



**Kennedy Monari, Geoffrey Osiago Monari & Dennis Onkoba Monari (Suing as the
Legal Representatives of the Estate of the late George Hudson Monari Ogeto) v
Mosoti (Appeal 6 of 2022) [2023] KEELC 67 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 67 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
APPEAL 6 OF 2022
M SILA, J
JANUARY 19, 2023**

BETWEEN

**KENNEDY MONARI, GEOFFREY OSIAGO MONARI & DENNIS ONKOBA
MONARI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
THE LATE GEORGE HUDSON MONARI OGETO) APPELLANT**

AND

MORAA MOSOTI RESPONDENT

*(Being an appeal against the ruling of Hon. Nathan Shiundu Lutta, delivered
on 28 July 2021, in the suit Kisii CMCC No. 281 of 2018 in respect of the
Motion dated 18 December 2020, being one to set aside ex parte judgment)*

JUDGMENT

1. Through a plaint filed on 18 May 2017, George Hudson Monari Ogeto (now deceased) sued the respondent, claiming that in the year 1980, the respondent had invaded his land parcel Central Kitutu/ Daraja Mbili/926. In the plaint, Mr Ogeto wished to have orders of eviction, damages for illegal occupation, and a permanent injunction to restrain the respondent from the suit land. The plaint was filed before this court but the matter was transferred to the Magistrates' Court through an order made by Mutungi J on 23 October 2018. The respondent did not file any appearance nor defence, and the matter proceeded for hearing *ex parte*, culminating in a judgment delivered on 29 January 2020 in favour of the appellant. Specifically, the court issued orders of eviction and permanent injunction and awarded costs to the plaintiff. In the course of time, the plaintiff died, and was substituted by the appellants herein. After judgment had been delivered, and when the appellants had taken steps to execute the judgment, the respondent filed an application dated 18 December 2020 seeking to set aside the judgment. That application was heard and allowed through a ruling delivered on 28 July 2021.



Aggrieved by the ruling, the plaintiff preferred this appeal. Four grounds are cited, but in a nutshell, they all allege that the respondent was not deserving of the order to set aside the judgment.

2. I invited both counsel for the appellant, and counsel for the respondent, to file written submissions to argue this appeal, which they both did. I have taken account of the same and I have also considered the record and the reasoning of the magistrates' court in allowing the application to set aside judgment.
3. In the application seeking to set aside the judgment, the respondent based her application on the ground that her attention was drawn to the case for the first time when a hearing notice dated 22 October 2020 was picked near her home. That hearing notice was in relation to an application dated 23 September 2020, which was an application by the appellant seeking to execute the eviction order in the judgment. The defendant added that she was resident in the land parcel Central Kitutu/Daraja Mbili/742 which was owned by her late husband. She stated that she was shocked that this land parcel No 742 has now been subdivided to produce the land parcel Central Kitutu/ Daraja Mbili/926 (the suit land) among others. She contended that the subdivision was fraudulent. She contested the locus of the appellant, asserting that he is not the registered owner of the suit land. She also averred that the claim of the appellant was time barred. She annexed to her application a draft statement of defence which denied the ownership of the appellant of the suit land and the entire claim of the appellant.
4. The appellant responded to the application through Grounds of Opposition. It was stated that the defendant has not offered any plausible explanation why she failed to enter appearance or file defence; that the delay in filing the subject application was unreasonable and inexcusable; that the application was brought in bad faith; that the defence is a mere denial and does not raise any triable issue; that the discretion of the court is not to assist a party who has deliberately sought to obstruct or delay the course of justice. The appellant was of the view that the respondent had not demonstrated sufficient cause to have the judgment set aside.
5. The trial magistrate made a very elaborate ruling where, in my view, he properly considered the principles upon which a judgment may be set aside and he indeed referred to, and quoted various authorities that were all on point. I observe that in arriving at his decision, the trial magistrate, stated as follows :-

“I note that the applicants (sic) Advocate admits that the failure to enter appearance/file a defence was on their part, citing inadvertent mistake. It is a general law that Advocate's failure to execute his client's instructions amounts to professional negligence.”

6. I have however not seen anywhere, that counsel for the respondent stated that the failure to file defence was inadvertent on his part. The application, as far as I can see, was premised upon the contention that the respondent had not been served, and that she only came to know of the suit when a hearing notice to the application for eviction was brought to her attention. I think that first, the trial magistrate ought to have addressed himself as to whether or not, the respondent had been served with summons. It is after this that he would then have proceeded to determine whether or not the judgment was a regular judgment or an irregular judgment. Where summons have been served and the defendant informed of the hearing notice, but fails to attend, then such judgment is a regular judgment. It can however still be set aside if the court considers that it would be in the interests of justice to set it aside so that the defendant may be heard. Where there is no proof of service of summons then the judgment would be an irregular judgment which must be set aside as a matter of right, that is *ex debito justitiae*.
7. In our instance, there is proof that the respondent was served, as there is an affidavit of service sworn by one Isaiah Miruka, which was filed on 25 September 2017. That affidavit deposes that the respondent was served with summons on 13 September 2017 at Daraja Mbili in the presence of her sons namely



John Mosoti and Nyambureti Mosoti. It continues to state that she was duly served but she declined to sign. This affidavit of service was not contested by the respondent. At no point did the respondent refer to this affidavit as being a false affidavit. Neither did she ask for the process server to be called for cross- examination on the affidavit. That being the case, it must be found that the judgment was a regular judgment.

8. I have pointed out that the trial magistrate erred in first not proceeding to first find whether the judgment was a regular judgment or not. He also erred by referring to a mistake of counsel when this was not cited as one of the grounds upon which the application to set aside was based. But having said that, I am unable to fault the trial magistrate for exercising his discretion in setting aside the judgment. I would on my part have set aside the judgment if only to give the respondent a chance to be heard. The respondent had raised issues in the defence that I think deserve ventilation. She raised issue that the appellant was not the owner of the land and in her affidavit she also raised the issue of limitation. These, in my view, are not trivial, and I do not agree with the appellant in his view that the draft defence was a bare denial.
9. However, since the judgment was a regular judgment, the setting aside of the same ought to have been subject to payment of thrown away costs, to not only compensate the appellant for the trouble he had taken to have the suit heard, but also to press the point that one cannot simply decline to attend to a suit then have it set aside with no consequences. Such amount is within the discretion of the court and it is expected that the court will consider the conduct of the defendant, the time taken to apply to set aside the judgment, the benefit that the defendant has accrued by being on the land for the duration taken after filing of suit to its judgment being set aside, the estimate expenses that the plaintiff has utilized and any other necessary factor that may affect such costs. It was not enough, in my humble view, given the circumstances of the case, for the trial court to simply state that costs would be to the respondent. The trial court, in all fairness to the appellant, ought to have made a specific order for payment of a specific sum as thrown away costs, and in default, the judgment to stand.
10. From the foregoing, I am inclined to disturb the order of the trial court, and instead, order that The judgment of the trial court be set aside on condition that there be payment of thrown away costs of Kshs 30,000/= (Kenya shillings thirty thousand) to the appellant within 60 days of this judgment. If the said thrown away costs are not paid as directed, then the judgment of the magistrate's court, dated 29 January 2020, to stand and to be executed. If the thrown away costs are paid as directed, then the respondent to proceed and file defence within 14 days of payment of the thrown away costs, and the matter to be set down for hearing in the usual manner.
11. The final issue is the costs of this appeal. The appellant has not succeeded in moving me not to allow the setting aside of the judgment. He has however succeeded partly by persuading this court to modify the order setting aside the judgment. Given that position, I will award the appellant half costs of this appeal.
12. Judgment accordingly.

DATED AND DELIVERED THIS 19 DAY OF JANUARY, 2023

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JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

