

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO E028 OF 2022

ELIZABETH

WAITHIRA

KIHARA.....APPELLANT

VERSUS

VINCENT

KINGATI

NDIRANGU.....RESPONDENT

JUDGMENT

(Being an appeal from the decision of Hon. Y. M. Barasa (SRM) delivered on 3rd March 2022 in Naivasha CMCC No. 827 of 2017)

1. By a memo of appeal dated 30th March 2022 the appellant is seeking for the following orders:

a) That the orders made by the Hon. Senior Resident Magistrate dismissing the Appellant's application

be vacated set aside or varied to enable the Appellant defend herself in the suit in the court below and/or the Appellant's application in the Court below be allowed

b) That costs of this Appeal be paid by the respondent

c) That such other or further relief as this Honourable court may deem fitting and just be grant

2. The appeal is based on the grounds that:

a) That the Honourable Senior Resident Magistrate misdirected himself on the law and the fact in failing to find that the right of the Appellant to defend herself and aerate her case are not extinguished by negotiations

b) That the Honourable Senior Resident Magistrate misdirected himself on the law and facts in failing to consider the entirety of the circumstances of the case.

- c) That the right to be heard is basic and should not be denied except in extreme circumstances.*
- d) That the Honourable Senior Resident Magistrate erred and misapprehended the evidence and the applicable law and failed to do justice in dismissing the appellant's application*
- e) That this Honourable court be pleased to grant leave to the defendant to file defence.*
- f) That the costs of this application be provided for.*

3. The impugned ruling arose from a notice of motion application dated 11th November 2021 wherein the appellant/application was seeking for the following orders:

- a) That this Honourable court be pleased to certify the application herein urgent and to dispense with service hereof in the first instance to enable the same be heard and interim orders given.*

- b) *That leave be granted to the Firm of P.K Njuguna & Company Advocates, to come on record for the defendant in the place of M/S Wairegi Kiarie & Associates Advocates.*
- c) *That this Honourable court be pleased to make orders temporarily staying execution of the ex parte judgment entered herein on the 29th day of October 2018 and the subsequent decree dated 25th day of April 2019, the orders made on the 25th of August 2021 and issued on the 8th of September 2021 and/or all other consequential orders pending the hearing and determination of this application*
- d) *That this Honourable court be pleased to make orders temporarily restraining M/S Gillette Traders Auctioneers or any other Auctioneers from attaching and/or offering for sale the Defendant's property known as NAIVASHA/MWICHIRINGIRI*

BLOCK 4/1366 whether in execution of the decree of this court or otherwise, pending the hearing and determination of this application

e) That the ex parte judgment entered herein on the 29th day of October 2021 and the subsequent decree dated 25th day of April 2019 the orders made on the 25th of August 2021 and issued on the 8th of September 2021 and/or all other consequential orders

4. The application was supported by the grounds thereto and applicant's affidavit of even date, who deposes that, she sold an acre of land to the respondent at an agreed sum of Kshs 2,500,000. The acre of land was to be sub-divided from LR Naivasha/Mwichirigiri Block 4/1366.
5. That the respondent paid a deposit of Kshs 1,000,000 with the balance to be paid within sixty (60) days. That subsequently the respondent declined to pay the

balance on the ground that Kenya Electricity Transmission Company (KETRACO) had published a notice to use the land to construct power lines. The applicant avers that she was not aware of the notice as it was issued to Njagi Juma Julius who sold the land to her.

6. That, upon discovery of easement on the property the respondent expressed interest to take another land without easement and as the parties were awaiting subdivision the respondent filed a civil suit CMCC No. 827 of 2018, Vincent Kingati Ndirangu vs Elizabeth Waithira Kihara.
7. The applicant avers that she was served with summons to enter appearance and the parties agreed that the deposit be refunded. That the applicant refunded a sum of Kshs 500,000 to the account of Kaira Mbuthia & Kingati Advocates A/C No. 0820083000 Bank of Africa on 22nd November 2018.

