IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, J. MOHAMMED & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 219 of 2007

BETWEEN

HEZEKIAH KAMAU …….…… 1st APPELLANT

NJONGE NDITU …….. 2nd APPELLANT

AND

KAMAU MUKUNA ……...…….…....…. RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (A'ngawa J.) dated 9th February 2005

in

HCCC No. 3303 of 1995

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JUDGMENT OF THE COURT

1. The respondent, ***Kamau Mukuna***, filed suit against the appellants at the High Court. At all material times, the respondent was the registered proprietor of Land Parcel No. Nyandarau/Muruaki/162 situated within North Kinangop while the 1st appellant was the registered proprietor of Land Parcel No. Nyandarau/Muruaki/152 and the 2nd appellant the registered proprietor of Land Parcel No. Nyandarau/Muruaki/154. A boundary dispute arose between the three registered proprietors.

2. On or about 27th September 1995, the Land Registrar of Nyandarua made determination in respect of the boundary dispute and thereafter on or about 9th October 1995, the appellants allegedly trespassed on the respondent's land and removed his fence. The respondent filed suit against the appellants seeking an order that the appellants do deliver up the disputed portion of the suit property and they be compelled to re-fix the boundary and be evicted from the disputed portion of the suit premises. The appellants denied trespassing on the respondent's parcel of land and counterclaimed that it was the respondent who was in occupation of 2 ½ acres belonging to the appellants; that it was the respondent who removed the original fence boundary and fixed a new boundary inside the appellants portion of land thereby purporting that the new boundary was the correct one.

3. The trial and hearing before the High Court was conducted on 19th and 20th June 2000. The grounds in

support of the instant appeal can only be understood in the context of what transpired at the trial. On the said 19th June 2000, the case was listed before Ang'awa, J. and learned counsel Messrs W.G. Wambugu for the respondent/plaintiff and Mr. Timan Njugi for the appellant/defendants were present. On 19th June 2000, the respondent/plaintiff gave evidence and called his witnesses. At the close of business day, the record shows that the appellants defence hearing was scheduled for the following day, 20th June 2000, at 9.00 am. On the said 20th June 2000, counsel for the appellants/defendant was absent and the plaintiff\respondent counsel made his closing submissions. It was submitted before the trial court that since no evidence was adduced in support of the counterclaim the same should be dismissed.

4. The learned judge delivered judgment in favour of the respondent/plaintiff on 21st June 2000. In entering judgment and dismissing the counterclaim, the judge expressed as follows:

> *"The advocates of the parties agreed on the following issues for determination:*
>
> 1. *Whether there exists on the plaintiff's parcel of land a fence put up by the 2nd defendant. If so, should the fence be removed?*
>
> 2. *Who should pay the costs?*
>
> *The Plaintiff informed the court how they were all settled on the parcel of land in 1964. There seems to have been no boundary fence or dispute at that time. He denied he planted trees along his boundary but stated the trees were on his parcel of land. The Land Registrar was to solve the boundary dispute in 1986. Nothing happened until 1995. He admitted to the Land Registrar's ruling but the defendants did not. The court adjourned the proceedings to allow the defendant to appear and give evidence. Neither the advocate for the defendant nor the defendants appeared for trial on the 2nd day (sic). To assure the issue, I would find that the 2nd defendant is blamed by the Land Registrar ruling together with the 1st defendant (sic). They did not appeal to the Chief Land Registrar against the said decision. I hold that the said defendants remove any fence that is not in line with the Land Registrar's boundary decision. I dismiss the counter claim as having not been pursued with costs to the plaintiff. I award the plaintiff the costs of this suit."*

5. Aggrieved by the judgment of the trial court, the appellants made an application seeking orders to set aside the judgment delivered on 21st June 2000. The learned judge observed that the gist and issues raised in the application were *inter alia* that the appellant's advocate did not appear in court on the following day for hearing; that the matter was not a boundary dispute but the changing of acreage; that the Registrar of the High Court did not inform the appellants that he would execute the mutation form and that the hearing before the trial court was conducted ex-parte.

6. By a ruling dated 9th February 2005, the subject of the instant appeal, the learned judge in dismissing the application to set aside the judgment delivered on 21st June 2000 expressed as follows:

> *"I wish to state after hearing both parties on this application that the trial before me was heard inter-partes. The defendants were represented by an advocate of the High Court of Kenya. Both advocates confirmed and signed my file that the only issue is whether the 2nd defendant, who conceded with the 1st defendant, should remove his fence. I held that he must do so. It is true that when the trial proceeded the following day, the advocate for the defendant made no appearance. If in fact he would have returned soon after, the court would not have had any objection in hearing the defendants if they so wished. Instead, four years later and at the stage of execution, this application is being made… I further note that Aluoch J. sort (sic) clarification from the district land surveyor of the exact boundary. The same was confirmed to her namely that the boundary is along the seasonal river. Should I set aside my judgment? Besides the delay being inordinate and admissions by defendants, there is indeed nothing left to merit a trial…I award the costs of this application to the plaintiff/respondent."*

7. It is this ruling of 9th February 2005 that is the subject of the instant appeal.

The grounds of appeal as stated in the memorandum are *to wit:*

(i) *That the learned judge erred in law and fact in making a finding that there was no merit to set aside her judgment of 21st June 2000 where there were grounds to do so;*

ii. *That the trial judge erred in law and fact in holding that the disputed boundary was along the seasonal river while there was no documentary evidence to support the same;*

iii. *The trial court erred in law and fact by holding that the orders in the application dated 22nd September 2004 to the Principal Deputy Registrar stood while at the same time she had directed that the Mutation Forms had to be served upon the advocates on record first before such an application to the Deputy Registrar could be made;*

iv. *That trial judge erred in law and fact by failing to observe that the respondent had in execution of her judgment relied on documents that were unlawfully signed by the Registrar of the High Court prior or before the Orders authorizing the Registrar to do so were issued by the Court;*

v. *The learned judge erred in law and fact in failing to make a finding that the dispute before the court was to ascertain the correct boundary line and not acreage;*

vi. *The learned judge erred in law and fact in failing to find that the respondent had unlawfully altered the acreage of the suit premises while the dispute before the court was a boundary dispute."*

8. At the hearing of this appeal, learned counsel Mr. Vincent Muia appeared for the appellant while learned counsel Ms. Anne Mbugua holding brief for Mr. Muchangi Nduati appeared for the respondent. Ms. Mbugua informed this Court that she had no instructions to respond to submissions made by the appellant in this appeal.

9. Counsel for the appellant reiterated and elaborated on the grounds urged in the memorandum of appeal. He submitted that the main issue is that the learned judge did not properly exercise her unfettered discretion to set aside her own judgment delivered on 21st June 2000; that the judge erred in failing to find that there was merit in setting aside the judgment; that the judge erred in failing to find that the proceedings giving rise to the judgment were *ex-parte* proceedings and the appellant was not given an opportunity to present his evidence and exhibits before the trial court and that the appellant was neither informed nor made aware that the hearing of the case before the trial court was to be continued on 20th June 2000.

10. Counsel submitted that whereas the High Court had an unfettered discretion to set aside its judgment, the learned judge was duty bound to look into the circumstances surrounding the case and give the appellants an opportunity to defend their case and canvass the counterclaim; that the opportunity for a defendant to agitate its claim is a right which should not be taken away; that the main purpose of the court is to do justice to all and the appellants should not be denied the opportunity to canvass their case. Counsel pointed out that on record before the learned judge, there was a replying affidavit and the judge ought to have examined the same; that if the judge analysed the contents of the replying affidavit, it would have been clear that the annexure thereto revealed that misleading evidence had been tendered in court; that if the court had looked at the annexure, it would have set aside the judgment delivered on 21st June 2000; that the Mutation Forms were signed four (4) months earlier contrary to the court order and this by itself was sufficient for the learned judge to set aside her judgment. Counsel further submitted that the learned judge erred in failing to note that the respondent had converted what was a boundary dispute to become a claim for land and 2 ½ acres had now been illegally hived off the appellants' land and taken by the respondent; that the learned judge erred in failing to notice that a different claim was executed and the appellants ought to have been given an opportunity to defend the loss of 2 ½ acres of land; that the

respondent using the back door got property belonging to the appellants and that the appellant's defence and counterclaim raised triable issues that should be canvassed and determined on merit. The appellant cited the following decisions in support of the case: **Harith Ali El Busaidy -v- Kenya Commercial Bank Ltd HCCC No. 534 of 2003*;* Ashwichand Hirji Shah & 3 others -v- Lucy Wairimu Mwaura Civil Appeal No. 59 of 2006*;* Pindoria Construction Co. Limited -v- Iron** and **Sanitary Wares Civil Appeal No. 16 of 1976 and Aggrey Odanga -v- Joshua Siambe (2008) eKLR.**

11. As already stated, there was no response to the appellant's submissions. We have considered the grounds of appeal, submissions by the appellant, the authorities cited and examined the record of appeal and analyzed the ruling dated 9th February 2005. As this is a first appeal, it is our duty to analyse and re-assess the evidence on record and reach our own conclusions in the matter. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123);** see also **(Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**.

12. The appeal before us relates to the exercise of discretion by a trial court in setting aside its own judgment. The circumstances in which appellate courts can interfere with discretionary orders is well settled in the case of **Mbogo & Another -v- Shah (1968) EA 93,** where it was held at 96 that;

"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."

13. The discretion to set aside is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable or otherwise to obstruct or delay the cause of justice. **(**See **Shah -v- Mbogo [1969] E.A. 116.)** In exercising the discretion, the Court considers *inter alia* the facts and circumstances both prior and subsequent and the merits of either side. The Court also considers whether or not the affected party can reasonably be compensated by costs for the delay always remembering that to deny a party a hearing based on merits should be the last resort of the Court. **(**See **Jamdas vs Sodina Gormanda [1952] 7 UR).**

14. Applying the above principles to the present case, the record shows that the hearing of the suit before the trial court was conducted on 19th and 20th June 2000. On the first day, 19th June 2000, both counsel for the appellant and respondent were present. On the second day, 20th June 2000, when the defence case came up for hearing, the appellants/defendants were absent; this is notwithstanding the fact that counsel was present on 19th June 2000 when the hearing was adjourned to the following day. The failure to attend hearing the following day by the appellants counsel is reprehensible noting that she was present when the case was adjourned to the following day. The hearing date of 20th June 2000 was fixed in court in the presence of all counsel.

15. Given the facts in this case, we concur with the learned judge and uphold the finding that the trial conducted on 19th and 20th June 2000 was not *ex-parte*. When a party has notice and knowledge of the hearing date and is actually present in court through counsel or in person when hearing is adjourned to a further date, and subsequently the party fails or absconds to come to court at the resumed hearing, in the absence of a convincing explanation such a party cannot be allowed to turn around and state that he was never given an opportunity to present or canvass his case. In the instant case, the appellants were given an opportunity to be heard on 20th June 2000; they failed to take the opportunity to put their defence and canvass their counterclaim.

16. In the submissions before this Court and from the record of the High Court, it has not been explained why on 20th June 2000, counsel for the appellant was not present in court. The case cited by the appellant of **Harith Ali El Busaidy -v- Kenya Commercial Bank Ltd (HCCC No. 534 of 2003)** captures the

principle that an explanation for failure to attend court is required. Likewise in the case of **Ashwichand Hirji Shah & 3 Others -v-Lucy Wairimu Mwaura Civil Appeal No. 59 of 2006** it is stated that an explanation by way of affidavit or oral submissions for the delay is necessary. In the instant case, no explanation has been forthcoming from the appellants as to why they did not attend court on 20th June 2000.

17. The other issue for our consideration relates to time lag between the judgment delivered on 21st June 2000 and the application to set aside the said judgment which application was filed on 5th April 2004. This is a delay of about four (4) years. The learned judge in declining to set aside the judgment invoked the principle of inordinate delay. The judge noted that the appellants only moved to set aside the judgment at the execution stage. At the hearing of this appeal, the appellants made no submissions explaining the inordinate delay in making the application to set aside the judgment. In effect, the appellant neither submitted nor made challenge to the *ratio decidendi* in the ruling delivered on 9th February 2005.

18. Considering the four (4) year delay in bringing the application to set aside, we ask ourselves in hindsight whether failure to attend court by the appellant on 20th June 2000 is an excusable mistake or was it meant to deliberately delay the cause of justice. In **Richard Nchapi Leiyagu -vs- IEBC & 2 Others- Civil Appeal No. 18 of 2013,**this Court expressed itself as follows:-

"We agree with the noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice." (emphasis ours).

19. The appellants contend that they failed to attend the hearing on 20th June 2000 because they were not aware of the resumed hearing date. The record clearly shows that counsel for the appellant was present in court on 19th June 2000 and even cross-examined the plaintiff/respondent's witnesses. Counsel in this matter submitted that it was a mistake on the part of previous counsel for the appellants who did not inform his clients to come to court and given evidence on 20th June 2000. In **Belinda Murai & others -vs- Amoi Wainaina (1978) LLR 2782 (CALL)**, Madan J.A described what constitutes a mistake in the following words:-

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it bit it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule.."

20. The record shows that the appellants through their counsel on record were aware of the hearing date of 20th June 2000. The issue of mistake of previous counsel is being raised four years after judgment. We are of the considered view that this is an afterthought and no plausible explanation has been given for the four year delay- the non-attendance at the resumed hearing on 20thJune 2000 is inexcusable.

21. In the memorandum of appeal and vide submissions made before us, the appellants raise numerous factual grounds in support of the appeal. Most of the facts raised and the issues submitted upon occurred after judgment had been delivered by the trial court. The appellant submitted on the issue of mutation forms; that the dispute now involves acreage of land whereby 2 ½ acres has illegally been taken by the respondent and that the documents relied upon by the respondent were unlawfully signed.

22. It is trite law that a party is bound by his pleadings and a court of law cannot enter judgment on matters that have not been pleaded. In **Galaxy Paints Co. Ltd. -v- Falcon Guards Ltd. (2000) 2 EA**

385; s*ee also* **Odd Jobs -v-Mubia (1970) EA 476**.The record shows that the parties in this case agreed on the issues for determination by the trial court and the trial judge at the hearing and in the Judgment delivered on 21st June 2000 did not consider and address the new facts and issues now raised by the appellant. The trial judge made a determination on the issues as framed by the parties. The facts in support of the grounds of appeal urged by the appellant in the memorandum of appeal occurred after judgment and were neither facts nor issues before the trial court.

23. We note that no notice of appeal or any appeal has been lodged against the judgment delivered on 21st June 2000. The appellants cannot circumvent failure to appeal the judgment of 21st June 2000 by appealing against the ruling delivered on 9th February 2005. A party cannot be allowed to argue an appeal where no notice of appeal has been lodged. We are of the view that the inordinate delay in making the application to set aside the judgment is a factor weighing heavily against the appellants. We are cognizant of the fact that what constitutes inordinate delay must depend on the facts of each particular case and in this case we are satisfied that four years is inordinate delay.

24. One ground of appeal is that the learned judge erred in finding that the boundary between the disputed suit properties was along the seasonal river. Our perusal and reading of the record shows that the Land Registrar confirmed the boundary was along the seasonal river; a further clarification on this was sought by Aluoch, J. from the Land Registrar who confirmed that the seasonal river was the boundary. Accordingly, we have no reason to fault the finding by the learned judge that the boundary between the disputed properties is along the seasonal river. There is no evidence on record to challenge the findings of the Land Registrar that the seasonal river is the boundary.

25. For reasons stated above, we conclude by finding that the learned judge did not err in her ruling dated 9th February 2005 which we hereby uphold. This appeal has no merit and is hereby dismissed. As the respondent did not reply to the submissions in this appeal, each party is to bear his costs.

Dated and delivered at Nairobi this 17th day of July, 2015

M.K. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR