**Othuon & 6 others v Odero (Civil Appeal (Application) 51 of 2017) [2022] KECA 886 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 886 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CIVIL APPEAL (APPLICATION) 51 OF 2017**

**W KARANJA, S OLE KANTAI & M NGUGI, JJA**

**MAY 13, 2022**

**BETWEEN**

**DAUDI OTIENO OTHUON ..... 1ST APPELLANT**

**JOHN ABSALOM ODUOR OTHUON ..... 2ND APPELLANT**

**DAVID OTIENO ..... 3RD APPELLANT**

**CALEB OKOTH OUMA ..... 4TH APPELLANT**

**WILSON ODUOR OUMA ..... 5TH APPELLANT**

**DAMAR ACHIENG OUMA ..... 6TH APPELLANT**

**BOARD OF ELDERS ST. PAULS METHODIST CHURCH ..... 7TH APPELLANT**

**AND**

**MELITUS OLUOCH ODERO ..... RESPONDENT**

***(Being an appeal from the Ruling of the Environment and Land Court at Kisumu (S. K. Kibunja, J) delivered on 1st March, 2017 in ELC Case No. 818 of 2015)***

## JUDGMENT

1. Melitus Oluoch Odero (the respondent) was the plaintiff in ELC Case No. 818 of 2015 filed at the Environment and Land Court (ELC) at Kisumu. He sued the appellants vide a plaint dated 21st October, 1995, which was amended on 26th March, 1997 and further amended on 13th December,2011. He averred to be the rightful owner of land parcel number Uholo/Ugunja/264 (the suit property) which had been sub-divided into various parcels namely Uholo/Ugunja/840, 841, 842, 843, 844, 845, 846,847, 849, 850, 851, 852 and 853, which he inherited from his deceased father, Odero Oluoch, in 1956. That during the years 1970/71 when land adjudication was being conducted, he was

away and the 1st respondent unlawfully registered the suit property in his name. The 1st respondent caused the parcels of land to be registered and possession given to the 2nd to 7th respondents as follows:

a. Parcels Nos. 840, 846 and 850 - 2nd respondent

b. Parcels Nos. 841, 848 and 851 - 3rd respondent

c. Parcels Nos. 842, 849 and 852 - 4th respondent

d. Parcels Nos. 845, 847 and 853 - 5th respondent

e. Parcel No. 844 - 7th respondent

2. It was the respondent's contention that the 1st appellant held the suit property in trust and so in sub dividing and transferring the same to himself and selling part of it to other parties, he had breached the trust. His claim against the appellants was jointly and severally for the recovery of the said parcels of land. He prayed that judgment be entered for: a declaration that the registration of the said parcels of land was fraudulent or procured by fraud; a declaration that the appellants held the parcels of land in trust; an order for correction or rectification of the register accordingly; transfer the respondent's portion of land fraudulently registered into his name.

3. This claim was denied by the appellants who averred that they were the registered proprietors of the respective parcels of land. After close of the pleadings the matter was adjourned on several occasions for one reason or another. On 15th December, 2011 at the High Court registry learned counsel for the 1st respondent took a hearing date in the absence of the 1st appellant. The matter was fixed for hearing on 9th May, 2012 and counsel for the respondent was supposed to serve the hearing notice on counsel for the 1st appellant.

4. On the scheduled hearing date, learned counsel Mrs Staussi, appeared for the respondent but there was no appearance for the appellants. The respondent was present in court with eight (8) witnesses. Mrs Staussi confirmed to the court that the hearing notice had been served on counsel for the appellants herein but they were absent. She had filed an affidavit of service as proof of service on the appellants' counsel. The learned Judge (Abida Ali-Aroni J), having satisfied herself that the appellant's counsel was properly served with the hearing notice, and after considering the length of time the matter had been pending in court, decided to proceed with the hearing in the absence of the appellants.

5. The court took the evidence of the seven (7) witnesses who were present in court and reserved the matter for submissions to be filed within 30 days. It would appear from the record, however, that neither party filed any submissions as directed by the court and so the court reserved the matter for judgment to be delivered on 18th October, 2012. Judgment in the matter was eventually delivered on 19th August, 2013 in favour of the respondent herein.

6. Aggrieved by the judgment and subsequent orders arising therefrom, the appellants filed the Notice of Motion dated 25th July, 2016 in which they sought, orders, inter alia, as follows:

    i. Temporary injunction orders restraining the respondent from evicting the appellants pending the hearing and determination of the application.

    ii. Setting aside of the execution order issued on 30th August, 2013, pursuant to the judgment dated 6th August 2013, delivered on the 19th August 2013, resulting to the cancellation of the listed parcels and setting aside the registration of the Plaintiff with title to land parcel Uholo/Ugunja/264.

iii. Setting aside of the exparte proceedings of 9th May 2012, judgment of 6th August 2013, delivered on the 19th august 2013 and order issued on 30th August 2013.

7. The application was predicated on the 14 grounds on its face and supported by the affidavit of Wilson Oduor Ouma, the 5th appellant, sworn on the 25th July, 2016 summarized as follows: that the Judge who heard the case had no jurisdiction to hear and determine the matter; the respondent had not served the appellants with "full pleadings" hence denying the appellants the opportunity to know the case they were facing so as to respond to it appropriately; that their advocate forgot to diarize the hearing date and to inform them of the date; that they were not served with any other notices and only came to know of the judgment on or about 27th July, 2014; the judgment was executed before the determination of costs.

8. Other grounds were that William Onyango Oluoch, who was appointed the co-administrator of the estate of Pius Odero Oluoch with the respondent in Nairobi H.C. Succession Cause No. 2334 of 1995 was never joined as a party in this suit and that the grant of letters of administration issued to them has never been confirmed; the judgment affected parcels of land registered in the names of persons who were not parties in this suit; the appellants' new advocates on record received the file relating to the case from the counsel previously on record on the 20th May, 2016.

9. The respondent opposed the motion vide a replying affidavit in which he deposed that the court had jurisdiction to hear and determine the matter even if it was part heard; notice of delivery of judgment was issued and served on the appellants' counsel; he did not have to sue with his co-administrator and that his claim was not only to apportion the suit land and that the respondents had failed to attend court on several occasions and had shown lack of interest in the matter. The trial court heard the motion and in its ruling dated 1st March, 2017 dismissed the motion with costs.

10. Aggrieved by that decision, the appellants have preferred an appeal to this court vide a Notice of Appeal dated 7th March, 2017 together with a memorandum of appeal dated 25th May, 2017 raising 14 grounds of appeal.

11. The appellants fault the trial court basically for failing to analyze the factual and legal issues canvassed before it; overlooking the undisputed facts; for finding that the appellants' failure to attend court can only be remedied by

    a claim against their counsel for negligence; failing to find that the respondent acquired title to the suit property through an execution process which was undertaken illegally, irregularly and without jurisdiction and that the court erred in failing to give them a chance to be heard. They pray that the appeal be allowed and the orders of 1st March, 2017 be set aside.

12. The appeal was canvassed by way of written submissions with brief highlighting at the plenary hearing by learned counsel Mr. Otieno and Mr. Olel who appeared for the appellants and the respondent respectively.

13. For the appellants, it was submitted that the court erred by overlooking the undisputed fact that failure by their counsel to attend court was because he forgot to diarize the matter when they were served, and suing the counsel was not a remedy that would solve the dispute. Further, that the court erred when it stated that they stalled the suit yet when it came up for hearing on 10th March, 2010 the suit was adjourned because the respondent was not ready to proceed and on 29th September, 2010 it is the respondent's advocate who sought for an adjournment. The matter came up for hearing on two occasions and the suit was heard on 9th May, 2012 and in the various applications which had been filed, the same were adjourned at the instance of the respondent's counsel.

14. On delivery of judgment the court was blamed for failing to issue a notice contrary to Order 21 Rule 1 of the Civil Procedure Rules, which is framed in mandatory terms. They were entitled to be informed on when the submissions were to be filed and when the matter was to be fixed for purposes of fixing a judgment date.

15. The appellants further submitted that the decree was extracted irregularly contrary to Order 21 Rule 8 of the Civil Procedure Rules and premised on this irregular decree the registrar cancelled the titles in the appellants' names and the same was registered in the respondent's name. Thus, the execution process was irregular and the learned Judge ought to have so found. To buttress this argument, the Court was referred to the decisions in *Standard Chartered Bank v. Intercom Services Ltd & 4 Others* [2004] eKLR and *National Bank of Kenya Ltd v. Wilson Ndolo Ayah* [2009] eKLR.

16. It was further submitted that the court failed to find that execution of a decree before the determination of the amount of costs payable is permissible only with leave of the court. The respondent did not seek leave of the court before he commenced execution, thus the court ought to have declared the execution process null and void.

17. Further, that the court failed to find that they had a good defence. The respondent was acting for the estate and not in his own capacity as claimed. From the evidence, it was clear that the 1st appellant had a portion of the land which was being claimed by the respondent. It was their defence that the land having been registered in 1970, the claim was barred by limitation of time under Section 7 of the *Limitation of Actions Act*.

18. The appellants submitted that the court failed to consider that several persons who had acquired interest in the property had not been made parties to the suit. It was the duty of the respondent to inform them. Finally, the Court was urged to allow the appeal.

19. In opposing the appeal, the respondent urged this Court to be guided by the principles in *Shah v. Mbogo* (1968) EA in exercising its discretion to interfere with the decision of an inferior court. The court has been urged to find that the failure by the appellants to attend court was for the entire period the suit was pending in court. The right to be heard is a universal principle but whether it applies or not depends on the circumstances of each case. Reference was made to the case of *Judicial Service Commission v. Mbalu Mutava & Another* (2015) eKLR.

20. On notice of the judgment, the appellants were served with the same by the deputy registrar and thus they cannot feign ignorance. In addition, the mention and hearing notices were served on the appellant's advocate on record and therefore there was fair trial.

