



**Shibende v Omukuyia (Environment and Land Appeal E017 of 2023)
[2024] KEELC 1517 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1517 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E017 OF 2023**

DO OHUNGO, J

MARCH 21, 2024

BETWEEN

AMINA SHIBENDE APPELLANT

AND

JAMES OMUKUYIA RESPONDENT

*(Being an appeal from the ruling and order of the Senior Principal
Magistrate's Court at Mumias (Hon. Thomas Obutu, Senior Principal
Magistrate) delivered on 9th March 2023 in Mumias MCELC No. 16 of 2019)*

JUDGMENT

1. The background of this appeal is that the Respondent filed the suit in the Subordinate Court through plaint dated 6th May 2019 wherein he averred that he was the registered proprietor of the parcel of land known as E/Wanga/Lubinu/3135 (the suit property) and that the Appellant had been squatting on the parcel. He therefore prayed for judgment against the Appellant for eviction from the suit property.
2. The Appellant filed an amended defence and counterclaim in which she denied the Respondent's averments and stated that her late husband had purchased 3 acres of the suit property which they had been occupying since 1972 and that they had acquired title by adverse possession. She prayed that the Respondent's title in respect of the suit property be cancelled to revert to E/Wanga/Lubinu/575 and that a 3 acre portion of E/Wanga/Lubinu/575 be declared her property.
3. After several adjournments, hearing of the matter proceeded on 2nd June 2022 in the absence of the Appellant and the Subordinate Court (Hon. Thomas Obutu, Senior Principal Magistrate) delivered judgment on 28th July 2022 and granted the eviction order sought by the Respondent. Aggrieved, the Appellant filed Notice of Motion dated 17th October 2022, seeking setting aside of the judgment. Upon considering the application, the Subordinate Court (Hon. Thomas Obutu, Senior Principal Magistrate) delivered ruling on 9th March 2023 and declined to grant setting aside.



4. Undaunted and dissatisfied with the ruling, the Appellant filed this appeal on 6th April 2023. The grounds of appeal are listed on the face of the Memorandum of Appeal dated 5th April 2023. In summary, they are that learned Magistrate failed to consider that the case concerned a dispute over land which necessitated hearing both sides on the merits. I note that most of the grounds of appeal address the judgment as opposed to the ruling appealed against.
5. The appeal was canvassed through written submissions. The Appellant's submissions dated 9th August 2023 focused on Notice of Motion dated 5th April 2023, an application through which she had sought stay pending hearing and determination of this appeal. The application was settled when stay was granted by consent on 16th June 2023.
6. On his part, the Respondent argued that the Appellant had exhibited frequent non-attendances and that this appeal does not contest the main grounds of the ruling delivered on 9th March 2023. He therefore urged the court to dismiss the appeal.
7. The principles that guide an appellate court while considering an appeal against an order made in exercise of discretion are settled. The Court of Appeal reiterated in the case of *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment) that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion.
8. I have considered the grounds of appeal, the pleadings, the parties' submissions, and the entire record. The sole issue that arises for determination is whether the Appellant was entitled to setting aside as sought in her Notice of Motion dated 17th October 2022.
9. When considering an application for setting aside, the court exercises discretion pursuant to the principles laid down in *Mbogoh & another v Shah* [1968] EA 93 and reiterated in *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. The court has unfettered discretion and will consider such factors as the reason for the failure to attend court, the length of time that has elapsed since the order sought to be set aside was made, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside. The court's discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.
10. I have perused Notice of Motion dated 17th October 2022 and the affidavit in support thereof. The Appellant focused on blaming her advocates for not filing a notice that they had ceased to act for her. She also complained that no notice of delivery of judgment was served upon her. She did not offer any explanation for her failure to attend court for hearing on 2nd June 2022, a date that was fixed by consent in the presence of her advocates. She simply did not avail any material that would form a basis for exercise of discretion in her favour. While it may be fashionable and convenient to blame one's advocates, such blame must have a scintilla of plausibility. No material was availed by the Appellant to back her claims of mistake of counsel.
11. Further, a perusal of the record shows that the Appellant was granted adjournments on 28th January 2021, 6th April 2021, 11th May 2021, 20th January 2022, 3rd March 2022 and 12th April 2022. The adjournment on 3rd March 2022 was marked as last adjournment to the Appellant. After the hearing proceeded on 2nd June 2022, the matter was scheduled for mention to confirm filing of submissions



on 23rd June 2022. Mr Namatsi appeared on behalf of the Appellant on 23rd June 2022 and informed the court that he intended to cease acting for the Appellant. The date of delivery of the judgment was scheduled in his presence. Thus, the Appellant was represented even before the judgment was delivered. Further, although the Appellant claimed in her supporting affidavit that she was not aware of the judgment and that she only learnt of it on 26th September 2022 when the Respondent went to her compound accompanied by policemen, the record shows that the judgment was delivered in her presence. The record does not speak well of the Appellant. She severally sought to adjourn the matter, thereby attracting the Subordinate Court's sanction through an order of 'last adjournment.' The Appellant did not satisfy the conditions for setting aside. The learned Magistrate correctly exercised his discretion.

12. In view of the foregoing, this appeal is bereft of merit. I dismiss it with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF MARCH 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Appellant present in person

Respondent present in person

Court Assistant: M Nguyayi

