Kabuthia & 10 others v Karanja (Civil Appeal 370 of 2019)
[2025] KECA 624 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 624 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 370 OF 2019

DK MUSINGA, JW LESSIT & A ALI-ARONI, JJA

APRIL 4, 2025

BETWEEN

BORO KABUTHIA .... 1ST APPELLANT

MARGARET WAMBUI .... 2ND APPELLANT

JOSEPH MATHERI CHEGE .... 3RD APPELLANT

GEOFFREY GATONYE KARANJA .... 4TH APPELLANT

GEOFFREY NJAGA GITHUA .... 5TH APPELLANT

KINYANJUI KAMONDIA .... 6TH APPELLANT

MOSES KARANJA .... 7TH APPELLANT

MBURU GITHUA .... 8TH APPELLANT

MBURU NGURUKO .... 9TH APPELLANT

NJENGA KAIBUTI .... 10TH APPELLANT

NJENGA KARIUKI .... 11TH APPELLANT

AND

MICHAEL JAMES KARANJA .... RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court at Nairobi (Eboso, J.) delivered on 28th June, 2019 in ELC Case No. 323 of 2014)

JUDGMENT

1. To contextualize the dispute, a brief history will suffice. The respondent, Michael James Karanja, filed suit before the Environmental and Land Court (ELC) in a plaint dated 18th March 2014 against the

appellants, seeking a declaratory order compelling the appellants to vacate the suit property, Parcel Number Karai/Lussiggeti/T1038 and for costs of the suit. No memorandum of appearance and defence were filed and on 10th June 2014, the Deputy Registrar directed the suit be set down for hearing as an undefended cause. On 22nd September 2017, a judgment was entered in favour of the respondent as prayed in the plaint.

2. From the proceedings, we note as follows:On 18th March 2014, the respondent filed an application. (the same was not on record).On 19th March, 2014 the court directed the respondent to serve the same together with all other pleadings for hearing on 9th April 2014.On 6th May 2014, Macharia Advocate appeared for the respondents and sought time to file a response to the respondent's application. Leave was granted, and the status quo was maintained. The matter was scheduled for hearing on 18th June 2014.On 9th June 2014, the file was placed before the Deputy Registrar, who found that no appearance or defence had been filed and entered an interlocutory judgment.On June 18, 2014, the file was placed before Gitumbi J, who directed that a date be fixed in the registry for formal proof.On 24th November 2014, the applicant filed another application, which the court declined to certify urgent and directed the matter be set down for formal proof.On 2nd February 2015, the respondent appeared before the Executive Officer and fixed 22nd April 2015 as the date for formal proof.On 23rd of February 2015, the respondent filed yet another application seeking to have the appellants cited for contempt for disobeying and breaching the interlocutory judgment entered on 18th August 2014. The court declined as the order he relied on had only indicated that he should fix the case for hearing. The court struck out the application.In a letter dated 23rd April 2015, Mwendwa, Macharia, and Mwangi & Co. Advocates addressed a letter to the court inquiring about the missing file and raised the issue of the vault failing to open on the 18th of June 2014.On 22nd May 2015, the formal proof was heard.On 22nd September 2017 judgement was read.

3. Mwendwa Macharia, Mwangi & Co. Advocates filed an application on 6th December 2017 seeking inter alia, a stay of execution, setting aside of the interlocutory judgement, and the judgement entered on 22nd September 2017, on grounds that the appellants had not been served with summons to enter appearance as required by law; the interlocutory judgement entered was irregular; that on the 6th of May 2014, parties appeared before Mutungi, J. for hearing of an application when the defendants/ appellants were granted leave to file their response and status quo maintained. The matter was fixed for a hearing on the 18th of June 2014. The response was filed on the 12th of June 2014, but the matter was not listed for hearing as the registry vault could not open; hence, the file could not be retrieved. Thereafter, the appellants were in court on 5th January 2015 and 10th April 2015, but the matter had been listed; the defendants were not given a chance to defend the suit.

4. The appellants later withdrew the application dated 6th December 2017. They filed an application dated 19th April 2018, seeking an order to set aside the judgment delivered on 22nd September 2017; a stay of execution of the decree dated 25th September 2017; leave to defend the suit; the draft defence and counterclaim to be deemed duly filed; and costs of the suit.

