Kariuki v Baya (Environment and Land Appeal E009 of 2023)
[2024] KEELC 6149 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6149 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E009 OF 2023

NA MATHEKA, J

SEPTEMBER 25, 2024

BETWEEN

PETER KARUGA KARIUKI ..... APPELLANT

AND

DANIEL BAYA ..... RESPONDENT

JUDGMENT

1. The Appellant Peter Karuga Kariuki being aggrieved by the whole of the said Ruling given by the Honourable Court on the 23rd June, 2023 in CMCC No. E092 of 2021 appeals to this Court against the above mentioned Ruling on the following grounds: -

    1. The Honorable Magistrate erred in law and fact in failing to appreciate that the Honourable Court was functus officio and is therefore bound by its decision delivered on the April 16, 2021 and/or lacks authority to deviate since the judgment has not been reviewed and/or appealed against.

    2. The Honorable Magistrate erred in law and fact and abused its discretion in hearing the Respondent exparte allowing the Respondent to reopen the case and proceeding list the said matter for pre-trial conference.

    3. The Honorable Magistrate erred in law and fact in allowing Respondent to remote control the Honourable Court whereof the Honourable Court, issued erroneous orders purporting to set aside an interlocutory judgment of 3rd October, 2022 whereas the interlocutory judgment was entered on the 25th March, 2021.

    4. The Honorable Magistrate erred in law and fact by failing to appreciate that the suit was not in its interlocutory stage as the matter had proceeded for formal proof and judgment in the matter issued on the 16th April, 2021.

5. The Honorable Magistrate erred in law and fact by violating the rights of the Appellant as enshrined under Article 47 and 50 of *the Constitution* of Kenya 2010 to a fair administration, and to be heard before the ruling issued on the 23rd June, 2023.

6. The Honorable Magistrate erred in law and fact and acted in bad faith by purporting to issue orders on the 14th June, 2023 when the record clearly show that said application ought to have been heard on the 13th June, 2023.

7. The Honorable Magistrate erred in law and fact, and in utter violation of the Appellant's right protected under Section 21 of Land Titles Act Cap 282 by continuing to allow the Respondent to illegally possess the Appellant's suit land Plot No. C.R 38375 Plot N6046/II/ MN situated within Mombasa County.

8. The Honorable Magistrate erred in law and fact in setting aside a judgment when there was nothing and/or draft defence placed before Court to show if the Respondent had a defence that raised any triable issues warranting the orders sought.

9. The Honorable Magistrate erred in law and fact and abdicated his judicial function and duty by failing on Court's record and proceedings which indicated that the judgment was issued on the 16th April, 2021 but instead relied on misrepresented facts provided by the Respondent.

10. The Honorable Magistrate erred in law and fact in proceeding to hear the Respondent's Notice of Motion application dated 3 ISI May, 2023 exparte giving rise to the ruling on 23rd June, 2023.

11. The Honorable Magistrate was biased by dismissing the Appellant's Amended Notice of Motion dated 23td June, 2023 with cost seeking a review of the Ruling delivered on 23rd June, 2023 even after the facts had been provided that the Court was functus officio.

12. The Honorable Magistrate erred in law and fact by relying on the allegation by Respondent in misleading the Court to believe that the mistake was of his former Counsel, but the record will indicate on numerous occasion the suit was adjourn on the instant of his former counsel inability to locate him because he had vanished in thin air

13. The Honorable Magistrate erred in law and facts by failing to take into consideration that making the Appellant to pay for the purported mistake and/or an oversight on the part of the Respondent and his Counsel is a grave miscourage of justice.

The Appellant prays to this Honorable Court for Orders:-

a. That this Appeal be allowed

b. That the Ruling issued on the 23rd June, 2023 and the consequential orders thereof be vacated.

c. That the Civil suit CMCC No. E092 of 2021 be removed from Court No. 9 and/or before Honorable G. Sogomo PM to another Magistrate Court for execution of the Decree issued on the 21st April, 2021

d. That the cost of this Appeal be provided for.

2. The appeal herein is against the ruling of (Hon. G. Sogomo) in Mombasa CMCC E092 OF 2021 where the trial court allowed the respondent's application dated 31st May 2021. The application sought orders for setting aside the interlocutory judgment and leave to file a defence. The affidavit in support deponed that the failure to file a defence was occasioned by the inadvertent mistake of the respondent's former advocates to act on the instructions given within the statutory timelines. The application was

unopposed by the appellant. In his ruling dated 23rd June 2023, the learned magistrate ruled that the respondent was let down by his previous advocates and proceeded to allow the application as prayed.

3. The appellant herein filed the trial suit on 27th January 2021, and effected service of the plaint and accompanying documents onto the respondent on 1st March 2021. The firm of Ameli Inyangu entered an appearance on behalf of the respondent on 14th April 2021 but never filed a defence. The appellant requested judgment against the respondent for failure to enter appearance and file a defence on 24th March 2021 and was issued with a decree on 21st April 2021. Then he proceeded to file an exparte notice of motion dated 7th September 2021 seeking eviction orders against the respondent, and the same was allowed vide a ruling dated 31st October 2022.

4. From the facts, it is clear the judgment that was entered was a regular default judgment, where Order 10 Rule 11 of the Civil Procedure Rules applies, the said rule empowers the court to set aside an ex parte judgment for default of appearance and defence. The Court of Appeal in *James Kanyiita Nderitu & another vs Marios Philotas Ghikas & another* (2016) eKLR held that:

> In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other."

5. These powers are discretionally and as regards the exercise of this discretion, it was established in *Pithoni Waweru Maina vs Thuka Mugiria* (1983) eKLR that;

> "Firstly, as was stated by Duffus P in Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E:
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> > "There are no limits or restrictions on the judge's discretion 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 it by the rules."
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> Secondly, as Harris J said in Shah v Mbogo [1967] EA 116 at 123B:
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> > "This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

6. That judgment was approved by the Court of Appeal in *Mbogo v Shah [1968] EA 93. And in Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 Briggs JA said at 51:

> "I consider that under order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though

> negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

7. The setting aside of an interlocutory judgement and allowing the respondent to file a defence is not granted as a right, it is done on terms that are just. In *Times U Savings and Credit Co-Operative Society Limited vs Njuki & another* (Civil Appeal E033 of 2021) (2022) KEHC 3012 (KLR) (12 May 2022) (Judgment), the court held that;

> The court must satisfy itself that there is a good explanation that has been offered to set aside such judgment and upon such terms that it would deem fit in the circumstances for the reason that such action would definitely be taking a plaintiff back in time causing delay in the conclusion of her case especially where the matter had proceeded to formal proof and a judgment given."

8. The respondent in his supporting affidavit deposed that failure to file a defence in good time was due to an oversight and inadvertence of his previous advocates on record. He proceeded to claim that the firm failed to act as he had instructed them and he urged court not to punish him for his counsel's mistake. In my view the reasons advanced by the respondent were not sufficient to warrant the exercise of the court's discretion in his favour. The respondent claimed his previous counsel did not act on his instructions, yet the said counsel filed an application dated 4th November 2021 seeking to cease acting for the respondent as a result of the failure to issue instructions. The respondent did not follow up with his previous advocates on the process of the case, which was an indication he took the case casually until he was issued eviction orders.

9. In my considered view, there was no blunder on the side of the previous advocates, instead the respondent failed to instruct them and take charge of his case to its formidable conclusion. As was correctly stated in Shah v Mbogo (Supra), the court should not assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. At the same time, Section 1A of the *Civil Procedure Act* mandates litigants to be actively involved in the affairs of their case. It states:

10. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".

11. The respondent should have annexed a draft defence to their application to enable the court to evaluate whether he had a reasonable defence raising triable issues. The reasons advanced by the respondent for his failure to file a defence are not satisfactory. Their previous counsel sought to leave to cease acting on account of failure to be instructed. The learned magistrate erred in law and in fact by exercising his discretion of setting aside a regular default judgment, while prejudicing the appellant who did not have the advantage of knowing the defence that would be levelled against his case. The court also notes that the default judgment was entered on 16th April 2021 and the application to set it aside was made on 31st May 2023. The time that has elapsed since the default judgment was entered has not been explained by the respondent at all. The learned magistrate erred by failing to consider the prejudice that the appellant would suffer and whether the same would be compensable by an award of damages.

12. The upshot of the foregoing is that the Appeal is merited and is allowed in terms of prayer (a), (b) and, (d).

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE