



**Mbogo v Kirubi (Environment and Land Appeal E020 of 2023)
[2024] KEELC 14118 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14118 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E020 OF 2023
A OMBWAYO, J
DECEMBER 20, 2024**

BETWEEN

PETER MBOGO APPELLANT

AND

GEOFFREY KIRUBI RESPONDENT

RULING

1. This is an appeal arising from the ruling of Honourable I. Orange Principal Magistrate, Nakuru delivered on 1st September, 2023 in Nakuru CMC ELC No. 196 of 2018.
2. The Appellant filed a Memorandum of Appeal dated 22nd September, 2023 appealing against the said ruling on the following grounds: -
 1. The Learned Trial Magistrate erred in law and fact by visiting the mistakes of former Counsel on record for the Appellant on him and failed to take into consideration the Appellant's right to be heard on merit.
 2. The Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's right to fair hearing as guaranteed by *the Constitution* of Kenya, 2010.
 3. The Learned Trial Magistrate erred in law and fact by failing to consider the grave injustice to be occasioned to the Appellant if the matter is not determined on merit.
 4. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the Appellant had filed a defence which raises triable issues and which should have been considered before dismissing his application to set aside ex-parte proceedings of 2nd March, 2022; and to re-open the defence case for hearing on merit.



5. The Learned Trial Magistrate erred in law and fact by exercising discretion in favour of the Respondent against the reasons adduced by the Appellant and the great injustice of shutting out the Appellant from the hearing of his case.
 6. The Learned Trial Magistrate erred in law and fact in finding that there were no sufficient reasons adduced by the Appellant to set aside the ex-parte proceedings and have the matter heard de novo.
 7. The Learned Trial Magistrate erred in law and fact by failing to consider the reasons adduced for the delay, the defence which raised triable issues and the degree of prejudice the Appellant stands to suffer if the case is not heard on merit.
 8. The Learned Trial Magistrate erred in law and fact by failing to take into consideration Article 159(2)(d) of *the Constitution* which requires the Court administer substantive justice without undue regard to procedural technicalities especially where the subject matter concerns a land dispute.
 9. The Learned Trial Magistrate erred in law and fact by failing to consider that there was a pending application by the previous Counsel on record to cease acting on behalf of the Appellant at the time the matter proceeded for hearing.
 10. The Learned Trial Magistrate erred in law and fact by failing to consider that the Appellant was not personally served with the hearing date of 2nd March, 2022.
 11. The Learned Trial Magistrate erred in law and fact in failing to consider that the Appellant had entered appearance and filed a Defence and was interested in defending the suit; and should not be condemned unheard.
 12. The Learned Trial Magistrate erred in law and fact by failing to consider whether thrown away costs would have been sufficient to compensate the Respondent for the delay occasioned by the Appellant and the Court to proceed determine the real issues in dispute.
3. The Appellant seeks orders setting aside the trial court's ruling and an order allowing the Appellant's application dated 19th January, 2023 filed in ELC No. 196 of 2018.

BRIEF FACTS

4. The Appellant filed an application dated 19th January, 2023 in the trial court seeking the setting aside of the ex parte proceedings of 2nd March, 2022 and reopening of the Appellant's case. It was the Appellant's case that his then advocate had filed an application to cease acting which was allowed but he was never served leading to the matter being heard in his absence.
5. The trial magistrate upon hearing of the application on 1st September, 2023 dismissed the same with costs.
6. The Appellant being dissatisfied with the ruling lodged the instant appeal before this court.
7. On 28th October, this court allowed the appeal which was canvassed by way of written submissions.

Submissions

8. Counsel for the Appellant filed his submissions dated 6th November, 2023 where he gave a background of the case and identified two issues for determination. The first issue was whether the Learned Magistrate erred in law and facts in visiting the mistakes of Counsel on record on the



Appellant. He submits that the Appellant had instructed the firm of Geoffrey Otieno & Company Advocates to act on his behalf in Nakuru Magistrate's Court ELC Case No. 196 of 2018 and that he became aware that the matter had proceeded ex-parte when he was served with a mention notice by the Respondent. He adds that the Appellant's counsel had filed an application to cease acting which was allowed on 16th September, 2022. He further submits that the Appellant was never served with the said application and that his failure to attend court on 2nd March, 2022 was inadvertent since he had not been informed by his counsel on record thus, the mistake should not be visited upon him. He relied on the cases of Lee G. Muthoga Versus Habib Zurich Finance (K) Ltd and another, Civil Application No. Nai 236 of 2009 and CFC Stanbic Limited v John Maina Githaiga & another [2013] eKLR. He urged the court to exercise its discretion in his favour and set aside the proceedings of 2nd March, 2022 and re-open the case for hearing on merit.

