Mwadumbo v Said Bin Seif Properties Limited (Environment and Land Appeal E018 of 2023) [2024] KEELC 4641 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4641 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E018 OF 2023

NA MATHEKA, J

JUNE 13, 2024

BETWEEN

SALIM ALI MWADUMBO ..... APPELLANT

AND

SAID BIN SEIF PROPERTIES LIMITED ..... RESPONDENT

JUDGMENT

1. The Appellant, being dissatisfied with the Ruling and Order of the Honourable Magistrates (Hon Gathogo Sogomo), delivered on 11th August 2023 in Magistrates Court ELC No 1213 of 2022 appeals to this court on the following grounds;
    1. The learned magistrate erred in law and in fact in dismissing the Appellants' notice of motion application dated 8th March 2023, without any cogent reason.
    2. The learned magistrate erred in law and in fact in failing to evaluate the appellants draft statement of defence and appreciate that it raises triable issues.
    3. The learned magistrate erred in law and in fact in failing to apply several decided case laws chat were cited and submitted in support of the appellant's application, thus this arriving at an erroneous decision
    4. The learned magistrate erred in law and fact in finding that the appellants' suit lacked merit.
    5. The learned magistrate erred in law by not giving the appellant the right to a fair hearing.
    6. That in all the circumstances of the case, the learned trial magistrate failed to render justice to the appellant.
2. The Appellant prays that this Appeal be allowed and ruling, and order of the Honourable Magistrate delivered on 11th August 2023 be set aside.

3. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and make a determination as to whether the conclusion reached by the trial magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another v Shah* (1968) EA 93 where it was held that;

> "I think it is well settled that this court will not interfere with the exercise of its 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 matter 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. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

4. I am also guided by the case of *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR where the Court held that;

> "this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

5. This court has considered the application and the supporting affidavit. The respondent was served but failed to file any response. Order 12 Rule 7 which is discretionary depending on the circumstances of the case states as follows;

> "Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just".

6. By virtue of Order 12 Rule 7 this Court has discretion to set aside any orders upon terms that it considers just. The principles that guide the Court in its exercise of discretion are set out in the case of *Patel v East Africa Handling Services Limited* (1974) E.A where the Court stated that in setting aside judgements/orders the main concern for the Court is to do justice to the parties.

7. In the case of *Shah v Mbogo & Anor* (1967) E.A 470 the Court of Appeal for Eastern African held;

> "applying the principle that the Court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused".

8. The appellant submitted that the trial magistrate erred by dismissing their application as they had given sufficient grounds for setting aside the judgement. That they were condemned unheard contrary to Article 50(1) and Article 25 (c) of the *Constitution* which provides that the right to fair hearing cannot be limited. The respondent submitted that a party is bound by their pleadings and the appellant's technical misstep was fatally defective and further he failed to amend his motion when he had the opportunity to do so.

9. This court has carefully perused the pleadings in the trial court and in the ruling dated 11th August 2023 the trial magistrate in dismissing the application observed the following;

> "From the onset the court observes that the prayers for setting aside of the impugned judgement as drawn in the motion are contigent to the hearing and determination of the Application.
>
> This is to mean that the orders if allowed shall efflux upon grant making the court engage in futile labors of Sisphus which is an untenable prospect. As stated in a phlethora of decisions including that in the case of *Kenya Chemicals and Allied Workers Union v Milly Glass Works Ltd* (2020) eKLR courts do not act in vain."

10. The main reason for the application without going into the merits was hence based on the wording of the application which the trial magistrate admits was a technical mishap. Talking of technicalities, I am remined of Article 159 of the *Constitution*.

11. In the case of *Raila Odinga v I.E.B.C & others (2013)* eKLR, the Court observed that;

> "Article 159(2) (d) of the *Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

12. Be that as it may, the essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties. In the instant issue I find that the wording of the application was an inadvertent mistake which does not go into the substance of the prayers sought. It is obvious the objective was to set aside the judgement so that the matter is reopened for hearing. I find that the trial magistrate erred in not determining the matter on its merit but dismissed it on a technicality and for that reason I will proceed and determine the appeal on merit.

13. By a plaint dated 5th August 2022 the respondent sought orders in the trial court against the appellant for vacant possession of the suit premises amongst other prayers. Default judgement was entered in favour of the respondent on the 24th February 2023 and a decree issued on the 17th August 2023. Being dissatisfied with the default judgement, the appellant filed a notice of motion to set aside the judgement and decree which this court has dealt with above. The appellant further states that they were never served with summons to enter appearance and that they have an arguable defence.

14. During the trial PW1 one Winnie Waithanji testified that the plaintiff and the defendant entered into a tenancy agreement for the suit property on the 1st December 2019 for a term of two years commencing on the 1st January 2022. The same was never renewed but the defendant remained in occupation. That the defendant fell into arrears of Kshs. 150,000/= and has refused and /or neglected to make rent payments but continues in occupation. The defendant states that the defence raises triable issues. That the plaintiff did not utilize the mode of dispute resolution provided for in the agreement between the parties hence this suit is premature and not properly in court. That if granted the opportunity to defend the suit the defendant will raise this preliminary objection on this basis. The plaintiff will therefore explain why he did not utilize the modes of dispute resolution before moving to the court, which can only be done through a full hearing. The plaintiff's case has not been controverted and has been proved on a balance of probabilities. I have perused the said lease agreement and do not see a clause concerning alternative dispute resolution. Even if there was I find that the defence is frivolous and dose not raise any triable by reopening the case and intends to delay execution of the said decree. Besides I find that

the defendant was duly served and failed to enter appearance and defend the matter only to wake up when he was served with the decree. I find this appeal is not merited and I dismiss it with costs.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE