Barchuro & another v Maina & another; Kuryases & 8 others (Interested Parties) (Civil Appeal 293 of 2019) [2024] KECA 1436 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1436 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 293 OF 2019

FA OCHIENG, SG KAIRU & WK KORIR, JJA

OCTOBER 11, 2024

BETWEEN

JACKSON BARCHURO ..... 1ST APPELLANT

DANIEL RUTTO ..... 2ND APPELLANT

AND

WILLIAM MACHARIA MAINA ..... 1ST RESPONDENT

JOHN MUTHUI MAINA ..... 2ND RESPONDENT

AND

KIBIWOTT YATOR KURYASES ..... INTERESTED PARTY

KURYASES CHARLES KIMUTAI ..... INTERESTED PARTY

JOSEPH MAIYO CHELIMO ALEX ..... INTERESTED PARTY

KIPROP KIPTOO ..... INTERESTED PARTY

MUSA TOROITICH AYABA ELIAS ..... INTERESTED PARTY

CHELANGA TOROITICH TITUS ..... INTERESTED PARTY

BOWEN KISANG ..... INTERESTED PARTY

FIONA JEMAIYO KIROP ..... INTERESTED PARTY

MICAH KOSGEI KIRITICH ..... INTERESTED PARTY

(Being an appeal from the Ruling of the Environment and Land Court at Eldoret (Odeny, J.) dated 8th August, 2019 in ELC Cause No. 172 of 2014)

JUDGMENT

1. The respondents, William Macharia Maina and his brother John Muthui Maina, as legal representatives of the Estate of Ishumael Maina Gichumbi, deceased, filed suit through the law firm of Ngigi Mbugua & Company Advocates, by a plaint dated 28th May 2014 before the Environment and Land Court at Eldoret, being ELC Case No 172 of 2014. They sued Francis Barchuro, Chebutiei Koin, Jackson Barchuro and Daniel Ruto (the four brothers) claiming that the four brothers had unlawfully invaded the property of the deceased known as Title Number Cherangany/Kapcherop/171(the property). The respondents sought judgment for a declaration that the four brothers are not entitled to enter, possess or use the property; a permanent injunction restraining them from doing so; a declaration that the respondents are entitled to possession of the property; an order of eviction of the four brothers; and damages for trespass.

2. The four brothers filed a joint statement of defence and counterclaim asserting that they were born on the property; that their families had occupied the property from time immemorial and had acquired the same by adverse possession prior to the deceased being registered as owner. They prayed for a declaration to that effect; an order for cancellation of the title; and an order for them to be registered as the proprietors. Significantly, in their Memorandum of Appearance and in the subsequent statement of defence and counterclaim, the four brothers gave their address as "c/o Katama Ngeywa & Co. Advocates, Bokoli House, 1st Floor, Moi Avenue, P. O. Box 4196-30200, Kitale". We shall advert to this later in the judgment.

3. The record of proceedings of the trial court shows that on 4th December 2017, when the matter was scheduled for hearing, Miss. Ruto, holding brief for Miss. Gerald, appeared for the respondents (plaintiffs). It was recorded that "Katama Ngeywa for defendant absent". At the request of Miss. Ruto,the court adjourned the hearing to 13th March 2018 on grounds that Miss. Gerald was indisposed. The court ordered, "hearing notice to issue."

4. On 13th March 2018, a Mr. Ngugi appeared for the respondents (plaintiffs). The record indicates, "Katama Ngeywa for defendant absent" while Mr. Komen appeared for interested party. After an opening statement, William Macharia Maina, the 1st respondent testified, was cross examined by Mr. Komen, and thereafter the respondents' case was closed. Mr. Komen indicated that the interested party would not testify. Parties were directed to file written submissions, and judgment was reserved for 12th April 2018. Judgment was however delivered on 4th July 2018 in the presence of counsel holding brief for the respondents and in the absence of counsel for the appellants or the interested party.

5. Months later, by an application dated 22nd March 2019 made under Order 12 Rule 7 of the Civil Procedure Rules through their advocates, Katama Ngeywa & Company Advocates, the appellants applied for an order of stay of execution of the decree and all consequential orders; and for the setting aside of "the ex parte judgment entered against" them and for the suit to be set down for hearing on merits.

6. Based on the supporting affidavit of Jackson Barchuro and the grounds in support of the application, the appellants' asserted that there was no proper service of a hearing notice on their advocates; that they only learnt of the existence of the judgment on 14th March 2019 when they received a letter from the respondents' advocates dated 1st March 2019 demanding they vacate the property within 30 days or face eviction; that on 18th March 2019, they were served with an order of eviction issued on 1st March 2019; and that their defence and counterclaim raised triable issues including the defence of limitation;

that in the meantime, two of the four brothers, namely, Francis Barchuro and Chebutiei Koin who were named as the 1st and 2nd defendants had died on 4th March 2017 and 16th June 2018 respectively and proceedings could not have been taken in the absence of their substitution.

7. Opposing the application, the respondents, in their grounds of opposition and replying affidavit sworn by the 1st respondent William Macharia Maina contended that the appellants were properly served with a hearing notice dated 4th December 2017; that despite the death of Francis Barchuro and Chebutiei Koin, the surviving brothers Jackson Barchuro and Daniel Ruto would have proceeded with the matter; that their claim for adverse possession could only have been initiated by way of originating summons; and that there was delay in making the application. Regarding the contentious matter of service of hearing notice, reference was made to an affidavit of service sworn by Allan Mbugua Ngigi Advocate on 13th March 2017 who deponed that he had the conduct of the matter on behalf of the respondents and:

> " 2. That on 4th December 2017, I caused service of Hearing Notice upon the clerk with the firm of M/s Komen Kipchirchir & Co. Advocates who acknowledged service by signing and stamping on my principal copy.
>
> 3. That on 5th December 2017, I proceeded with the same service through registered post No RD121793762 KE to the firm of M/S Katama Ngeywa & Co Advocates return here duly served." [Emphasis added]

8. Regarding the postage, the certificate of posting does not appear to have been attached or exhibited with the affidavit of service and neither is it part of the record before us.

9. Having considered the application dated 22nd March 2019 alongside an application for substitution dated 5th April 2019, and having considered the rival submissions, the learned Judge delivered the impugned ruling dated 8th August 2019 in which she found, on the issue of service, that "that there was proper service, and the [appellants] just woke up when judgment and decree were up for execution." On the application for substitution dated 5th April 2019, the learned Judge stated:

> " No explanation was given why the applicant did not file an application for revival of the suit and why substitution was not done expeditiously. I find that the application for revival of an abated suit against the defendant lacks merit and is therefore declined."

10. In the end the judge concluded as follows:

> " Having found that there was proper service and that there was inordinate delay in bring (sic) an application for revival of the suit that had abated and substitution of one of the defendants, I find that the applications lack merit and are therefore dismissed with costs to the plaintiffs."

11. Aggrieved, the appellants filed a Notice of Appeal dated 10th August 2019 and subsequently lodged this appeal in which they fault the Judge for holding that there was proper service of the notice of hearing; for failing to find that there were proper grounds for setting aside the judgment; and for finding that their defence did not raise triable issues.

12. We heard the appeal on 25th April 2024 when learned counsel Mr. Katama Ngeywa appeared for the appellants while Mr. Simiyu, learned counsel, appeared for the respondents. They orally highlighted their written submissions dated 16th April 2024 and 8th April 2024 respectively. The essence of the appellants' arguments is that the learned Judge should have set aside the judgment against them because

they were not served with a hearing notice. Apart from flaws in the date of the affidavit of service, it was urged that it did not include a copy of the hearing notice or evidence of postage.

13. The appellants maintain that they were only made aware of the judgment against them when they received a letter to which reference has already been made. It is urged that the appellants have a defence on the merits of the case, including a defence of limitation of action and a counterclaim in adverse possession; that they have been in possession of the property since before the deceased obtained registration. The appellants cite precedents, including the decision in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another*, Civil Appeal No 6 of 2015 [2016] eKLR to support their argument that a judgment entered without service or proper service is irregular and should be set aside as a matter of right.