8. That on 7th June 2019, she paid Kshs 200,000 to Kingati Ndirangu Associate, Advocate leaving a balance of Kshs 300,000. That all the while the respondent had placed a caution on the land.
9. The applicant avers that she was shocked to be served with an application seeking to have her land attached to satisfy a decree from an ex parte judgment entered against her on 29th October 2018 and a decree dated 25th April 2019.
10. That the application allowing attachment was allowed without a replying affidavit or grounds of opposition and an order extracted on 8th September 2011. Further a request has been made vide a letter dated 14th October 2021, received on 15th October 2021 for issuance of warrant of attachment to M/S Gillette traders Auctioneers for sale of the land. However, ironically, it is the land with easement which the respondent decline.

11. The appellant reiterates that she did not know of the easement before she entered into a sale agreement with the respondent and that, even, then the land was sold subjecting all subsisting easement's and right of way. That the respondent was not entitled to terminate the contract, and neither did he serve a notice to terminate the agreement.
12. Furthermore, the parties negotiated settlement of the matter and that is why the suit was not defended. That, she has been condemned unheard and the respondent is seeking to execute a decree in the sum of Kshs 21 million, when the outstanding balance is Kshs 300,000. As such, it is only fair and just that, she be accorded an opportunity to be heard.
13. However, that application was opposed vide a replying affidavit sworn by the respondent dated 16th November 2021. He deposed that, the application is

an abuse of the court process due to the following reasons: -

a) *The Applicant commenced settling the claim after judgment was entered and has never raised any concerns over the suit.*

b) *The Applicant has been aware of this suit and has in fact been participating in it.*

c) *The application is an afterthought meant to delay the course of justice.*

d) *The delay in filing the application is inordinate and inexcusable.*

14. The respondent further argued that the applicant was served with notice to show cause, why attachment of the suit property should not be issued and she failed to show cause, and attachment allowed on 22nd July 2020. That she appointed the firm of Wairegi Kiarie & Associates to represent her in the matter and on appearance in court on 28th April and 23rd June 2021

the applicant offered to have the matter settled out of court but failed to pay the decretal sum.

15. That the application was heard and allowed on 28th August 2021 ex parte. That consequently the applicant has shown insufficient reason to set aside the judgment.

16. Further that the sale agreement was terminated due to the notice from KETRACO duly published in a newspaper of countrywide circulation (10) days before entry of agreement for sale of suit property and that a notice of termination was issued to the applicant through the firm of; Messrs Kairu Mbutia & Kiingati Advocates on record, representing her and at the same time demand for refund of deposit of purchase price was made. That upon refusal to refund the deposit, the suit in Chief Magistrate's court was filed on 30th August 2018.

17. The respondent acknowledged receipt of the Kshs 700,000 being a refund of part deposit after the suit was filed and acknowledged in the application dated 23rd January 2020, filed on the same date. That he had a right to put a caution on the subject land.
18. The respondent argues that, in the given circumstances the application to set aside the judgment is a sham, and an abuse of the court process.
19. However, the appellant filed a further affidavit dated 24th November 2021, and denied the allegation that, she was notified of entry of judgment in the year 2018, arguing that the notice of entry of judgment is itself dated 26th August 2019, and affidavit alleged to have served it effected on 27th August 2019. That, payment was made after judgment on assurance that the proceedings would be halted for her to refund the money. That, she instructed a counsel to take action

but for unknown reason he did not so and that there is no deliberate delay in the matter.

20. The appellant denied having been served with a notice to show cause and that the affidavit of service is designed for that purpose. Further that it was scheduled for hearing on 22nd July 2020 and was served on 30th July 2020. Further that the telephone number quoted therein is not hers, and neither did her lawyer inform her of the hearing scheduled for 23rd June or 28th August 2021 to seize her property.

