Hassan & 3 others v Ali & 4 others (Civil Appeal E089 of 2021)
[2024] KECA 1167 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1167 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E089 OF 2021

SG KAIRU, AK MURGOR & KI LAIBUTA, JJA

SEPTEMBER 20, 2024

BETWEEN

RUKIA HASSAN ..... 1ST APPELLANT

MOHAMMED KHERI ..... 2ND APPELLANT

SEIF LAMIR ..... 3RD APPELLANT

BWALEH HASSAN ..... 4TH APPELLANT

AND

MOHAMMED HASSAN ALI ..... 1ST RESPONDENT

JUMAA ABDLALLA NGUZO ..... 2ND RESPONDENT

REHEMA HASSAN ..... 3RD RESPONDENT

SULEIMAN NGWARE ..... 4TH RESPONDENT

ALI KHAMISI JUMA ..... 5TH RESPONDENT

(Appeal from the Ruling and Orders of the Environment and Land Court at Mombasa (C. Yano, J.) dated 23rd March 2021 in Mombasa Environment and Land Court Case No. 59 of 2017)

JUDGMENT

1. The respondents instituted a suit by way of a plaint dated 24th February 2017, which was amended on 17th March 2017 against the appellants seeking judgment against them jointly and severally for:

    a. A permanent injunction restraining the Appellants either by themselves, their employees, servants and agents from trespassing into or entering into the suit property thereby committing acts of wastage, alienating and/or interfering with their quiet and peaceful occupation of plot

sub-division No.6827 (original No. 172/2) Section II Mainland North and Plot Number 172/1 Section II Mainland North.

b. A mandatory order of injunction do issue compelling the appellants, their servants, either agents, employees or any other person whosoever to bring down the illegal and unlawful structures and walls erected on Plot sub- division No. 6827 (Original No. 172/2) Section II Mainland North.

c. Costs of and incidental to this suit; and interests.

2. The respondents were appointed as trustees of the estate of the late Ali Nguma by Principal Kadhi on 24th April 2014 in Mombasa Succession Cause No. 158 of 2007, and have been administering the estate comprising Plot No. 172 of Section II Mainland North (the subject property) in respect of which a provisional certificate of title was issued on 28th November 2013. They claimed that all the heirs and beneficiaries have since been allocated an equitable and just share of the estate pursuant to the judgment of the Kadhi's Court, which has not been set aside to date.

3. After the distribution of the estate, the 1st and 4th appellants disposed of a portion of land sub-division No. 6827 (original No. 172/2) Section Mainland North, and unlawfully and without any right trespassed onto the subject property thereby interfering with appropriate administration of the Estate and quiet possession of the appropriate portions by the other heirs to the subject property. The respondents further claimed that the 1st and 4th appellants had unlawfully erected structures on the 1st respondent's demarcated portion in plot sub-division No.6827 (original No.172/2) Section II Mainland North and erected a wall through the plot in a manner calculated to deny the respondents free access to their house.

4. They further claimed that the 2nd and 3rd appellants, who are strangers to the family of the late Ali Nguma, have trespassed onto plot subdivision No. 172/1 Section II Mainland North and erected a house, temporary structures and a perimeter wall thereon, and are running an open garage on a portion of the subject property. It was their claim that, unless the appellants are ordered to demolish the illegal structures and walls and restrained from trespassing on the subject property, the respondents' right to own property and execute their administrative duties to the estate of the late Ali Bin Nguma and the protection of the heirs right to enjoy quiet possession of their property may never be achieved but, rather, will be adversely prejudiced.

5. The appellants filed a joint statement of defence dated 31st March 2017 in which they deny ever having trespassed or encroached onto the subject property. And since they failed to attend court on several occasions for the hearing despite being served with hearing notices, no evidence was tendered or adduced in court in respect of their case.

6. Consequently, the trial judge, upon considering the suit, allowed the respondents' claim and entered Judgment on 9th July 2020 against the appellants in the following terms:

> " a. A mandatory order of injunction is hereby issued compelling the defendants, either by themselves, their agents, employees, or any other person claiming through them to vacate from or otherwise howsoever and do demolish and/ or pull down to ground level the illegal structures and wall standing on and deliver vacant possession of plot sub-division No.6827 (original No. 172/2) Section II Mainland North and Plot No. 172/1 Section II Mainland North within sixty (60) days from the date of service of the decree herein upon them.

b. In default of (a) above as aforementioned, the plaintiffs shall be entitled to an order of eviction for forcible removal of the defendants whether by themselves, their agents, employees or otherwise howsoever from remaining on or continuing in occupation of the suit property and demolition of the illegal structures and walls standing thereon under supervision of an authorized police officer from the nearest police station.

c. A permanent injunction be and is hereby issued restraining the defendants whether by themselves, their employees, servants and/or agents or otherwise howsoever from encroaching, trespassing onto, remaining on or interfering with the plaintiffs' quiet and peaceful possession and occupation of the suit property.

d. The plaintiffs shall have costs of the suit."

