Murithi v Nkoroi (Environment and Land Appeal E022 of 2023)
[2024] KEELC 1540 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1540 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E022 OF 2023

CK NZILI, J

MARCH 20, 2024

BETWEEN

TIMOTHY MURIUNGI MURITHI ..... APPELLANT

AND

SAMWEL NKOROI ..... RESPONDENT

(Being an appeal from the ruling of the Principal Magistrate's Court at Nkubu (Hon. S. Ng'etich – SPM) delivered on 1.3.2023 in Nkubu ELC No. 76 of 2010)

JUDGMENT

1. The appellant, who was the plaintiff at the lower court, appealed to this court after the trial court set aside his judgment in default entered on 14.2.2019. He complains that the trial court failed to consider that the application to set aside the default judgment had been made after unreasonable delay, it did not meet the threshold of setting aside, failed to consider his replying affidavit, was not based on the principles of setting aside exparte judgment; there was enough evidence of prior service upon the respondent with all court processes including the notice of taxation and that the respondents has all along failed to attend court despite notices served and awareness of the suit.

2. As a first appellate court, the mandate under the law is to re-appraise and re-assess the lower court record and come up with independent findings on both facts and the law. See Abok James Odera t/a AJ Odera & Associates vs J.P Machira t/a Machira & Co. Advocates (2013) eKLR, Selle & another vs Associated Motor Boat Co. Ltd (1968) E.A 123, Gitobu Imanyara & others vs AG.

3. The suit at the lower court commenced with the plaint dated 20.7.2010 in which the appellant sued the respondent for illegally removing boundary marks, demarcating L.R No. 1287 and 955 Abothuguchi/ Kithirune on August 2005, cutting down trees valued at Kshs.10,000/= and trespassing into his land L.R No. 1287. He sought for permanent injunction and an order directed at the land registrar to remark and refix the permanent boundary and Kshs.10,000/= as compensation.

4. The respondent made an appearance on 11.8.2010 and filed a statement of defense dated 10.8.2010. He denied the alleged interference, trespass and destruction of the shared fence. The respondent averred that though the land was registered under his name in 1961 while he was still a minor, he has never been in occupation except for his family, which has an existing boundary with L.R No's Abothuguchi/ Kithurine/955, 1287, 1185 & 1186 and that attempts to resolve any boundary dispute involving 4 acres of land was thwarted by the appellant's uncooperative father. The respondents admitted that there was a need to involve the land registrar to remark and refix the permanent boundaries and costs attendant to it to be shared by the parties involved.

5. The record shows a hearing date was taken for 27.10.2010 and served upon the respondent on 11.9.2010, and an affidavit of service was filed by Zaverio Kiambi on 27.10.2010. A consent by parties was signed, filed and issued on 8.2.2010 for the district land registrar and surveyor to visit the land, fix the boundary, and file a report before the court. Mention date was taken for 23.3.2011. The court endorsed the consent by an order dated 24.2.2011.

6. By an application dated 15.6.2012, the appellant sought to join Mutea Kauga, the owner of L.R 1185, a party to the suit. The application was allowed and the 2nd defendant added as part of an earlier consent to fix the boundary, including his L.R No. Abothuguchi/Kithurine/1185 and an order to that effect was made on 21.1.2013.

7. By an application dated 5.6.2016, the appellant sought to set aside a dismissal order for his suit dated 7.4.2014, stay of proceedings and leave to prosecute the suit. The said application was served upon the respondent, and an affidavit by Gregory Oriaro Nyauchi was sworn on 29.3.2016. From the record, it appears the District Land Surveyor Meru Central filed a report dated 27.6.2017, on the boundaries and scene visit on 23.6.2017.

8. The appellant filed an application dated 17.7.2017 seeking an injunction against the respondent. Meanwhile, the district land registrar and surveyor filed an earlier report dated 24.10.2012, following a visit on 15.10.2012 pursuant to the earlier court order. In reply to the application dated 17.7.2017, Samuel Nkoroi, the respondent, filed an affidavit dated 4.07.2017 admitting that the land registrar and surveyor visited the land on 28.11.2012 and 11.12.2012. He denied the alleged trespass.

9. By a consent order dated 9.11.2017, the notice of motion dated 17.7.2017 was withdrawn, and the provincial land surveyor was directed to visit the land and file a report over L.R No. 1287 and 955. The report was eventually filed on 7.2.2018, dated 23.1.2018. The land surveyor said the court and the land registrar should determine the boundary as on the map and the ground. The court issued a summons dated 23.2.2018 for the regional surveyor to come to court and produce the report, which he did on 20.4.2018.

10. The record shows a notice to show cause under Order 17 Rule 2 (1) of the Civil Procedure Rules was issued on 26.6.2017 and served upon the parties. The trial court proceeded to dismiss the suit for non-prosecution. However, it appears the court reviewed the order and gave the appellant seven days to prosecute the suit. Eventually, the matter was fixed for hearing on 3.10.2018 and proceeded on 29.10.2018. The 1st defendant attended court on 3.10.2018 but was unavailable at 11.50 am when the appellant was directed to proceed with the hearing. The plaintiff testified as PW 1 adopted his witness statement dated 25.6.2018 and produced his list of documents as exhibits and a judgment was delivered on 14.2.2019. By an application dated 7.3.2019, the name of the land surveyor was directed to fix the boundary instead of a land registrar in efforts to execute the decree.

11. Further, on 5.3.2020, the 2nd defendant filed an application dated 4.3.2020 for non-attendance. The same was dismissed on 15.7.2020. Another one dated 1.12.2020 was eventually filed seeking for the

1st respondent to remove a barbed wire fence on the appellant's land or, in default, demolition and committal to civil jail for contempt of court. The same was allowed by a ruling dated 4.8.2021. The respondent advocate ceased acting for him, and by an application dated 29.10.2021, the OCS Kariene Police Station was ordered to provide security during the erecting of a fence on the appellant's land.

12. In further deviance of the court orders the respondent was committed to civil jail on 11.4.2022. It prompted the filing of an application dated 4.10.2022. Since there was a notice to show cause for Kshs.758,725, the trial court ordered the respondent to deposit a title deed. Parties were directed to canvass the application by way of written submissions for the two applications dated 6.9.2021 and 4.10.2022.

13. In the application dated 6.9.2021, the principal prayers were setting aside the judgment, decree, ruling dated 4.8.2021, court orders dated 16.8.2021 and all consequent orders; stay of executions; re-opening of the suit for cross-examination of the appellant and for the respondent to tender his defense. The reasons given were that on 29.10.2018, the respondent was informed that the trial court had other engagements, by the court clerk, so he left since the trial court was not going to hear their matter; he said they were unable to agree on a new date with the appellant and he was condemned unheard, he had a plausible defense; that he had not tampered with anything on the ground and in the interest of justice he should be heard.

14. In the application dated 4.10.2021, essentially the same as adopting the prayers in the earlier one save to say the defense by the respondent had a high chance of success. He admitted that he had been committed to civil jail.

15. The 1st application was opposed by a replying affidavit dated 11.11.2022, where the appellant narrated the history of the matter as per the court record alluded to above. The respondent filed a further affidavit sworn on 28.11.2022. In paragraph 5, he admitted service of court processes but said all he wanted was a chance to be heard on the merits of his defense. He also admitted all the previous consents to scene visits. Further, he said he could not have proceeded with the hearing due to a lack of witness statements and documents, especially the report by the regional surveyor. He admitted that he never opposed the assessment of costs. Additionally, the respondent said he had to change the law firm. He also said that the joint survey reports were not prejudicial to his defense, which he termed as raising triable issues.

16. The court has set out briefly what, by any means, is a long history of this case. The role of an appellate court of the first instance is to re-analyze the entire lower court record with a fresh mind and come up with independent findings on fact and law and see if the judgment is justified or was made contrary to law and its principles. In an application for setting aside a default judgment, the principles to consider are whether there are plausible reasons for not attending court, if there is a defense raising triable issues and if it is in the interest of justice to set aside the judgment or grant the applicant an opportunity to defend the suit. See Shah vs Mbogo (1967) E.A 116.

17. This appeal was canvassed by way of written submissions, whose deadline was set for 15.1.2024. The appellant relied on written submissions dated 10.1.2024. The respondents did not adhere to the set timelines. The appellant submitted that there was proper service upon the respondent. However, he took an inordinately long and unexplained delay to seek for the setting aside. Therefore, the appellant submitted that since the non-attendance was unexplained, the circumstances of the case did not warrant the trial court to set aside the judgment. Reliance was placed on Caroline Mwirigi vs African Wildlife Foundation (2021) eKLR, Philip Kiptoo Chemwolo and another vs Augustine Kubende (1982 – 1988) KAR, Ibrahim Mungara, Kamau vs Francis Ndegwa Mwangi (2014) eKLR, Order 7 Rule 7 Civil Procedure Rules and Section 27 of the *Civil Procedure Act*.

18. In Shah vs Mbogo (supra), the court said that the discretion to set aside exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but was not reassigned to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. In Ibrahim Mungara Kamau vs Francis Ndegwa Mwangi (supra), the court cited Shells Equity by John MC Ghee QC 31st Edition page 99 that the court of equity refuses to aid a stale demand where a party has slept his rights and acquiesced for a significant length of time especially where conscience, good faith and reasonable diligence.

19. In Philip Kiptoo Chemwolo & another vs Augustine Kubede (supra), the court said all the circumstances and facts, both prior and subsequent, and the merits of the parties must be considered. The court cited Kimani vs M.C Conwell (1966) E. A 545 that where a regular judgment had been entered the court would usually set aside the judgment unless satisfied there was a triable issue.

20. Service of court summons and the filing entry of defense was not disputed at the lower court by the respondent. Attendance during the hearing was also not disputed. The respondent did not mention which court clerk told him his matter was not going to proceed. The record of the trial court shows that the matter was given a time allocation. The respondent's version of events was at variance with the court record. Even assuming that the court clerk said so, still the respondent would have waited for another date to be issued or perhaps come back as soon as possible to find out the status of the file. The ultimate order or directions would only have come from the trial court and not anyone else.

21. Judicial power to hear and or adjourn a suit is not shared or delegated to court assistants. The explanation by the respondent for not attending the hearing and awaiting the trial court to resume was not convincing at all. Regarding the failure to file witness statements or documents, Order 7 Rule 5 of the Civil Procedure Rules is in mandatory terms. There is no evidence that the respondent had sought time to comply with or for an adjournment since he was not ready for a hearing on the day the trial court heard the matter.

22. From the court record, the report by the regional surveyor had already been produced and filed before the trial court. Summons were issued, served and complied with by the regional surveyor. He even attended court for that purpose. After the judgment and decree were issued, there was evidence of service upon the respondent with taxation costs, a date for the taxation and the subsequent execution processes. The respondent did not object to or deny any such service. He was aware of the entry of judgment and took too long to seek for the setting aside. From the court record, the respondent failed to take the earliest opportunity and apply for the setting aside. The law does not define maximum or minimum delay. Even a one-day delay may be inordinate, depending on the circumstances of the case. In this appeal, I find there was inertia, indolence and disinterest in the matter by the respondent that was not explained at all before the trial court.

23. A court may nevertheless set aside a regular judgment if the defense raises a triable issue. In this appeal, the respondent's statement of defense dated 10.8.2010, had made admission to the claim that a land registrar and surveyor to visit the suit parcels of land, re-fix and re-mark the permanent boundaries. Various reports, including the one jointly made by the land registrar and surveyor as early as 2012, had been made. The respondent, in the replying affidavit to the application dated 4.9.2017, had acknowledged all the prior scene visits.

24. A defense on merits need not succeed but must raise a prima facie issue calling for adjudication at the trial as held in Patel vs E.A Cargo Ltd (1974) E.A 75. While I agree, as held in Crescent Construction Ltd vs Dephis Bank Ltd (2007) eKLR, that a party should not be driven out of a seat of justice, however weak his case is, on the other hand, it would be unfair to drag a person to the seat of justice when the case purportedly brought against him was a non-starter.

25. In this appeal, the respondent was pleading with the trial court to be given an opportunity to be heard since his defense had raised arguable issues. The only issue raised in his defense, unfortunately, was an admission of the jurisdiction of the land registrar to fix the boundary.

26. The respondent had not denied trespass and destruction by way of a justification. He had been given an opportunity to put in a list of witnesses and documents since filing the statement of defense in 2010. The affidavit in support of the application for setting aside annexed no list of the proposed witnesses or documents to be relied upon. No leave had been sought to adduce or file a list of witnesses or documents out of time. The respondent was asking the trial court to be allowed to cross-examine the appellant only and offer a defense when he knew that he had not filed any witness statements or documents.

27. The respondent had filed the statement of defense in person. He cannot blame his ester while instructing lawyers for the delay and or non-compliance. The respondent already knew of the reports by the land registrar and land surveyors.

28. In Mashreq Bank PLC vs Kuguru Food Complex Ltd (2018) eKLR, the court said it could not to interfere with the exercise of a judge's discretion unless it was satisfied that the judge had misdirected himself in some matter and, as a result, arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of the discretion and occasioned injustice. In exercising discretion, a court is guided by law and facts and not ulterior considerations. In this appeal, I find that the respondent had raised no triable issue in his defense on record. He has not filed a cross-appeal. He had not disputed his conduct prior, during and after the entry of judgment, despite service with court processes. The respondent participated in the ruling dated 4.8.2021. The delay was inordinate and unexplained. Therefore, I find the appeal with merits. The same is allowed, and the judgment of the trial court dated 14.2.2019 is reinstated. Costs of the appeal to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 20TH DAY OF MARCH, 2024

In presence of

C.A Kananu

Ouma for the appellant

Miss Kerubo for the respondent

HON. C K NZILI

JUDGE