Obala v Amonde (Suing as the Legal Representative of the Estate of John Otieno Ouko - Deceased) (Civil Appeal E005 of 2023) [2025] KEHC 757 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 757 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E005 OF 2023

DK KEMEI, J

JANUARY 31, 2025

BETWEEN

BRIDGIT LYNETE ACHIENG OBALA ..... APPELLANT

AND

LUCY ANYANGO AMONDE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN OTIENO OUKO - DECEASED) ..... RESPONDENT

(Being an appeal from the ruling and order of Honorable S.W. Mathenge (SRM) delivered on 08/02/2023 in Bondo PMCC No. 91B of 2018)

JUDGMENT

1. The Appellant herein Bridgit Lynette Achieng Obala being aggrieved by the Ruling and Order delivered and issued on 08/02/2023 by Honorable S.W. Mathenge (SRM) vide Bondo PMCC No. 91B of 2018 wherein she dismissed the Appellant's application dated 20/9/2022 with costs to the Respondent has appealed to this court against the said decision on the following grounds:

    i. That the trial magistrate erred in law and fact in dismissing the appellant's application on review of the judgement delivered on 20/07/2022.

    ii. That the trial magistrate erred in law and in fact in holding that the interlocutory judgment was still in place by virtue that the consent had not been adopted by court yet by implication the parties had entered into contractual obligations.

    iii. That the trial magistrate erred in law and fact in holding that there was no apparent error on the face of record by having two advocates acting for the Defendant.

    iv. That the trial magistrate erred in law and in fact in holding that the Appellant did not meet the threshold of Order 45 Rule 2 of the Civil Procedure Rules.

v. That the trial magistrate erred in law and fact in holding that the said application was abuse of the court process.

2. The Appellant therefore prayed for the following reliefs:

a. The appeal be allowed.

b. The ruling delivered on 08/02/2023 be set aside.

c. Upon the grant of prayer b) above, this court be pleased to order that the interlocutory judgment entered on 21/08/2019 be set aside.

d. The trial pleadings filed by the Appellant be deemed as properly on record.

e. The trial court matter proceeds from where it had reached as at 20/07/2022.

f. Costs of this appeal be borne by the Respondent.

3. This being a first appeal, the duty of this court is well settled namely, to proceed by way of re-hearing and to subject the entire evidence presented before the trial court to a fresh and exhaustive re-evaluation so as to arrive at its own independent conclusion. See Selle Vs Associated Motor Boat Co Ltd [1968] EA 123. I take cognizance of the fact that the trial court had the advantage of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the trial court failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong.

4. A perusal of the lower court record reveals that the Appellant had filed an application dated 20th September 2022 filed seeking for an interim order of stay of execution of the judgement dated 21/8/2019 and taxation proceedings pending the hearing of the instant application as well as for review of the ruling delivered on 20/7/2022 and that all the consequential orders and proceedings thereto be varied, reviewed or set aside and finally that the matter proceed from where it had reached as at 20/7/2022.

5. The Respondent herein filed her grounds of opposition inter alia; that the application was defective and incompetent; that it was a backdoor attempt to revisit the application dated 23/9/2019 which was dismissed; that the court had pronounced itself on the judgment dated 21/8/2019; that litigation had to come to an end; that there was no new evidence to prompt the court to review the orders issued on 20/7/2022; that the applicant was guilty of laches in seeking to set aside a judgment three years after its delivery; that the applicant did not show intentions of providing adequate security for the decree.

6. The application was canvassed by way of written submissions. Both parties duly filed and exchanged written submissions.

7. Relying on the case of Brance versus Bank of Uganda (1999) EA 22 the Appellant/Applicant submitted that the Respondent had not demonstrated how she would be prejudiced if the application was allowed. The Appellant submitted further that there was an error apparent on the record as there was an issue on representation. That there was an obvious mistake on the court's ruling on 20/7/2022 since parties had set aside the interlocutory judgment and that she had filed defence and paid throw away costs of Ksh 10,000/=. That the Appellant/applicant was desirous of defending the suit. She anchored her submissions on the case of Philip Chemwolo & Another vs. Augustine Kubende (1986) eKLR.

8. The Respondent, on the other hand, submitted reiterating her grounds of opposition. She submitted further that the case does not belong to the advocate but the clients/parties therein. That the Appellant

should blame herself for the debacle she has found herself in courtesy of her lawyers. That the consent was never adopted by the court and that litigation must come to an end since she is being prejudiced now that the matter has been concluded. In conclusion, the Respondent submitted that if the application is allowed by the court, then it should be on condition that the Appellant/Applicant do deposit the entire decretal sum into a top tier bank in the names of both advocates on record.

