M'Itwameri & another v Ndumba (Environment and Land Appeal E039 of 2021) [2023] KEELC 225 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 225 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E039 OF 2021

CK YANO, J

JANUARY 25, 2023

BETWEEN

GILBERT MWONGERA M'ITWAMERI ..... 1ST APPELLANT

TABITHA NAITA MWETI ..... 2ND APPELLANT

AND

MERCY NDUMBA ..... RESPONDENT

(Being an appeal against the ruling of Honourable J Irura, Principal Magistrate in Nkubu ELC Case No 61 of 2017 delivered on February 3, 2021.)

JUDGMENT

1. The appellants filed this appeal from the ruling of Honourable J Irura Principal Magistrate in Nkubu ELC Case No 61 of 2017 delivered on February 3, 2021.

2. The appellants had filed an application dated October 27, 2020 seeking stay of the decree and to set aside the exparte judgment entered on February 5, 2020. The said application was opposed by the respondent. The subordinate court considered the said application and dismissed it with costs.

3. The appellants were dissatisfied with the said decision and filed the present appeal on the following grounds-;

    1. The learned magistrate failed to use her apparent discretion judiciously and set aside the exparte judgment.

    2. The learned magistrate erred in law in failing to appreciate that the appellants had a good defence with triable issues and thus give the appellant a chance to be heard.

3. The learned magistrate erred in law and facts in failing to note that the error in the defendant's failure to file defence was occasioned by their lawyer and as such the appellant should not have been condemned for his failures.

4. The learned magistrate erred in law and in facts in failing to note that land matters are emotive within her jurisdiction and as such she should have used her discretion in setting aside the exparte judgment in favour of the appellants.

4. For those reasons, the appellant prayed that this court allows the appeal with costs.

5. The appeal was canvassed by way of written submissions which were duly filed by both parties. The appellants filed their submissions dated July 20, 2022 through the firm of L Kimathi Kiara & Co Advocates while the respondent's submissions dated September 30, 2022 were filed on October 26, 2022 through the firm of Kaimenyi Kithinji & Co Advocates.

6. In their submissions, the appellants cited the case of *Wachira Karani v Bildad Wachira* (2016) eKLR and the case of *Richard Nchapi Leiyangu v IEBC & 2 others* where the courts expressed as follows-;

> " We agree with the noble principle which go further to establish that the courts discretion to set aside expare judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistakes or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

7. The appellants submitted that they were only served with notice of entry of judgment and were not served with summons to enter appearance. It is their submissions that this being a land matter which is sensitive, the trial court should have exercised her discretion judiciously and set aside the exparte judgment and hear the appellants on merit so as to determine issues on a finality.

8. The appellants submitted that their defence was that they are still alive and some of the children are forcing them to transfer land to them at the expense of others. It is the appellants' submission that those are triable issues which the court should determine on merit instead of entertaining an exparte judgment.

9. The appellants further submitted that it is trite law that mistakes or errors of an advocate should not be visited upon the client as held in *Elinda Muras & 6 others v Amos Wainanina* (1978) KLR arguing that in this suit, failure to file defence by the appellants' advocate should not shut the appellants out without being heard. The appellants' advocate relied on the said case of *Belinda Mura* (*supra*) in which Makau, JA defined what constitutes a mistake as follows:

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel 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 lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate"

10. The appellants counsel urged the court not to close the doors of justice to the appellants but in the interests of justice allow this appeal and give the appellants a chance to be heard.

11. The appellants submitted that the dispute in the main suit is land and the appellants seek to be allowed to prosecute case. That this is a serious subject matter and in the interest of justice, the parties herein should be heard on merit to determine the issues with finality.

12. Counsel for the appellants cited the provisions of article 159 (2) (d) of the *Constitution* which states that justice shall be administered without undue regard to procedural technicalities and submitted that failure to file defence is an omission which can be cured under this Article and that the trial magistrate erred in not considering this.

13. Finally, the appellants relied on the case of *Bank of Africa limited v Put Serajero General Engineering Co Ltd & 2 others* [2018] eKLR and *Martha Wangari Karua v IEBC*, Nyeri Civil Appeal No 1 of 1997 where the court of Appeal held as follows-;

> " The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing however weak his or her case may be..."

14. The appellants urged the court to set aside the trial court's ruling and allow this appeal to enable them be heard on merit.

15. The respondent submitted that she filed a suit on May 25, 2017 in the Principal Magistrate's Court at Nkubu seeking various reliefs. That the appellants entered appearance on June 16, 2017 vide a memorandum of appearance by the firm of M/s David John Mbaya & Co Advocates. However, the appellants did not file a defence until June 18, 2018 when the respondent made an application for interlocutory judgment under order 10 rule 6 of the *Civil Procedure Rules* as read with order 10 rule 10 of the *Civil Procedure Rules*. That the matter was heard wherein the respondent testified and called two witnesses. The respondent stated that documentary evidence were also produced in court to corroborate the witness testimonies. The respondent stated that the court after hearing the respondent, delivered a judgment which is the subject of this appeal. The respondent submitted that the appellants' appeal has no merit and should therefore be dismissed with costs to the respondent.

16. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law.

17. This court is obliged to abide by the provisions of section 78 of the *Civil Procedure Act* to evaluate and examine the lower court record and the evidence before it and arrive at its own conclusion. This principle of law was settled in the case of *Selle v Associated Motors Boat Co Ltd* (1968) EA 123 where Sir Clement De Lestang stated 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 allowances 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 particulars circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 EACA 279)"

18. Whereas the respondent submitted that the judgment which was delivered by the lower court is the subject of this appeal, it is clear from the record of appeal, and in particular the memorandum of appeal, that this appeal is against the ruling from the subordinate court delivered on February 3, 2021. The submissions by the respondent therefore cannot be correct. Indeed in her submissions, the respondent never addressed herself to the subject of this appeal, which is the ruling delivered by the lower court on February 3, 2021.

