



**Chute v Issu (Environment & Land Case 7 of 2023)
[2024] KEELC 6465 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 7 OF 2023
PM NJOROGE, J
SEPTEMBER 30, 2024**

BETWEEN

NASIR SAID CHUTE APPELLANT

AND

JAMAL BIDHU ISSU RESPONDENT

JUDGMENT

1. The Memorandum of Appeal in this suit states as follows; -

Memorandum of Appeal

1. The Learned Magistrate erred in law and in fact by not according the Appellant any audience at all or allow the Appellant to cross examine the Plaintiff's witnesses and failed to consider the defence and the documentary evidence filed thereon.
2. The Learned Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence and arriving at a decision which is not supported by or is against the weight of the evidence.
3. The Learned Magistrate erred in law and in fact in failing to appreciate that it is trite law that a certificate of title, issued by the Registrar upon registration is prima facie evidence before all courts that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation.



4. The Learned Magistrate erred in law and in fact by not considering that the Appellant is the only one who holds a valid title to the suit (*sic*) held that there was no defence when there was defence on record.
 5. The Learned Magistrate failed to appreciate or give due regard to the doctrine of and the provisions of the law regarding [Registered Land Act](#), Civil Procedure and the [Evidence Act](#).
 6. The Learned Magistrate erred in fact and law in failing to make an appropriate order that the suit had to be heard interparties.
 7. The Learned trial Magistrate based his judgment by ignoring that the weight of evidence produced by the Appellant outweighed that was tendered by the Respondent and proceeded to pronounce a harsh Judgment with set mind.
 8. The Learned trial Magistrate erred in law and in fact that the document produced belonged to another title Marsabit/Jirme/1416 which is distinct from the Appellant's Marsabit/Jirme/1969 yet the Respondent is occupying the same.
 9. The Learned trial Magistrate erred in law and in fact (*sic*) there was no boundary dispute but the issue of ownership.
 10. The Learned trial Magistrate erred in law and in fact by relying on conflicting written evidences (*sic*) of the Respondent against the straight forward and corroborating evidences (*sic*) of the Appellant inclusive of supporting documents.
 11. The Learned trial Magistrate erred in law and in fact by concluding that the Respondent was likely to suffer irreparable damage which the Appellant could not compensate.
 12. The Learned trial Magistrate erred in law and in fact by concluding that there was any judgment to be pronounced on a balance of probabilities.
 13. That the Learned Magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.
 14. The Learned trial Magistrate erred when the same failed to hold that the suit as mounted was brought with unclean hands and the same was equally an abuse of the court process.
 15. The Learned trial Magistrate fundamentally erred in law when the same failed to consider serious issues raised by the Appellant in his Defence.
 16. The Learned trial Magistrate erred in law and fact when the same relied on extraneous issues as a basis of her determination.
2. The Appeal was canvassed by way of written submissions.
 3. At page one of his submissions the Appellant unequivocally states that his main ground of Appeal is that he was never accorded any audience and arising thereof he was not allowed to cross-examine the Respondent's witnesses. On the same page and paragraph, he states that his other ground of Appeal is that the trial court failed to consider his defence and the documentary evidence he had tendered in



support of his case. As parties are bound by their pleadings, I will treat these two as the main grounds of his appeal.

4. In his submissions, the Appellant says that the Respondent had attempted to buy land from him but he rebuffed him. He says that he discovered that the Respondent had carved out a portion of land from his parcel of land which measured 1 Hectare.

He categorically states that the dispute in the trial court concerned trespass and not a boundary dispute and therefore contends that the Land Registrar had no business to be involved.

5. The Appellant further says that the Magistrate in the trial court did not consider the fact that his land is Marsabi/Jirme/1969 whereas the respondent's land is Marsabit/Jirme/1416.

6. The Appellant proffered a plethora of authorities, to wit;

- i. *Olympic Escort International Co. Ltd & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR for his assertion that

“It is trite law that a triable issue is not necessarily one that the defendant would ultimately succeed on. It only needs to be bona fide”.

The Appellant does not demonstrate any nexus between the legal principle enunciated by this case and his appeal.

- ii. *Ranji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 Others* [2005] eKLR for his assertion that power to strike out proceedings must be sparingly exercised. By any stretch of imagination, this prominently tenable legal principle is not relevant to the circumstances of this case. Nowhere does the appellant in his Memorandum of Appeal claim that the trial Magistrate had struck out his pleadings.
- iii. *Shah v Mbogo and Another* [1967] EA 116, for his assertion that the discretion to set aside ex parte proceedings is intended to promote the cause of justice but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct the course of justice. I opine that this case is a sound authority in the right circumstances and facts.
- iv. *Wachira Karani v Bildam Wachira* [2016] eKLR. In this case the court dealt with what was sufficient cause for setting aside an ex parte decision. I do note that this court is here dealing with an appeal against a judgment of the trial court.
- v. *BML v WVM* [2020] eKLR. In this case the court of Appeal was defining sufficient cause and opined that: “Sufficient cause means that the parties 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 not been “not acting diligently.” This case is no doubt a good authority in proper circumstances and facts but the appellant does not bring out its legal nexus with his appeal.
- vi. The *Hon. Attorney General v The Law Society of Kenya & Another*, Civil Appeal (Application) No. 2011. This case dealt with what is “sufficient cause”
- vii. *Patriotic Guards Ltd v James Kipchirchir Samba*, Nairobi Court of Appeal No. 20 of 2016 [2018] eKLR. This case enunciates the principle that a court's discretion should be exercised judicially taking into account the circumstances of each case with the ultimate aim being the paramount aim of the court to dispense substantial justice.



