



**Hamed v Easley & another (Civil Appeal 7 of 2019)
[2024] KECA 1142 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1142 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 7 OF 2019
SG KAIRU, JW LESSIT & GWN MACHARIA, JJA
SEPTEMBER 20, 2024**

BETWEEN

HASSAN HAMED APPELLANT

AND

YASIM EASLEY 1ST RESPONDENT

INSURANCE CORPORATION 2ND RESPONDENT

(Being an appeal from the Ruling of the Environment and Land Court of Kenya at Nairobi (K. Bor, J.) dated 20th August, 2018 in ELC Cause No. 368 of 2009)

JUDGMENT

1. This appeal arises from a ruling delivered on 30th August 2018 in which the Environment and Land Court (ELC) at Nairobi (K. Bor, J.) dismissed the appellant’s application dated 21st February 2018. In that application, the appellant Hassan Hamed had sought, among other things, an order to set aside interlocutory judgment entered against him approximately eight years earlier on 17th September 2010.
2. In dismissing the application, the learned Judge of the ELC stated:

“The court may set aside or vary judgement entered against a defendant in default of appearance and failure to file a defence upon terms that are just. The 1st Defendant has participated in these proceedings from 2010 to date. If he wished to challenge the service of summons he ought to have done so at the earliest opportunity and not waited until the suit has been set down for hearing. The 1st Defendant did not file a draft defence to demonstrate that he has a good defence to the Plaintiff’s claim for the court to exercise its discretion in his favour. The court has considered the application, the Replying Affidavit together with



the submissions of counsel. The court is not satisfied that the application has merit. It is dismissed with costs to the Plaintiff.”

3. In his memorandum of appeal and written and oral submissions canvassed before us on the appellant’s behalf by learned counsel Mr. Ezekiel Munyua, it is the appellant’s case that the judge erred in finding that the interlocutory judgment against him was regular; that the judge failed to appreciate that the suit had previously been dismissed by the ELC before it was reinstated, and the interlocutory judgment could not have survived the dismissal; that the interlocutory judgment ceased to exist upon the dismissal of the suit and the reinstatement of the suit did not revive the interlocutory judgment; and that in any event, the respondent made two applications for amendment of the plaint subsequent to the entry of the interlocutory judgment which would have required the appellant to be served afresh with the amended suit.
4. On her part, learned counsel for the 1st respondent Ms. J. Maangi, in her written and oral submissions in opposition to the appeal urged that there is no basis for interfering with the decision of the learned Judge; that the suit had been dismissed by the ELC suo motto and was reinstated on application by the 1st respondent; that by the time the suit was dismissed there was a regular interlocutory judgment against the appellant; that upon reinstatement of the suit, the status quo ante was restored and the interlocutory judgment remained in place; that the amendments of the plaint alluded to by the appellant related to, firstly, substitution of the original plaintiffs who died during the pendency of the suit, and secondly, substitution of Dubai Bank (K) Limited (the Bank) with the 2nd respondent, Kenya Deposit Insurance Corporation (KDIC), upon the former being placed under statutory management; and that it was not necessary to re-apply for and serve summons to enter appearance afresh as contended by the appellant.
5. We have considered the appeal and the rival submissions. A brief background will provide context. The suit before the ELC was commenced in July 2009 by Trevor Leonardo Ian Nandi and Eugene Leslie Antony Ossewe as plaintiffs in their capacity as the administrators of the estate of Prof. Thomas Risley Odhiambo (deceased). The plaintiffs were children of the deceased. They averred that the deceased was the registered proprietor, since 1972, of a property known as LR No. 330/560 situate in Lavington, Nairobi; that subsequent to the death of the deceased, and of the wife of the deceased, and triggered by “some strangers unknown to them (who) started visiting the said property and (to) put up sale signs”, they carried out a search and which showed that the property was transferred to the appellant under a Conveyance dated 10th September 2001 and mortgaged to the Bank. It is their case that the transfer to the appellant was fraudulent. Simultaneously with the plaint, the plaintiffs filed a Chamber Summons dated 24th July 2009 seeking temporary injunction to restrain dealings with the property.
6. The Bank, which was named as the 2nd defendant in the suit, entered appearance through the firm of Kiplangat & Associates Advocates and subsequently filed a Statement of Defence dated 15th January 2010. It also filed grounds of opposition to the application for injunction.
7. The record shows that the appellant, who was named as the 1st defendant, filed a Notice of Preliminary Objection dated 8th April 2010 through the firm of Wagara Koyyoko & Company Advocates contending that the suit was incompetent and barred under the Government Lands Act. Also filed on behalf of the appellant in opposition to the application were grounds of opposition dated 26th May 2010.
8. Meanwhile, the plaintiffs applied and obtained default interlocutory judgment against the appellant on 17th September 2010.



