Njagi v Njau (Environment and Land Appeal 5A of 2019)
[2023] KEELC 193 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 193 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL 5A OF 2019

CG MBOGO, J

JANUARY 26, 2023

BETWEEN

MOSES NJUGUNA NJAGI ..... APPELLANT

AND

FRANCIS MWANGI NJAU ..... RESPONDENT

(Being an appeal from the ruling delivered by the Honourable W.Juma, Chief Magistrate on 20th March, 2019)

JUDGMENT

1. The appellant herein being aggrieved by the ruing of Hon W. Juma, Chief Magistrate delivered on March 20, 2019 in Narok CMCC No. 199 of 2016 appealed to this court vide a memorandum of appeal dated April 12, 2019against the whole decision on the following grounds: -

    i. That the learned trial magistrate erred in fact in law in making a ruing dismissing the appellant without addressing her mind to the issues raised in the application dated the 24th day of December, 2018.

    ii. That the learned trial magistrate erred in law and in fact in making a finding on issues that were not pleaded.

    iii. That the learned trial magistrate erred in law and in fact in making observations that were prejudicial to the appellant/applicant.

    iv. That this being a land matter, the learned trial magistrate erred in law and in fact in making a ruling that was based on procedural technicalities and not substantive justice.

    v. That the learned trial magistrate erred in law and in fact in not finding that the application dated 24th day of December 2018 had not been opposed.

vi. That the learned trial magistrate erred in law and in fact in abdicating on her role of dispensing justice without regard to on procedural technicalities.

vii. That the learned trial magistrate erred in law and in fact in not finding that the appellant/ applicant had been served with a notice of entry of judgment.

viii. That the learned trial magistrate erred in law and in fact in failing to address her mind to the merits of the application dated the 24th day of January, 2018.

ix. That the learned trial magistrate erred in law and in fact in making a finding that was contrary to the provisions of the *Civil Procedure Act*.

2. The appellant prays that the ruling of the honourable magistrate be set aside together with the consequential decree and the matter be set down for hearing and determination on merits.

3. The appellant filed written submissions dated December 2, 2022.The appellant raised two issues for determination which is whether the appeal is merited and the costs of the suit.

4. On the first issue, the appellant submitted that it is the principle of natural justice that no one should be condemned unheard as is provided underarticle 47 (1) and (2) of the *Constitution* and section 4 of the *Fair Administrative Action Act* and that based on these provisions of the law, there was a constitutional and statutory obligation placed on the respondent herein to serve the appellant with the pleadings to enable them prepare their case.

5. The appellant submitted that he was not served with the pleadings nor with a hearing date and the purported memorandum of appearance filed on his behalf is a forgery and the affidavit of service is false and criminal. The appellant further submitted that he intended to call the process server during the hearing of the application but it was not in his place to call as the burden fell on the respondent and since the application was unopposed, the process server was not called for cross examination.

6. The appellant submitted that notice is a matter of procedural fairness and an important component of natural justice and which must be meaningful for it to meet the constitutional threshold. The appellant relied on the case of *Geothermal Development Company Limited v Attorney General & 3 others* [2013] eKLR and *Onyango Oloo v Attorney General* (1986) EA 456.

7. The appellant further submitted that the trial magistrate went against the rules of natural justice by dismissing the application on grounds that it is not merited when in fact the appellant contended that he was not served with the pleadings which contention was not opposed. The appellant further submitted that the application dated December 24, 2018is weighty and discloses an important issue of the law and fact which raises a serious and arguable defense in reply to the respondent's suit as it seeks to urge the court to set aside the ex-parte judgment since the appellant was not personally served with the pleadings and the hearing date. The appellant relied on the case of *Ridge v Baldwin* (1963) All ER 66.

8. The appellant submitted that it was a grave miscarriage of justice for the trial magistrate to hold in her ruling that the appellant filed a memorandum of appearance when in fact the memorandum of appearance is a forgery and that the trial cur did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that he was not served with any pleadings was true or not. The appellant further submitted that the respondent was under an obligation to prove that service was actually effected but that did not happen and the appellant was driven out of the seat of justice empty handed when he had what might have well amounted to lack of service of pleadings and a hearing date. The appellant relied on the case of *Mureithi Charles & another v Jacob Atina Nyagesuko* [2022] eKLR, *CMC Holdings Limited v Nzioki* (2004) KLR 173

and *Sangram Singh v Election Tribunal, Koteh* AIR 1955 SC 664.The appellant did not submit on the second issue which was on costs.

9. The respondent herein did not file written submissions despite service of the memorandum of appeal. Be that as it may, I have carefully analysed and considered the memorandum of appeal and the submissions filed by the appellant and the issue for determination is whether the appeal has merit.

10. This being the first appellate court, I take guidance on the role of this court from the case of *Sumaria &another v Allied Industries Limited* (2007) KLR 1where the court of appeal expressed itself as follows: -

> " Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did".

11. I have perused the record of appeal and the lower court file and the nature of this appeal is that of lack of service of pleadings and an alleged forgery of a memorandum of appearance. The appellant herein filed a notice of motion application dated December 24, 2018 under a certificate of urgency seeking stay of execution of the *ex-parte* judgment and leave to file and serve his statement of defence and counter claim out of time. The trial court delivered a ruling on March 20, 2019. Prior to this, the respondent filed a plaint dated November 9, 2016 and Summons to enter appearance dated November 15, 2016.The appellant herein filed a memorandum of appearance dated November 18, 2016 filed in court on November 21, 2016.It is this memorandum of appearance that the appellant contends that it is a forgery and which issue was not addressed by the trial court.

12. Order 10 Rule 11 of the *Civil Procedure Rules* provides that:

> " Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

13. Thus, there is no gainsaying that the court does have the discretion to set aside or vary any default judgment so long as this is done upon such terms as are just on the basis of the evidence placed before the court, and always bearing in mind the principle set out in the case of *Mbogo v Shah* [1968] EA 93 that the discretion is intended to be exercised "...to avoid injustice or hardship resulting from inadvertence or excusable mistake or error," but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

14. It is also noteworthy that although the appellant had expressed the intention to have the process server cross-examined on the contents of his affidavit, this was not done and no such cross-examination was undertaken. This can be seen from paragraph 11 of the appellant's supporting affidavit sworn on December 24, 2018. Also notable is the fact that the appellant did not seek for prayers to call the process server for cross examination of the contents of the affidavit of service if any in his application. Accordingly, it must be presumed then that the process server's averments are indeed correct, in line with the decision of the Court of Appeal in *Shadrack arap Baiywo v Bodi Bach* [1987] eKLR, that:

> " There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of

service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

15. More importantly is the contention by the appellant that the memorandum of appearance of service is a forgery. A look at the record and the ruling delivered by the trial court shows that this fact was an allegation; a mere statement and the same was not proved. It was upon the appellant to show that indeed it was a forgery.

16. Sections 109 and 112 of the *Evidence Act* provide that:

> "
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> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ...
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

17. As the appellant was the one claiming that the memorandum of appearance was a forgery, the burden was on him to prove that the documents was not authentic. Section 107 of the *Evidence Act*, provides as follows: -

> " (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

18. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows; -

> " ...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts." (Emphasis mine)

19. Having stated the above, I find no grounds in which to fault the trial court. The memorandum of appeal dated April 12, 2019is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 26TH DAY OF JANUARY, 2023.

HON. MBOGO C.G.

JUDGE

26/1/2023.