7. The appellants were aggrieved by the Judgment and filed a Notice of Motion dated 24th July 2020 and brought under sections 1A, 3, 3A of the *Civil Procedure Act*, Order 10 rule 11, and Order 51 of the *Civil Procedure Rules*. They sought orders that: the Court be pleased to stay execution of the ex-parte judgment of the High Court delivered on 9th July 2020; and that the Court be pleased to set aside the ex-parte judgment entered on 9th July 2020 and all consequential orders.

8. The application was supported by the affidavit of Swaleh Hassan sworn on 24th July 2020 in which it was averred that they gave instructions to the firm of Were Geoffrey & Co. Advocates to commence conduct of the suit and that, after filing of the defence, the advocate was taken ill and failed to attend court; that the advocate's illness was not anticipated, although his health condition was well known to the members of the legal fraternity; and that the advocate's absence was not in any way meant to frustrate the case, but rather arose out of unforeseen circumstances. They further averred that they have instructed another advocate to take over the conduct of their case, and that they have a good defence; and that the mistake of counsel should not be visited upon them, adding that the court has discretion to set aside the ex-parte judgment under the Rules.

9. In opposition to the application, the respondents filed grounds of opposition dated 5th August 2020 and a replying affidavit sworn by Mohamed Hassan Ali, the 1st respondent. It was deponed that the application was misconceived, fatally defective, bad in law, incompetent and otherwise a gross abuse of the court process as it does not raise any substantive prayer to be determined. They contend that the application was fatally defective, and was filed in contravention of Order 9 rule 9 of the *Civil Procedure Rules* since the firm of Thabit, Wampy & Kitonga Advocates was not properly on record for the appellants and thus could not purport to file the application on their behalf; and that the application was brought with the sole aim of frustrating their enjoyment of the fruits of their valid proper and lawful judgment. It is averred that, at all times, the appellant's advocates then M/s Were Geoffrey & Co. Advocates was served with hearing notices which the firm always acknowledged by stamping the documents without any reservations whatsoever; and that, therefore, the appellants' were aware of the hearing dates, but deliberately chose not to participate despite being duly served.

10. By a ruling dated 23rd March 2023, the trial judge dismissed the application.

11. The appellants were aggrieved and have filed an appeal on grounds that: the learned judge misdirected himself by failing to find that the mistakes of counsel should not be visited upon an innocent litigant; by failing to exercise his discretion in favour of the appellants and thus condemning them unheard; that the reasons given for nonattendance arose out of counsel's mistake, and that the appellants should not be made to suffer the consequences, but that their case should be heard on its merit since a court

exists to determine the rights of parties; that the appellants' counsel's failure to attend court could have been compensated with costs; that the right to be heard is a constitutional right and courts ought to only dismiss suits where there is need to protect the integrity of the court process from abuse leading to an injustice; by failing to appreciate that the appellant's defence raises triable issues; and by failing to summon Mr. Geoffrey Were to testify to the averments made in his sworn affidavit.

12. The appellants filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the appellants Mr. Mkan briefly highlighted the appellant's submissions. It was submitted that Mr. Were filed a defence and attended court whenever the matter came up for mention; that, during the pendency of the suit, their counsel was taken ill and failed to attend court; that this fact was never brought to the appellants' attention since they had lost touch with their advocate and only came to learn of the exparte judgment through their current advocates on record who, upon taking conduct of the matter and perusing the court file, discovered that judgment had already been entered against them.

13. Counsel submitted that failure to attend court for hearing on the material day was an inadvertent error on the part of counsel, and that the appellants should not suffer for the mistake of counsel; and that Mr. Were had filed a replying affidavit where he had deponed to the fact of his illness.

14. In rebuttal, learned counsel for the respondents Mr. Mutubia also filed written submissions and contended that it was not enough for a party to simply blame the advocate; that the parties must show that they have taken tangible steps to follow up their matter; and that the appellants had the opportunity to show the trial Court the steps they undertook, but that they failed to do so and were now hiding behind the mistake of advocate. Counsel further submitted that this was a 2017 matter, and that the hearing took place in 2020 after three years; that the trial court's ruling considered the advocates inadvertence in view of numerous summons and service of hearing notices, as well as the question as to whether the appellants had a viable defense. Counsel submitted further that the appellants were not condemned unheard because, the trial court gave them an opportunity in the first instance to defend their case; and that, further, they filed a Notice of Motion to set aside judgment and give sufficient reason and produce even documentary evidence through affidavits, which they failed to adduce, and now seek to fault the court's discretion.

15. This is a first appeal from the decision of the High Court in its original jurisdiction. This Court's mandate as a first appellate court is as stipulated explicitly in rule 31(1) of the *Court of Appeal Rules* namely: to re-appraise, re- evaluate and re-analyze the record, consider it in light of the rival submissions and draw its own conclusions thereon and give reasons either way. This Court will only depart from the finding by the trial court if they were not based on evidence on record; or where the court acted on the wrong principles, or where its discretion was exercised injudiciously. See *Mbogo & Another v Shah* [1968] EA 93.

16. In this case, the issue for consideration is whether the learned judge rightly declined to exercise his discretion and set aside the judgment of 9th July 2020. A consideration of the ruling shows that the learned judge declined to set aside the judgment for the reasons that: firstly, the explanation for having failed to attend court for the hearing was unsatisfactory, particularly since the hearing notice was served upon the appellants' counsel Mr. Were's firm, and was received without reservation, and that, further, no evidence was adduced to support the reasons for non-attendance; and, secondly, that the defence did not raise any triable issues and amounted to mere denials.

17. Order 10 rule 11 of the *Civil Procedure Rules* provides as follows:

> Setting aside judgment [Order 10, rule 11] Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

18. This Court in the case of *Kwanza Estates Limited v Dubai Bank Kenya Limited (in Liquidation) & 2 others* [2019] eKLR stated that:

> " The power of the court to set aside an interlocutory judgment under that provision is discretionary. See *CMC Holdings Limited v. Nzioki* [2004] 1KLR173. For us to interfere with the exercise of discretion by the Judge, it must be shown that his decision is clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted or because the he failed to take into consideration matters which he should have taken into consideration."

19. Similarly, in the case of *Stephen Ndichu v Monty's Wines and Spirits* [2006] eKLR it was held that:

> " 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."

20. A consideration of the proceedings shows that the appellants filed an appearance and a defence. Thereafter, the suit came up for several pretrial hearings and, on those occasions, notwithstanding that the appellants' counsel was served, there was no appearance by either the appellants or their counsel. On 6th November 2019, the suit came up before the learned judge and was fixed for hearing on 11th March 2020. On the material date, the court was informed that the suit was for hearing whereupon, Mr. Nyongesa, learned counsel for the respondents, requested that time be allocated for the commencement of the hearing. By this time, there was no appearance by the appellants or their counsel, despite the record having confirmed that the appellants' counsel was served with the hearing notice. On this basis, the trial judge set the suit down for hearing at 11 a.m.

21. Later, at 11 a.m, Mr. Nyongesa was in court ready to proceed and, again, there was no appearance by the appellants or their counsel, at which point the respondent's case commenced. Thereafter, the appellant's case was closed whereupon the court entered judgment in favour of the respondents on 9th July 2020.

22. Though in their motion and the affidavit in support the appellants sought to advance the reason for non-attendance by their counsel as being due to illness, our consideration of the record does not disclose that on or before the hearing date the appellants' counsel had been taken ill and was therefore so indisposed that he was unable to attend the hearing or seek representation by another counsel. As observed by the trial judge, no evidence was adduced to support this assertion. This being the sole reason advanced for the non-attendance by their counsel, it would have been incumbent upon the appellants to provide evidential material that sufficiently supported the averment that their counsel was indeed too ill to attend court so as to satisfy the trial Judge.

23. It is also not lost on us that the trial Judge took into account that the counsel's non-attendance was against the backdrop of the fact that he was duly served at all times, and that he received service without reservation, which would infer that their counsel could have attended court, but chose not to do so.

24. Turning to the excuse that the appellants should not be impugned for the mistake of their counsel, this Court has variously stated that it is not sufficient for a party to blame their counsel for acts or omissions that may occur during the conduct of their matters. Parties are equally responsible for their cases, and it is incumbent upon them to follow up on the progression of their matters with their counsel from time to time. See *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR.

25. Likewise, in this case, the appellants cannot escape responsibility. Much as they assert that their counsel's mistakes should not be visited on them, the question that begs answers is why the appellants expressed no interest in their case until judgment was entered before being spurred into action to instruct another counsel? Had they been vigilant, they would have been aware before the hearing that their advocate was unwell and would have taken adequate steps to instruct another counsel. Their failure to do anything upto and including the date of hearing would point to lack of interest in the suit, or to their unwillingness to participate in the hearing. On this basis, they cannot be heard to allege that they were denied their Constitutional right to be heard.

26. In so far as the appellants' complaint that the trial judge failed to appreciate that the appellant's defence raises triable issues is concerned, the appellants have not pointed out where the trial judge went wrong or provided any justification for this complaint. On this account, we find that nothing turns on this issue.

27. Having considered the appellant's motion, affidavit and submissions, we can find nothing that demonstrated that the Judge misdirected himself or took into account matters that he should not have taken into account, or failed to take into consideration matters he should have taken into consideration so as to warrant our interference with that decision. Given the foregoing, the appellants have not demonstrated that the trial judge injudiciously exercised his discretion.

28. Accordingly, the appeal lacks merit and is hereby dismissed with costs to the respondents.

It is so ordered.

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

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR