



**Mombasa Cement Limited v Kitsao & 34 others (Civil Appeal
E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 562 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E016 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 24, 2022**

BETWEEN

MOMBASA CEMENT LIMITED APPELLANT

AND

SAMUEL CHARO KITSAO & 34 OTHERS RESPONDENT

*(Being an appeal from the ruling and orders of the Environment and Land Court
at Malindi delivered by [Olola, J.] on 27th May, 2020 in ELC Case 46 of 2010)*

JUDGMENT

1. The appeal is against the ruling of Olola, J. delivered on the 27th May, 2020, declining to set aside an ex parte judgment entered in the case.

There were two applications before the Court which were heard together and the impugned ruling rendered in answer to both. One of the applications is dated 12th February 2019 brought by the appellant, which is the defendant in the consolidated suits. In the application, the appellant sought a temporary order of stay of execution of the judgment delivered on 11th October, 2018 as well as setting aside of the ex parte judgment and the re-opening of the defence case for hearing.

2. There are 3 grounds listed in the memorandum of appeal. The appellant faults the Environment and Land Court (ELC) for dismissing its notice of motion application, accusing it of misdirecting itself in the exercise of discretion and for failing to consider the appellant's defence as filed. The appellant seeks to have the ruling dated 27th May, 2020 set aside, and the application dated 12th February 2019 heard afresh by a different judge; that in the alternative this court pronounces itself on the said application based on the submissions filed by the parties in the ELC.
3. This application was supported by an affidavit sworn by the appellant's Operations Manager one Javed Mohamed Sidik. In short, the deponent premised the application on grounds the appellant's defence was closed before it could prosecute it because the wife of the appellant's witness was ill and required



- his personal attention; that the defence raised triable issues; that there were pending applications in the case dated 31st December 2012; that there was a judgment in HCCC No. 185 of 1991 which declared the suit property a Wakf of the Mazrui, and their successors and was not available for adjudication.
4. The respondents opposed the application and urged that the appellant had not explained delays in prosecuting the application of 31st December, 2012, and in bringing its application to set aside judgment; that it did not give a satisfactory reason why its witness failed to attend court on 4th December, 2018; and that the alleged judgment in HCCC No. 185 of 1991 did not conflict with the judgment of the ELC.
 5. The second application is dated 25th February 2019 filed by an entity referring itself as Trustees of the Mazrui Community [Welfare and Development) Wakf Lands Trust [the Proposed Interested Parties]. It was seeking to be enjoined to the suit as interested parties or defendants; and further that the judgment delivered on the 11th October 2018 be set aside.
 6. The second application was supported by an affidavit sworn by Trustees Chairman, one Salim Al-Amin Suleiman Mazrui. In his affidavit he averred that the applicants were vested with the management of the property in Takaungu, Kilifi County, known as LR 4226; that there was a judgment issued in HCCC No. 134 of 1991 which declared the adjudication exercise carried out by the Government after divesting the applicants of the suit property was illegal null and void; that the suit properties was private property belonging exclusively to the Mazrui; and, that the impugned judgment had the effect of dispossessing them of their land.
 7. The respondents opposed the application, and in the main they urged that the applicants were total strangers to the suit, and that including them would only serve to convolute the case.
 8. The suit before the ELC had been instituted by the respondents, who claimed to have all been residing for many years in their respective portions of land situated at Vuma-Maweni/Takaungu village (hereinafter the suit properties) within Kilifi District; that their rights and interests were adjudicated upon and were ascertained in accordance with the law. That they were aggrieved by the appellant's actions of fencing off and cutting the respondents' trees on the suit land and denying them use of the land. They sued the appellant which, in its defence averred that a number of the respondents sold the suit land to it on willing buyer- willing seller basis.
 9. The ELC, after considering the reason given by the appellant why its witness was not able to attend court on 4th December 2017; after considering the numerous number of times the case was adjourned on account of the appellant; considering the delay of bringing the application under consideration of almost a year, concluded that the application was not merited for lack of supporting document to prove that the wife of the appellant's witness was indeed ill as to prevent him attend court; that the reason for the delay in bringing the instant application until judgment was entered was unreasonable, and that in all the appellant had failed to demonstrate excusable mistake, accident or inadvertence to warrant the court exercise its discretion in his favour.
 10. In regard to the application by the Proposed Interested Parties it was dismissed and is not appealed. We leave it at that.
 11. The appellant was represented by Kanyi J & Co Advocates, who filed submissions dated 2nd October 2021. Ms. Mango learned counsel argued this appeal before us virtually on 16th March 2022. Counsel relied on the case of *Pitbon Waweru Maina v Thuka Mugiria* (1983) eKLR and urged that the court ought to have considered that the appellant's defence raised triable issues. The court was faulted for failing to find that the respondents would suffer no prejudice if the defence case was reopened; that the reason given by the appellant for non-attendance was excusable. It was further pointed out that



the judgment of the court was in conflict with the decision in HCCC 185 of 1991 where it was found that the repeal of the Mazrui Land Trust Act was null and void therefore all the affected parcels of land including that of the appellant, vested in the Mazrui as the lawful proprietors.

