



Remku Limited v Onyango & Onyango (Sued as legal representative of the Estate of Japheth Omondi Owino - Deceased) & 2 others (Environment and Land Appeal E023 of 2022) [2023] KEELC 15753 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E023 OF 2022
SO OKONG'O, J
FEBRUARY 23, 2023**

BETWEEN

REMKU LIMITED APPELLANT

AND

ELIJAH OCHIENG ONYANGO & JOSHUA OKOTH ONYANGO (SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF JAPHETH OMONDI OWINO - DECEASED) 1ST RESPONDENT

DISTRICT LAND REGISTRAR, KISUMU 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(An Appeal from the Ruling and Order of the Chief Magistrate's Court at Kisumu (Hon.T.Odera CM made on 5th May 2022 in CMELC NO. E31 OF 2020)

JUDGMENT

Background:

1. At all times material to this suit, all that parcel of land known as Kisumu/Kapuonja/2226 (hereinafter referred to only as “the suit property”) was registered in the name of Japheth Omondi Owino, deceased (hereinafter referred to only as “the deceased”). The deceased died on May 14, 1998. The 1st Respondents are the legal representatives of the estate of the deceased. On August 27, 2012 after the death of the deceased but before a grant of letters of administration in respect of his estate was taken out, the suit property was transferred to one, Owino Moses Odhiambo who was one of the sons of the deceased. The circumstances under which the suit property was transferred to the said Owino Moses Odhiambo (hereinafter referred to only as “Moses”) are not clear. On September 5, 2012 a few days after the suit property was transferred to Moses, the same was transferred again to the Appellant. The circumstances under which that transaction took place are also not clear.



2. The 1st Respondents filed a suit in the lower court namely, CMELC No E31 of 2020 (hereinafter referred to only as “the lower court suit”) against the Appellant and the 2nd and 3rd Respondents herein. The 1st Respondents averred that sometime in April 2019, they conducted a search on the suit property and discovered that the same had been transferred to the name of Moses in August 2012 and subsequently to the name of the Appellant in September 2012. The 1st Respondents averred that these transactions took place despite the fact that after the death of the deceased, they registered a caution against the title of the property to stop any dealings with the property. The 1st Respondents averred that upon contacting Moses, he told them that he was not aware of the circumstances under which the suit property was registered in his name and subsequently in the name of the Appellant. The 1st Respondents averred that the transfer of the suit property from the name of the deceased before a grant of letters of administration in respect of his estate was taken out to Moses and subsequently to the Appellant was fraudulent.
3. The 1st Respondents sought judgment against the Appellant and the 2nd and 3rd Respondents for; a declaration that the suit property belonged to the deceased and that the title of the suit property in the name of the Appellant be cancelled and the property returned to the name of the deceased. The 1st Respondents also sought a declaration that the registration of the suit property in the name of the Appellant was fraudulent, illegal, null and void and an order of a permanent injunction restraining the Appellant from interfering with their quiet possession and enjoyment of the suit property. The 2nd and 3rd Respondents were served personally with the Summons to Enter Appearance. They entered appearance and filed a joint statement of defence. The Appellant could not be traced for the purposes of personal service and with leave of the court, it was served with Summons to Enter Appearance through advertisement in the Daily Nation Newspaper of April 29, 2021. The Appellant neither entered appearance nor filed a statement of defence to the 1st Respondents’ claim.
4. At the trial, the 1st Respondents called two witnesses in support of their case while the Appellant and the 2nd and 3rd Respondents did not adduce any evidence in their defence. In a judgment delivered on January 28, 2022, the lower court entered judgment for the 1st Respondents as prayed in the plaint. The lower court found that since no grant of letters of administration in respect of the estate of the deceased had been issued by the court, Moses had no valid title in the suit property that he could transfer to the Appellant. The lower court held that any dealing with the estate of a deceased person before a grant in respect of his estate has been issued amounts to intermeddling with the estate which is a criminal offence. The lower court observed that Moses had denied transferring the suit property to the Appellant and that that denial was not controverted. The lower court held that the Appellant acquired the suit property fraudulently and as such its title could not stand.

The Application to Set Aside the Lower Court Judgment:

5. On February 4, 2022 a few days after the delivery of the lower court judgment, the Appellant filed an application in the lower court by way of a Notice of Motion dated February 3, 2022 seeking an order for the setting aside of the lower court judgment delivered on January 28, 2022 unconditionally and leave to file a defence. The application was brought on the grounds set out on the face thereof and on the affidavit of the Appellant’s advocate, Agasna Afrophilia. The Appellant contended that it was served with Summons to Enter Appearance through Newspaper advertisement and that it was not aware of the advertisement and likewise the existence of the suit. The Appellant averred that that explained its failure to enter appearance and file a defence. The Appellant averred that it had a good defence to the 1st Respondents’ claim which raised triable issues which should be heard on merit. In the supporting affidavit, the Appellant’s advocate stated that she received instructions from the Appellant on January 25, 2022 to enter appearance on its behalf in the lower court suit and to protect its interest since the



judgment on the matter was scheduled to be delivered on January 28, 2022. The Appellant's advocate stated that she was unable to enter appearance before the judgment was delivered on January 28, 2022 because the court file was missing. She stated that it was upon perusing the file on January 31, 2022 after the delivery of the judgment that she learnt that the Appellant was served by way of substituted service. She stated that the Appellant only learnt of the lower court suit two days before the date of the judgment. The Appellant's advocate reiterated that the Appellant had a good defence to the 1st Respondents' claim. She annexed a draft defence to her affidavit in support of the application.

6. The Appellant's application was opposed by the 1st Respondents through a replying affidavit sworn by Elijah Ochieng Onyango on February 24, 2022. In the affidavit, the 1st Respondents contended that the Appellant's application was misplaced and lacked good faith. The 1st Respondents averred that the Appellant was duly served with Summons to Enter Appearance and that the Appellant did not explain how it came to know of the existence of the lower court suit if it was not served. The 1st Respondents averred that the lower court judgment had already been executed and as such setting aside of the same would serve no purpose. The 1st Respondents averred that the purported purchase of the suit property by the Appellant was contrary to the provisions of sections 5, 79, 80(2) and 82(b)(ii) of the [Law of Succession Act](#) and as such the same was null and void. The 1st Respondents averred that setting aside of the judgment would serve no purpose since the court would not sanction an illegality. The 1st Respondents averred that the Appellant did not have a defence to the 1st Respondent's claim. The 1st Respondents averred further that the affidavit filed in support of the application was improper.
7. The Appellant's application in the lower court was heard by way of written submissions. In a detailed ruling delivered on May 5, 2022, the lower court dismissed the application with costs to the 1st Respondents. The lower court held that the Appellant had failed to establish that the defence it intended to put forward raised triable issues. The lower court found that the Appellant had no answer to the 1st Respondent's claim that the suit property was transferred to the Appellant before a grant of letters of administration had been obtained in respect of the estate of the deceased and as such the title held by the Appellant was illegal and void the same having been obtained in breach of the law. On whether the Appellant was served with Summons to Enter Appearance, the lower court found that the Appellant was served through substituted service. The lower court found that the Appellant did not disclose how it got to know of the existence of the suit having claimed that it was not served. The lower court held that the Appellant failed to give a reasonable explanation why it failed to Enter Appearance and file a defence within the prescribed period after service upon it of the Summons to Enter Appearance. The lower court found that the Appellant had not demonstrated the existence of inadvertence, excusable mistake or error that could have formed a proper basis for setting aside the judgment. The lower court found that allowing the application would not serve the interest of justice.

The Appeal Before this Court:

8. The Appellant was dissatisfied with the said ruling by the lower court and filed this appeal on May 10, 2022 through a Memorandum of Appeal dated May 5, 2022. In its Memorandum of Appeal, the Appellant challenged the ruling on the following main grounds;
 1. The lower court failed to appreciate the evidence that the Appellant had tendered in proof of the fact that it had a valid defence to the 1st Respondents' claim which raised triable issues.
 2. The lower court erred in not finding that the Appellant was not served with Summons to Enter Appearance and that an order for substituted service was obtained improperly.
 3. The lower court erred in wrongly exercising its discretion in disregard of the law.



4. The lower court erred in not finding that no notice of entry of judgment was served upon the Appellant and that the 1st Respondents had acted in breach of the *lis pendens* rule.
9. The Appellant urged the court to allow the appeal, set aside the ruling of the lower court dated May 5, 2022 and substitute it with an order allowing the Appellant's application in the lower court dated February 3, 2022. The Appellant also prayed for the costs of the appeal.

The Submissions by the Parties:

10. The appeal was argued by way of written submissions. The Appellant filed its submissions on December 15, 2022 while the 1st Respondents filed their submissions on January 9, 2022. The Appellant submitted that there was an error apparent on the face of the record of the lower court in that the Appellant was a Kenyan registered company whose postal address was well known and as such there was no basis for serving it with Summons to Enter Appearance by way of advertisement in the Newspaper. The Appellant submitted that the substituted service through advertisement in the Newspaper was malicious and intended to lock out the Appellant from having its day in court. The Appellant submitted that its right to a hearing was violated.
11. In their Submissions, the 1st Respondents supported the lower court's decision. The 1st Respondents submitted that the Appellant failed to establish valid grounds upon which the lower court could exercise its discretion in its favour. The 1st Respondents submitted that the Appellant failed to give a good explanation for its failure to file a defence within the prescribed period. The 1st Respondents submitted further that the Appellant failed to demonstrate that it had a *prima facie* defence to the 1st Respondents' claim. The 1st Respondents submitted that it would have been futile to set aside judgment when there was no defence to the said claim. On the issue of service, the 1st Respondents submitted that the Appellant was properly served in accordance with the law. The 1st Respondents submitted that the reason given for the failure by the Appellant to file a statement of defence was neither reasonable nor honest. The 1st Respondents submitted that the e-mail that was attached to the Appellant's application before the lower court showed that the Appellant was aware that the lower court suit was fixed for judgment on January 28, 2022. The 1st Respondents have submitted that the Appellant failed to disclose how it came to know of the said judgment date. The 1st Respondents submitted that the Appellants were aware of the suit and were watching it quietly from a distance. On the issue of a defence, the 1st Respondents submitted that the Appellant did not have a valid defence on merit to justify the setting aside of the lower court judgment. The 1st Respondent submitted that the Appellant purported to purchase a property of a deceased person before a grant of letters of administration in respect of his estate was issued. The 1st Respondents submitted that the transaction was illegal, null and void and conferred no proprietary interest in the property upon the Appellant. The 1st Respondents cited the provisions of the [Law of Succession Act](#) and several authorities in support of this submission. The 1st Respondents submitted that in the absence of a *prima facie* defence by the Appellant the court would be acting in vain to set aside the lower court judgment.

Analysis and Determination of the Issues Arising:

12. The Appellant's application before the lower court was brought under Order 10 Rule 11 of the [Civil Procedure Rules](#) which provides as follows:

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



13. The power given by the court under Order 10 Rule 11 of the *Civil Procedure Rules* is discretionary. In *Patriotic Guards Ltd v James Kipchirchir Sambu*, Nairobi CA No 20 of 2016, (2018)eKLR the court stated as follows:

"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

14. In *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 that was cited with approval in *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR the court stated that:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgement 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."

15. In *Shah v Mbogo* [1967] EA 116 that was also cited in *Pithon Waweru Case (supra)* the court stated that:

"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

16. The Appellant had a duty to persuade the lower court that it deserved the exercise of that court's discretion. The only issue arising for determination in this appeal is whether the lower court exercised its discretion properly in dismissing the Appellant's application dated February 3, 2022. I have carefully perused the record of appeal which contains the application that was filed before the lower court, the ruling of the lower court the subject of this appeal and the grounds of appeal put forward by the Appellant. I have also considered the submissions of counsels together with the authorities cited in support thereof. In *Mbogo v Shah* [1968] E A 93 the court stated as follows at page 94:

"I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

17. I am not persuaded that the lower court exercised its discretion wrongly. The lower court was asked by the Appellant to set aside the judgment that was entered against the Appellant on January 28, 2022 and to grant leave to the Appellant to file a statement of defence out of time. A perusal of the ruling reveals that the lower court applied the correct principles to the application before it and appreciated the fact that the power to set aside an ex-parte judgment is discretionary and must be exercised judiciously. The lower court considered whether the Appellant was served with Summons to Enter Appearance and whether any good reason had been put forward by the Appellant for its failure to file a defence within the prescribed time. The lower court was convinced that the Appellant was served with Summons to Enter Appearance and that no good reason had been put forward for the Appellant's failure to enter appearance. The lower court also considered whether the Appellant had a prima facie defence to the



1st Respondents' claim that would justify setting aside the judgment and found that the draft defence put forward by the Appellant did not answer the 1st Respondents' claim. The lower court also found that the Appellant was not candid with the court in that it did not disclose how it came to know that the lower court suit was coming up for judgment on January 28, 2022.

18. I am unable to fault the lower court on the foregoing findings. The Appellant's application was supported by the affidavit of the Appellant's advocate. In the said affidavit, there was no mention of how the Appellant came to know of the existence of the lower court suit. That information was very material taking into account the fact that the Appellant claimed that it was not served with the Summons to Enter Appearance and as such it was not aware of the suit. The Appellant claimed not to have been served with Summons to Enter Appearance despite the existence on record of evidence that he was served with Summons to Enter Appearance by way of substituted service through advertisement in the newspaper. Although the Appellant took issue with the manner in which it was served, the Appellant did not include in its application before the lower court a prayer for the setting aside of the leave that was granted by the lower court to the 1st Respondents to effect service upon it by way of substituted service. Service having been effected pursuant to the leave that was granted by the lower court, this court cannot interrogate that mode of service in the present appeal unless the said leave was challenged in the lower court. From the lower court application, the Appellant claimed to have known of the existence of the lower court suit on January 25, 2022; a few days before the judgment was delivered in the matter on January 28, 2022. It was important for the Appellant to explain how it learnt of the existence of the suit if its claim that it was not aware of the suit until that date was to be believed. In the Appellant's advocate's said affidavit, there was also no mention of how the Appellant acquired the suit property. The sale agreement, evidence of payment of the purchase price, Land Control Board Consent or transfer were not placed before the lower court by the Appellant. A copy of the extract of the register for the suit property that was produced in evidence in the lower court showed that an entry had been made in the register to the effect that the registered owner of the property was deceased. In its draft defence, the Appellant admitted that it was aware of this fact. In the absence of evidence that the Appellant acquired the suit property from the legally appointed legal representative of the estate of the deceased, the lower court cannot be faulted in its finding that the Appellant had not established a prima facie defence or a defence that disclosed triable issues that would warrant the setting aside of the lower court judgment.
19. In the absence of a good excuse for its failure to file a statement of defence and in the absence of a defence to the 1st Respondents' claim which raised triable issues, the Appellant's application was for dismissal. I find no merit in all the grounds of appeal put forward by the Appellant. It is my finding that the lower court exercised its discretion properly. I therefore find no reason to interfere with its exercise of discretion.

Conclusion:

20. In the final analysis and for the foregoing reasons, I find no merit in the Appellant's appeal. The appeal filed herein on May 10, 2022 is dismissed with costs to the 1st Respondents.

DELIVERED AND DATED AT KISUMU ON THIS 23RD DAY OF FEBRUARY 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Otieno for the Appellant



Mr. Kouko for the 1st Respondents

N/A for the 2nd and 3rd Respondents

Ms. J.Omondi-Court Assistant