14. It was submitted that even if the Court were to find that the judgment was regularly obtained, the Court should also consider that the appellants have a defence on merits which raises triable issues. In support the case of *Muthaiga Road Trust Company Ltd v Five Continents Stationers Ltd & 2 others*, Civil Appeal No 298 2001 [2003] eKLR was cited.

15. In the written submissions dated 8th April 2024, counsel for the respondents appeared to focus on defending the judgment delivered on 4th July 2018 as opposed to the ruling of the court declining to set aside that judgment. The respondents argue that the appellants are focusing on procedural technicalities regarding the service of notice; that the appeal lacks merit and is an attempt to re-litigate settled issues. Mr. Simiyu urged that the appeal has no merit and the judgment should stand; that attempts to overturn the judgment based on procedural technicalities are without merit.

16. Counsel submitted that service of the hearing notice was regular and in accordance with Order 5 of the *Civil Procedure Rules*; that no good reason is given for the appellants failure to attend court during the hearing; and that in any event the appellants are guilty of indolence and did not bother, for a long time, to establish from the court the status of the case. It was submitted that the appellants' defence does not raise triable issues; that in the judgment, the trial court considered the defence of limitation and adverse possession and found the same to lack merit.

17. We have considered the appeal and the submissions. An application to set aside judgment under Order 12 Rule 2 of the *Civil Procedure Rules*, such as the learned Judge was called upon to determine, involves exercise of judicial discretion. The circumstances under which this Court can interfere with exercise of discretion are limited. As pronounced 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."

18. With those principles in mind, the critical issue in this appeal is whether the learned Judge erred in concluding that there was proper service of the hearing notice on the appellants and that the resultant judgment was regular. As indicated earlier in this judgment, the appellants' advocates in the Memorandum of Appearance and in the Statement of Defence and Counterclaim provided their

address for service thus: "c/o Katama Ngeywa & Co. Advocates, Bokoli House, 1st Floor, Moi Avenue, P.O. Box 4196-30200, Kitale". The advocate for the respondents Mr. Allan Mbugua Ngigi undertook service of the hearing notice on the appellants. As indicated, he deponed in his affidavit of service that on 5th December 2017, he served the Hearing Notice through "registered post No RD121793762 KE to the firm of M/S Katama Ngeywa & Co Advocates."

19. The court was not provided with information regarding the address to which the hearing notice was sent. The certificate of posting in respect of the registered mail was not provided. Neither was a copy of the Hearing Notice that was said to have been served provided. It is unclear therefore on what material the learned Judge concluded that service was proper. Had the learned Judge considered that the certificate of posting and the address to which the Hearing Notice was allegedly sent were not provided to support the claims of service, the reasonable conclusion would have been that the respondents had not established that the appellants had been served with notice of hearing.

20. Absent evidence of service of the hearing notice, the judgment that ensued was in our view irregular. What this Court stated in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another (above) about an irregular default judgment obtained without the defendant having been served with summons to enter appearance, applies equally to the circumstances of this case that:

> " In an irregular default judgment, ..., judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

21. We respectfully agree and adopt that passage. It was incumbent upon the respondents to demonstrate, which they failed to do, that the hearing notice was duly served. Having failed to do so, the resulting judgment was liable to be set aside.

22. Even if we were to consider whether the defence raised triable issues, we are satisfied that it did. The claim by the appellants that the respondents' suit was barred by statute and their assertion of adverse possession over the property are matters that would require interrogation.

23. In end, we are satisfied that the learned Judge erred in failing to consider that the evidence of service of the hearing notice was insufficient. We are therefore entitled to interfere with the ruling of the learned Judge.

24. As regards the dismissal of the application for substitution, none of the grounds of appeal relate to that aspect of the ruling and none of the parties addressed us on the same. We do not therefore interfere with the decision of the learned Judge dismissing the application for substitution of the deceased brothers.

25. In conclusion, the appeal succeeds to the extent that we set aside the order of the trial court dismissing the appellants' application dated 22nd March 2019. We substitute therefor an order allowing the application and hereby set aside the judgment of the ELC delivered on 4th July 2018.

26. The matter is remitted back to the ELC before a judge other than Odeny J, for hearing and determination on merits. The appellants shall have the costs of this appeal.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR