



Ochieng & 2 others v Pedval Limited (Environment and Land Appeal E052 of 2022) [2024] KEELC 5987 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5987 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E052 OF 2022
AA OMOLLO, J
SEPTEMBER 19, 2024**

BETWEEN

KELVIN OCHIENG 1ST APPELLANT

ERICK OTIENO HESBON 2ND APPELLANT

ABDUL WAMALA 3RD APPELLANT

AND

PEDVAL LIMITED RESPONDENT

JUDGMENT

1. The Appellants being dissatisfied with the finding of the honourable Murage ESQ in the ruling delivered on 24th June, 2022 brought this appeal. They pleaded thus;
 1. That the Learned Magistrate erred in law and fact when she failed to appreciate that Summons had not been served upon the Defendants in these proceedings hence locking the Defendants Pleadings out is prejudicial and a denial of justice.
 2. That the Learned Magistrate erred in law and fact that she failed to appreciate that at the time she confirmed the matter for hearing the third Appellant was in United States of America and parties had not complied with Order 11 of the Civil Procedure Code hence the matter was confirmed prematurely.
 3. The Learned Magistrate erred in law and fact when she failed to appreciate that the 1st Appellant and 2nd Appellant were only but agents of the 3rd Appellant hence they knew very little about the ownership of the suit premises and could not be sued when there is a disclosed principal.



4. The Learned Magistrate erred in law and fact by locking the Defendants pleadings out of the case when the substantial loss or prejudice was going on to be occasioned to the Respondent while irreparable loss may be occasioned to the Appellants.
 5. The Learned Magistrate erred in law and fact by locking real evidence out hence the case as left cannot be decided on merit and as such no substantial justice can be done to the parties herein as the Respondent had been given undue advantage.
 6. The Learned Magistrate erred in law and fact by failing to appreciate that the grounds adduced by the Appellants in their Applications were plausible, merited hence the Appellants deserved being given a chance to be heard on merit.
 7. The Learned Magistrate erred in law and fact when she failed to consider the relevant facts but dwelt on irrelevant and extraneous matter which did not go into the merit of the case thereby occasioning injustice to the Appellants.
2. The Appellant prayed that the appeal be allowed and this court to issue the following reliefs;
- a. The decision of the Lower Court issued on 24th June, 2022 be reserved, quashed and/or be set aside.
 - b. That the Appellants' Application dated 19th May, 2022 be allowed as prayed.
 - c. That the Hearing of the Lower Court case do proceed before any other Magistrate other than Hon. Murage (S.R.M)
 - d. Costs of this Appeal provided for.
 - e. Any other Order or relief this Court may deem to grant in the circumstances.
3. Directions were taken that the appeal be prosecuted by way of written submissions. The Appellants submissions are dated 5th April 2024 and the Respondent submissions are dated 12th of June, 2024. The Appellants submitted on the provisions of Order 5 arguing that to date they have not been served with summons to enter appearance. They cited the case of Challenger Trade Finance Segregated Portfolio of South Africa SPC Vs Danish Bnewing Company for the proposition that upon service of summons, time for compliance with steps in the proceedings start running.
4. The Appellant avers that the 1st and 2nd Appellants were his agents who could not be sued when there is a disclosed principal. That the 3rd Appellant who could issue instructions had left the country before being served with STEA thus he could not give instructions.
5. The Appellant also submitted that the matter was certified ready for hearing pre-maturely as parties had not complied with the provisions Order 11 and despite the fact that summons had not been served. They added that given the 3rd Appellant was out of the Country seeking treatment was a good ground for the lower court to exercise discretion to allow his pleadings and documents to be filed out of time.
6. It is their further submissions that the trial Magistrate erred in leaving their documents out when no substantial loss or prejudice was going to be occasioned to the Respondent. They invited the court to look at the events preceding the hearing inter alia the hearing of 17th May, 2022 being fixed exparte. That the learned trial magistrate was in a hurry to expunge the defendants pleadings and documents without considering the law and article 159 (2) (d) of *the Constitution*.
7. In support of ground 5 of the appeal, they submitted that this case relates to two compelling titles and that the 3rd Appellant's title was issued first time. They cited the case of Hassan Hashi Shirwa v Swala



Hudin Mohmaed [2011] eKLR where E.K.O Ogola allowed reopening of a case after both parties had closed their case. The Appellants also relied on the case of Belinda Murai & Others v Amoi Wainaina & 2 Others [1978] eKLR which held that;

“A mistake is a mistake. It is no less a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

8. They continued to submit that their impugned application raises plausible grounds hence it was merited. That the trial court only relied on extraneous matter in dismissing the application. They urged the court to allow the appeal and set aside the order dismissing the application dated 19th May, 2022.
9. The Respondent on its part raised three questions in their submissions to wit;
 - i. Whether the documents filed out of time should be admitted.
 - ii. Whether summons can be dispensed where a party has entered appearance.
 - iii. Who bears the costs of the appeal.
10. The Respondent submitted that courts have power to strike out pleadings under order 2 rule 15 and the power to admit documents filed out of time is discretionary which should be exercised when the defendant produces compelling reasons. The Respondent cited the case of Beatrice Wanjiru Kamuri v John Kibira Muiruri [2016] eKLR which held;

“I on my part have little sympathy for persons who deliberately file their documents late. If such party does not file his documents within time, he needs to give reasons as to why his documents needs to be admitted, or else there is a risk that the same may be struck out. I agree, that striking out is an extreme measure which should only be resorted to where it is clear that a party is abusing the court process and attempting to steal a march (sic) on the other party. But that does not mean that parties ought to take for granted what is prescribed in the rules. I do not think that a party who cannot give good reason why he/she has filed his/her documents late ought to go scot-free as if there has been no breach of rules. There ought to be sanctions There is a purpose why the rules prescribe for various time frames within which to file and serve documents and these time frames ought to be given the utmost respect.”

11. It is their argument that the Defendant failed to show the lower court compelling reasons why they did not file their pleadings on time inspite of them having one year to do so. It argued that the 3rd Appellant always had time to instruct his advocate to defend the suit just like he did instruct them to defend the application for injunction and for contempt.
12. The Respondent averred that the allegation of 3rd Appellant being out of the country and sick were make believe, lacking any cogent evidence and this court should not be swayed by any such rumours. That the 3rd Appellant failed to show a copy of his passport. That the Appellant’s failure to file pleadings on time was to delay the hearing of this case. They urged this court to decline the invitation to be a conduct of impunity and injustice and refuse to admit the pleadings by the 3rd Appellant.



13. Further, the Respondent submitted that the Appellants have come to equity with unclean hands. It stated that the 3rd Appellant is still in occupation of the suit premises against the orders of this court and any delay of these proceedings are adversely affecting them. It also contravenes the overriding objective of the Civil Procedure of just expeditious and affordable resolution of civil disputes.
14. The Respondent submitted that the court was functus Officio at the time the Appellants application was filed. It cited the case of Gladys Boss Sholei v JSC & Another Civil Appeal No. 10 [E066] of 2022 which held that once proceedings are finally concluded, the court cannot review its decision.
15. In addition, the Respondents argued the documents were not compelling to warrant them being admitted. First that the copy of title sought to be filed is already part of the Respondent's documents on record. That the documents sought to be introduced by the Appellant show they are engaged in fraud and improper procedure in acquiring the suit property.
16. On the subject of STEA, the Respondent cited inter alia the case of Amina Hersi Moghe & 2 Others v Diamond Trust Bank of Kenya & Another [2021] eKLR which stated the purpose of summons to enter appearance is to notify the defend and or invite them to defend the suit. In this instant, the Appellants having entered appearance are estopped from claiming they have not been served.
17. The respondent concluded by submitting that section 27 of the Civil Procedure Act provides for costs they want the court to dismiss the appeal and award them costs.
18. I have considered the record of appeal filed and the submissions rendered by both parties. The issue in dispute is whether or not the trial magistrate erred in refusing the Appellant leave to file their pleadings out of time. It is correctly submitted that the power to grant leave to extend time is discretionary and a party must demonstrate that there are genuine reasons for not complying within the time lines set.
19. This suit was filed vide a plaint, dated 31st March, 2021 which was amended on 9th April, 2021. Alongside the plaint, the Respondent also filed an interlocutory application which was also amended on 9th April, 2021. The 3rd Appellant filed a replying affidavit dated 30th April, 2021 to oppose the said application. The application was determined on 20th June, 2021. Subsequently, the Respondent moved the court with a contempt application dated 14th October, 2021. The contempt application was opposed by the replying affidavit of the 1st and 2nd Appellants both sworn on 3rd November, 2021 and the 3rd Appellant filed grounds of opposition dated 16th November, 2021.
20. There is on record parties' submissions in support of and against the contempt application filed in November, 2021. The court rendered itself on the application on 4th February, 2022. Thus from the time the suit was filed, parties were busy prosecuting interlocutory applications brought by the Respondent. It is therefore dishonest of the Respondent to submit that the Appellant's failure to file their pleadings on time was intended to delaying the prosecution of the case.
21. Further the matter came up for pre-trial directions on 17th February, 2022 where the trial court granted 14 days for parties to fully comply with Order 11 but proceeded to certify the matter ready for hearing. Thereafter, the Appellants averred that the Respondent proceeded to fix an ex parte hearing date in the registry and the date set was 17th May, 2022. The Appellant proceeded to file their pleadings on the eve of the hearing (16th May, 2022) which pleadings were struck out for being filed without leave. Consequently, the Appellants filed the motion dated 19th May, 2022 seeking leave to have their pleadings admitted out to time. That application was also dismissed hence this appeal.
22. In her ruling, the learned trial magistrate stated that when she rendered her ruling on 28th June, 2021, she directed parties to comply with the pre-trial directions within 30 days. That the directions were



issued in the presence of counsel representing the Appellants. The honourable magistrate appreciated that when the matter came up on 15th October, 2021, the court was informed of an application for contempt which had been filed by the Respondent.

23. It is my considered view that the filing of the application which consumed the pre-trial date of 15th October, 2021 means that the issue of compliance with order 11 had to be put on hold to deal with the said interlocutory application. Indeed, the parties proceeded to prosecute the contempt application which was determined on 4th February, 2022. Therefore, shifting the blame on the Appellants who did not bring the contempt application was faulty and they deserve the exercise of discretion due to the intervening events.
24. The issue of when time for parties were to comply ought to have run from 17th February, 2022 when fresh directions were given by the learned honourable magistrate, I am in agreement that the Appellants ought to have complied even partially within the timelines stated. They did not and when they filed their documents just before the hearing date without permission of the court the court reserved the right to admit and or reject the same.
25. Consequently, the Appellants, sought the leave vide the application dated 19th May, 2022. In exercise of discretions of powers, the court is required to exercise the same judiciously, the traditional set guidelines is found in the case of *Mbogo & Another v Shah* [1968] EA 93 at page 96 thus;

“Whether.....in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”
26. Was the application for leave to extend time brought after undue delay? The orders were issued on 17th February, 2022 and the application filed on 19th May, 2022 (3months) and before the hearing of the suit had commenced. This in my view was not undue delay. The prejudice the Respondent was likely to suffer was the post ponement of the hearing on 17th May, 2024 and which prejudice could be cured by an award of costs and leave to file additional documents/witness statements if necessary.
27. Assuming there was delay, was there any reasonable explanation offered? The 3rd Appellant stated he was a principal of the 1st and 2nd Appellants and the only one who ought to be sued. He explained that he had travelled out to the Country for treatment. Since he had not sought adjournment on previous dates the Applicants explanation in my view was reasonable. Therefore, I am persuaded to hold that the learned hon. Magistrate erred in dismissing the application.
28. On the issue of non-service of the STEA, I take the same view cited by the Respondent in the case of *Amina Hersi Moghe Supra* that its purpose is to invite the defendant to defend the suit. Once the Appellants were served with pleadings and proceeded to participate in the application, raising the non-service of summons now becomes a procedurable technically curable under article 159(2) (d) of [*the constitution*](#).
29. In conclusion, I hold that there is merit in the appeal and it is allowed. I make order as follows;
 - i. The decision of the subordinate court made on 24th June, 2022 is set aside and its place an order is made that the Appellant’s application dated 19th May, 2022 is granted.
 - ii. The Appellants pleadings and documents annexed to the said Application are deemed as filed upon payment of the requisite court fees.



- iii. The order seeking to have the matter proceed before any other Magistrate other than Hon. Murage (SRM) is not granted. The Appellant is at liberty to make any such application for recusal before the said magistrate.
- iv. Costs of this appeal is awarded to the Appellant. Choose

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024

A. OMOLLO

JUDGE