- viii. Embu High Court Civil Appeal No. E033 of 2011. In this case the court restated the principles apposite to exercise of a Courts' discretion but stressed that such discretion should not be designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of Justice.
 - ix. *Abdirahamn Abdi v Safi Petroleum Products Ltd & 6 Others* [2011] eKLR. In this case the court recognized that Article 159 (2) of the *Constitution* makes it abundantly clear that courts have to do justice without undue regard to procedural technicalities.
 - x. *Nicholas Salat v IEBC & 6 Others*, CA (Application) No. 228 of 2013. This case restated the principle that courts should eschew inordinate regard to procedural technicalities.
7. The Appellant has submitted that Order 10 Rule 11 of the *Civil Procedure Rules* has been clear that because of non-appearance, the court may set aside or vary such Judgment or any subsequent decree or order upon such terms as are just. Whereas this is a true exposition of the law, this provision is expected to apply where a litigant files an application for the trial court's judgment to be set aside. In the circumstances of this case, the appellant never moved the trial court to set aside the impugned Judgment.
 8. The Appellant submits that Order 22 of the *Civil Procedure Rules* provides that a party may make an application to set aside a sale on grounds of irregularity or fraud. With due respect this submission has no evidential probative value in the circumstances of this appeal as the appellant has not claimed that he had filed any application in the trial court to set aside any sale on grounds of Irregularity or fraud.
 9. The Respondent agrees with the appellant that this appeal concerns two main issues, to wit;
 - i. Whether or not the appellant was accorded a fair hearing by the trial court through adequate opportunity to be heard and to tender his evidence.
 - ii. Whether or not the trial court considered all the evidence before it before arriving at its Judgment.
 10. The Respondent's Advocate narrates, that the Respondent purchased Parcel No. Marsabit/Jirme/1416 from one Stella Uran Lekituce Lesotia at a consideration of Kenya Shillings One Million and One Hundred Thousand on 22nd August, 2011. He says that upon transfer of the said property to him he fenced the property and deposited Construction materials but the appellant mobilized some youths who destroyed the fence upon the Appellant's claim that the fence was on land which was part of the Appellants Parcel No. Marsabit/Jirme/1969. The Respondent reported the matter to Marsabit Police Station where he was advised to Lodge a complaint with the Land Registrar for him to ascertain if or if not Parcel Nos Marsabit/Jirme/1416 and Marsabit/Jirme/1969 were situated on the same ground and whether the boundaries of the two plots were separate and, if so, then the two plots were distinct.
 11. The Respondent narrates that the Land Registrar invited both parties informing them of the intended visit to the disputed plots on 17th June, 2021 but the Appellant responded to the invitation through his advocate and unequivocally rejected the jurisdiction of the Land Registrar and laconically held that their dispute could only be handled by the court. He declined to attend the visit.
 12. The Respondent states that the Land Registrar and the County Surveyor made their visit on 17th June, 2021 and they prepared a report in which they concluded that the two parcels on the ground were separate.
 13. The Respondent submits that the date for hearing of the suit was given by the trial court in the presence of the appellant and of his advocate. He says that on the date slated for hearing the plaintiff called 2



witnesses and since there was no appearance by the defendant, a date for Judgment was given as the 17th of January, 2023. He says that when the Judgment was delivered, the defendant was in court. I do find as a fact that both the defendant and his advocate were present in court when the Judgment was delivered.

14. The Respondent submits that the Appellant was accorded fair hearing and he cannot blame the court when it is he himself who refused to attend the hearing despite full knowledge of the hearing date. He further submits that at no time did the appellant approach the trial court with an application to set aside or review the Judgment. The Respondent submits that the Appellant is merely seeking to circumvent the court of Justice through a plethora of unsubstantiated grounds hoping that any one of them would stick. He opines that this appeal is an abuse of the court process and a waste of Judicial time meant to frustrate him from developing his suit property.
15. The Respondent has proffered as an authority the case of *Shah v Mbogo & Another* [1967] EA 116 for its holding that setting aside of ex parte proceedings or decisions is meant to obviate injustice or hardship emanating 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.”
16. The Respondent submits that the Appellant is being uneconomical with the truth when he says that it is his advocate who failed to inform him regarding the date when the suit was to be heard. He unequivocally states that the appellant and his advocate were present in court when the trial court fixed the hearing date. He states that the appellant has not explained why he did not attend the hearing when he was there when the date for the hearing was fixed by the court.
17. The Respondent submits that having given his evidence which was supported by two witnesses and having tendered all the apposite exhibits including the registrars report which was unequivocal that Land Parcel Marsabit/Jirme/1416 belonged to him and that on the ground it was distinct from the appellants land Parcel No. Marsabit/Jirme/1969, he had proved his case to the satisfaction of the trial court. He therefore contends that the trial court properly considered, analyzed and assessed all the evidence placed before it before arriving at the impugned Judgment. Consequently, he prays that the appeal be dismissed with costs.
18. My court being the 1st Appellate Court is entitled to look at all the evidence tendered in the trial court, to consider it, to analyze it and to arrive at my Independent decision regarding the integrity of the impugned Judgment.
19. I have carefully gone through the proceedings in the trial court. I have also perused the Impugned Judgment.
20. I do find that the Appellant except for just willy nilly bandying several grounds including ground numbers 3,4,5,6,7,8,10,11,12,13,14,15 and 16 did not proffer evidence to prove the assertions claimed in those grounds. I, therefore, dismiss them outrightly.
21. I agree with the submissions made by both the appellant and the respondent that there are two main issues meriting consideration in this appeal. These are;
 - i. Was the appellant accorded a fair hearing and therefore given an opportunity to cross-examine the respondent and to tender his evidence?
 - ii. Did the trial court consider all evidence tendered by the parties including the appellants defence and his documentary evidence?



22. I have considered all the authorities proffered by the parties and the legal principles contained therein, where applicable, are applied to this Judgment.
23. I note that paragraph 9 of his Memorandum of Appeal States that;

“The Learned trial Magistrate erred in law and in fact (*sic*) there was no boundary dispute but the issue of ownership.”

He means that issues concerning boundaries and trespass (meaning ownership) should not be conflated. This court observes that there is a very fine line separating the two issues, especially where a dispute concerns adjoining properties. Where one party claims that the other party has intruded into his property and the other denies that assertion, the dispute becomes both a case of trespass (boundary) and a case of ownership. Someone needs to determine who should be positioned where on the ground. In our law, that person is the Land Registrar who on Survey technical issues is assisted by the appropriate Surveyor. I, therefore, find that contrary to what the appellant claims in his Memorandum of Appeal, the Land Registrar had an important role to play before the dispute in this matter was escalated to the trial court. I unequivocally opine that a court of law cannot arrogate unto itself the technical and professional knowledge of the Land Registrar and the Surveyor. I also opine that it is unfortunate that the appellant refused to participate during the visit made by the Registrar and the County Surveyor to the disputed parcels of land.

24. I will now address myself to the two overarching issues;

The first one concerns if the appellant was accorded a fair hearing. Having perused the lower courts proceedings, I find as a fact that the appellant and his advocate were present in court when the hearing date was fixed. He however absented himself from the hearing as a result of which the hearing proceeded *ex parte* and the respondent and his witnesses gave their evidence. I find that the court acted within the law when it proceeded to hear the suit and to pronounce its Judgment. Even after Judgment was delivered, the appellant did not move the court by the way of a proper application to set aside its Judgment. I, indeed, find that the appellant is being untruthful when he claims that he failed to attend the hearing because his advocate had not informed him that hearing was to take place on the date fixed for it. He was in court with his advocate when the hearing date was fixed. If a party deliberately refuses to take part during a hearing he is fully aware of, a court of law has no other choice but to proceed with the hearing. Otherwise the court's business would be brought to a complete standstill by devious litigants. Indeed, as held by the Court of Appeal in the case of *Shah v Mbogo and Another* [1967] EA 116, discretion to set aside *ex parte* proceedings

“... is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of Justice.” I find that by the appellant refusing or failing to attend the impugned hearing and not offering any explanation for that refusal or failure, the appellant was evading and delaying the course of Justice.”

25. I now turn to the appellants assertion that the trial court did not take into account pleadings, his defence and the documents he had filed. Having refused to participate in the hearing, the appellant denied himself the opportunity to cross-examine the respondent and his witnesses and to produce his exhibits. Having perused the trial courts Judgment, I find that the trial Magistrate eruditely delivered his Judgment having considered all the evidence that had properly been placed before him. I hereby dismiss the claim that the trial court did not consider all pertinent evidence when it made its Judgment.
26. In the circumstances, I find that none of the grounds in the appellants Memorandum of Appeal has been proved. Consequently, I issue the following orders;



- i. This appeal is hereby dismissed.
- ii. Costs shall follow the event and are awarded to the Respondent.

DELIVERED IN OPEN COURT AT ISIOLO THIS 30TH DAY OF SEPTEMBER, 2024 IN THE PRESENCE OF:-

Court assistant: Balozi/Rahma

HON. JUSTICE P.M NJOROGE

JUDGE

