



REPUBLIC OF KENYA



**Govani v Shah & another; Jaff (Third party) (Civil Appeal 185 of 2019)
[2024] KECA 1775 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1775 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 185 OF 2019
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
DECEMBER 6, 2024**

BETWEEN

SADRUDIN TARMOHAMED MULJI GOVANI APPELLANT

AND

SANJEET K SHAH 1ST RESPONDENT

MANISHAH SHAH 2ND RESPONDENT

AND

DR KIBWANA ABDALLA ATHMAN JAFF THIRD PARTY

(Being an appeal from the decision and order of Environment and Land Court at Nairobi delivered by (A. K. Bor, J.) dated 7th March 2019 in ELC NO. 1468 of 2013)

JUDGMENT

1. Sanjeet K. Shah and Manishah Shah (the respondents) filed in the Environment and Land Court (the ELC) a plaint dated 27th November 2013 seeking permanent injunction against Sadrudin Tarmohammed Mulji Govani (the appellant) to restrain him, his servants, agents or in any way whatsoever from disposing off, interfering, constructing, trespassing, entering in any manner whatsoever or dealing with L.R. No. 4242/46 Kitusuru (the suit property) and all the improvements thereon; damages for trespass; and costs of the suit. The appellant entered appearance and filed a defence dated 19th December 2014. However, he did not file witness statements.
2. The suit proceeded for hearing. On 7th March 2019, the respondents' witness being the 1st respondent testified in support of their case. According to the trial court record, counsel for the respondents informed the court that she had just been served with the appellant's documents and witness statement after taking the respondents' evidence. She thus asked the court that the said documents



be not admitted in evidence. Counsel for the appellant stated that he had informed counsel for the respondents on the difficulty in filing the witness statements and sought an adjournment.

3. The learned Judge in her ruling stated that the matter before her was an old one having been filed in the year 2013. She observed that the appellant was granted leave to file and serve the statements and documents within 7 days on 16th January 2019 during the pre-trial hearing but had failed to comply; and that as a consequence, the hearing would proceed and the appellant was directed to only rely on his defence. Thereafter parties were directed to file and exchange their respective written submissions within 14 days.
4. Aggrieved by the said order, the appellant preferred this appeal on 10 grounds summarised as follows: That the learned Judge erred in law and in fact: in refusing to exercise her discretion under Order 50 Rule 6 of the Civil Procedure Rules to grant leave to the appellant to file and serve his witness statement and bundle of documents out of time; in refusing to admit in the court's record the appellant's witness statement and bundle of documents despite the documents being erstwhile filed and made available on 7th March 2019 for the purposes of the court's record; in refusing to exercise her discretion to adjourn the hearing to give the parties sufficient time to review the appellant's witness statements and bundle of documents despite the parties informing the court in the first instance and before the commencement of the hearing, of their prior agreement to seek an adjournment; in refusing to exercise her discretion to adjourn the defence hearing after the closure of the respondents' case despite the appellant's advocates having informed the court that they had managed to file the witness statement and bundle of documents and were ready to comply with the orders; in refusing to exercise her discretion to adjourn the hearing despite (i) there being no other adjournment of the hearing previously sought by any of the parties as this was the first time that the matter had been scheduled for hearing and (ii) the appellant had not conducted himself in such a manner so as to delay the determination of the matter or to obstruct the course of justice; and in failing to appreciate Article 159(2) of the Constitution of Kenya 2010 and to ensure substantive justice was administered between the parties.
5. The appellant prayed that: the appeal be allowed; the orders issued on 7th March 2019 in ELC No. 1468 of 2013 be set aside; the witness statement and the bundle of documents filed out of time without leave of the court be deemed as properly filed; and that subsequent to the above order, the filed witness statement and the bundle of documents be admitted to the court's record.
6. This appeal came before us for hearing on 10th June 2024. Learned counsel Mrs. Macharia was present for the appellant while learned counsel Mr. Michuki was present for the respondent. Both parties had also filed their respective written submissions.
7. In highlighting the appellant's submissions dated 6th February 2020, Mrs. Macharia condensed the grounds of appeal into three. She submitted that the learned Judge erred in exercise of her discretion in refusing to grant an adjournment at the beginning of the hearing, following the close of the respondents' case. She stated that the reason advanced by the Judge in refusing to grant an adjournment is the age of the case; and that this reason overlooked the significant delays in the matter that were occasioned by the respondents.
8. It was submitted that pre-trial directions were fixed on two occasions, namely on 3rd July 2018 and 16th January 2019 respectively, which was 6 years after the suit had been filed; that on both occasions, the respondents did not comply with the directions given by the court; that furthermore, the court acknowledged that the appellant, being the defendant in the case could not comply with the directions before the respondents did; and that that is why the appellant was late in filing his witness statement as well as the documentary evidence.



9. Counsel went on to state that the appellant was served with the respondents' witness statement and the documents on 23rd January 2019 instead of 19th January 2019 during the pre-trial conference; that despite the respondents filing their documents out of time and without obtaining the court's permission, these documents were nonetheless admitted into the record.
10. Mrs. Macharia told us that they were able to file their documents on 7th of March 2019, and this was after a failed attempt on 5th March 2019 because the court file was in the Judge's chamber, hence the delay. The appellant cited the decision of Jafeth Pasi Kilonga and 8 others vs. Mombasa Autocare Limited (2015) eKLR where this Court held that in refusing to grant adjournment or leave to do anything required of a party, the court should consider the overall conduct of the parties, the sufficiency of the reasons advanced and the potential for occasioning an injustice.
11. It was submitted to us that Mr. Situma, learned counsel who was representing the appellant at that time, faced significant health challenges that severely impacted on his professional responsibilities; that as a result in November 2019, Mr. Situma had to resign from the law firm; that therefore, the missed deadlines were also occasioned by Mr. Situma's health challenges, which the firm did not know about; and that overall, the history of the matter attested that the appellant was applying for adjournment for the first time.
12. Ms. Macharia stated that the documents already filed in court by the appellant are essential for the substantive determination of the matter. She hinged this argument on the assertion that the filed documents will aid the court to determine the true owner of the suit land, as the suit property is currently entangled in two conflicting title documents; and that if the trial Judge considers only one side of the story, she may not be able to make an objective decision. Counsel pleaded with us to grant the appellant another chance to have the suit heard substantively.
13. Counsel went on to state that prior to the hearing date, appellant's counsel had informed the respondents' counsel of the difficulty he was facing in trying to file a witness statement and documents on time; that in any case, the learned Judge refused to grant him a chance to tender his defence despite him being present in court and the court being informed of his presence; that hence, the court did not consider the overriding objective of doing justice as envisaged under section 1A and 1B of the *Civil Procedure Act*; and that overall, she misdirected her mind in declining the request for adjournment when on the other side, the respondents had not alluded to any prejudice that would be occasioned to them if adjournment was not granted.
14. In conclusion, the appellant contended that the longevity of the matter in court was largely attributable to the respondents who sought several adjournments while he only sought adjournment once during the hearing on 7th March 2019; and that the failure to accord him an opportunity to tender his defence violated his right to hearing under Articles 48 and 50 of *the Constitution*, which he urged us to uphold.
15. In highlighting the respondents' submissions dated 25th July 2023, Mr. Michuki submitted that the main issue before this Court was the exercise of discretion of the court; that in determining whether the learned Judge properly exercised her discretion whilst declining to grant an adjournment to the appellant, we should be guided by the locus classicus case of Mbogo vs. Shah (1968) EA on what a court ought to consider at an appellate level in order to overturn a decision on exercise of discretion of the court below.
16. Counsel cautioned and asked us to be wary of interfering with exercise of discretion as it is tantamount to robbing a trial court its inherent power in this regard; and that more so bearing in mind that the issue at hand relates to the trial court's inherent discretion to control its processes, we should be slow to disturb the order issued by the trial court.



17. Counsel contended that the appellant's previous conduct attests that he was not deserving of the court's discretion to grant him adjournment; and that in any event, the facts he alluded to that occasioned the delay in filing his witness statement and documents were not supported by the evidence on record, and had no basis.
18. Counsel contended that Order 50 Rule 6 of the Civil Procedure Rules does not apply in the present proceedings; that that was because when the suit came up for hearing on 7th March 2019, any application for adjournment that a party required to make fell squarely under Order 17 of the Civil Procedure Rules; that in the present case, during the hearing, the appellant did not at all give an indication that he intended to apply for adjournment; that in fact, he informed the court that he intended to call one witness; that on that basis, the court set down the suit for hearing; that it was only after the respondents had closed their case that the appellant served the respondents with his witness statement and documents and then applied for leave to formally file them; that after the adjournment sought was declined the appellant turned around to say that the learned judge had refused to grant him a chance to testify despite him being present in court.
19. It was submitted that until the appellant served the respondents' counsel with his documents, they were aware that the suit was proceeding on the basis only of his defense as directions had been issued on the 16th January 2019 for parties to file any statements and documents if they wished, but the appellant did not comply.
20. Mr. Michuki submitted that the suit was filed before the amendment to Order 11 of the Civil Procedure Rules; and that prior to 16th January 2019, what had been filed by the respondents was not a comprehensive witness statement consequent to which on this date, the respondents sought leave to file a comprehensive witness statement; that the respondents duly filed and served the witness statement on the appellant on 23rd January 2019, giving the appellant sufficient time to respond, but that the appellant did not comply. Further, that if the appellant was out of time for genuine reasons, he would have served the witness statement and documents on the respondents early enough and then await to make an application to admit them on record on the hearing date. However, this was not to be as he waited until the hearing day when he simultaneously served the documents and applied for leave; that this was a clear testament that he was hell bent to have the matter adjourned; and that he therefore he must bear the consequences. The court duly and properly exercise its discretion to order that the matter does proceed to its conclusion.
21. Counsel further submitted that Article 159(2) (b) of *the Constitution* is a double-edged sword since it also seeks that justice be administered without delay and that is what purposely and specifically the Judge did. Finally, it was contended that the documents which the appellant wished to be admitted on record were not properly filed pursuant to the provisions of Order 3, Rule 3, as read with Order 7, Rule 17 as he only left them with the Deputy Registrar but were not stamped by the registry. Consequently, his request that they be deemed as properly filed on record had no basis.
22. We have considered the appeal, the oral and written arguments by the respective counsel and the law. This is a first appeal. Our duty is to re-assess and re-evaluate the evidence as presented before the trial court and draw our own conclusion bearing in mind that we neither saw nor heard the witnesses testify and so give due regard for that. However, we are cautious that it is not open to us to arrive at a different conclusion when reviewing the trial court's decision simply because we would have reached a different



result if we were hearing the matter for the first time. In *Kenya Ports Authority vs. Kuston (Kenya) Limited* (2009) 2EA 212, the predecessor of this Court held as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

23. The single issue for determination is whether the learned Judge exercised her discretion properly in refusing to grant an adjournment and to grant leave for the appellant to file documents and witness statements.

24. Discretion is generally defined to mean the power and/or ability an individual has, to make decisions based on the assessment of the circumstances before him. The Black’s Law Dictionary 9th Edition defines judicial discretion as:

“court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

25. This Court in *JMM vs. (2023) KECA 99 (KLR)* held, inter alia:

“Judicial discretion then is 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. Every discretion be it judicial and judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. There is no hard and fast rule as to the exercise of judicial discretion by a court because if it happens then, discretion will become fettered.”

26. The guiding principles on the extent to which an appellate court should interfere with discretion of a trial court was stated in *Mbogo vs. Shah* (1968) EA 93 as follows:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It would be wrong for this Court to interfere with the exercise of the trial Judge’s discretion merely because this Court’s decision have been different.”

27. In this appeal, what is not disputed is that the appellant’s counsel served the respondents’ counsel with documents and witness statements at the close of the respondents’ case. The reason advanced by counsel for the appellant is that they encountered difficulties in filing the witness statement and they therefore sought an adjournment.

28. In declining to grant the appellant his prayer, the learned Judge held:

“This is an old matter filed in 2013. The defendants were given leave to file and serve their documents and witness statements on 16/1/2019, they were to file and serve within 7 days. They did not do this as directed by the court. They only filed and served on the plaintiff’s advocate after the plaintiff had testified. The court did not grant leave to defendant to file the statement and documents this morning. The documents and witness statements are not



on the court record. The defendant will only rely on its defence filed on 19/12/2014. Parties are directed to file and exchange written submission within 14 days of today...”

29. Indeed, on 16th January 2019, the court gave directions on the filing and service of documents by the parties. The appellant was given an opportunity to file and serve his documents within 7 days after service by the respondents. The appellant had approximately some 2 months within which to comply. There are two reasons advanced by Mrs. Macharia on why they were unable to comply on time. First, the alleged personal health challenges that the then counsel for the appellant, Mr. Situma was undergoing. However, nothing has been presented to us to demonstrate the alleged medical issues that Mr. Situma was undergoing in order not to have the capacity to undertake his professional duties. In any event, that is information which the trial court was not privy to as there was no mention of the health status of Mr. Situma before the trial court.
30. Secondly, Mrs. Macharia submitted that failure to find the file which was alleged to have been in the Judge’s chamber, resulted in them not filing the witness statement on time. We have read the email dated 6th March 2019 from the appellant’s counsel Mr. Situma. It does not bespeak of the fact that the appellant was unable to file his witness statement on time due to unavailability of the file. Similarly, even before the trial court, Mr. Situma did not make a mention of it.
31. To us, it behoves a party who is in default, and who seeks the court’s discretion, to place relevant material before the court to satisfy the court that despite his/her omission, discretion should nevertheless be exercised in his/her favour. This, is a burden which the appellant has not discharged.
32. In the premises, we find no basis to fault the decision of the learned Judge in exercising her discretion to disallow the adjournment sought and the admission of documents and witness statements by the appellant. It follows that this appeal has no merit and we hereby dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