9. Trevor Leonardo Ian Nandi and Eugene Leslie Antony Ossewe died during the pendency of the suit and were substituted with their sister, Yasmin Easley, the 1st respondent, as the administrator of the deceased. As alluded to earlier, the Bank was placed under statutory management during the pendency of the suit and KDIC substituted in its place. Consequent upon the substitutions, an Amended Plaint dated 10th March 2015 and a Further Amended Plaint dated 15th February 2018 were filed.
10. By his application dated 21st February 2018, the appellant then moved the court seeking orders that the interlocutory judgment entered on 17th September 2010 be set aside *ex-debito justitiae*; that the suit against him be dismissed; that pending the hearing and determination of the application, the 1st respondent do deposit rent of the suit premises in court and render a proper account of all rents paid by tenants; that the interim injunction granted in the suit be varied or set aside.
11. That application was based on the grounds that the appellant had never been served with summons; that there is no valid suit against him; that the interlocutory judgment entered against him is irregular and invalid; that he is the lawfully registered proprietor of the property; that it is in the interest of justice and fairness that the orders sought be granted and that the 1st respondent would not suffer any prejudice. The application was supported by the appellant's supporting affidavit.
12. The application was opposed through grounds of opposition and a lengthy replying affidavit by the advocate for the 1st respondent setting out the procedural history in the matter.
13. Having considered the application, the affidavits and the submissions, the ELC delivered the impugned ruling dismissing the application as already stated.
14. The decision dismissing the appellant's application involved exercise of judicial discretion. The circumstances in which this Court can interfere with that decision are limited. As stated by the Court in *United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v. East African Underwriters (Kenya) Ltd* [1985] eKLR :

“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.”
15. In the record of appeal at page 31 is an affidavit of service by one Boniface Kioko Karugi who deponed that he is a licensed process server; that he received the summons to enter appearance in the suit from the plaintiffs' advocates on 23rd November 2009 and proceeded to the offices of the Bank along Kenyatta Avenue, adjacent to ICEA Building Nairobi where he was directed to the office of the Company Secretary, one Aisha, who accepted service on behalf of the Bank before escorting him to “the next office of Mr. Hassan Hamed who was personally known” to him; that after perusing the Summons to Enter Appearance, the said Hassan Hamed (the appellant) accepted service and directed his secretary to stamp on the principal copy. Thereafter, as already noted, the appellant through Wagara Koyyoko & Co Advocates filed a Notice of Preliminary Objection contending the suit is incompetent as well as grounds of opposition to which we have referred.



16. The record then shows that request for default interlocutory judgment was made on 3rd June 2010 which was entered on 17th September 2010.
17. On 14th March 2014, the appellant appointed the firm of Musalia Mwenesi Advocates who filed a Notice of Change of Advocates. There is correspondence exchanged between the advocates for the appellant between 2014 and 2017. However, on 22nd February 2018, the firm of Kiplangat and Associates Advocates which hitherto acted solely for the Bank, filed and served a Notice of Change of Advocates on behalf of the appellant and at the same time filed the application dated 21st February 2018 which culminated with the impugned ruling.
18. Based on the foregoing, it is clear that apart from the evidence presented regarding the appellant having been served with Summons to Enter Appearance, the appellant was represented by advocates from the very onset. Indeed, the record also shows that the applications dated 10th March 2015 and 19th July 2016 for substitution of the original plaintiffs and the Bank respectively were served on the appellants' advocates, yet the application for setting aside the interlocutory judgment was not made until February 2018, a delay of about eight years. The learned Judge cannot therefore be faulted for concluding, as she did, that if the appellant wished to challenge service of the Summons to Enter Appearance, he should have done so at the earliest opportunity. We respectfully agree that there was inordinate delay in making the application and we have no basis for interfering with that decision.
19. An argument was made for the appellant, that following the amendments to the plaint brought about by the substitution of the original plaintiffs and of the Bank, that Summons to Enter Appearance should have been filed afresh. The application dated 10th March 2015 was heard before H. Gacheru, J. on 17th June 2015. The appellant's advocate, a Mr. Onindo who appeared is recorded to have indicated that he was not opposed to the application. Similarly the appellant was represented during the hearing of application dated 19th July 2016. Having been served with Summons to Enter Appearance at the onset, there is no requirement that upon amendment of the plaint, fresh Summons on the amended plaint should have been issued. The appellant was already privy to the proceedings when the amendments were sought and allowed and there is no suggestion that the amended plaint and further amended plaint was not served.
20. Counsel for the KDIC in supporting the appeal through written submissions urged that the interlocutory judgment is faulty as the claim is not liquidated. However, that argument does not appear to consider that the interlocutory judgment entered on 17th September 2010 is not final and the Deputy Registrar in granting it was alive to this as it was ordered that "the suit shall be set down for formal proof."
21. The last issue arises from the contention by the appellant that the interlocutory judgment did not survive after the order dismissing the suit was set aside and after the amendments. As already noted, interlocutory judgment against the appellant was entered on 17th September 2010. The matter was then listed for hearing before P. Mwilu, J. (as she then was) on 3rd February 2012 when it was dismissed for non appearance by the plaintiff. An application to review and set aside the order dismissing the suit was then made, heard and subsequently allowed. The effect was to vacate the order dismissing the suit and to reinstate the suit as it was before the dismissal. The interlocutory judgment was not thereby set aside. Neither did the amendments involving substitution of parties vitiate the interlocutory judgment.
22. The High Court decision in *Ainushamsi Construction and Transport Limited & 55 others v. County Government of Garissa & 2 others* [2020] eKLR cited for the proposition that the interlocutory judgment cannot survive after amendments was decided on the facts of that case, namely that a



payment of Kshs.154,059,037.00 had not been factored in the claim. The circumstances in that case are therefore different and distinguishable.

23. All in all, we are not persuaded that the appellant has demonstrated that the learned Judge misdirected herself in law; or that she misapprehended the facts; or that she took account of considerations of which she should not have taken account; or that she failed to take account of considerations of which she should have taken account, or that her decision is plainly wrong.
24. The appeal fails and is hereby dismissed with costs to the 1st respondent only being the only party that successfully opposed the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIARB

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR_

