of Actions Act* Cap 22 Laws of Kenya, the respondent submits that the appellant slept on his rights and is therefore not entitled to agitate them after the lapse of time.

31. On whether the judgment of the court dated 11th December 2008 should be set aside and the appellant be allowed to file his defence and counterclaim in Eldama-Ravine SPMCC No. 33 of 2008, the respondent makes reference to the provisions of Order 10 rules 9, 10 and 11 and in that regard submits that the rules provide that before an interlocutory judgment is entered by any court, the plaintiff must prove that the defendant was duly served and an affidavit of service duly filed.

32. In the circumstances of this case, the respondent submits that the trial court was satisfied that the appellant was properly served before entering default judgment against him and fixing the matter for formal proof.

33. On account of the delay in bringing the application for setting aside the ex parte judgment, for over 16 years, the respondent submits that this court should not exercise the discretion vested in it in favour of the appellant.

34. It is the respondent's case that the court may not be required to consider the merits of a defence in an application of this nature. The respondent urges this court not to set aside the impugned judgment for the following reasons: -

    i. The judgment has been extinguished by express provisions of Section 4(4) of the *Limitation of Actions Act*;

    ii. The appellant was duly served with all the court processes. He was aware of the instant suit and elected to bury his head under the sand on the basis that no one will demolish a permanent structure;

    iii. The judgment before court was executed five years ago and the title deed was converted, subdivided and transferred. As at now, the title to the property has changed hands severally and that the appellant has failed to partake due diligence;

    iv. The appellant has slept on his imaginary rights for too long. It's wrong and late in the day to come to court with half-truths and expect leniency when he had opportunity long ago to ventilate his issues before the trial court then.

35. On who should bear the costs of the appeal, the respondent urges this court to exercise the discretion vested in it in deciding whether or not to award costs in his favour, as it he has demonstrated that the appeal lacks merit.

Analysis and determination

36. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the proceedings of the lower court with a view of of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see Selle & Another vs. Associated Motor Boat Co. Ltd (1968)E.A 123 and Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR and Kiruga vs. Kiruga & Another (1988)KLR 348.

37. In so doing, I have carefully reviewed the circumstances leading to filing the application hereto and the instant appeal. I have also considered the law and/or principles that undergird an application for setting aside an ex parte judgment, espoused in the case of Patel v East Africa Cargo Handling Services Ltd (1974)EA 75 and restated in many decided cases thus;

> "There are no limits or restrictions on the judge's discretion except that if he does vary judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter the wide discretion given to it by the rules. The principle obviously is that unless and until the court has pronounced judgment upon merits, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

In the case of *Ouma v Ondieki (Civil Appeal 076 of 2023*) (2024)KEHC 7093 (KLR) (3 June 2024) (Judgment), while addressing the duty of the court when considering an application for setting aside an ex parte judgment, the court stated:-

"It is trite law law that the court must look at the draft defence to see whether it raises triable issues in deciding setting aside of a regular judgment."

In CMC Holding Ltd vs. Nzioki (2004) KLR 173 quoted in Gicharu v. Gachui (Environment and Land Court Appeal 5 of 2023) (2024)KEELC 812 (KLR) (15 February 2024)(Judgment) the Court of Appeal stated:-

"The law is now well settled that an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence filed, if filed already or if a draft defence is annexed to the application, raises triable issues."

In Gicharu v. Gachui (supra) the court stated: -

" the principles to be considered while determining whether to set aside the ex parte regular judgment entered herein are:-

i. Whether there is a defence on merit?

ii. Prejudice;

iii. Explanation for the delay....

In the impugned ruling, there is no mention of the draft defence and whether it raises triable issues or not. The trial magistrate did not consider the said draft judgment (read defence), and that was an error."

38. As can be discerned from the respondent's submissions, the respondent admits, albeit impliedly, that the draft statement of defence and counterclaim attached to the defendant's application hereto raises triable issues but contends that where there is inordinate delay in bringing the application for setting aside, the court may refuse to take into account whether the defendant's prospective defence raises triable issues.

39. With all due respect to the counsel for the respondent, his submission on the duty of the court to consider whether the draft defence raises a triable issue(s) is not supported by law.

40. The law imposes an obligation on courts to consider whether the proposed defences raises a triable issue. In that regard, see the case of Ouma v Ondieki supra, cited herein above.

41. Whilst from the conduct of the appellant, the trial court determined that he was convinced that the appellant had insufficient interest in the suit property, it is clear from his ruling and the court record, that the Learned Trial Magistrate did not consider the draft statement of defence and counterclaim attached to the appellant's application for setting aside the ex parte judgment.

42. There is no doubt that the draft statement of defence and counterclaim raises triable issues which the Learned Trial Magistrate ought to have considered in making his decision as to whether or not to set aside the ex parte judgment. These included the question as to whether the appellant was served with summons to enter appearance and all other court processes (the court's ruling shows that the Learned Trial Magistrate considered that issue and made a decision in respect thereof). He however, failed to consider the other issues raised in the defence and counterclaim like the claim by the appellant that he

was the lawful owner of the suit property by virtue of having been the lawful allotee thereof and having been in possession of it for over 12 years. Failure to consider those aspects of the defence, among others, was a misdirection on the part of the trial court warranting interference with his decision by this court.

43. Based on the provisions of Section 4(4) of the *Limitation of Actions Act* and the authorities cited herein above in support of his contention that the intended proceedings by the appellant are time barred, having read and considered the provisions of section 4(4) of the *Limitation of Actions Act* and the decisions cited by the respondent in support of his contention that the defendant's contemplated proceedings are time barred, I find them to be inapplicable in the circumstances of this case as the appellant is seeking to set aside an ex parte judgment as opposed to trying to execute a judgment or decree issued in his favour as contemplated in Section 4(4) of the *Limitation of Actions Act*.

44. Whereas there was inordinate delay in bringing the application to set aside the impugned judgment and whereas the impugned judgment has since being executed, I am satisfied with the explanation offered by the appellant concerning the two or so years delay in filing the application for setting aside the ex parte judgment, at least from 2021, when the trial court was capable of ascertaining with certainty when the appellant got to know about the impugned judgment.

45. It is noted that upon becoming aware of the judgment, the appellant moved the court for setting aside the judgment. That application was later withdrawn, on what counsel for the appellant explains as need to cure a defect in it. Under the circumstances, I do not find the conduct of the appellant as conduct that was calculated at obstructing or delaying the cause of justice as was held in the case of Shah vs. Mbogo & another (1967) EA 116.

46. In the peculiar circumstances of this case, where the applicant has demonstrated that his use and occupation of the suit property may not have been unlawful or without legal justification, I am satisfied that the appellant deserves an opportunity to be heard on his defence and counterclaim, the change of circumstances notwithstanding. The issues arising as a result of the changed circumstances are issues that may be addressed through amendment of pleadings to reflect the changed circumstances, if need be.

47. Concerning the plea by the appellant to this court to consider its application for a temporary injunction pending the hearing and determination of the application, since the application was premised on an existing judgment, it is the considered view of this court that the appellant could not sustain that prayer because there existed a lawful judgment against him, which judgment had not been set aside to warrant the appellant arguing that he had a prima facie case with high probability of success.

48. The upshot of the foregoing is that the appeal herein has merit. Consequently, save for the order as to costs, which shall abide the outcome of the suit before the lower court, I allow the appeal as prayed.

49. Having ordered that costs shall abide the outcome of the suit before the lower court, considering the application dated 4th June 2025 will serve no purpose.

50. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 28TH DAY OF JULY, 2025

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of;-

Mr. Gekonga for the Appellant

Mr. Kemboi for the Respondent

Court Assistant; Ian