



Mwazengele v Yaa (Suing as the administrator of the Estate of Omar Bakari Yaa (Deceased) & 2 others (Civil Appeal E056 of 2021) [2024] KECA 34 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KECA 34 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E056 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JANUARY 26, 2024**

BETWEEN

YUSUF MWERO MWAZENGELE APPELLANT

AND

**BENSON BAYA YAA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
OMAR BAKARI YAA (DECEASED) 1ST RESPONDENT**

THE HON ATTORNEY GENERAL 2ND RESPONDENT

THE REGISTRAR OF TITLES, MOMBASA 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) delivered on 27th May 2020 in E.L.C No. 93 of 2017)

JUDGMENT

1. By a plaint dated April 24, 2017, Benson Baya Yaa (suing as the administrator of the estate of Omar Bakari Yaa (deceased), the 1st respondent, instituted proceedings against Yusuf Mwero Mwazengele (the appellant), the Attorney General (the 2nd respondent) and the Registrar of Titles, Mombasa (the 3rd respondent) in the Environment and Land Court at Malindi in ELC No. 93 of 2017 praying for: a permanent injunction restraining the appellant from trespassing onto plot No. 80 (the suit property) situate at Mida Creek in the Watamu area of Kilifi; an order that the suit property registered in the appellant's name be reconveyed to him; an order that the 3rd respondent be ordered to effect the changes; and costs of the suit.
2. The 1st respondent's case was that the suit property was registered in the name of Omar Bakari Yaa (deceased) on May 17, 1960, and that the deceased was living thereon with his family until his death in 1983; that the deceased's family continued living on the suit property as their home and developed a tourist lodge and resort, as well as a camping site; that, sometime in 2016, the appellant started sending



people to survey the land purporting that it belonged to him; that, unknown to him, the 3rd respondent had apparently issued the appellant with instruments of title in respect of the suit property; and that the issuance of the title documents to the appellant was illegal, and ought to be cancelled.

3. In his defence dated June 13, 2017, the appellant averred that he was a stranger to the allegation that the suit property was registered in the deceased's name; that he was the registered proprietor, and admitted sending surveyors to the suit property; that he instructed his advocates to demand vacant possession thereof; that he acquired title to the property legally, and denied that the 1st respondent was entitled to the orders sought. He asked the trial court to dismiss the 1st respondent's suit with costs.
4. On their part, the 2nd and 3rd respondents neither entered appearance nor filed defence to the 1st respondent's claim.
5. When the suit came for hearing on 25th March and June 12, 2019, the 1st respondent testified and called 2 witnesses whereupon he closed his case. However, the appellant, and the 2nd and 3rd respondents did not appear to testify, and neither did any witnesses testify in the appellant's defence. Accordingly, his defence case was closed on 12th June 2019 and the suit was scheduled for mention on July 9, 2019 to confirm compliance with the court's order directing the parties to file their respective submissions within 21 days next following, and to take a date for judgment.
6. Subsequently, the appellant moved the trial court on notice dated June 26, 2019 seeking orders that his defence case be re-opened, and that the 1st respondent's witnesses be recalled for cross-examination. When the appellant's Motion came for hearing on September 17, 2019, the same was not heard in view of the fact that the trial court had, upon the suit being mentioned on 9th July 2019, set the date for judgment as December 5, 2019. However, judgment was delivered later on May 27, 2020.
7. To our mind, the appellant's Motion had been overtaken by events as it remained pending after the 1st respondent's suit had been determined. Suffice it for the moment to take note of the two reasons advanced in the appellant's Motion aforesaid, namely that his "... right as enshrined in the Constitution and the principle of natural justice ..." was "... likely to be violated ..." if the judgment was issued without his input as his former advocate on record "... did not brief nor give [him] "... a clear position of the case to make an informed decision."
8. In its judgment dated May 27, 2020, the ELC (J. O. Olola, J.) allowed the 1st respondent's suit as prayed. The impugned judgment read in part:

“20. As it were, the 1st Defendant and the other two Defendants did not testify herein and it was unclear how the title for the suit property was transferred from the Plaintiff's grandfather some three years after he had passed away without the involvement of his family.

21. Unless and until that was explained, the Plaintiff and his family who have been in occupation of the land all along remained in my view the lawful proprietors thereof and the actions of the 1st Defendant were therefore uncalled for.

22. In the premises, and in the absence of any evidence to the contrary, I am persuaded that the Plaintiff has proved his case to the required standard.

23. Judgment is accordingly entered for the Plaintiff as prayed in the Plaintiff with costs.”



9. Dissatisfied with the decision of Olola, J., the appellant moved to this Court on appeal on 7 grounds set out in his memorandum of appeal dated 29th November 2021 faulting the learned judge for: failing to “stay judgment” and allow the appellant to testify in his defence; failing to consider that title to the suit property was registered in the appellant’s name; failing to allow the appellant’s Motion to be heard first and disposed of before delivery of judgment; denying the appellant a fair hearing; failing to appreciate that mistake of counsel should not be visited upon the appellant; and for failing to consider that the appellant was likely to suffer “sentimental and monumental” prejudice that could not be compensated with costs.
10. Learned counsel for the appellant, M/s. Kedeki & Company, filed written submissions and a list of authorities dated July 17, 2023 citing the High Court decision at Nyeri in *Wachira Karani v Bildad Wachira* [2016] eKLR for the proposition that, where a defaulting party has provided sound reasons, the interests of justice require that the party should indeed be given a hearing; and *Philip Chemowolo & another v Augustine Kubende* [1982-88] 1 KAR 103, submitting that mistake of counsel should not be visited on the appellant who is a layman wholly dependent on his advocate; and that mistakes and errors are part of human nature and, where necessary, the same can be corrected to avoid any damage or inconvenience caused. Counsel urged us to set aside the impugned judgment and allow the appellant to testify in his defence.
11. On their part, learned counsel for the 1st respondent, M/s. K. Lughanje & Company, filed written submissions dated September 29, 2023 citing the ELC decision at Thika in *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others* [2016] eKLR, submitting that the appellant had failed to explain how he secured registration of the suit property in his name, and in accord with the ratio of this decision, concluded that “... every party must show that their title has a good foundation and passed properly to the current title holder”. Counsel also relied on the decision in *Wreck Motors Enterprises v the Commissioner of Lands & 4 others* [1997] eKLR where this Court held that “... where there are two competing titles the one registered earlier is the one that takes priority.”
12. Counsel submitted further that the 1st respondent demonstrated to the trial court that his late grandfather was issued with title to the suit property way earlier and before the appellant’s.
13. We have considered the appeal, the submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the *Rules* of this Court is to reappraise the evidence and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”
14. To our mind, the following five issues commend themselves for determination, namely: whether the learned Judge erred in law or in fact by failing to re-open the case and allow the appellant to testify in his defence; whether the alleged mistake of counsel excused the appellant from the consequences of non-appearance to testify in his defence; whether, in any event, the learned Judge denied the appellant the right to be heard; whether the appellant was lawfully registered as proprietor of the suit property; and whether the appellant is entitled to any of the reliefs sought.
15. On the 1st issue, it is noteworthy that the appellant’s motion dated June 26, 2019 seeking to have the 1st respondent’s case re-opened was filed too late in the day, and in the backdrop of persistent default on



the part of the appellant to attend at the hearing. From the record as put to us, it is indubitable that the appellant and his counsel failed to attend court on 25th March 2019 despite due service upon learned counsel of the hearing notice. When the suit was re-scheduled for further hearing on June 12, 2019, Mr. Ogetto held brief for Mr. Shimake, counsel for the appellant. When the suit was confirmed for hearing at 10.00 am, neither the appellant nor his counsel returned. When the suit came for mention on July 9, 2019 to confirm whether the parties had filed their respective submissions and take a date for judgment, Ms. Oweya appeared for the appellant and requested that the appellant's Motion be heard before final judgment.

16. It is instructive that, for some reason, the appellant's counsel had fixed the Motion for hearing on September 17, 2019. That date was fixed at the registry without notice to the learned Judge, who had already set the date for judgment on July 9, 2019 and retired to prepare his decision. In the circumstances, we find no reason to interfere with the discretionary decision of the learned Judge to proceed and render his judgment against the backdrop of glaring laxity on the part of the appellant and his counsel. Indeed, ample opportunities were open to the appellant to present his defence. He did not. That was not the trial court's fault. As common adage holds, to whom much is given, much is required. Moreover, the two-edged sword of justice cuts both ways, both in the interest of the appellant and of the respondent(s).
17. We are also mindful of the pivotal principle of judicial discretion, one of the latitudes given to judges and judicial officers in the course of their work. *Black's Law Dictionary*, 10th Edition defines "judicial discretion" as:

"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."
18. The hallowed nature of judicial discretion finds meaning in the words of Madan, JA. (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898 where he had this to say:

"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."
19. We find nothing to suggest that any of the above-mentioned five criteria were established to warrant interference with the impugned judgment on account of the 1st issue before us. Accordingly, that ground fails. Neither are we persuaded that any of the appellant's constitutional rights, including the right to a fair hearing, was in any way infringed. His choice to sit back and not appear in his defence yet the time later fixed for hearing was agreed by the parties was by no means attributable to the learned Judge, and neither were the proceedings subordinate to his convenience or to the convenience of his counsel.
20. Turning to the 2nd issue, this Court has time and again pronounced itself to the effect that it is the litigant's duty to take charge of his or her case. Accordingly, but for exceptional circumstances, any



attempt to evade liability for laxity by casually laying blame on legal counsel would be in vain. This Court in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR pronounced itself thus:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

21. Having said that, the 2nd and the related 3rd issue stand settled. The fact that mistake of counsel cannot be successfully pleaded in the circumstances of this case in which laxity is manifest leads to the inescapable conclusion that the learned Judge did not by any means limit or compromise the appellant’s constitutional right to be heard.
22. Turning to the decisive question raised in the 4th issue as to whether the appellant was the lawfully registered proprietor of the suit property, it is noteworthy that the 1st respondent produced a copy of the original “Certificate of Ownership” of the suit property dated May 17, 1960 and issued to his deceased grandfather, Omar Bakari Yaa under the Land Titles Ordinance, 1908 (Repealed). There was no evidence that the deceased had transferred the property to anyone prior to his death on December 5, 1983.
23. We take to mind that it was not until two or so years after his death that the property was purportedly sold and transferred by the deceased to Yusufali Nazarali Panju, Kassimali Nazarali Panju and Husseinali Nazarali Panju on January 9, 1986. How that alleged sale and transfer took place remains unexplained in light of the fact that no- one had taken out letters of administration to the deceased’s estate until March 7, 2017 when the 1st respondent was issued with Letters of Administration Ad Litem for the purpose of filing the suit that culminated in the impugned judgment, and the subject of tis appeal. In our considered view, the learned Judge cannot be faulted for allowing the 1st respondent’s suit in the absence of any explanation as to how the appellant obtained a “Provisional Certificate of Title” to the suit property dated June 22, 2016 more than 33 years after the owner’s demise, and without involvement of any of the members of his family. It goes without saying, therefore, that the appellant could not by any means have become the lawful owner thereof in the absence of evidence in support of a valid transfer to the Panjus and, ultimately, to the appellant. We hasten to observe, though, that how this provisional certificate of title was obtained is not for us to establish. This and other questions remain alive for inquiry elsewhere.
24. Finally, we turn to the 5th and last issue as to whether the appellant is entitled to any of the reliefs sought. Having carefully considered the record of appeal, the impugned judgment, the rival submissions of the parties, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed in its entirety with costs to the 1st respondent. In effect, the judgment of the ELC at Malindi (J. O. Olola, J.) is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL



G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

