Kwambai v Mathenge (Environment and Land Appeal 15 of 2024) [2024] KEELC 5360 (KLR) (Environment and Land) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5360 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL 15 OF 2024

MC OUNDO, J

JULY 18, 2024

BETWEEN

STANLEY KIPRONO KWAMBAI .... APPELLANT

AND

PATRICK MAINA MATHENGE .... RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate's Court at Nakuru delivered by Hon. B. Ochieng, on 21st April, 2022 in Nakuru CM ELC No. 217 of 2019)

JUDGMENT

1. Before me for determination on Appeal is a Ruling dated 21st April, 2022 delivered by Hon. B. Ochieng, Chief Magistrate where the learned Magistrate, had dismissed, for being unmeritorious, the 2nd Defendant/Appellant's Application dated 10th October, 2021 which Application had sought for review of a judgment and decree of 26th June, 2021.

2. The Appellant, being dissatisfied with the Ruling of the trial Magistrate has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:

   i. That the learned trial Magistrate erred in law and in fact in denying the Appellant an opportunity to be heard by filing his Defence.

   ii. That the learned trial Magistrate erred in law facts in not considering the Appellant's application seeking to set aside the Judgement entered on 29th June, 2021 hence leaving the Appellant herein un-heard which is contrary to the dictates of natural justice,

   iii. That the learned trial Magistrate's decision is contradictory, misconceived and contrary to rule of law of natural justice and should be set aside.

iv. That the learned trial Magistrate erred in law and fact by failing to take into account that the Appellant's Advocate who was on record did not update the Appellant as to the directions for the Appellant to file his Defence hence the Advocates mistake should not be visited on the Appellant.

v. That the learned trial Magistrate erred in law and facts by failing to consider how a company can be sued as provided in the *Companies Act*, Chapter 486, Laws of Kenya.

vi. That the learned trial Magistrate erred in law and facts by not considering that if the Nakuru C.M. ELC 217 of 2019 was defended, the judgement would have been different.

3. The Appellant thus sought that the ruling delivered on 21st April, 2022 be set aside so that can be given leave to file his Defence in Nakuru Civil Case ELC No. 217 of 2019 at Nakuru.

4. The Appeal was admitted on 18th July, 2023 and directions issued for the same to be disposed of by way of written submissions.

Appellant's submission.

5. The Appellant vide his written submissions dated 26th October, 2023 summarized the factual background of the matter before framing his issues for determination as follows; -

i. Whether the learned Magistrate erred in law and facts by not considering that if the Nakuru C.M. ELC 217 of 2019 was defended, the judgement would have been different.

ii. Whether the learned trial Magistrate erred in law and facts by failing to take into account that the Appellant's Advocate who was on record did not update the Appellant as to the directions for the Appellant to file his Defence hence the Advocates mistake should not be visited on the Appellant.

iii. Whether the learned trial Magistrate erred in law and in fact in not considering the Appellants application seeking to set aside the judgement entered on 29th June, 2021 hence leaving the Appellant herein un-heard which is contrary to the dictates of the natural justice.

iv. Whether the trial Magistrate erred in law and in facts by failing to consider how a company can be sued as provided in the *Companies Act*.

v. Whether the costs should issue?

6. On the first issue for determination, the Appellant asserted that whereas it was trite that a just legal proceeding required an equal opportunity for all parties to present their arguments and safeguard their interests, the same had been overlooked by denying him an opportunity to file his Defence thus infringing upon the principles of natural justice and casting a shadow on the legitimacy of the legal proceedings. He placed reliance in the decided case of *Ephantus Gathua Muiyuro v Kenya Power & Lighting Company Ltd* [2016] eKLR where the court had cited the case of *Sebei District Administration v Gasyali & & Others* (1968) EA 300.

7. On the second issue for determination, the Appellant while reiterating the learned trial Magistrate's conclusion in its ruling on 21st April 2022 which had been articulated in part as follows;

> "…it is evident that the applicant's Advocate on record was served and all the affidavits of service are on record…I therefore find and hold that the applicant was aware of the matter but chose to ignore and not participate in the same…"

……submitted that the said conclusion had been erroneous as it was based on the presumption that if the Advocates were served, then the Appellant should have been aware of the court's proceeding hence ought to have filed a defence.

8. The Appellant's submission was that he had persistently in his applications and pleadings asserted that his Advocates had failed to communicate the court's proceedings to him but no one had been willing to comprehend his plight. He placed reliance on the decision in the case of *Belinda Muras & 6 others v Amos Wainaina* [1978] KLR to submit that it was in the best interest of justice that a party be heard as locking a party out of the seat of justice was both draconian and a despicable mockery of the constitutional imperative under Article 50. Further reliance was placed in the decided case of *Kiai Mbaki & 2 others v Gichuhi Macharia & another* [2005] eKLR to submit that if the impugned ruling was maintained, the Appellant would face irreparable harm as he would be deprived of the opportunity to present a defence, leading to significant loss and harm, thereby greatly undermining his constitutional property rights.

9. On the third issue for determination, he placed reliance in the decided case of *Stephen Wanyee Roki v K-Rep Bank Limited & 2 others* [2018] eKLR where the court had cited the case of *Patel v E.A Cargo Handling Services Ltd* (1974) EA 75 and *Shah v Mbogo* (1967) EA 166, to submit that the Appellants application to set aside the judgement had signified a legitimate attempt to rectify a potential miscarriage of justice or any procedural irregularities that may have occurred. That subsequently, by not affording the Appellant an opportunity to present his case for reconsideration, the trial Magistrate had effectively silenced his voice and denied him the chance to address any legal or factual errors that might have influenced the *ex-parte* judgment. That the trial Magistrate should have at least given due consideration to the Appellant's application for a review of the judgment as the Appellant had a justifiable cause for the delay in filing the defence.

10. On costs, he placed reliance on the *Judicial Hints on Civil Procedure, 2nd Edition (Nairobi) Law Africa 2011 at page 101* to urge the court to direct the Respondent herein to bear the costs of the instant suit (sic).

11. He concluded by urging the court that in the interest of justice and in line with the audi alteram patern principle, the judgement, decree and any consequential orders that had been issued by the trial court in the instant matter be set aside and the Appellant be allowed to defend the said suit.

Respondent's submissions

12. In response to the Appellant's appeal and in opposition thereto, the Respondent vide his written submissions dated 27th October, 2023, urged the court to dismiss grounds 1 and 2 of the Memorandum of Appeal in totality since despite the Appellant having been given a chance to defend himself, he had ignored the said chance. That ground 3 and 6 of the said Memorandum of Appeal were vague while ground 4 was a new issue. Lastly, that ground 5 of the Memorandum of Appeal did not relate to the instant suit since there was no company that had been sued hence the Appeal should be dismissed with costs.

13. That whereas the Appellant had indicated that he was Appealing against the ruling that had dismissed his application dated 1st October, 2021, yet he had sought for the review, varying and stay of execution of the decree of 29th June, 2021 pending the hearing and determination of the application inter parties and therefore the Appellant had not been praying for the setting aside of the impugned judgement. That whereas the Appellant had stated that they were never served with summons, upon perusal of the court record the court had satisfied itself that service had been properly done. That further, the

Appellant had failed to annex a draft Defence thus the trial Magistrate had been right in not assisting an indolent litigant.

14. That the instant matter had been filed on 25th July, 2014, heard and determined in favour of the Respondent. However, when the Respondent wanted to execute the eviction orders therein, the Appellant had rushed to court claiming that he had not been served, prompting the parties to record a consent to have the ex parte proceedings set aside. That subsequently, the Appellant was to file a Defence and all compliance Documents within 15 days and thereafter, the matter had been transferred to the Chief Magistrate's court for hearing and determination. That nonetheless, the Appellant had failed to comply with the court's directions requiring him to file a Defence.

15. That accordingly, when the Appellant's Advocate had sought for an adjournment and the court noting that there had not been a Defence on record, it had directed that the case proceeds undefended. That thereafter, the Appellant had filed an application to set aside the proceedings which application had been dismissed and a judgement date given. That after the judgment, the Appellant brought the instant Application which had also been dismissed. He maintained that the Appellant had never had any defense in the instant matter.

16. He placed reliance on the decision in the case of *Shah v Mbogo & Another* [1967] EA 116 to submit that whereas the decision on whether or not to set aside *ex parte* judgment was discretionary, the said discretion was intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error but was not designed to assist a person who had deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. Further reliance was placed on the court of appeal's decision in the case of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR to urge that his rights be realized since the benefits of his judgement were also proprietary rights that were equally protected by the *Constitution* and that litigation must come to an end. He also prayed that he be awarded costs.

Determination.

17. I have considered the record of Appeal, the Ruling by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions. See the case in *Selle vs. Associated Motor Boat Co. Ltd*. [1968] EA 123.)

18. According to the proceedings herein, the Respondent instituted suit against the Appellant and others via Nakuru ELC No. 219 of 2014 *vide* a Plaint dated 25th July 2014 wherein he has sought for judgment and eviction orders against the Defendants from Plot No 12 Residential 5KA Gilgil and thereafter an injunction issue restraining them from dealing with the said parcel of land.

19. It is on record that the Appellant herein did not file a defence nor comply with pre-trial direction wherein on the 15th March 2017, the matter had been set down for hearing for the 2nd November 2017 with notice to the Appellant. However the matter did not proceed because counsel was indisposed. The same was then rescheduled for hearing for the 9th February 2018 with notice to the Appellant and on which day the matter had proceeded for hearing in the absence of the Appellant. The Respondent closed its case and parties had been directed to file their submissions and the matter scheduled for mention for the 18th May 2018 with service upon the Appellant. There was no compliance and mention had been slated for the 29th September 2018 to confirm service upon the Appellant and to take a date for judgment on which date judgment had been slated for the 24th January 2019 upon confirmation that service had been effected upon the Appellant.

20. Subsequently an application dated 30th May 2019 had been filed wherein on the said date, there had been issued an order for stay of execution of the judgment and decree and status quo to be maintained. On 13th June 2019 there was appearance of representation for the Appellant wherein on 17th July 2019, a consent was entered to the setting aside of the ex-parte pleadings, Judgment and decree wherein the matter was then transferred to the Magistrate's court for hearing and determination and registered as ELC No. 217 of 2019.

21. In the Magistracy court, the Appellant did not file his defence nor comply with pre-trial directions yet again despite service. The matter was set down for hearing and proceeded ex-parte on the 21st November 2019. Subsequently the Appellant filed an application dated the 2nd December 2019 to set aside the ex-parte proceedings which application had been dismissed via a ruling of 16th December 2020 and a date set for delivery of judgment for the 3rd February 2021.

22. The Appellant then filed an application dated the 1st October 2021 again seeking to stay of execution of the decree and the judgment of 29th June 2021 which application had been dismissed in a ruling of 21st April 2022 wherein the learned trial Magistrate, had noted the Appellant had yet again failed to file any Defence wherein he had found that despite service, the Appellant had decided to sit on his right, that the application was unmeritorious and the trial Magistrate then went ahead to dismiss the Application, which then formed the basis of the Appeal herein. With the said background in mind, I find the issue arising for determination being whether the Appeal is merited.

23. Having considered the Appellant's Application seeing to set aside the ruling of 21st April 2022 so that he could be given an opportunity to file a defence, the law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the *Civil Procedure Rules* which provision is clear to the effect that.

> " 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. ''

24. I have also considered the reasons that were presented by the Appellant regarding his failure and the failure of his Advocate file their defence to the Plaint. I have keenly perused the court proceedings both in the Environment and Land Court and the Magistrates court to find out whether the Appellant had valid reasons for the said failure.

25. Setting aside an *ex parte* judgment is a matter of the discretion of the court, as was held in the case of *Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd* [2014] eKLR where the court citing relevant cases on the issue had held inter alia:-

> ''The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd*.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration vs Gasyali*. It also goes without saying that the reason for failure to attend should be considered."

26. The Court of Appeal for Eastern Africa in the case of *Mbogo v Shah* [1968] EA 93, held that for the court to set aside an *ex parte* judgment, the court must be satisfied about one of the two things namely:-

> ‘’a. either that the defendant was not properly served with summons; or
>
> b. that the defendant failed to appear in court at the hearing due to sufficient cause.’’

27. As to what constitutes sufficient cause, to warrant the exercise of the court’s discretion, the Supreme Court of India in case of *Parimal vs Veena* 2011 3 SCC 545 attempted to describe what sufficient cause was when it observed that:-

> “ Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

28. In the present case, it is clear that the main ground upon which the Appellant seeks to set aside the ruling of the trial learned Magistrate is that there was sufficient cause that his Advocate had not informed him of the proceedings in Court wherein he had failed to file his defence.

29. In *Patel vs East Africa Cargo Handling Service Ltd* (1974) EA Duffus,V.P. the court had held as follows;

> “ 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 to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

30. From the history of the matter herein above stated, it is clear that the court had noted that there had been no defence filed despite service having been effected but that whenever an *ex-parte* judgment would be delivered which was done twice in this instance, the Appellant, he would file an application to set it aside but neither file his defence nor comply with pre-trial directions.

31. The test to be applied is whether the Appellant honestly and sincerely intended to remain present and participate in the proceedings herein. Sufficient cause is thus the cause for which the Appellant / Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. The Appellant did not demonstrate sufficient cause why they never filed their defence nor appeared in court on the several occasions the matter was coming up for either mention or hearing.

32. From the record, only the Respondent had complied with the provisions of Order 11 of the *Civil Procedure Rules*, by filing witness statements and documents to be relied on as exhibits at the hearing and had proceeded to be present at the hearing wherein he had tendered his evidence both at the Environment and Land Court and before the Chief Magistrates court.

33. The question therefore is whether the kind of defence the Appellant claims in this application is triable or raises triable issues when the same has not been availed/filed despite the court having asked him to regularize the said anomaly. The court while deciding whether there is a sufficient cause or not, must bear in mind the object of doing substantial justice to all the parties concerned. In this case, it is clear that the Appellant failed to file his defence and attend court for the hearing despite service.

34. The Court of Appeal in the case of *Richard Nchapai Leiyangu vs. IEBC & 2 Others*, expressed itself as follows:-

> " we agree with the noble principles which goes further to establish that the court's discretion to set aside 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."

35. It is trite that cases belong to litigants and not their Advocate and therefore a litigant has a duty to peruse his or her case. It will therefore be a travesty of justice to allow the appeal so as to reinstate the suit where the Appellant refused to take the chance to prosecute it.

36. Indeed in *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR, the court of Appeal had observed as follows:

> " The applicant had a duty to pursue his Advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile Advocates. It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an Advocate."

37. I find that the Appeal is an afterthought, a waste of judicial time and an abuse of the court process to vex the Respondent and put him to expense. The Respondent is being gravely prejudiced by the Appellant and therefor there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice. That the court is not powerless to grant relief, when the ends of justice and equity so demand, to this effect, I find that the Appeal herein has no merit and proceed to dismiss it with costs to the Respondent.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 18TH DAY OF JULY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

NAIVASHA ELCA No.15/2024 JUDGMENT Page 3 of 3**