



**Njambi v Karah & 3 others (Environment and Land Appeal E029 of 2022)  
[2024] KEELC 6678 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6678 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E029 OF 2022  
MD MWANGI, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**PETER NDAMBIRI NJAMBI ..... APPELLANT**

**AND**

**QASIM HIRSI KARAH ..... 1<sup>ST</sup> RESPONDENT**

**FARAH HASSAN ABDULLAHI ..... 2<sup>ND</sup> RESPONDENT**

**AMINA ABDULLAHI ..... 3<sup>RD</sup> RESPONDENT**

**MAHAMED ABUBAKAR MOHAMED ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The appeal before me is an appeal from the ruling and order of the Chief Magistrate's Court in Nairobi CMCC 3073 of 2010 issued on 20<sup>th</sup> March, 2021. The Appellant's Memorandum of Appeal is dated 7<sup>th</sup> April, 2022 and is indicated to have been filed pursuant to leave of the court granted on 24<sup>th</sup> March, 2022. The Appellant has listed 10 grounds of appeal. He prays that his appeal be allowed and that the order issued on 30<sup>th</sup> March, 2021 by Hon. E. M. Kagoni be set aside and in its place, the application dated 17<sup>th</sup> December, 2020 be allowed as prayed. Finally, he prays that the suit be remitted to the subordinate court for hearing by a judicial officer other than Hon. E. M. Kagoni, Principal Magistrate.

**Court's Directions.**

2. The Court's directions were that the appeal be canvassed by way of written submissions. Both parties complied and filed their respective submissions which I have had an occasion to read and consider.



### Submissions by the Appellant

3. The Appellant's submissions are dated 3<sup>rd</sup> April, 2024. The Appellant addresses all the 10 grounds of appeal wholesomely.
4. In his submissions, the Appellant submits that the Respondent's suit before the Magistrate's court was on 8<sup>th</sup> May, 2017 dismissed for want of prosecution. Surprisingly, on 21<sup>st</sup> May, 2020, the file was placed before Hon. Kagoni, Principal Magistrate, for consideration of an application under certificate of urgency by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 20<sup>th</sup> May, 2020. The learned Magistrate certified the application urgent and granted an order ex parte for the removal of a perimeter wall that purportedly encroached into the Respondents' land.
5. The Appellant asserts that the order issued by the learned Magistrate amounted to an abuse of the process since there was no suit as the entire suit had been dismissed on 8<sup>th</sup> May, 2017. Secondly, the Appellant contends that an order of such magnitude cannot be issued ex parte. Further he states that there was no service (of the application) upon the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs. The Appellant argues that the issuance of the orders ex parte was prejudicial to him.
6. On 22<sup>nd</sup> June 2020, learned Magistrate Hon. Makau, noted that the application had been filed and orders obtained when there was no suit in view of the dismissal for want of prosecution. The matter was nonetheless reserved for mention on 22<sup>nd</sup> July, 2020. The Respondents did not attend court on 22<sup>nd</sup> July, 2020 but filed an application dated 27<sup>th</sup> July 2020, a week thereafter.
7. The said application dated 27<sup>th</sup> July 2020 was placed before Hon. Kagoni on 3<sup>rd</sup> August, 2020 who reinstated the suit and the prayer for the removal of the perimeter wall reserved for a later date. The order was subsequently given on 17<sup>th</sup> August, 2020.
8. The Appellant filed an application dated 11<sup>th</sup> December, 2020 seeking to set aside the order of 17<sup>th</sup> August, 2020 which was however dismissed on 30<sup>th</sup> March, 2021. It is that dismissal order that the Appellant appeals against. The Appellant points out that, in dismissing the application to set aside, the learned Magistrate stated that the orders of 17<sup>th</sup> August, 2020 did not amount to final orders. Further that the Appellant had not provided evidence to show the attempts he had made to get in touch with his former Advocates, and that he had not demonstrated the prejudice he was going to suffer.
9. The Appellant urges the court to exercise the 'broad sense of justice and fairness' by allowing his appeal to enable him have his day in court and his case be hard on its merits for a fair determination as opposed to the summary and unprocedural manner employed by the Respondents.
10. In their submissions, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that on the date that their application dated 27<sup>th</sup> July 2020 was set down for inter-partes hearing, neither the Appellant nor his advocates appeared in court. They too had not filed any response to the application despite having been served. The court therefore, upon considering, and satisfying itself that the application was merited, proceeded to allow the same as prayed.
11. The Appellant filed the application dated 17<sup>th</sup> December, 2020 seeking to set aside the aforesaid orders of the court issued on 17<sup>th</sup> August, 2020. The court dismissed the application vide its ruling dated 30<sup>th</sup> March, 2021.
12. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents identify 3 issues for determination, namely;
  - a. Whether the learned Magistrate erred in dismissing the application dated 17<sup>th</sup> December, 2020.



- b. Whether the orders issued on 17<sup>th</sup> August, 2020, effectively disposed of the substantive suit prematurely; -
  - c. Whether the appeal is merited.
13. On the 1<sup>st</sup> issue, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that though the power to set aside is discretionary, it is to be exercised judiciously. The Applicant is obligated to establish that he was either not served or that there was some other sufficient reason that prevented him from appearing in court despite service. They refer to the decision in PMM – vs – JNW (2020) eKLR, where the court stated that in setting aside *ex parte* orders, it must be satisfied of one of two things, namely, either the Respondent was not properly served or that he failed to appear in court at the hearing due to sufficient cause.
  14. On the 2<sup>nd</sup> issue, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents assert that there is no dispute of ownership of property title Nos. Tassia –II 21190/081/1 and Tassia-II 21190/082/2. The Appellant does not claim any proprietary interest over the 2 properties. The trial court was therefore right in holding that no prejudice would be suffered by the Appellant on the issuance of the order to remove the perimeter wall. The orders of 17<sup>th</sup> August, 2020 did not in any way dispose of the entire suit as alleged by the Appellant.
  15. Finally, on the merits of the appeal, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the appeal is devoid of merit. The Appellant has not proved that the trial Magistrate misdirected himself in exercising his discretion and issuing the impugned orders.

#### **Determination**

16. I may as well say that the law is well settled on the duty of the 1<sup>st</sup> Appellate court.
17. As Mativo J (as he then was) stated in the case of *Mursal & Ano vs Manese (suing as the legal administrator of Dalphine Kanini Manesa){2022} (Civil Appeal E20 of 2021)* KEHC 282 (KLR)(6 April 2022) (Judgement),
 

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
18. The same position was enunciated in the case of *Selle & another -vs- Associated Motor Boat Co. Ltd & others* (1968) E.A 123, where the court stated that:
 

“.... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.”
19. As I noted earlier on, the Appellant addresses all the 10 grounds of appeal wholesomely. I will likewise handle the appeal in a similar manner.
20. The impugned ruling was delivered by the court on 30<sup>th</sup> March 2021. It was in respect to the Appellant’s application dated 17<sup>th</sup> December 2020.



21. The Appellant's application of 17<sup>th</sup> December 2020 was brought under the provisions of Order 22 rule 22(1) of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. The application was that'

"...This Honourable Court be pleased to stay the execution of the orders issued on 14<sup>th</sup> August, 2020 against the Defendant/Applicant herein and set them aside pending inter partes hearing and determination of this application."

22. The court after considering the application found that the Appellant had not made a case either for stay of execution or setting aside its earlier orders.

23. Having carefully considered the submissions by parties herein as well as the documents in the record of appeal, I agree with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the issues for determination as follows:

- a. Whether the learned Magistrate erred in dismissing the application dated 17<sup>th</sup> December, 2020.
- b. Whether the orders issued on 17<sup>th</sup> August, 2020, effectively disposed of the substantive suit prematurely.
- c. Whether the appeal is merited.

24. There is no dispute that a court of law has the discretion to set aside ex parte order(s). The court's discretion as spelt out in the case of Shah – vs – Mbogo (1967) EA 116, 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

25. The court in CMC Holdings Ltd – vs – Nzioki (2004) 1KLR 173, held that: -

"...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 other things an excusable mistake or error."

26. I need to be clear here. It is incumbent upon the Applicant to demonstrate the inexcusable mistake, error or inadvertence to justify the court's exercise of discretion in his favour.

27. In his ruling the learned Magistrate duly considered this issue and found out that;

"Upon reading the applicant's supporting affidavit sworn by Patrick Muriithi Counsel for the applicant it was evident that no reason was preferred why the applicant did not file its response nor is there any reason why the applicant's counsel was not in attendance on the day scheduled for interpartes hearing. This court has gone through the proceedings of 06.08.2020 herein. Mr. Omega holding brief for Mr. Ndegwa told this court that the application dated 27.07.2020 was coming for hearing but they were yet to file a response despite service being effected on their part on 04.08.2020. Mr. Omega prayed for leave to file a response and in as much as the application was opposed by Mr. Khaemba stating that the defendant has been served severally, Mr. Omega's oral application for leave to file a response was granted. At that point it should have been clear to the defendant/applicant herein that his time was running out in responding to the application, lest he be seen as the party seeking to delay the hearing of the application."



28. The trial court clearly found the Appellant undeserving of its exercise of discretion after duly considering the reasons advanced by the Appellant.
29. I have reconsidered, re-analysed and re-evaluated the Appellant's application. The Appellant did not, as clearly pointed out by the trial court, sufficiently explain his reasons for failing to respond to the application by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The court therefore rightly exercised its authority in dismissing the application to set aside.
30. Further and as I earlier noted, the Appellant's application was brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*. The Appellant sought refuge in the overriding objective principle spelt out in Sections 1A and 1B of the *Civil Procedure Act*.
31. The overriding objective as has been variously stated, must not be abused as the shield for indolence and sloppiness.
32. The Court of Appeal pronounced in the case of *Floris Pierro & Ano – vs – Giancarlo Falasconi (As the Administrator of the estate of Santuzza Billioti Alias Mei Santuzza (2014) eKLR*,

“...Article 159 of *the Constitution* of Kenya, enjoins courts to administer justice without undue regard to procedural technicality. Failure to include in the record of appeal a primary document or to formally apply to court for leave to file a supplementary record to include the same cannot be wished away as a procedural technicality. Otherwise, there will be no orderly conduct of business in this court nor was that article in *the Constitution* meant to be a panacea for advocates' negligence or casual approach in dealing with appeals to this court. Nor can it be said that such blatant omissions should be relegated to the periphery in pursuit of the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* and 3B of the *Appellate Jurisdiction Act*. Similarly, these provisions were not meant or aimed at camouflaging the indolence or negligence of the parties to the appeal neither were they meant to throw out of the window the well-known rules of the court.”

33. The 2<sup>nd</sup> issue is whether the ruling of the court determined the entire suit with finality. I disagree with the Appellant's submissions on this issue. The order on demolition of the wall as ordered by the court is not tantamount to a determination on the ownership of the properties in dispute. I will refrain from any further comments on this issue in order not to prejudice any party at the hearing of the case or embarrass the trial court. The Appellant still has the opportunity to present his case and have it determined on its merits before the trial court.
34. Consequently, this court's finding is that the appeal herein lacks in merit and the same is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Bryan Khaemba for the 1st and 2nd Respondent

Mr. Kerongo for the Appellant

Court Assistant: Yvette



**M.D. MWANGI**  
**JUDGE**

