Jonyo v Kandiawo & another (Environment and Land Appeal 7 of 2021) [2024] KEELC 4241 (KLR) (13 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4241 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL 7 OF 2021

GMA ONGONDO, J

MAY 13, 2024

BETWEEN

JOASH ODHIAMBO JONYO ..... APPLICANT

AND

WALTER ODOYO KANDIAWO ..... 1ST RESPONDENT

VICTOR OTIENO CHIANDA ..... 2ND RESPONDENT

RULING

1. This ruling is in respect of an application by way of Notice of motion dated 21st November 2023 brought under, *inter alia,* Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Orders 10 Rule 11 and 51 Rule 1 of the *Civil Procedure Rules*, 2010 by the 2nd respondent/ applicant, Joash Odhiambo Jonyo through M/s Omuthe and Company Advocates seeking the following orders;

    a. Moot

    b. Moot

    c. That this honourable court be pleased to set aside the ex parte proceedings and the judgment entered against the 2nd respondent/applicant herein dated 21st September 2022 and any ensuing orders.

    d. That this honourable court be pleased to direct that ELC Suit No. 6 of 2019 before the Principal Magistrate Oyugis be heard afresh on merit.

    e. That in the alternative to prayer (d) above, this honourable court be pleased to direct that the 2nd respondent/applicant herein put in his submissions and evidence in response to the instant appeal.

f. That the costs of this application be provided for.

2. The application is founded upon twelve grounds and anchored on the supporting affidavit of twenty paragraphs sworn on even date by Joash Odhiambo Jonyo, alongside the annexed documents marked as JOJ-1 to JOJ-3 which include; a copy of the court judgment dated 21st September 2022, a copy of the submissions filed by the appellant dated 13th June 2022 and a copy of the outpatient card from Rachuonyo County Hospital.

3. Briefly, the applicant laments that the appellant/respondent obtained an ex parte judgment against him on 21st September 2022 and is on the verge of executing the same. That he was not served with the hearing notice and mention notices thereof. That further, the appellant did not serve him with the memorandum of appeal, record of appeal and submissions thereof. That he was ill and not present in court on 5th May 2022 when the court directed that the appeal be canvassed by way of written submissions. That as a result, he was not granted an opportunity to be heard. He avers that he has a good defence to both the appeal and the original suit at the trial court.

4. The appellant/respondent through Oguttu Mboya, Ochwal and Partners Advocates filed a statement of grounds of opposition dated 20th January 2024 on 23rd January 2024. He averred that this court lacks jurisdiction to entertain the instant application. That this court is *functus officio*, having pronounced itself on the appeal. Also, that the applicant has not satisfied the conditions for grant of an order of stay under Order 42 Rule 6 of the Civil Procedure Rules, 2010. That the instant application is thus, devoid of merit.

5. Hearing of the application proceeded by way of written submissions pursuant to the court's directions of 25th January 2024.

6. The applicant's counsel filed submissions dated 7th February 2024 and submitted that he was condemned unheard, as proper service was never effected upon him both in the original suit and at the appeal. Counsel urged the court to be guided by Articles 50(1) and 159 (2) (d) of the *Constitution* of Kenya as well as Sections 1A, 3A and 3B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. Reliance was placed on various authoritative pronouncements, including the case of *James Kanyiita Nderitu and Another v Marios Philotas Ghikas and Another*, Civil Appeal No. 6 of 2015 (2016) eKLR, to buttress the submissions.

7. The respondent's counsel filed submissions dated 28th February 2024 on 4th March 2024 and identified three issues for determination thus: whether the 2nd respondent's /applicant's counsel is properly on record, whether the honourable court is *functus officio* and whether the 2nd respondent/applicant has met and/or demonstrated the conditions set out for staying of execution of the decree.

8. Learned Counsel submitted that the instant application offends the provisions of Order 9 Rule 9 of the *Civil Procedure Rules,* 2010 and ought to be struck out, since the applicant's counsel has not sought leave of court to come on record for the applicant herein. That this court is *functus officio*, having determined the appeal on 21st September 2022. That this application ought to have been lodged before the trial court pursuant to the provisions of Section 34 of the *Civil Procedure Act*, 2010. Also, that the applicant has not satisfied the conditions for grant of an order of stay under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. Counsel relied on the case of *Julieta Marigu Njagi v Virginia Njoki Mwangi & another* [2022] eKLR among others, to fortify the submissions.

9. In the foregone, the following issues fall for determination;

i. Whether the applicant's counsel is properly on record.

ii. Depending on the outcome in (i) above, is the instant application merited?

10. Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 provides that:

> When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be"

11. In the present case, the record reveals that the applicant had no legal representation at the trial court and in the appeal, since he did not participate in both suits. Therefore, it is my considered view that the provisions of Order 9 Rule 9 (*supra*) are not applicable herein and that counsel is properly on record.

12. So, is the instant application merited?

13. On one hand, the applicant contends that he was condemned unheard, as proper service was never effected upon him both in the original suit and at the appeal. Thus, he urged the court to set aside the ex parte proceedings and the judgment entered against him on 21st September 2022. Further, he prayed that the court do direct that the original suit be heard afresh on merit. Alternatively, he implored the court to grant him leave to put in his submissions and evidence in response to the instant appeal.

14. On the other hand, the respondent avers that this court is *functus officio*, having determined the appeal on 21st September 2022. That this application ought to have been lodged before the trial court pursuant to the provisions of Section 34 of the *Civil Procedure Act*, 2010. Also, that the applicant has not satisfied the conditions for grant of an order of stay under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010.

15. Order 42 Rule 23 of the *Civil Procedure Rules*, 2010 provides thus:

> Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit."

16. Therefore, this court is seized with jurisdiction to hear and determine the instant application with regards to its judgment delivered on 21st September 2022. In that regard, I note from the record that no affidavit of service was availed by the appellant/respondent as proof of service of both the memorandum of appeal as well as the record of appeal and submissions herein. Further, there is no indication that the applicant was served with mention and hearing notices relating to this appeal.

17. It is trite law that the decision on whether or not to set aside ex parte judgement is discretionary and that the discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah v Mbogo & Another* [1967] EA 116.

18. This court subscribes to the decision in *James Kanyiita Nderitu case* (*supra*), where the Court of Appeal made a distinction between a default judgment that is regularly entered and one which is irregularly entered. The court stated in part:

> "... In a regular default judgment, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled under *Order 10 Rule 11 of the Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit....
>
> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion..."

19. In *Yooshin Engineering Corporation v Aia Architects Limited* [2023] KECA 872 (KLR), the Court of Appeal pronounced itself thus:

> "...where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise..."

20. Thus, it is my considered view that the ex parte judgment entered by this court on 21st November 2022, is irregular. It is a technical one as observed in *Kanwal Sarjit Singh Dhiman v Kashavji Jivraji Shah* [2015] eKLR. The same ought to be set aside.

21. Consequently, the application by way of Notice of motion dated 21st November 2023 hereby succeeds in part and is allowed in terms of prayer numbers 3 and 5 and as indicated in paragraphs *1*(c) and (e) hereinabove.

22. Regarding prayer number 4, the same is untenable since there is a pending appeal herein.

23. *Afortiori*, I hereby direct the 2nd respondent/applicant herein to file and serve his submissions and evidence in response to the instant appeal within 14 days from the date of this ruling, failure to which the orders granted herein shall automatically lapse.

24. Costs of this application to abide the outcome of the appeal.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 13TH DAY OF MAY 2024.

G.M.A ONGONDO

JUDGE

Present

1. B. Mulisa, Learned Counsel for the appellant/respondent

2. Mutiva, Court Assistant