Njagi v Gitari (Environment and Land Appeal E006 of 2023)
[2024] KEELC 4473 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4473 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL E006 OF 2023

A KANIARU, J

MAY 9, 2024

BETWEEN

FREDRICK NDUURU NJAGI ..... APPELLANT

AND

DESDERITO GITARI ..... RESPONDENT

(Being an appeal from the ruling of the Hon Edwin N. Wasike PM delivered on 02.03.2023 in Siakago PM's MCL & E Case no. 18 of 2021)

RULING

1. Vide a Memorandum of Appeal dated 30.03.2023 filed in court on the same date, the Appellant appeals to this court challenging the Ruling that dismissed his Notice of Motion application that had sought to set aside an interlocutory judgment entered against him on 30.09.2021 in the lower court at Siakago in MCL & E case no 18 of 2021. The appellant was dissatisfied with the ruling of the learned trial magistrate (Hon. Edwin N. Wasike) dated 02.03.2023and therefore filed the appeal herein on the following grounds:-

    a. The learned principal magistrate erred in law and fact in entering an interlocutory judgement in respect of the respondents claim yet it was not a claim for liquidated damages or pecuniary damages.

    b. The learned principal magistrate erred in law and fact when he failed to consider that the appellant's failure to file and serve his pleadings in time was due to an oversight on the part of his advocates.

    c. The learned principal magistrate erred in law and fact when he failed to consider that the appellant who was in court when the matter proceeded for hearing was denied a chance to cross examine the respondent.

d. The learned principal magistrate erred in law and fact in denying the appellant an opportunity to be heard.

e. The learned principal magistrate erred in law and fact in failing to consider that the respondent would suffer no prejudice if orders sought by the appellant in his application were granted.

f. The learned principal magistrate misdirected himself when he held that the memorandum of appearance and statement were purportedly filed on 14.04.2022 yet the said documents were filed on 12.10.2021.

g. The learned principal magistrate misdirected himself by holding that the application dated 14.04.2022 was filed by a person (an advocate) who had no capacity to do so.

h. The learned principal magistrate erred in law and fact in exercising his discretion wrongly.

He asks:

i. That the appeal be allowed.

ii. That the ruling dated 02.03.2023 in Siakago PM's MCL & E Case no. 18 of 2021 be set aside.

iii. That the said ruling be substituted with an order allowing the notice of motion dated 14.04.2022

iv. That the appellant be awarded costs of the appeal.

2. It was agreed on 16.11.2023 that parties dispose of the appeal by way of written submissions. The appellant filed his submissions on 15.01.2024 whereas the respondent filed his submissions on 13.02.2024.

3. The appellant submitted that he was served with the pleadings in this case and he appointed an advocate to represent him. However, the said advocate filed his pleadings outside the stipulated period. That the trial magistrate exercised his discretion wrongly in disallowing the appellant's application to have the ex parte judgement set aside. The case of *James Kanyiita Nderitu v Marios Philotas Ghikas & Anor* (2016) eKLR was cited to support this. That also the trial magistrate failed to properly take into account the factors that led to the appellant failing to file his memorandum of appearance and statement of defence within the required period.

4. It was submitted further that the appellant had a valid excuse for failing to file his pleadings in time and the trial court erred in visiting upon him the mistakes of his advocate. The case of *David Kiptanui Yego & 134 Others v Benjamin Rono & 3 others* (2021) eKLR was cited to support this. That further the trial magistrate had failed to take into consideration the fact that the appellant had presented his application to set aside the judgement without unreasonable delay, the judgement having been delivered on 17.03.2022 while the appellant filed his application on 14.04.2022, which was a period of about 30 days. That the court failed to consider that the appellant's statement of defence which was filed on 12.10.2021 before the matter proceeded for formal proof raised triable issues.

5. Further also that the trial magistrate referred to the defence in his judgement where he indicated that the appellant had stated in his defence that he had been in occupation of the suit property since 1980's and that the respondent had been registered as proprietor through fraudulent means. These were said to be triable issues that required to be addressed on merit. That the magistrate failed to consider the prejudice the appellant was likely to suffer. That in his judgement, the trial magistrate ordered that the appellant be evicted from the suit property thereby rendering the appellant and his family landless.

That it would have been fair for the appellant to be given a chance to defend the respondent's claims before such draconian orders were granted. That on the other hand, the respondent did not prove that he would suffer any prejudice in the event that the court directed that the matter proceeds on merit.

6. Further, it was submitted that failure by the appellant to file his pleadings on time was a procedural infraction that was curable under section 3 of the *Environment and Land Court Act*. That the trial magistrate misdirected himself by holding that the notice of motion dated 14.04.2022 had been filed by an advocate who had no capacity to do so and hence bad in law. That at the time of filing the said application, Order 9 rule 9(b) had been complied with and a consent between the outgoing and incoming advocate had been filed on 11.04.2022. Ultimately it is urged that the appeal be allowed as prayed.

7. The respondent on the other hand submitted that the trial court granted the appellant sufficient time to file his defence and memorandum of appeal but he failed to do so. That the wilful and fragrant disobedience of court orders undermines the authority and dignity of the courts and must be dealt with firmly so that the court's authority is not brought to disrepute. That the appellant cannot allege that the court denied him an opportunity to be heard when he was granted a chance to file his defence and memorandum of appearance and having confirmed that his pleadings were in the court record. That a matter once filed belongs to the litigant and it is upon the litigant to always follow up diligently with his or her case and check on its progress to its logical conclusion. That the appellant cannot fault his advocates for failure to file and serve his pleadings in time.

8. That no evidence has been produced by the appellant that is persuasive to this court to show that the non-compliance with court orders of the trial court was unavoidable and inadvertent. It is urged that the appeal be dismissed with costs to the respondent. In support of his submissions, the respondent cited the cases of *Republic v Ahmad Abolfathi Mohammed & Anor* (2018) Eklr, *Elaki v District Land Registrar Vihiga & Anor* (Civil Appeal 220 of 2019)(2021) KECA 340 (KLR)(17 December 2021) (Judgement), *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others* (2019) Eklr among others.

9. I have considered the appeal herein as well as the party's submissions. The appeal requires this court to determine whether the trial courts discretion was exercised judicially. If it was, this court has no business interfering with the decision. But it will certainly do so if it finds that there was either an error in principle or that the trial court was plainly wrong.

10. The suit herein was instituted in the lower court by the respondent who was the plaintiff via plaint filed on 09.03.2021. It was against the appellant who was the defendant. It was set down for pre-trial directions on 27.05.2021 and again on 19.08.2021. On that date, the respondent informed the court that the appellant had never entered appearance and that he had therefore filed a request for judgement. It appears that the appellant was present in court in person and he informed the court that he had instructed his advocate to follow up on the matter. The court then directed that the appellant file his memorandum of appearance and/or defence and serve the same to the respondent within 7 days failure to which that window would have closed.

11. The court directed that the matter would be mentioned on 30.09.2021 to confirm compliance. The appellant did not comply as directed. When the matter came up for mention on 30.09.2021 it appears from the proceedings that the respondent was absent whereas the appellant was present. The court however directed that it had realized that the appellant had failed to enter appearance or file a defence as ordered by the court and endorsed the request for judgement. It also gave a date for formal proof which is shown to be on 04.11.2021.

12. The record shows that the appellant filed his memorandum of appearance and statement of defence on 12.10.2021. The matter however proceeded for formal proof on the date set for the same and an ex-parte judgement was delivered on 17.03.2022. The appellant subsequently filed an application to set aside the judgement on 14.04.2022. That application was dismissed vide a ruling dated 09.02.2023. The court in the said ruling was dissatisfied with the explanation given by the appellant as in its view, he had decided to disobey the orders of the court and had become indolent. The court also was of the opinion that the appellant's notice of motion application to set aside the interlocutory judgment was bad in law as it had allegedly been filed by an advocate who had no capacity to do so which was a violation of Order 9 rule 9 of the civil procedure rules.

13. In Law, the discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is very wide and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended or calculated to obstruct or delay the course of justice. See *Shah v Mbogo & Anor* (1967) EA 116. See also the case of *CMC Holdings Ltd vs. Nzioki* [2004] I KLR 173 where the court held:

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of, amongst others, an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle."

14. In the instant case, the appellant's reason for failing to enter an appearance or file a defence within the time that the court had prescribed to him was that he instructed his advocate in good time to do so but he later came to learn that the advocate had filed the said documents outside the window given by the court. He explained that even during the day the matter proceeded for hearing, he was present in court but his advocate failed to turn up. Therefore he did not testify or give his evidence in the case. The trial court was not persuaded that the appellant had instructed an advocate because the appellant failed to specify the said advocate.

15. I do not agree with the trial court in that regard because, as can be seen from the proceedings, the appellant had taken a keen interest in his matter as he would appear in court and he even took instructions directly from the court to pass on to his advocate. The record also shows that his pleadings were filed by an advocate even though they were filed outside the period the court had given to him. This shows that he had indeed instructed an advocate. To me, he might have just been an innocent litigant under the impression that his advocate was in control of his case and that's why he turned up in court when he was required to. Otherwise, if he had no interest in the case he would not appear at all. It is not a new trend that advocates will receive instructions from clients and fail occasionally to attend to their matters. It has happened before and it continues to happen. This should not be a reason to drive away a litigant from the seat of justice without hearing them on the merits. This is a view that most courts have always taken. See the cases of:

Philip Chemowolo & Another –vs- Augustine Kubede [1982-88] KAR 103 at 1040:

"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no

error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline." See also:

Murai vs. Wainaina (No. 4) [1982] KLR 38 as cited in *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR where it was held that:

"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 might 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 know better. The Court may not condone it but it ought 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 are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

16. Again at the time the matter proceeded for formal proof, the appellants defence and memorandum of appearance was on record and the trial Magistrate stated that he considered the same and dismissed it. I agree with the appellant that some matters raised in the defence were triable issues that were not considered at all and could not be considered without the appellants input. As rightly pointed out, the fact that the appellant had stated that he had been in occupation of the suit property for over 20 years and that the respondent had been registered as proprietor of the suit land by way of fraud were issues that needed to be determined on merit. In my view, the reasons given by the appellant for failing to comply with the court orders and file his pleadings in time were reasonable and, in the circumstances of this case, excusable. It would have been in the interest of justice for the trial court to set aside the ex-parte judgement and allow the appellant to have his case heard on merit because of the prejudicial nature of the orders that the respondent was seeking.

17. In making that decision I am again guided by the case of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR (supra) where the court was faced with the same circumstances. The court observed;

> " The respondent had a judgment which was not obtained by consent or as a consequence of a full trial. Both before the Trial Court and the Superior Court, the applicant's counsel laid a lot of emphasis on the argument that there were several triable issues raised by the defence in its defence and counterclaim which was before the Court and urged the Trial Court to set aside ex parte judgment to allow the appellant ventilate the same issues, and further urged the Superior Court to allow the appeal on that ground. What we feel the Trial Court should have done when hearing application to set aside ex parte judgment, was to ignore her judgment on record and look at the matter afresh considering the pleadings before her (ie plaint, defence and counterclaim) and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised then, whether the reason for the applicant's appearance were weak, she was in law bound to exercise her discretion and set aside ex parte judgment so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay throw away costs."

18. The trial court also gave another reason for dismissing the appellants application to set aside the ex parte judgment. The reason was that the same had been filed by a person without the capacity to do

so as the provisions of order 9 rule 9 of the civil procedure rules had not been complied with. The said provisions provide;

> 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.

19. This in my view was erroneous because from the court record, the appellant's current advocate and his former advocate did file a consent on 11.04.2022 for the current advocate to come on record before filing the subject application on 14.04.2022. The appellant's advocate had therefore complied with the provisions of Order 9 rule 9 as is required and therefore the appellant's application was filed by a competent person.

20. I think it is useful to add that in this day and age, the approach by the court to issues such as these should be liberal and broad, not unduly technical or procedurally constricting. This liberal and broad view is for instance clearly noticeable in the case of *Waiboci & Another Vs Pashito Holdings Ltd & 7 Others* [2004] 2 KLR 415 where Ojwang Ag. J (as he then was) held, interalia, that an entirely regular interlocutory judgment can be set aside where the defendant happens to have and places before the court, a reasonable defence on the merits, and an assessment of such merits may be made on the basis of a draft defence.

21. Further, in *Rapando Vs. Ouma & 6 Others* I KLR 115, Warsame J (as he then was) also observed and held that there should be no limits or restriction on the judges discretion to set aside an exparte judgment except that if he does vary the judgment 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 by the rules save that the discretionary power must be exercised judicially and not arbitrarily in order to safeguard the interest of both parties.

22. It is in light of all this that, having considered the entire appeal, I find its merits demonstrated. The appeal therefore succeeds and the ruling appealed against is hereby set aside. The notice of motion that gave rise to the ruling is hereby allowed, meaning that the judgement of the lower court is also set aside. The lower court should proceed to hear the matter on its merits.

23. As regards the issue of costs, my considered view is that the respondent is not wholly to blame for the manner in which the proceedings were conducted. I therefore make no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF MAY, 2024.

A. KANIARU

JUDGE-ELC, EMBU

09/05/2024

In the presence of Ms Muthamo for respondent and Ithiga Githinji for Rose Njeru for appellant.

Court Assistant - Leadys