



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Opaille v Olumatia & another (Civil Appeal 205 of 2019)  
[2022] KECA 134 (KLR) (11 February 2022) (Judgment)**

Neutral citation: [2022] KECA 134 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 205 OF 2019  
PO KIAGE, K M'INOTI & M NGUGI, JJA  
FEBRUARY 11, 2022**

**BETWEEN**

**LUKAS ORENDE OPAILE ..... APPELLANT**

**AND**

**PENINA LYNET OLUMATIA ..... 1<sup>ST</sup> RESPONDENT**

**PROTUS OMBAKA SHITUBI ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Ruling and Orders of the Environment and Land Court  
at Kakamega (Matheka, J.) dated 26th June, 2019 in ELC NO. 477 OF 2014)*

**JUDGMENT**

1. By this appeal, the appellant, Lukas Orende Opaille, challenges the ruling and order of Matheka, J. by which his application for the court to set aside, vary and/or review its orders made on 15<sup>th</sup> October, 2018 was dismissed with costs. Other orders sought in the application included;
  4. THAT upon granting of prayer (3) above of this notice of motion, the 1<sup>st</sup> respondent and her witness recalled but limited for their cross-examination and thereafter the applicant be allowed to testify and call his witnesses for this suit to be heard and determined on merits;
  5. THAT costs of this application be in the cause.”
2. The application stemmed from an *ex parte* judgment of the Environment and Land Court made in default of appearance of the appellant and the 2<sup>nd</sup> respondent. In that judgment, the court gave an order of permanent injunction restraining the appellant and the 2<sup>nd</sup> respondent from evicting the 1<sup>st</sup> respondent or interfering with her portion of one acre of land which she had purchased from the appellant.



3. The appellant complained in that application that although the hearing date of 15<sup>th</sup> October, 2018 was taken by consent on 12<sup>th</sup> July, 2018 between the advocates on record for both the appellant and the 1<sup>st</sup> respondent, his advocate inadvertently failed to advise him to attend court for hearing and that due to a pressing personal issue the advocate was attending to, the hearing date escaped his mind and he failed to instruct another advocate to hold his brief.
4. In reply, the 1<sup>st</sup> respondent contended that the appellant, who was her neighbour, was present in court when the suit was fixed for hearing on 15<sup>th</sup> October, 2018, therefore he ought to have attended court, whether he was informed of the hearing date by his counsel or not. In any case, submitted the 1<sup>st</sup> respondent in determining the suit, the court considered the appellant's material on record being; written statements, exhibits and statement of defence.
5. Aggrieved by the ruling in the application, the appellant filed a notice of appeal, followed with a memorandum of appeal containing nine (9) grounds which are that the learned Judge erred by;
  1. Applying the principles applicable to an application for Review under Order 45 of the *Civil Procedure Rules, 2010* instead of applying the principles for setting aside a Judgment or Order under Order 12;
  2. Holding that the suit was res judicata which was not an issue for determination;
  3. Holding that the appellant has failed to show any mistake or error apparent on the face of record and /or any sufficient reason to set aside its decision when the issue before the court was quite different;
  4. Misdirecting herself as to the principles applicable in setting aside a default order or judgment;
  5. Holding that the appellant did not deny knowledge of the hearing date yet he did on oath;
  6. Failing to take into account the Appellant's affidavits and submissions;
  7. Failing to apply principles as enunciated by the Court of Appeal in similar situations;
  8. Issuing a decision that has occasioned the Appellant injustice and does not amount to a fair hearing under Article 50 of the Constitution.
6. The firm of Gichaba & Company Advocates for the appellant, and Elizabeth Chunge & Company Advocates for the 1<sup>st</sup> respondent, relied on their filed written submissions.
7. It is submitted on behalf of the appellant that the trial court delivered judgment in the main suit while an application to set aside *ex parte* proceedings was still pending before it. Further, in determining the matter, the trial court applied principles applicable to applications for review, which the application before it was not. On the principles upon which the Court exercises discretion in setting aside a court order or judgment, the appellant's counsel cited *Shah -vs- Mbogo & Another* [ 1967] EA 116 , where the High Court held;

"This discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. The motion should therefore be refused".



8. The case of *Wachira Karani -vs- Bildad Wachira* [2016] eKLR is also relied on for the proposition that where an *ex parte* judgment has been issued, a defaulting party should be heard if he has sound reasons. Counsel further asserts that the appellant's statement of defence raises serious issues of law, for instance, that the agreement for sale of the suit land was frustrated for lack of consent from the Land Control Board within the stipulated time. In the end, Counsel urges this Court to allow the appeal with costs among other prayers.
9. On her part, Counsel for the 1<sup>st</sup> respondent affirms the finding of the trial court as correct, lamenting that the appellant has caused the 1<sup>st</sup> respondent untold suffering having barred her from accessing her home on the suit land. Counsel implores this Court to dismiss the appeal with costs.
10. The primary issue for determination in this appeal is whether the learned Judge wrongly exercised her discretion in declining the appellant's application for setting aside the *ex parte* judgment. As an appellate Court, we interfere with the discretion of a first instance Judge under well-known circumstances. In *Mbogo -vs- Shab* [1968] EA 93 De Lestang VP (as he then was) observed at page 94;

"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."

11. The appellant contends that the learned judge erred by applying principles applicable to an application for review under Order 45 of the Civil Procedure Rules, 2010 instead of applying the principles for setting aside a judgment under Order 12 of the same. From our review of the record, the third prayer of the appellant's application before the trial court was;

"That this Honourable Court be pleased to set aside and vary and/or review its orders made on 15<sup>th</sup> October 2018"

12. It would seem that the appellant was seeking both the relief of "setting aside" and "review" of the *ex parte* judgment or, in the alternative, either of the reliefs, by the use of the connecting words "and/or". The appellant cannot therefore fault the trial court for proceeding to consider the matter on the basis of the relief of review only. Even so, supposing what the appellant intended, as he claims, was for the matter to be considered for the relief of setting aside of the *ex parte* judgment, did the application meet the test for setting aside the impugned judgment? As rightly pointed out by the appellant, in the case of *Shab (supra)* the court was clear that the discretion of setting aside an *ex parte* judgment was intended to correct an accident or an excusable mistake, "but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice". This holding was later upheld by this Court in *Mbogo -vs- Shab* [1968] EA 93. The appellant concedes that the hearing date in the matter was fixed by consent of both parties, but that on the said date his counsel had a personal emergency and the date escaped his mind, with the result that he did not attend court. We do not find such an explanation tenable. Such conduct was bound to delay the cause of justice and we do not think that the learned judge acted perversely in not acceding to the setting aside/review application.
13. We also take cognisance of this Court's holding in *CMC Holdings Limited -vs- James Mumo Nzioki* [2004] eKLR that;

"The law is now well settled that in an application for setting aside *ex parte* judgment, the Court must consider not only reasons why the defence was not filed or for that matter why



the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues”.

14. The appellant asserts that his statement of defence raises serious triable issues of law like the fact that, the agreement for sale of the suit land was frustrated for lack of consent from the Land Control Board within the stipulated time. A reading of the record however reveals that despite the appellant selling to the 1<sup>st</sup> respondent a one acre piece of land under a valid contract of sale, he failed to obtain the requisite consent from the Land Control Board on the premise that his family had not consented to the sale. The trial court in its judgment ordered the appellant to appear before the Land Control Board and sign all the requisite documents in order to effect the transfer of the one-acre portion of land to the 1<sup>st</sup> respondent. We think the trial court adequately addressed all germane issues in the matter to meet the ends of justice. Ultimately, we find no reason to interfere with the learned Judge’s exercise of discretion in the matter.
15. In consequence, this appeal is devoid of merit and we dismiss it with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**K. M’INOTI**

.....

**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