9. The second issue was whether the Learned Magistrate erred in law and facts in failing to consider the right of the Appellant to fair hearing and the prejudice the Appellant stands to suffer if the case is not heard on merit. He submits that the Appellant entered appearance and filed his statement of defence. He further submits that the defence raises triable issues which deserve to be heard on merit as the Appellant risks being condemned unheard and losing his property valued at over Kenya Shillings Ten Million (Kshs. 10,000,000/=). It was counsel's submission that the Appellant's chance to be heard will not in any way prejudice the Respondent's case as he will also have a chance to ventilate his case. He urged the court to exercise its discretion in favour of the Appellant by setting aside the Ruling dated 1st September, 2023 and allowing the Appellant's application dated 19th January, 2023. Counsel cited the cases in Shah V Mbogo & Another [1967] EA 116, CMC Holdings Ltd V James Mumo Nzioki [2004] eKLR and St. Patricks Hill School Ltd Vs Bank of Africa Kenya Ltd (2018) eKLR. In conclusion, he urged the court to allow the appeal.
10. Counsel for the Respondent on the other hand filed his submissions dated 20th November, 2024 where he identified two issues for determination. The first issue was whether the application was merited. Counsel for the Respondent relied on the case of Philip Ongom, Capt V Catherine Nyero Owoto Civil Appeal No. 14 of 2001 [2003] UGSC 16 that set the two conditions to be met in setting aside of proceedings. The first condition on whether the Appellant was properly served he submits that hearing of the suit was scheduled for 18th December, 2019. He submits that on 17th December, 2019, the Appellant filed a notice of change of advocates where the firm of Geoffrey Otieno & Company Advocates came on record. He added that on 15th September, 2021, a hearing notice was served upon the Appellant's advocate and the court upon being satisfied that there was proper service, the matter was heard ex parte. It was counsel's submission that the Appellant was duly served with the pleadings and hearing notice but failed to participate in the proceedings. He cited the case of Julius Kibiwott Tuwei V Reuben Argut & 7 Others [2022] eKLR and Patel V E.A Cargo Handling Services Ltd (1974) EA 75.
11. The second condition is whether there was sufficient cause for the Appellant's failure to attend court. He relied on the case of Wachira Karani V Bildad Wachira [2016] eKLR and submits that the Appellant's counsel filed an application to cease acting on 22nd March, 2022 for reasons that their client had failed to tender them sufficient instructions. He further submits that the court ordered the Appellant's advocates to serve their client in person in order for him to elect if he can represent himself or not. He went on to submit that on 17th November, 2022 the Appellant was served in person and an affidavit of service filed on 21st November, 2022. Counsel relied on the case of Peter Mwangi Macharia V Alphaxard Warotho Komu & 2 Others [2019] eKLR and submits that the Appellant's lack of awareness did not constitute sufficient cause to warrant setting aside of the proceedings. He further relied on the maxim, Equity aids the vigilant and not the indolent and the case of *Matthews Sankok Shompa V Kenya Commercial Bank & 3 Others Civil suit No. 529 of 2004*. Counsel for the



Respondent went further to submit that the Appellant took no action from 10th January, 2023 only for him to instruct his advocates on record 9 months later to file the application dated 22nd September, 2023.

12. The final issue on costs, counsel relied on Section 27 of the *Civil Procedure Act* and submits that upon dismissal of the Appellant's application, he should pay costs.

Analysis and Determination

13. Having considered the lower court record, the memorandum and record of appeal and the issues proffered by the parties' submissions, the following issues are for determination:

1. Whether the Appeal is merited.
2. Who should bear the cost of the appeal.

14. Being a first appeal, this court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

"...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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

15. It is this court's view that the basis of this appeal is the Appellants application dated 19th January, 2023 which sought for orders in the trial court to set aside the ex parte proceedings on 2nd March, 2022.

16. Order 51 Rule 15 of the Civil procedure Rules grants the court jurisdiction to set aside an order made ex parte. It is trite law that the principles to set aside ex parte orders are well settled and the trial court had unfettered discretion to set aside ex parte orders, on terms that were just, and which discretion must be exercised judiciously based on sufficient cause and not whimsically.

17. Further, in the case of *Shah V Mbogo* (1967) EA 116 the court held as follows:

"the exercise of the court's discretion in setting aside ex parte orders is to avoid injustice or hardship emanating from an accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice."

18. In the case of *Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd* [2014] eKLR the court held as follows:

"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." [Emphasis mine]



19. In the instant case, the Respondent's case was heard and closed in the absence of the Appellant or his counsel on record. It was the Appellant's case that his then advocate had not served him with the application to cease acting and that his failure to attend court on 2nd March, 2022 was inadvertent since he was not aware that his counsel had ceased acting for him. The Respondent on the other hand contends that the Appellant was duly served with the pleadings and hearing notice but he deliberately failed to participate in the proceedings.
20. I have keenly perused the record and it is not in dispute that the application dated 15th March, 2022 by the Appellant's advocate that sought to cease acting for the Appellant was allowed on 16th September, 2022. The trial magistrate thereafter directed the Respondent to serve the Appellant personally. It is not in dispute that prior to the said application being allowed, the Appellant may have not been aware of the hearing date of 2nd March, 2022 since the mention notice was served upon his Advocate who was then on record.
21. It would be in the interest of justice for the Appellant be accorded a chance to participate in the proceedings. Furthermore, any prejudice suffered by the Respondent may be adequately compensated in costs.
22. The upshot of the above is that the appeal is merited and allowed in the following terms: -
 - a. That the order of the trial court made on 1st September, 2023 is hereby set aside and the Respondent's case is hereby re-opened for cross examination by the Appellant.
 - b. That the trial court issue fresh pre-trial directions and the matter proceeds for denovo hearing.
 - c. Costs of the application to abide the determination of the suit. It is so ordered.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT

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