21. In regard to execution of the judgment, counsel submitted that the court did not have to consider the same in an application to set aside proceedings and the judgment. The court was to consider whether due process was followed; whether the appellant gave a reason for not attending court and whether there was proper service of the hearing notice. In conclusion,counsel emphasized that the appellants cannot fault the court in its ruling and that litigation must come to an end the suit having been filed in 1996.

    The Court was urged to dismiss the appeal with costs.

22. Upon considering the record of appeal in its entirety along with the rival submissions and the relevant law we identify the sole issue for our determination to be whether the trial Judge judicially exercised his discretion in dismissing the application dated 25th July, 2016.

23. As noted earlier, the original plaint was filed in 1996 and the matter was heard on 9th May, 2012, a total of 16 years since filing. The suit was just 2 years shy of being classified as "an adult" suit. This was

pointed out by the learned Judge before she decided to hear the matter in the absence of the appellants. We remind ourselves that we must be slow in interfering with the exercise of discretion by the court below. There are parameters which we must be guided by before we can so interfere. These parameters were succinctly enunciated by the predecessor of this Court in *Mbogo v. Shah* (supra) where the Court stated: -

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."
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> See also *Magunga General Stores v. Pepco Distributors* (1987) eKLR.

24. Judgment was delivered on 19th August, 2013 and the appellants acknowledge that it came to their attention on 27th July, 2014. On 26th August, 2014, they filed a motion seeking to set aside the said judgment but 2 years later the same was withdrawn by consent on 20th July,2016, and the instant motion subject of this appeal was filed.

25. The appellants urged that the trial court did not have jurisdiction to determine the suit. Although this, being a jurisdictional issue ought to have been raised at the earliest opportunity before the trial court, we shall nonetheless address it here. When the suit was filed in 1996, the ELC had not been established. That court came into being after coming into force of *the Constitution* of Kenya 2010, by virtue of Article 162(2)(b). The *Environment and Land Act* No. 19 of 2011 became operational on 30th August, 2011. In the meantime, as a transitional measure, the Chief Justice issued practice directions on proceedings in respect of environment and land matters which would going forward be heard by the Environment and Land Court. These directions authorized the partly heard cases to continue before the court handling them but fresh matters were to be transferred to the ELC once it became operational. The first Environment and Land Courts were operationalized in October 2012 following the appointment of the pioneer Judges of the said court. This suit was heard on 9th May, 2012 and the issue of lack of jurisdiction does not, therefore, arise.

26. On failure by the appellants to attend Court, the appellants argue that since the advocate had failed to diarize the matter and hence the appellants were not informed, they should not be penalized and that the proceedings ought to be set aside. In our view however, the appellants had a duty to constantly check with their advocate the progress of their case. Whereas it would constitute a valid excuse for the appellants to argue that they had been let down by their counsel, the record is clear, in most occasions in court, their counsel was absent and so were the appellants. We note further that there was no deposition by counsel who is said to have failed to diarize the hearing date to confirm what is otherwise hearsay. We do not think that explanation sufficed to satisfy the court to adjourn the matter in view of the 16 years' delay.

27. The power to set aside ex-parte proceedings is discretionary and unfettered. *In Patel v. E.A Cargo Handling Services Ltd (1974) EA 75*, the court held

as follows:-

> " There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does so on such terms as may be just. The main concern of the

court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."

28. Did Kibunja, J err in dismissing the application to set aside the judgment of the High Court? Did he exercise his discretion in a judicial manner or was he malicious or capricious in the way he handled the matter? As stated above, this suit was filed in 1996 and only took off in 2012. This had been a long delay and therefore the suit had to proceed on the hearing date. The discretion to set aside has to be exercised to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but the same is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. See Mbogo v. Shah (supra).

29. In this case, we have no hesitation in finding that the appellants, from the history of the matter, were applying all means possible to delay the hearing. We are in agreement with the trial court's finding that the duty of the respondent and his counsel ended once the hearing notice was served on the appellant's counsel, and if the appellants are of the view their counsel was negligent, the law provides for a recourse against him.

30. Turning to the ground on notice on judgment, the appellants cannot dispute this yet there is a notice of delivery of judgment addressed to their counsel informing them that judgment was to be delivered on 19th August, 2013. This was pursuant to Order 21 rule 1 of the Civil Procedure Rules. The notice is in their initial application dated 26th August, 2014 which was dismissed by the court on 22nd September, 2014 for want of prosecution. This ground fails too.

31. The appellants have also challenged the execution process. In our view, this has nothing to do with the ruling that is the subject of this judgment and we shall say no more about it.

32. In conclusion, for the reasons we have given in this judgment, we are not persuaded that the learned Judge wrongly exercised his unfettered discretion in dismissing the Notice of Motion dated 25th July, 2016 to give us cause to interfere with the exercise of the said discretion. Accordingly, we find this appeal devoid of merit and dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

**MUMBI NGUGI**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**