9. I have considered the rival submissions and the record of the lower court. The genesis of this matter appears to have arisen from the trial court dismissing the Appellant's application dated 20/9/2022 which sought for review of orders made on 20/7/2022 by the trial court after it was discovered that a consent to set aside an interlocutory judgement that had been entered by the parties earlier on had not been adopted as an order of the court. The trial court dismissed the said application vide its ruling dated 8/2/2023 and affirmed its orders of 20/7/2022. The said consent is dated 23/09/2019 wherein the parties agreed to set aside the interlocutory judgment and that a thrown away costs of ksh 10,000/= was to be paid to the Respondent's Counsel. That acting on the said consent the Appellant filed her defense and her requisite papers and that the matter proceeded with no objection from the Respondent until 20/07/2022 when the Respondent raised the issue of interlocutory judgment having not been set aside. That's when it dawned on them that the said consent signed by both parties almost three years earlier had not been filed. It is upon that finding that the court ruled on 20/07/2022 that the interlocutory judgment was still valid and in force and thus the proceedings made after the said judgment were null and void. That the Appellant being aggrieved with the said Ruling filed an application for review of the said Ruling of 20/07/2022 but the same was dismissed vide the impugned ruling delivered on 08/02/2023 and hence the current appeal. There appears to have been a lapse on the part of the Appellant's Advocates to ensure that the consent entered into by the counsels was filed and duly adopted by the trial court. The fact the Respondent had already received and pocketed the thrown away costs of Kshs 10, 000/ from the Appellant, then the Respondent ought not to be seen to be challenging the process because the Appellant will have lost both the money and her right to access justice before the court. Hence, I find that the Appellant suffered a double jeopardy in the process. The trial court ought to have seen that even blunders by parties and counsels at times are made and that the parties should be given some reprieve but not to be shut out completely. In the circumstances of the Appellant, the proceedings leading to 20/7/2022 were nullified and that the status quo as at the time of the interlocutory judgement was restored. Of course the parties while proceeding prior to 20/7/2022 were acting in good faith and that they should not have been shut out of the matter. The issue of the consent could still have been regularized by being filed and adopted by the trial court and the parties allowed to continue with the matter.

10. The application dated 20/9/2022 had sought for review of the orders made by the trial court on 20/7/2022. It seem the learned trial magistrate was not persuaded to give the Appellant a second chance and proceeded to dismiss the Appellant's application in limine. I find that the circumstances warranted a review of the orders of 20/7/2022 in view of the fact that the Respondent by her conduct had received the thrown away costs of Kshs 10, 000/ and participated in the proceedings post the interlocutory judgement. The issue of the Appellant having an array of Advocates causing confusion should not have been seen in bad light by the learned trial magistrate. The application had been perfectly brought under the provisions of Order 45, rule 1 of the Civil Procedure Rules which provides as follows":

    1. Any person considering himself aggrieved—

        (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

        (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due

diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

11. It is my considered opinion that by the parties appending their signatures on the consent to set aside the interlocutory judgment and the Respondent's counsel accepting the thrown-away costs from the Appellant shows that they had agreed to be bound by the same. This is shown by both continuing with the court's proceedings for more than two years before realizing that the said consent had not been filed and adopted by the court. Further, this court takes cognizance of the fact that it behooved upon the counsels to file and follow up that the consent was adopted as an order of the court. Thus, by the mistake of the counsels, the said consent was not filed and thus not adopted by the trial court. It is also instructive that there is no evidence that the Respondent has ever refunded the thrown away costs paid by the Appellant and hence the Appellant was entitled to be heard before the trial court. Literally, the Appellant was thrown under the bus and lost the opportunity to be heard in the matter.

12. In Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR, as cited in the case of Creekview Limited v Scratch Logistics Limited t/a Scratch Bar [2020] KEHC 10017 (KLR) it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

13. Article 25 of *the Constitution* stipulates that:

> Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
>
> (b) freedom from slavery or servitude;
>
> (c) the right to a fair trial;

14. Article 50(1) of *the Constitution* provides that:

> 1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

15. In SM VS. HGE (2019)eKLR the court associated itself with the reasoning of the court in Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR, stated the following pertaining Article 50 with respect to the principle of fair trial in civil cases:

> "While the wording of Article 50 of *the Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal

representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time."

16. The court went on to say:

> ... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.
>
> Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pretrial or in the course of trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The *Civil Procedure Act* and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time disposition ..."

17. It is clear that the dismissal of the Appellant's application dated 20/9/2022 by the learned trial magistrate was in error and thus it must be interfered with so as to ensure the parties rights to access justice is granted and that they are given their day in court.

18. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The orders made by the trial court dated 8/2/2023 are hereby set aside and substituted with an order that the Appellant's application dated 20/9/2022 is allowed as prayed with costs to the Respondent. Each party shall bear their own costs of this appeal.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OF JANUARY, 2025.

D.KEMEI

JUDGE

In the presence of :

Sumba.....for Appellant

N/a Ms. Owenga.....for Respondent

Ogendo.....Court Assistant