19. There are only two issues that I find call for my determination-;

    i. Whether the learned trial magistrate wrongly exercised her discretion in failing to set aside the judgment delivered on February 5, 2020 and grant the appellants leave to file defence out of time.

    ii. Whether the appeal is merited or not.

20. The appellants have submitted that they were not served with summons to enter appearance. That they were only served with notice of entry of judgment. They have further submitted that the dispute which is over land, is between the appellants and some of their children who are forcing the appellants while still alive to transfer the land to the respondent at the exclusion of other children. The other reason given by the appellants is that the trial court condemned them because of the mistake of their advocates who failed to file defence on time.

21. I have perused the ruling dated March 3, 2021. In the said ruling, the learned trial magistrate stated *inter alia* that-;

> " Applying the above principles in this case, there is no dispute by the applicants that on June 16, 2017 they had already engaged the services of David John Mbaya who filed the notice of appointment of advocates dated June 15, 2017 together with the memorandum of appearance for the defendants also dated June 15, 2017 and filed in court on June 16, 2017. However, the defendant/ applicants did not comply with order 7 rule 1 of the *Civil Procedure Rules* which provides:-
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> .....
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> .....
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> Although the applicants claim they were never served with the summons herein by the respondent it baffles this court as to how then they were able to engage the services of an advocate who went ahead to file the said notice of appointment of advocate together with the memorandum of appearance on behalf of the defendants/applicants. That was clear evidence that they had actually been served with the summons to enter appearance and the accompanying pleadings for them to have known the case number and also the suit against them and it was their choice not to file their defence...
>
> ... I therefore find that there is no sufficient cause demonstrated to warrant this court to set aside both the interlocutory and regular judgment as to do so would be sitting on my own appeal..."

22. Order 10 rule 11 of the *Civil Procedure Rules* provides as follows-

> " 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"

23. The same is provided in order 17 rule 7 but with regard to non -attendance at the hearing.

24. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75, it was held as follows-;

> " There is no limits or restrictions on the judge's discretion to set aside or vary an exparte judgement 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"

25. The court went further and held-;

> " That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. In this respect, defence on merits does not mean a defence that must succeed. It means a "triable issue' that is an issue which raises a prima facie defence which should go to trial for adjudication."

26. In *Shah v Mbogo* (1967) EA 116, it was held that-;

> " This discretion to set aside an exparte judgment 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 has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice"

27. From the foregoing, it is clear that the court has unfettered, unlimited and unrestricted jurisdiction to set aside an exparte judgment where there is a triable issue that should go to trial. In their application before the lower court, the appellants explained that they were never served with summons to enter appearance. However, the respondent and indeed the trial court concluded that since there was a memorandum of appearance and notice of appointment of advocate filed, it was presumed that the appellants were served.

28. I have perused the affidavit of service annexed to the respondent's replying affidavit in response to the application to set aside judgment. In that affidavit, the process server indicated that the appellants were served but refused to sign the principal copy. Therefore the appellants may as well have been served and they instructed an advocate who only entered appearance and filed a notice of appointment of advocate, but did not file defence within the stipulated time or at all.

29. In the case of *Philip Chemwolo & another v Augustine Kubede* (1982 -88) Apalloo, JA (as then was) stated as follows-;

> " Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".

30. That mistakes do occur in the process of litigation was also appreciated by the Court of Appeal in *Murai v Wainaina (No 4)* [1982] KLR 38 where it was held that-;

> " A mistake is a mistake. It is no less a mistake because it is 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 lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistake which are politely referred to as erring in their

interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule."

31. I have also perused the proposed defence which forms part of the record of appeal. The appellants have raised serious triable issues such as whether the respondent who is a child of the appellants can compel the respondents to transfer the suits parcel of land to her while they are still alive. In my view, the learned trial magistrate failed to exercise her discretion judicially by not considering whether the said defence raised any triable issues. Moreover, the respondent has not demonstrated that she will suffer prejudice if the appellants are granted leave to defend the suit as its effect would be to allow the court hear and determine the case on its merits.

32. The courts are also guided by the provisions of article 159 (2) (d) of the *Constitution* and section 1A and 1B of the *Civil Procedure Act* as well as section 19 of the *Environment and Land Court Act* in administering substantive justice, rather than focusing on procedural technicalities. This is so especially on disputes over land between family members as in this case.

33. In the end, I find that this court would be justified in the circumstances of this case to interfere with the discretion of the trial court which in my view was clearly wrong. No doubt the failure by the trial court to exercise her discretion in favour of the appellants occasioned a miscarriage of justice to the appellants.

34. Having considered this appeal, I find that the appeal is merited. The learned trial magistrate did not sufficiently address herself to the principles that govern setting aside of judgments and hence misdirected herself in the exercise of her discretion.

35. Accordingly, this appeal succeeds, the ruling delivered on February 3, 2021 in Nkubu PMC ELC Case No 61 of 2017 is hereby set aside, the Application dated October 27, 2020 is hereby allowed and the judgment the subject thereof set aside. The appellants are granted leave to file and serve their defence to the respondent's suit within 14 days with liberty to the respondent to file a reply thereto within 14 days of service after which the court will give directions on the hearing of the suit on merit.

36. In view of the fact that the parties to this case are close family members, the circumstances of this case call for an order that parties bear their own costs.

37. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF JANUARY, 2023.

In the presence of:

C.A Kibagendi

Kaimenyi for respondent

No appearance for Kimathi Kiara for appellants

CK YANO

ELC JUDGE