5. The grounds of the application and the supporting affidavit of the 1st appellant dated 6th December 2017 state that the appellants had instructed the firm of the Mwendwa, Macharia, Mwangi & Co. Advocates to represent them, who failed to enter appearance; as a result, judgment was entered on 22nd September 2017 and a decree issued on 25th September 2017 and thereafter an order for eviction issued on 16th November 2017; that the appellants are the bona fide owners of the suit property, and have lived in it since 1976 having been allocated the land by Kiambu County Council; and that the appellants risked being evicted as the Deputy County Commissioner had issued an eviction notice.

6. The application was supported by the replying affidavit of the 1st appellant, Boro Kabuthia, sworn on 19th April 2018, in which he deposed that the County Council of Kiambu (the Council) allocated the suit land to them in 1975. They lived on the land peacefully until 21st May 1991, when the Council gave them forms to fill out and required payment of Kshs. 2,500 for each plot. They were then issued with mutation forms and maps and were promised title deeds. They thereafter continued to live on the land peacefully, cultivating crops for daily subsistence and even burying their loved ones on the property. In 2014, they received court documents from one Michael James Karanja claiming ownership of the property, upon which they instructed counsel as aforementioned when they learnt that the first firm of advocates had not entered appearance nor filed a defence within time leading to the interlocutory judgement; they were seeking the court's intervention in the interest of justice; they were going to suffer irreparable loss and would be rendered destitute.

7. The respondent opposed the application on grounds that the appellants had paid the County Council of Kiambu for the open space known as Ndeiya/Karai while the judgment in the suit related to Karai/Lusigetti/T.1038, further that the 4th appellant was present in court when the judgment was being delivered and that the appellants had subsequently requested an amicable settlement of the dispute through their Member of Parliament.

8. The 1st appellant filed a further affidavit sworn on 7th February 2019 and deposed that it was clear that the beacon certificates, receipts, letters and minutes issued to the appellants and presented to the court showed that the land for which the appellants made payment for, and were allocated was, Karai/Lusigetti/T.1037 and Karai/Lusigetti/T.1038, the latter being the suit property; that on 3rd April 2017, the property was still described as open space by the County Government and listed as one of the properties without title deeds calling for any party with interest thereon to come forward; the appellants have been in possession since 1975 and are thus not intruders and that the title held by the respondent was fake and was fraudulently acquired and transferred by the alleged seller.

9. He further deposed that the appellants were promised title deeds by the County Council of Kiambu, after filling out the allocation forms in 2005, and it would not have been so, if the property already had a title registered in 1983; that they were only served with court documents on three occasions; the first time was in March 2014 when they were served with summons to enter appearance together with an application and they immediately instructed the Firm of Mwendwa, Macharia, Mwangi & Co. Advocates to enter appearance and defend them; that they were not aware that a defence had not been filed by the firm and neither were they so advised by their advocates on record; the second time is when they attended court on 18th June 2014 they all attended court but were informed that the case could not proceed because the vault could not open; the third was in April 2015, when they were served with a hearing notice and attended court but the case did not proceed as the file could not be found; that the advocate wrote severally to the court for a status update but they did not receive any response.

10. It was deposed further, that on 13th April 2018, they received an eviction notice from the Deputy County Commissioner giving them 14 days to vacate; they were not served with the hearing notice of the formal proof and were condemned unheard; that there is no affidavit of service to confirm that they or their advocate was served and that the draft defence and counterclaim are not a sham and raise several triable issues which deserve to be allowed to be heard.

11. In its ruling, the court found that the respondent held a title to the land parcel registered in 1983, while the appellants did not have any title to the suit property. Further, the court found that as much as the advocates for the appellants did not implement instructions, the appellants did nothing by follow-up for three years. The court found that the appellants were served with a notice to enter appearance in 2014. That although the appellants contended that they only came to know of the verdict upon receipt

of an eviction order, the court found that they had been served on each occasion the case came up in court. The court also found that the 4th appellant was in court when the judgment was rendered, yet it took the appellants more than seven months to bring the present application. No explanation had been provided to account for the inordinate delay.

12. The court also found that the parcel register for the suit property was opened on 1st July 1983, and the respondent acquired the suit property on purchase. The appellants did nothing to challenge the registration between 1983, when the parcel was opened, and 2014, when the respondent brought the suit, a period of 31 years. The court dismissed the application.

13. Aggrieved by the court's ruling, the appellants preferred an appeal to this Court and raised 8 grounds of appeal in their memorandum of appeal dated 8th August 2019, praying that the appeal be allowed, the ruling of the ELC Court be set aside, and the respondent be condemned to pay costs.