12. Submissions in opposition to the appeal were filed by J.K. Mwarandu & Co Advocates and were dated 9th November, 2021. Mr. Shujaa learned counsel from the same firm represented the respondents in this appeal. Counsel, relied on the case of *Philes Nyokabi Kamau v ICDC*, Civil Appeal 263 of 2014 for the proposition that a judge's discretion ought not to be interfered with unless there was misdirection of law, a misapprehension of facts, consideration of irrelevant factors or failure to consider relevant matters resulting in a wrong decision and injustice. Counsel posited that the court did not err but was not satisfied with the reason given by the appellant's witness for failing to attend court on the day of the hearing. It was also pointed out that the court noted the appellant was guilty of laches and hence undeserving of discretion; that the appellant's case was closed in December 2017 and the application was presented in February 2019; that the delay was unexplained. It was refuted that the judgment in HCCC 185 of 1991 conflicts with the judgment rendered by the court.
13. This is a first appeal. The appellant is challenging the exercise of discretion by the ELC, and has urged us to set aside the decision appealed for being erroneous. In order for us to interfere with the exercise of discretion by the Judge, certain parameters must be met. This Court in *Mulemi v Angweye & another* (Civil Appeal 170 of 2016) [2021] KECA 214 (KLR) (Civ) (5 November 2021) (Judgment) while discussing the principles to be had in regard to a challenge against exercise of discretion of a Superior Court observed as follows;

“In *Mbogo & Another vs. Shah* [1968] E.A 93; at page 94, paragraph H - 1 Sir Clement De Lestang V.-P: had this to say:

I think it is well settled that this Court will not interfere with the exercise of 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.”

14. The power to set aside an ex parte judgment, is unfettered. It is trite that there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does on such terms as he thinks fit. [See *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76]. It is intended to be exercised in order to avoid 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 course of justice. [See *Shah v Mbogo* [1967] EA 116 at 123B:]. The question the ELC should have asked itself when considering the application is whether the applicant had a reasonable excuse or explanation that prevented its witness from attending court; or whether it has established that there was a mistake or inadvertence that may have led to the non-attendance in court.
15. The learned Judge of the ELC considered the supporting affidavit of the appellant's witness sworn in support of the application and observed:

“9. In support of that application the Defendant relies on a Supporting Affidavit sworn by its Operations Manager JavedMohamed Sidik who avers that on 4th December 2018 when the matter came up for defence hearing, he was unavailable as his wife had been taken ill....



12. The Defendant's Operations Manager avers that he was aware of the hearing date of 4th December 2017. He however asserts that he was prevented from attending the hearing as his wife had been ailing for some time and her condition had suddenly worsened on the date when the matter was to be heard.
13. That averment is unfortunately not supported by any evidence. The Defendant has not attached any medical evidence or other evidence to support the position... that the wife... had been ailing.”
16. The ELC proceeded to consider the number of times the defence case had not taken place and the reasons given for it, and based on that consideration concluded that the record did not make the excuse given for non- attendance in December 2017 believable, as it demonstrated deliberate attempts to delay and obstruct the matter. On these grounds the application was declined.
17. With respect to the ELC judge, whereas documentary or medical proof that the wife of its witness was ailing would have strengthened the case for allowing the application, we have considered the supporting affidavit of Mr. Sidik and the record of the proceedings. The number of adjournments by the appellant were not all attributable to this witness, The initial witness the appellant intended to call was one, Mr. Ashok. On eight (8) occasions prior to the time under consideration [December 2017] the witness was reported to be ill, at other occasions he was reported to have traveled out of the country. The final report on him was that he died,
18. The other observation we make of the learned Judge's exercise of discretion is the disregard for very serious issues which were equally important, deserving of consideration, and which would have put the matter under consideration in a clear perspective. The matter of the existence of a Judgment that touched on the suit property, which could conflict with the decision of the ELC was raised. That judgment was annexed to Mr. Sidik's affidavit. It's a judgment of the High Court and was delivered in 2012. It shows that it touches on ownership of 9100 acres of land in the same area as the land in dispute in the instant matter. That was an important matter, and it could not be determined in submissions, as the respondents' counsel purported to do. Had the ELC considered that matter, we think it could have come to a different conclusion of the matter.
19. Having considered this appeal, we are satisfied that the decision of the learned ELC judge was clearly wrong, on account of misdirections; on account of failing to take into consideration matters which it should have taken into consideration. Due to these flaws, we find that the Judge arrived at a wrong conclusion, thus giving us the right to intervene in the matter.
20. In the result we allow the appeal and make the following orders:
 - 1) The ruling of the J.O. Olola, J, delivered at Malindi on the 27th May, 2020 be and is hereby set aside in its entirety.
 - 2) The application dated 12th February 2019 by the appellant be and is hereby allowed to the extent that the appellant's defence case is re-opened for hearing.
 - 3) The matter be placed for hearing before any judge in the ELC other than Olola, J.
 - 4) Due to the nature of this application and of the case, each party will bear their own costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU, FCIArb



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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

