



**Wambua v Kaunda (Civil Appeal 438 of 2018)
[2024] KECA 95 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KECA 95 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 438 OF 2018
S OLE KANTAI, F TUIYOTT & PM GACHOKA, JJA
FEBRUARY 9, 2024**

BETWEEN

FRANSCISCO KAUNDA WAMBUA APPELLANT

AND

TABITHA NGINA KAUNDA RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court of Kenya at Nairobi (Angote, J.) dated 23rd February, 2018 in ELC No. 196 of 2014)

JUDGMENT

1. In a judgment delivered by Angote, J. on 27th January, 2017 in Machakos Environment and Land Court (ELC) Case No. 196 of 2014 the Judge allowed Originating Summons that had been taken out by the respondent Tabitha Ngina Kaunda against her husband (the appellant) Francisco Kaunda Wambua. The respondent had in the Summons asked for a determination on the following issues:

- “(1) Whether land parcel Nos. Plot No. 887, Kiboko ‘A’, Machakos/ Kiandani/3729, Agricultural Plot No. 831 & 2034 and five other land parcels whose details are with the Respondent all within Malili Ranch Ltd, formerly parcel no. Muputi/Kiima-Kimwe/2233, Plot No. 7 and one more land parcel within Kiboko market, plot No. 191, Kiboko ‘B’ and plot Nos. 25, 258, 264 and 4235 all within Kyuu Adjudication Section, Mbooni location form part of the matrimonial property, herein after the matrimonial property.
2. Whether the Respondent holds the property above in trust for the Applicant.
3. Whether the above properties can be shared equally between the Applicant and Respondent or as the Court may deem fit.



4. Whether the Respondent himself, his agent and or servant can be restrained from alienating or encumbering or in any other manner disposing of the said properties.”
2. The respondent had testified before the Judge and the Summons was heard ex parte after the Judge had found that the appellant had been served but had neither appeared nor filed a replying affidavit in the suit.
3. What followed was a Notice of Motion brought by the appellant under various provisions of law where ELC was asked in the main that pending the hearing and determination of the Motion the court stay execution of the Judgment delivered on 27th January, 2017; that the Court review and/or set aside the said Judgment and order; that the Court grant leave to the appellant to file a defence out of time; that pending hearing and determination of the application the respondent be ordered to return and/or deposit in Court some original title documents that had been released by the Court to her after judgment had been delivered. In grounds in support of that application and a supporting affidavit of the appellant it was said that the suit had proceeded ex-parte when the appellant had not been served with any Court documents or Summons; that judgment had been obtained irregularly because documents produced by the respondent as exhibits in the case had been stolen from the appellant’s house; that the respondent had made little or no contribution towards purchase of the properties subject of the Judgment and that the respondent could dispose of the properties. The respondent opposed the Motion in a replying affidavit. The Judge (Angote, J.) considered the application and the rival positions taken by the parties and in a ruling delivered on 23rd February, 2018 the application was dismissed. That ruling is the subject of this appeal through Memorandum of Appeal drawn for the appellant by his lawyers L.M. Ombete & Company Advocates where 8 grounds of appeal are set out. The appellant says that the Judge erred in law and fact in finding that the appellant had been served with Originating Summons and affidavit on 13th December, 2014 and an order when it was probable that he might not have been served; that the Judge erred in law and fact in finding that the appellant had been served with a hearing notice on 11th July, 2016 while it was most likely that he had not been served; that the Judge erred in law and fact in finding that the appellant had not met the threshold of setting aside a regular ex-parte Judgment; that the Judge erred by refusing to exercise discretion in favour of the appellant where it was not clear that all the listed properties were matrimonial property; and that the Judge erred in law and fact in failing to appreciate that where there was no decree of divorce or separation between the spouses a court has no power to order division of matrimonial property; that the appellant was condemned unheard. In the penultimate ground the appellant says that the Judge erred in failing to set aside the ex-parte judgment so as to allow the appellant to prove that the properties were not matrimonial properties and, finally, in the last ground:
 4. That the learned Judge grossly erred when he followed the authorities that we have attached to this record of appeal at pages 60 to 78 as enabling him to dismiss the appellant’s application.”
 5. It is proposed that we set aside the ruling of ELC and substitute it with an order granting the appellant the right to file his response to the suit and have the suit heard on the merits.
 6. When the appeal came up for hearing before us on a virtual platform on 17th October, 2023, learned counsel Mr. L.M. Ombete appeared for the appellant but there was no appearance for the respondent. We were satisfied that counsel on record for the respondent had been served with a hearing notice on 3rd October, 2023 at 3.13 p.m. and in the premises allowed counsel for the appellant to proceed. In a highlight of the written submission, Mr. Ombete submitted that the appellant had not been served with Originating Summons or other documents and that where a judgment has been entered ex-parte



the Court has unfettered discretion to set it aside; that the Court has a duty to do justice to the parties in a case. Counsel asked the question whether a Court can order subdivision of matrimonial property where the marriage still exists and referred us to Section 6 of the *Matrimonial Properties Act* on how matrimonial property is to be shared. According to counsel all the properties listed at paragraphs 1-3 (inclusive) of the orders issued by the Judge did not satisfy the requirements under *Section 6 of the said Act. In further submissions counsel reminded us that there is no requirement under *Civil Procedure Act* for a defendant in an Originating Summons to file a defence; that there was an affidavit in support of Notice of Motion which showed the Court what defence was being taken by the appellant.

7. We have considered the record of appeal and submissions made.
8. The Judge was asked in the Motion to do various things including reviewing or setting aside the judgment that had been issued after an ex-parte hearing.
9. Order 10 rule 11 Civil Procedure Code on setting aside judgment provides that the Court may, where judgment has been entered under that Order, set aside or vary such judgment and any consequential decree or order upon such terms as are just.
10. On the other hand, Order 45 of the said Code provides for when a Court may review a decree or order.
11. The appellant deponed in supporting affidavit that he had not been served with Originating Summons; that title documents produced before the Court by the respondent as exhibits had been stolen from his house when it was broken into. He deponed at paragraph 6 of the affidavit:
 6. That subsequent to my Advocates’ perusal of the Court file in the matter herein, my Advocate did inform me that my wife, to wit; the Respondent had filed suit seeking Declaratory Orders on several of my properties;

which astonished me as we are not divorced, notwithstanding the law relating to matrimonial property and further that the matter herein had proceeded to Judgment “ex-parte” without my notice.”
12. We note that the Motion is dated 10th July, 2017 and the order arising from the judgment was issued by ELC on 18th May, 2017.
13. In considering the Motion before him the Judge held at paragraph 17 of the ruling that he had gone through the affidavits and had not come across any deposition where the appellant had denied the respondent’s claim.
14. As we have seen in this judgment the appellant had raised an issue pertaining to whether the court could order division of matrimonial property where the couple in the marriage were not divorced. The appellant also raised the issue whether his wife the respondent acted in cahoots with the thieves who had broken into his house and concluded his supporting affidavit by stating that it was only fair in those circumstances that he be allowed to present his case and be heard on the merits. The Judge exercised his discretion and dismissed the application.
15. In an appeal against exercise of discretion, the appellate Court should not interfere with exercise of discretion unless satisfied that the lower Court misdirected itself on some matter and thereby arrived at a wrong decision or it is manifest from the case as a whole that the lower Court made a wrong decision – See *Mbogo & Another v Shah* [1968] EA 93.
16. In the persuasive case of *Stephen Ndichu v Monty’s Wines and Spirits* [2006] eKLR it was stated:

The principles governing the exercise of judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the



parties before it (See *Patel –v E.A. Cargo Handling Services Ltd* [1974] E.A. 75) The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs (See *Sebei District Administration v Gasyali* (1968) E. Way.300)”

17. There were important questions before the Judge which had not been answered. These included whether division of matrimonial property could be ordered where there was no decree of divorce. The Originating Summons asked for division of:
.... five other land parcels details with the respondent ”
18. The order given in the Judgment included division of those properties whose particulars were not stated or known. The appellant denied being served with any court documents and in those circumstances we think that the Judge should have exercised discretion in such a way that would have allowed all the unanswered questions to be answered. We find merit in this appeal and allow it. We set aside the ruling of ELC delivered on 4th May, 2018 and grant leave to the appellant to file a response to the Originating Summons which shall be heard and determined on merit by a Judge other than Angote, J. As the parties are husband and wife let each meet their own costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

S. ole KANTAI

JUDGE OF APPEAL

.....

F. TUIYOTT

JUDGE OF APPEAL

.....

M. GACHOKA, CIArb, FCIArb.

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