21. She argues that the mistake of a counsel should not be visited upon her as she stands to lose her property worth millions of shillings. Hence the need to offer her defence. Further the demand to pay millions of shilling after paying Kshs 700,000 is conspiracy to defraud her of her land.

22. Similarly, the respondent also filed a further affidavit dated 14th January 2022 and deposed that, the notice

to show cause was served on 3rd July 2020 upon the applicant in person vide her mobile No. 0728340608 given to him by her. That due to a typo error stated it was 0728346608. That it is not true that the affidavit of service is dated 30th July 2020.

23. The matter was disposed of through filing of submissions. Notably whereas the respondent's submission dated 17th January 2022 filed in the trial court are included in the record of appeal, the appellant's submission in the trial court are not available in the record of appeal.

24. Be that, as it may, the trial court rendered the impugned ruling herein dated 3rd March 2022 wherein the application was dismissed for lack of merit with costs to the respondent, hence the appeal herein.

25. The appeal was disposed of vide filing of submission. The appellant in submissions dated 22nd June 2023, argued the court's discretion to set aside ex-parte

judgment should be exercised judicially to meet the ends of justice and not to deny a litigant justice. She referred the court to the case of CMC Holdings Ltd vs Nzioki [2004] KLR 173 where it was held that discretion to allow or reject setting aside of an ex-parte judgment must be exercised judicial and is meant to ensure a litigant does not suffer hardship or injustice for an excusable mistake, inadvertence, accident or error.

26. She submitted that, the trial Magistrate misdirected himself in finding that the negotiations by the parties were for purposes of settling the decretal amount while in actual fact the appellant was negotiating on the refund of the consideration paid and/or the method of resolving the transaction.

27. That further the trial Magistrate erroneously held that negotiations extinguished the appellant's right to defend herself and failed to consider that negotiations

may break down or may be based on different considerations. That, the right to be heard is a basic right that can only be denied in exceptional circumstances.

28. Furthermore, negotiations are conducted on a without prejudice basis and are not binding unless they culminate in a judgment by consent of the parties. That the court not being a party to negotiations cannot take into consideration the issues in the negotiations and bind the parties in a judgment.

29. The appellant relied on the case of *Al- Sabah vs East African Fitness Limited (Civil Case E484 of 2020) [2021] KEHC 269 (KLR) (Commercial and Tax) (17 November 2021) (ruling)* where the High Court held that “*where without prejudice negotiations are apparent, the court should lean towards excluding them in evidence so as not to discourage parties from pursuing such negotiations.*”

30. The appellant further faulted the trial Magistrate for failing to consider the grounds and evidence presented in support of her application and failed to make a determination on whether the appellant had a reasonable and/or triable defence, whether the respondent was entitled to terminate and/or rescind the agreement due to the KETRACO notice, and whether the appellant was served with the termination notice and the method of service, all of which are triable issues.

31. The appellant argued that the interest by KETRACO being in the nature of an easement was covered under clause 9(i) of the agreement which provides that the land was sold subject to all existing easements and rights of way. Further, the respondent had a duty to carry out due diligence and should have been alive to the interest by KETRACO thus had no right to terminate the contract.

32. The appellant further argued that if the ex parte judgment is not set aside it will be highly prejudicial to her as she will be deprived of her property and the sum of Kshs. 700,000, which she already refunded to the respondent, despite the fact that termination was not occasioned by her actions. She urged the court to set aside the ex parte judgment and grant her leave to file her statement of defence so as to set down her case for hearing and not be condemned unheard.

33. However, the respondent vide submissions dated 22nd April 2024, opposed the appeal and referred the court to the case of Mbogo & another vs Shah [1968] EA where the Court of Appeal set out instances where an appellate court may interfere with the discretionary power of the trial court being; that the trial court misdirected itself in some matter and as a result arrived at an erroneous decision; or it is clear from the case that the trial court wrongly exercised its

discretion and that there has been misjustice as a result.

34. The respondent submitted that discretion to set aside ex parte judgment should be exercised to avoid injustice or hardship due to an accident, inadvertence, excusable mistake or error but is not meant to aid a party who deliberately by evasion or otherwise sought to obstruct or delay the course of justice as held by the Court in the case of Shah vs Mbogo and another [1967] EA 116 as cited by the Supreme Court in Parliamentary Service Commission vs Martin Nyaga Wambora & others [2018] eKLR.

35. The respondent submitted that explanation by the appellant that she did not enter appearance and defend the matter as she was engaged in negotiations with the respondent on payment of the amount owed, does not hold water. That it is trite that time does not stop running merely because parties are engaged in

negotiations as held by the Court of Appeal in G4S Security Services (K) Limited vs Joseph Kamau & 486 others [2018] eKLR and Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye and another [2016] eKLR.

36. The respondent argued that it is only after default judgment was entered on 29th October 2018, that the appellant instructed an advocate who came on record on 24th May 2021. But, the appellant's advocate did not seek to set aside the default judgment but instead sought to negotiate with the respondent on payment of the decretal sum. That it is only after the negotiations failed that the appellant appointed her current advocates on record who filed the application dated 11th November 2021 seeking to set aside the default judgment. That it was an attempt by the appellant to delay the respondent from enjoying the fruits of his judgment and that the trial Magistrate

exercised his discretion rightfully in dismissing the same.

37. On whether the appellant was entailed to an order setting aside the default judgment and allowing her to defend the suit, the respondent referred the court to the case of *Shanzu Investment Ltd vs Commissioner of Lands [1993] eKLR* where the court set out factors to consider in determining whether to exercise discretion to set aside an ex parte judgment being; whether there is a defence on the merits, if there would be any prejudice, and the explanation for the delay.

38. The respondent argued that the appellant in her supporting affidavit dated 11th November 2021 admitted that she had agreed to refund the money paid and had even paid back part of it. That the trial court considered the appellant's defence and rightly held that the appellant having agreed to and/or

offered to settle the decretal amount, the defence did not raise triable issues.

39. The respondent relied on the case of Peeraj General Trading & Contracting Company Limited & anothers vs Mumisa Sugar Company Limited [2016] eKLR where the High Court held that the defendant having unequivocally admitted to being in debt to the plaintiff the mere denials in the defence does not constitute triable issues and there is no reasonable defence on the amount owed.
40. The respondent further argued that the appellant will not be prejudiced as she has already refunded some of the money. That once she fully refunded the money the property will still be in her name. However, on the flip side, the respondent has been greatly prejudiced as he has been put out of his money from the year 2016 to date.

41. Lastly, the respondent submitted it is trite that costs follow the event and argued that he had shown that the trial court was correct in dismissing the appellant's application to set aside the default judgment. That the appellant having failed to meet the threshold for setting aside and/or varying the trial court's decision, it is only fair that the appellant bears the costs of the appeal.

42. Having considered the ruling delivered I note that, in dismissing the application the trial court in a brief ruling stated as follows: -

"I have perused through the records and I have realized that the applicant had previously engaged the services of Wairegi Advocate and parties were actually attempting to negotiate on how to settle the decretal amount.

It is when negotiations have failed that the applicant has now moved the court to have the ex parte

judgment set aside which in my view is done in bad taste. The upshot is that the application dated 11th November 2021 lacks merit and the same is dismissed with costs”

43. Pursuant to the aforesaid, it is clear that, the trial court considered only the prayer to set aside the judgment. However, prayer 5 of the application was seeking for an order that, the “ex parte judgment” subsequent decree, the orders made on the 25th of August 2021 and 8th September 2021 and/or other consequential orders be set aside was not considered in totality. Thus, other than considering the ex parte judgment the ruling did not deal with the decree and the other orders. To that extent the ruling is not complete.

44. Be that as it were the chronology of events herein are that, the plaint in the primary suit CMCC 827 of 2018 dated 27th August 2018 was filed on 30th August 2018,

summons were issued and served and indeed the defendant/appellant entered appearance in the matter on 27th September 2018. She did not defend the suit thereafter and ex parte judgment was entered on 29th October 2018.

45. At this stage, it suffices to note that, while entering judgment the trial court stated that, it was entering judgment due to the default of the defendant filing a defence and entered judgment as prayed for in the plaint. The question is what were the prayers in the plaint.

46. From the plaint the plaintiff prayed for orders as follows:

a) The sum of Kshs 1,000,000

b) Interest on (a) above at 21% per annum from 18th March 2016 being the date of payment of the deposit until repayment in full.

c) Costs of this suit and interest thereon.

d) Any other relief that this Honourable court may deem fit to grant.

47. The trial court also stated that, the costs of the suit would be determined upon hearing the matter on formal proof. However, the record reveals that, no formal proof took place. But, a decree was subsequently drawn dated 25th April 2019, indicating the contents as follows: -

a) Principal sum----Kshs 1,000,000

b) Interest-----Kshs 647,260

c) Costs-----Kshs 123,375

48. There are several questions that arise up to this stage, even if the court were to uphold the judgment. First and foremost was the interest claimed of 21% from the date indicated proved and/or substantiated. Was it provided for in the sale agreement and/or agreed on by the parties? Secondly how were the

costs assessed without formal proof as ordered by the trial court?

49. Furthermore, the total sum arising from the decree is Kshs 1,770,635.00 yet according to the appellant as deposed at paragraph 19 of the affidavit in support of the application herein, the respondent is seeking to sell off her land to recover a sum of Kshs 2,108,135, yet the respondent has not rebutted this averment.

The question is, how was that sum arrived at?

50. In that regard, notably the notice to show cause issued indicates a sum of Kshs 1,212,135. The notice is dated 24th June 2020, and decree is dated 25th April 2019. It is not clear how this figure was arrived at. Even then there is dispute as to whether the notice was served due to the mix up in the telephone number of the appellant.

51. The other significant finding in this matter is the fact that, the respondent conceded to have paid a deposit

of Kshs 1,000,000. He indeed sought for a refund thereof and got a judgment for the same. The appellant then made a payment in satisfaction of the decree to the extent of the total sum of Kshs 700,000. The first payment was made on 22nd November 2018 before the decree dated 26th April 2019 was drawn and yet the decree states, the principal sum as Kshs 1,000,000 not reflecting the payment made.

52. Furthermore, the next installment was made on 7th June 2019 after the decree was drawn, yet at execution stage, there is no indication as to whether the subject sum has been taken into account. Yet, it is acknowledged by the respondent.

53. With utmost due respect and as submitted by the appellant, the impugned ruling did not consider all these issues raised by the parties.

54. That apart from the trial court indicating that, it had perused the record, there is no indication as to what

was considered. In particular, whether the prayers in the application, the supporting or replying affidavits, the submissions by the parties (if any), the issues arising for determination and the determination thereof were ever considered.

55. Consequently, in the absence of analysis of the matter, it is not possible to appreciate what formed the basis of the finding of the trial court in arriving at the decision made.

56. Be that, as it were, the principles of setting aside ex parte judgement were settled in the case of CMC Holding Limited v Nzioki (Civil Appeal 329 of 2001) [2004] KECA 143 (KLR) (12 March 2004) (Judgment)

“The law is now well settled that in 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 if filed already or if a draft defence is annexed to the application, raises triable issues.”

57. There is no indication in the ruling delivered that, the same was considered.

58. The upshot of the aforesaid is that, the ruling of the trial court dated 3rd March 2022, is hereby set aside in its entirety. I direct that, the subject application that gave rise to that impugned ruling herein be remitted to another court for hearing and determination afresh. It is so ordered.

Dated, delivered and signed this 5th day of March 2026

GRACE L. NZIOKA
JUDGE

In the presence of:

P. K. Njuguna for the appellant

Ms. Kihenjo for the respondent

Ms. Hannah: Court Assistant