



**Diaspora Homes Limited v Kanyi (Environment and Land Appeal
16 of 2021) [2023] KEELC 15802 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 16 OF 2021
AK BOR, J
FEBRUARY 21, 2023
(FORMERLY NYERI ELC APPEAL NO. E006 OF 2021)**

BETWEEN

DIASPORA HOMES LIMITED PLAINTIFF

AND

MESHACK WACHIRA KANYI DEFENDANT

JUDGMENT

1. The Respondent filed suit on 5/5/2014 against the Appellant based on the sale agreement dated December 18, 2012 that they entered into for the sale of the land known as Nanyuki/Marura Block III/3320 (Sweet Waters) (“the suit property”) at the agreed consideration of Kshs 1,170,000/=. The Appellant paid the deposit of Kshs 117,000/= on execution of the agreement and was to pay the balance of Kshs 1,053,000/= upon completion of the transaction.
2. The Respondent averred that in accordance with the terms of the agreement, he forwarded the completion documents to the Appellant who promptly transferred the title to its name but failed to pay the balance of the purchase price. In the suit, the Respondent sought cancellation of the registration of the Appellant as proprietor of the suit property made on January 10, 2013 and his reinstatement on the land register as the proprietor of the suit proprietor.
3. In its defence filed on 27/5/2014, the Appellant admitted that it was registered as proprietor of the suit property but averred that the sale transaction was marred by fraud and misrepresentation and that the Respondent failed to inform it that there were Kenya Power and Lighting Company (KPLC) electric posts on the land which meant that a good part of the land had been a hived off. It contended that the Respondent had unilaterally varied the sale agreement by allowing KPLC to erect posts on the land which therefore rendered the agreement unenforceable.



4. Parties appeared before Honourable WJ Gichimu (Principal Magistrate) on 27/8/2018 and informed the court that the case was ready for hearing. The proceedings show that Gichuhi held brief for Onindo for the Defendant while Chweya held brief for Ombongi for the Plaintiff. The case was set down for hearing on November 12, 2018. On November 12, 2018 when the matter came up for hearing both the plaintiff and defendant were in court as well as Mr Ombongi for the Plaintiff. There was no advocate who appearing for the defendant.
5. The hearing proceeded and upon the plaintiff closing its case, the court set down the matter for delivery of judgment on 21/1/2019. The court entered judgment in favour of the plaintiff against the defendant in terms of prayers (a) and (c) of the plaint dated 17/4/2017.
6. There were further proceedings that took place including the filing of an application dated 1/10/2020 vide which the Appellant sought to set aside the judgment and for the hearing to start *de novo*. Honorable B Mararo (Principal Magistrate) dismissed the application dated 1/10/2020 with costs to the Respondent on the basis that it was a perfect case of indolence.
7. Being agreed by that decision, the Appellant filed the memorandum of appeal on 15/2/2021. It faulted the Learned Magistrate for dismissing its application dated 1/10/2020. It faulted the Learned Magistrate for failing to consider the reasons given in the application and for finding the Appellant guilty of inordinate delay without considering the time when the Appellant became aware of the judgment delivered on 21/1/2020.
8. Further, it urged that the Learned Magistrate erred in law by not appreciating that it had not been properly served with the mention notice yet it had participated in the matter except for the main hearing where service was not properly effected. The Appellant sought to have the ruling delivered on 19/1/2021 set aside and its application dated 1/10/2020 allowed by this court.
9. The appeal was canvassed through written submissions which the court considered. The Appellant submitted that it was not aware of the date of hearing and that the only information which the Respondent's advocate gave the court was that the hearing date was taken by consent. Further, it argued that the date was taken by consent but not by the respective advocates on record. It contended that the Learned Magistrate should have given it the benefit of doubt and fixed the case for hearing on another date. It pointed out that the file was placed aside at 12:10 to wait for the plaintiff's 3rd witness. That when the court gave the judgment date it knew that the coram indicated that the defendant was in court. It maintained that there was no indication that the judgment notice was served on it.
10. The Appellant relied on *National Bank (K) Limited v Mary S Ndeto and another* [2002] eKLR where the court stated that it would not usually set aside judgment a regular judgment unless it is satisfied that there is a defence on the merits which raises triable issues and which should go for trial. It also relied on *Jackline Ombongi v Agnes Nyanchama and Another* [2016] eKLR where the court dealt with the issue of replying affidavit and ordered the reinstatement of the suit for hearing.
11. The Appellant also cited *Bosire Ogero v Royal Media Sevices* [2015] eKLR where the court observed that it employs the principle that no party who comes before it seeking to ventilate their grievance should be ousted from the seat of justice by reason of a mere typographical error. In that case the court was of the view that costs could compensate the defendants for the delay in filing the application for amendment. The delay was for a year and 3 months from the date of filing suit which the court found was not inordinate.
12. Lastly, the Respondent relied on *Vijay Kumar Mandal v Rajinder Kumar Mandal* [2014] eKLR where the court found that at the time the application proceeded the Respondent did not have leave to serve through substituted means and that the applicant was not heard and the orders made were



- prejudicial to him. The Appellant concluded that it had a good defense and was the registered owner of the suit property.
13. Further, the Appellant urged that it had made a deposit of Ksh 117,000/= to the Respondent which ought to be addressed at the hearing. It maintained that the Respondent did not reveal to it crucial facts about KPLC.
 14. The Respondent submitted that the ruling dated 19/1/2021 was just because the record of appeal and the record of the trial court speak on the Appellants indolence. It submitted that when the hearing date was taken on 28/8/2018 the Appellant's counsel was in court and the hearing date was taken by consent when both advocates confirmed that they had complied with Order 11 of the Civil Procedure Rules. He pointed out that the Appellant swore in the affidavit dated 1/10/2020 at paragraph 21 that its advocate's failure to attend the hearing was not intentional but that he was not aware of the dates, which in the Respondent's view was a clear misrepresentation of facts.
 15. He pointed out that the court attendance of November 12, 2018 indicated that the defendant was present but there is no indication that he attempted to address the court but was denied the opportunity to do so.
 16. He pointed out that Mr Gichuhi advocate held brief for Mr Onindo on 27/8/2018 confirmed compliance and went ahead to take the hearing date of November 12, 2018. He contended that the Appellant does not suggest that Mr Gichuhi failed to inform him of the hearing date of November 12, 2018 after holding his brief on 27/8/2018. Further, that several documents and processes were served upon the Appellants advocates pursuant to the entry of judgment which they ignored until a certificate of costs and notice to show cause was served on them.
 17. The Respondent added that in fact it had filed the application dated 1/3/2022 for dismissal of the appeal which had been dormant for 13 months.
 18. The Respondent submitted that the Appellant did not disclose when it became aware of the judgment yet it moved the court 22 months from the date of judgment. Further, no explanation was given as to why the Appellant did not follow up on the progress of the case. It maintained that the Appellant was far from being innocent and urged that the Appellant's indolence should not be visited on the Respondent as that would be unfair and unjust. He made the appeal that he should be allowed to enjoy the fruits of his judgment.
 19. The Respondent relied on *Mbogo v Shah* (1967) EA 93 where the court observed that the court sitting on appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or where it is manifest that the judge was clearly wrong in the exercise of his discretion and as a result there had been injustice.
 20. The Respondent also referred the court to the decision in *James Kanyiiita Nderitu & another v Mario Pholotas Ghikals & Another* (2017) eKLR where the court held that it had an unfettered discretion in determining whether or not to set aside the default judgment and takes into account factors such as the reason for the failure to file the defence on time, the length of time that had elapsed since the default judgment was entered, whether the intended defence raised triable issues, the prejudice each party is likely to suffer and whether on the whole it was in the interest of justice to set aside the default judgment.
 21. The Respondent challenged the Appellant's submission that service by registered post is what occasioned the Appellant's failure to attend court. He argued that the hearing date was taken by consent in court and there was no requirement to serve a hearing date as the Appellant claimed. The Respondent concluded that the appeal lacked merit and should be dismissed with costs.



22. The issue for determination in this appeal is whether the court should allow the appeal. Looking at the typed proceedings, they confirm that the Appellant was represented by an advocate on 27/8/2018 when the matter came up in court and the advocates informed the court that the case was ready for hearing. The case was fixed for hearing on November 12, 2018. The proceedings show that Gichuhi held brief for Onindo for the Defendant while Chweya held brief for Ombongi for the Plaintiff.
23. The proceedings also show that the Defendant was present in court when the case was heard on November 12, 2018. On conclusion of the hearing, the court gave the judgment date of 21/1/2019. The Appellant was in court and must have heard the date the court gave for delivery of the judgment. It was expected that the Appellant would promptly notify its advocate that the hearing had proceeded without him then the advocate would take further steps in the matter to secure the Appellant's interest.
24. Despite averring that the Appellant was not aware as to when the matter proceeded to full hearing, Earnest Mungai did not disclose in the affidavit he swore 1/10/2019 (sic) when the Appellant learned that the trial court had delivered judgment in the suit. That averment by the Appellant contradicts what is on the court record, which indicates that the Defendant was in court when the case was heard.
25. The Respondent sought to be reinstated on the land register as proprietor of the suit property which the Appellant transferred to itself after only paying the deposit under the agreement. The Appellant failed to pay the balance of the purchase price. It did not counterclaim a refund of the deposit that it had paid towards the purchase price for the land.
26. The court agrees with the findings by the Learned Magistrate that the Appellant was indolent and was not keen to defend the Respondent's claim against it. This is demonstrated by the fact that even after filing the appeal, the Appellant did not take steps to prosecute it expeditiously. There is on record an application which the Respondent filed on 28/3/2022 seeking to dismiss the appeal for want of prosecution.
27. The conduct of the Appellant does not show that it was keen to have the dispute arising from the sale agreement resolved expeditiously yet it was already registered as proprietor of the suit property, had not paid the balance of the purchase price and claimed that the Respondent had varied the agreement by allowing KPLC to place electric posts on the land which meant that part of the land would not be utilised.
28. The appeal is dismissed. Each party will bear its costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 21ST DAY OF FEBRUARY 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Wambugu Muhoro for the Appellant

Ms. N. Simiyu holding brief for Mr. D. Ombongi for the Respondent

Ms. Stella Gakii - Court Assistant