14. The grounds of appeal are as follows: that the learned judge did not apply his judicial discretion in a fair manner; failed to consider that land is an emotive issue and therefore should have accorded both parties a fair hearing; failed to appreciate that the appellants have been occupying the land Karai/Lusigget/T.1038 without any interruptions since 1975 and the title held by the respondent was fake; failed to appreciate that the appellants did not engage the Firm of Thuita Kiiru Advocates; failed to appreciate that the suit property originally belonged to Kiambu County Council and was allocated to the applicants in 1975 by Kiambu County Council upon payment of a fee of Kshs.2000 and Kshs.500 for copies of allotment letters; denied the appellants a fair hearing exposing the appellants to massive loss and damage and that the negligence on the part of the advocate should not be visited on the client.

15. We did not receive submissions from the appellants in support of the appeal.

16. The respondent's counsel filed submissions dated 28th November 2022 and submits that in the orders which are the subject of the appeal, the judge rejected the application hence the order being appealed against by the appellants is a negative order as the superior court declined to exercise its discretion in favor of the appellants; that the appellants are in express breach of the provisions of rule 87 of the Court of Appeal Rules; by failing to put in primary documents in the record of appeal dated 8th August 2022; that the said record of appeal lacks the following crucial documents that are material and important in the determination of the subject appeal; summons to enter appearance, replying affidavit dated 25th May 2018 and further affidavit sworn on 13th November 2018, appellants' application dated 19th April 2018, draft defence and counterclaim as attached to the application dated 19th April 2018, certified copies of the order and decree of the trial court, and affidavits of service evidencing service upon the appellants in ELC Case No. 323 of 2014.

17. The respondent further submitted that he is the registered owner of the suit property; the High Court upheld his right to the suit property; the appellants have not offered any evidence before the court to support their claim on the property; they in fact admit that they have no title to the property; the appellants have offered no evidence to support their claim that they have been in occupation of the suit property since 1975; that no draft defence has been attached to the appellants' application or included in the record of appeal to enable the court to appreciate the nature of the claim or the defence to the respondent's claim.

18. The respondent submitted further that the appellants contradicted themselves in that in the memorandum of appeal dated 8th August 2019, they state that they did not instruct the Firm of Thuita Kiiru Advocates, yet in the application dated 7th February 2019, annexed to the record of appeal, they state that they failed to file a defence through counsel's mistake.

19. Learned counsel further submitted that after the judgment was delivered in the respondent's favour on the 22nd September 2017, the appellants did not move the court after a period of over 4 years and 8 months after they had been served with the plaint and summons to enter appearance; that they have not explained this inordinate delay apart from laying blame on their advocates; that the judgment was, therefore, a regular default judgment and the appellants failed to convince the trial court to exercise its discretion in their favor by setting it aside. In support of his contention, learned counsel relied on the case of James Kanyita Nderitu vs. Marious Philotas Ghika & Another [2016] KECA 470 (KLR).

20. Further, learned counsel submitted that the appellants have blatantly disobeyed court orders by being in occupation of the suit property despite there being a valid judgment affirming the respondent's title and ownership, and that they have offered no evidence that can defeat the respondent's right under section 24(a) and 26(1) of the *Land Registration Act*.

21. As this is a first appeal, it is our duty, in addition to considering the submissions by the appellants and the respondents, to analyze and reassess the evidence on record and reach our independent conclusions. This approach was adopted in Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others [2015] eKLR, where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows; -

> "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

22. We have carefully considered the record, the submissions by the respondent, the case law cited, and the law, and form the view that the following issues arise for our consideration: whether the appellants herein were served with the pleadings and hearing notices in the matter before the trial court; and whether we ought to interfere with the trial judge's discretion.

23. In the application subject of the impugned ruling, the appellants sought to set aside the ex-part judgement, and their defence and counter-claim to be deemed to have been properly on record. The appellants have maintained all along that upon service of the summons and pleadings they instructed counsel, that they were not invited to court, and were not served with a hearing notice for the formal proof nor served with a notice of entry of judgement against them. In the impugned ruling, the judge stated; -

> "On 10th June 2024, satisfied that the defendants had been served, the Deputy Registrar of the court directed that this suit be set down for hearing as an undefended cause as provided under Order 10 rule 9 of the Civil Procedure Rules. Consequently, hearing proceeded before Nyamweya J. on 22/4/2015."

> The issue at hand revolves around the trial court's exercise of discretion. The judge considered that the Deputy Registrar had entered an interlocutory judgment due to the defendants' failure to enter appearance and that a judgment was on record based on formal proof. Unless there are compelling reasons, this Court has consistently frowned upon interference with the exercise of judicial discretion. In the case of Coast Development vs.

Adam Kazunga Mzamba & 49 Others [2016] KECA 537 (KLR), this Court had this to say on the subject:

> " The decisions of this Court are consistent in that when an appeal questions the exercise of discretion by the trial court, this Court will be slow to interfere unless it is demonstrated that indeed grounds for interference exist. In Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others (supra), this Court restated that an appellate court will only interfere with the exercise of judicial discretion by a trial court if satisfied either that:
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> a. the judge misdirected himself on the law; or
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> b. he misapprehended the law; or
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> c. he took into account considerations which he should not have; or
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> d. he failed to take into account considerations which he should have;
>
> e. the decision was plainly wrong."

24. According to the ruling, the trial court considered that an interlocutory judgment existed. The court also stated that the appellants were served each time the matter came up for hearing. We respectfully disagree with the judge, as the record shows that although an advocate appeared for the appellants and filed an application seeking to set aside the interlocutory judgment, neither the appellants nor the said counsel were served whenever the respondent appeared before the court, and no proof of service was filed. There was no proof that the appellants who had shown interest in the matter were served to appear for formal proof; neither did the judge who heard the formal proof inquire whether the appellants had been served.

25. In the case of Attorney General vs. Small Wonder Ltd [2015] KECA 122 (KLR), a case on all fours with this matter, where during formal proof the Attorney General was absent per the record, in considering a similar complaint of non-service this Court stated:

> "The principles applicable to the setting aside of default judgments are settled. If the judgment is a regular one the court's discretion is to be exercised in order to do justice between the parties: Patel –v- EA Cargo Handling Services Ltd. [1974] EA 75. In weighing the interests of justice the court has to consider, among other things, the reasons, if any why the particular default was committed, the conduct of the parties and in particular such conduct as has a bearing on the course of justice in the case: Shah -v- Mbogo [1967] EA 116 and Pithon Waweru Maina -v- Thuku Mugira [1988] KAR 171; Whether the respondent can be compensated by costs for any delay that may be occasioned by the setting aside of the judgment, and of course it should always be borne in mind that to deny a party a hearing should be the very last resort of a court of justice: Sebei District Administration -V- Gasyali1968] EA 300. Where there is no proper or any service of a hearing notice, the resulting proceedings including the default judgment are irregular and the court must set them aside ex debito justiciae (as a matter of right) on application by the affected party. Such proceedings and judgment are not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of judicial process itself."

Further, the court was of the view that:

> " Having come to the conclusion that the respondent did not demonstrate that the appellant was served with a hearing notice when the case came up for formal

proof, we do not find it necessary to consider the other complaints made by the appellant. We allow this appeal."

26. We are of the view that the trial court failed to properly interrogate the record, thus arriving at the wrong conclusion and proceeding to consider whether the defence raised triable issues. The appellants were never served with the hearing notices of the various applications, including the hearing date for the formal proof. The 4th appellant may have been in court at the time of the judgment, but this cannot be a reason to punish the other 10 who may not have been aware of the judgment either, and who came to learn of it months later and ought not to be penalized for the delay.

27. Land remains a highly emotive subject in this country, and the appellants herein, who have shown an interest in defending the matter, were not made aware of the hearing. They ought not to be shut out from the seat of justice. Secondly, they explained that they had instructed counsel, which from the record they did, however, counsel did not enter appearance nor file a defence. We see from the record that counsel made an effort to set aside the interlocutory judgment; however, since the file went missing, he was not able to fix a date for the hearing. Thereafter, nothing was heard of him, not even service of the subsequent application culminating in the formal proof. We agree with the appellants that they ought not to be penalized for the transgression of counsel.

28. Based on the foregoing, we conclude that the pursuit of justice requires the setting aside of the ruling. We accordingly allow the appeal, set aside the impugned ruling, and grant leave to the appellants to file their defence and counter-claim within the next fourteen (14) days from the date of this judgement. Each party is to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2025.

D. K. MUSINGA (PRESIDENT)

...

JUDGE OF APPEAL

J. LESIIT

...

JUDGE OF APPEAL ALI-ARONI

...

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR