Waweru v Maina (Civil Appeal 59 of 2019) [2025] KECA 50 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 50 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 59 OF 2019

M NGUGI, F TUIYOTT & JM NGUGI, JJA

JANUARY 17, 2025

BETWEEN

NDUNGU WAWERU ..... APPELLANT

AND

RICHARD KUBONDO MAINA ..... RESPONDENT

(An Appeal from the Ruling of the Environment and Land Court at Kakamega, (Matheka, J.) dated 10th July, 2017 in ELC No. 23 of 2012)

JUDGMENT

Judgment Of Joel Ngugi, JA

1. The respondent was the plaintiff at the Kakamega Environment and Land Court Case No. 23 of 2012. His case was straightforward. He commenced the suit by way of a plaint dated 05/08/2012 in which he averred that he is the registered owner, in absolute fee simple, of the whole parcels of land known as Kakamega/Kongoni/802 and Kakamega/Kongoni/624 ("suit properties") each measuring 2.2 Ha and 2.08 Ha respectively and wanted vacant possession of them.

2. The respondent's claim was that he bought the suit properties at a public auction on 22/07/2011 after the appellant defaulted in his debt obligations to National Bank of Kenya. However, the appellant refused to grant vacant possession even after the public auction. The respondent, therefore, prayed for orders of eviction and demolition of any structures erected on the suit premises.

3. No defence was filed in the suit. On 29/02/2015, the learned Mukunya, J. directed that the suit would proceed for formal proof. The hearing for formal proof eventually took place on 10/10/2017 before N.A. Matheka, J. After the respondent's counsel filed written submission, judgment in the respondent's favour was delivered on 23/11/2017. In the judgment, the learned Judge ordered the appellant to vacate the suit properties within three months of the date of the judgment failure to which eviction was to proceed forthwith.

4. Thereafter, the appellant filed an application dated 22/03/2018. The application prayed for the following orders:

    i. That this matter be certified urgent and be heard ex parte in the 1st instance.

    ii. That pending the hearing of this matter inter partes, the court be pleased to issue a stay of the eviction orders issued on 23/11/2017.

    iii. That the court be pleased to set aside the judgment herein and all subsequent orders.

    iv. That the court be pleased to join National Bank of Kenya Limited as an interested party in this case.

    v. Costs be provided for.

5. The application was duly opposed by the respondent. It was heard by way of written submissions by the parties and the learned Judge N.A. Matheka, J.) delivered her ruling on 10/07/2018. She dismissed the application with costs.

6. The appellant is dissatisfied with the ruling and filed the present appeal. In his memorandum of appeal dated 25/03/2019, the appellant lists five grounds of appeal as follows:

    1. That the honourable court did not set aside the judgment on account that service of summons to enter appearance were (sic) not served.

    2. That the honourable court failed to determine, as it ought to have done, that the affidavit of service filed in court when summons to enter appearance was served did not disclose good service.

    3. The learned Judge failed to appreciate the fact that the defendant had a defence which raised triable issues and that those triable issues could not be tried by way of affidavits.

    4. The learned Judge did not appreciate that the transfer of titles to the plaintiff was done post the hearing and finalization of Kitale Civil Suit No. 44 of 1998 and that such issues could not have been raised in that case.

    5. The learned Judge failed to appreciate that the appellant's right to a hearing was a fundamental constitutional right under the bill of rights and that it could not be regulated/limited by the provisions of the *Civil Procedure Act* and Rules.

7. During the virtual hearing of the appeal, there was no appearance for the appellant, whereas the respondent appeared in person. Nonetheless, the parties had received directions that the appeal would be canvassed by way of written submissions as well as oral highlights. The appellant had filed his written submissions through his counsel on record as had the respondent. Consequently, the Court decided to hear the case on the basis of the written submissions.

8. In his submissions, the appellant raised three issues. The first issue was on whether there was a proper and valid service to enter appearance in the matter. The appellant argued that the court order issued by Justice Dulu on 28th October 2014 required fresh summons to be served on the defendant. However, this order was not executed, he argued. Instead, the plaintiff relied on a hearing notice to proceed with the case, which was heard and concluded in the defendant's absence. The appellant argued that the initial service of summons was defective and that subsequent affidavits of service provided contradictory accounts of how the defendant was identified, undermining the validity of the service.

The appellant contended that since proper service was not ensured, the court had a duty to confirm that service was done adequately, especially as the matter concerned land ownership.

9. Secondly, the appellant asserted that his defense raised substantial legal and factual issues, including the validity of the plaintiff's title to the land in dispute, which he claimed was obtained unlawfully. They also sought to join a third party (National Bank) to the suit. The appellant argued that these triable issues merited a substantive hearing, demonstrating that their defense was credible and deserved consideration. It was an error, the appellant argued, for the learned Judge to have concluded that there were no triable issues in the case.

10. Thirdly, the appellant claimed that his constitutional right to a fair hearing under Article 50(1) of *the Constitution* was violated. They argued that the dismissal of their application resulted in them being condemned unheard. Since they were unaware of the proceedings until after the judgment, the appellant maintained that they were not given an opportunity to present their defense, thus infringing on their right to a fair trial.

11. In conclusion, the appellant sought to have the judgment set aside, emphasizing procedural irregularities in the service of summons to enter appearance, the violation of their right to a fair hearing, and the presence of triable issues requiring resolution.

12. On his part, the respondent insists that service of the summons to enter appearance was effected. He points out that in his application before the ELC the appellant was not categorical that he was not served with the summons; he only stated that he could not remember such service. He insists that the affidavit of service dated 31/12/2014 by Athanas Arthur Musambai was very elaborate on how the appellant was traced and served.

13. Further, the respondent argues that the proposed defence does not raise any triable issues. This is because, he argues, the appellant's main defence is to fault the way the auction was done yet the land was sold by the bank and the auctioneer and the respondent is only a purchaser. Any issues with how the auction was done, the respondent argues, should be addressed to the bank and the auctioneer through a separate suit brought under section 99 of the *Land Act*.

14. Finally, the respondent contends that Kitale Civil Suit No. 44 of 1998 which is a suit between the appellant and the bank has no bearing on the present suit and is only being raised as a red herring.

15. The respondent, therefore, urges the Court to dismiss the appeal since no right to be heard was violated as the appellant was duly served but failed to file a defence.

16. I have exhaustively considered the record of appeal, the ruling of the trial court, the appellant's grounds of appeal, the rival submissions by the parties as well as the law. In reviewing decisions of this nature from trial courts, as a first appellate court, the legal standard of review to be deployed is an abuse of discretion standard. A trial court Judge is entitled to exercise her discretion in determining whether to set aside a default judgment or not. The outer limits of that discretion are contained in Order 10 of the Civil Procedure Rules. Under this standard, this Court will only review a discretionary decision if it was made capriciously, arbitrarily, in plain error, or otherwise not in accordance with the law or logic. A reversal under this standard can only happen where this Court is persuaded that the reviewed decision lies beyond the pale of reasonable justification or range of permissible outcomes under the circumstances. In reviewing affidavits and other pieces of evidence placed before the trial court to assist it in using its discretion, the standard set in Selle vs. Associated Motor Boat Co. Limited

(1968) EA 123) on a first appellate court's duty to reappraise the evidence and come up with its own independent evaluation and conclusions is applicable.

17. The singular issue for determination is whether the trial court erred in dismissing the appellant's application for setting aside the ex parte judgment entered in default of appearance and defence.

18. This situation is essentially governed by Order 10, Rule 11 of the Civil Procedure Rules. It provides for the setting aside of a judgment entered under Order 10. This Court has had occasion to judicially explain the applicable principles in James Kanyita Nderitu v Maries Philotas Ghika & Another [2016] eKLR. It is imperative to quote the Court in extenso thus:

> "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 factors 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....
>
> 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 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....Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

19. When confronted with an application to set aside a default or ex parte judgment, therefore, the first task of a trial court is to determine if the default judgment is an irregular or regular one. If it is the former, the trial court must be set aside the default judgment as a matter of right. If it is the latter, the trial court has unfettered discretion to determine if there is good cause and may set the default judgment aside if it so finds.

20. In the present case, the parties disagree whether the appellant was served with the summons to enter appearance and other court processes. After considering the affidavits filed in support of the appellant's application and the respondent's opposition to it, the learned Judge of ELC concluded that:

> " I have perused the court file in great detail and find that the defendant was properly served throughout the process of this trial. This is a 2012 matter and the defendant never bothered

to file any defence in this matter. It is only after he was served with the decree that he suddenly woke up. The applicant is aware that he had taken a loan of Kenya shillings 100,000 from the National Bank of Kenya Ltd and that he had problems repaying it and the Bank had sued him in Kitale Case No. 44 of 1998 whereby judgment was delivered against him for Kshs. 1,174,135.75....The applicant cannot now allege that the said process of sale and properties were undervalued as the same ought to have been raised in the annexed civil suit No. 44 of 1998 in Kitale. I find this application is an abuse of the court process. The defendant has been indolent and justice (sic) must come to an end."

21. In the case, therefore, the learned Judge concluded that the judgment was regular because service of summons to enter appearance was proper and that the proposed defence did not raise any triable issues to warrant her exercise of discretion to set aside the ex parte judgment.

22. I have perused the record of the trial court keenly. The record shows that the interlocutory judgment in the matter was entered on 26/07/2013. The case was fixed for formal proof on 20/01/2014. However, on that day, Dulu J. stood over the matter generally. Later, the matter was fixed for formal proof on 03/07/2014. Both parties were absent. The case was, thereafter, fixed for directions on 28/10/2014. On that day, Mr. Vadanga, counsel for the plaintiff (respondent herein) informed the court, seemingly in response to the court raising the issue, that he agreed that the service had not been done properly. He asked that the matter be stood over generally.

23. The learned Dulu, J. ordered that fresh service of summons to enter appearance be issued and served on the defendant. This would imply that the interlocutor judgment in the suit stood vacated as at that date. It would seem that new summons to enter appearance were issued on 13/11/2014 and served on 26/11/2014. An affidavit of service to that effect, one dated 31/12/2014, was filed and is in the record. The next consequential action in the matter occurred on 29/02/2015 when it was called before Mukunya J. The learned Judge gave directions that the case would be heard in Kakamega for a day. Ultimately, formal proof proceeded before Matheka, J. on 10/10/2017 resulting in the judgment of 23/11/2017. It is that judgment that the appellant wishes to set aside.

24. The question is whether the judgment can be said to be proper in this case. I have come to the conclusion that it is not for two reasons. This is because, first, after the trial court ruled on 28/10/2014 that service of the summons to enter appearance was not proper, the interlocutory judgment in the matter stood vacated. This meant that after the service of the new summons which were, apparently issued on 13/11/2014, an interlocutory judgment needed to be entered before the matter could proceed for formal proof. The record here indicates that this did not happen. Instead, the matter proceeded on the strength of the interlocutory judgment that had been entered on the strength of service of the summons to enter appearance which the trial court had already ruled to be improper.

25. Second, the record shows only one affidavit of service – the one dated 31/12/2014. Although the respondent claimed he had served the appellant each time the matter came up – and, in particular, claimed to have served him with a hearing notice for the formal proof on 10/10/2017, there is no affidavit of service to that effect. It is, therefore, doubtful that such service in fact happened. It is telling that the replying affidavit by the respondent to the Notice of Motion dated 22/03/2018 contains only one general paragraph on service. Paragraph 5 of that affidavit reads:

> " That at all times during the trial process, the Defendant/Applicant was duly served therefore aware of the suit herein and has not even issued a notice to cross-examine the process servers."

26. The rest of the affidavit is dedicated to defending the process through which the respondent acquired titles to the suit properties. There is no evidence attached to the replying affidavit demonstrating that

service was effected at the various times on the appellant. In particular, no evidence at all was attached demonstrating that the appellant was served with a hearing notice for the formal proof hearing on 10/10/2017.

27. In the end, on the strength of the record, I am persuaded that the judgment herein was irregular. This means that the appellant was entitled to it being set aside ex debito justiciae; as a matter of right.

28. This obviates the need for this Court to delve into the question whether the proposed defence by the appellant raised any triable issues. Were I to do so, however, I would have concluded that it did. In doing so, it is important to recall that a triable issue is not one that has high or real prospects of succeeding at trial; it is one which is prima facie arguable. The requirement is not to raise a sufficiently forceful defence which is likely to succeed at trial; the requirement is to raise at least one issue which ought to be adjudicated at trial.

29. In the present case, the proposed defence and counter-claim contested that the respondent acquired good title from the public auction which, the appellant contended, was unprocedural and irregular. He sought to enjoin the Bank in the suit, and prayed for orders that the titles to the suit properties be reverted to him. It seems to me that this line of defence minimally meets the standard of it being prima facie arguable. While it is not clear what facts and law the appellant would marshal to persuade the trial court that the respondent should not be permitted to retain the titles to properties which he bought in a public auction and that his true grievance is not against the Bank, as aforesaid, the requirement is only to raise at least one issue which ought to be adjudicated at trial. I think the proposed defence accomplishes that low threshold.

30. As I found above, the judgment was irregular in any event, and the appellant was entitled to a ruling setting it aside ex debito justiticiae. The upshot is that I would find this appeal meritorious. I would propose that it be allowed with costs with the orders that the default judgment entered together with any consequential orders flowing therefrom are all set aside; and that the suit be remanded back to the Environment and Land Court to be heard by a judge other than N.A. Matheka, J., and directions given for the re-hearing of the suit on priority basis.

Judgment Of Mumbi Ngugi, JA

1. I have had the benefit of reading in draft the judgment of my brother, Joel Ngugi, JA., which I entirely agree with and have nothing useful to add.

Judgment Of Tuiyott, JA

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DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF JANUARY, 2025.

JOEL NGUGI

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR