Muchelesi & 2 others v Zakali (Environment and Land Appeal 22 of 2018) [2023] KEELC 836 (KLR) (14 February 2023) (Judgment)

Neutral citation: [2023] KEELC 836 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL 22 OF 2018

BN OLAO, J

FEBRUARY 14, 2023

BETWEEN

RASOA MUCHELESI .... 1ST APPELLANT

JOHN JUMA MUCHELESI .... 2ND APPELLANT

WANYONYI MUCHELESI .... 3RD APPELLANT

AND

PHILIP SIMIYU ZAKALI .... RESPONDENT

(Being an appeal from the ruling of HON. F. KYAMBIA (RESIDENT MAGISTRATE) delivered on 4th June 2009 in BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE NO 592 of 2007)

JUDGMENT

1. This appeal was filed on June 15, 2009 and admitted by Muchelule J (as he then was) on December 22, 2011. On September 10, 2018, it was transferred to this Court by Riechi J and when it was mentioned before me on March 25, 2019, Mr Wachana Counsel for the Respondent informed the Court that the parties were still waiting for the record of the subordinate court.
2. On May 13, 2019, I expressed my displeasure at the delay in availing the record for appeal purposes and urged that the process be expedited. Unfortunately, it was not until April 6, 2022 that the record of appeal was filed. And as the Court was waiting for submissions to be filed on the appeal having given directions on July 6, 2022, the Appellants filed a Notice of Motion dated July 18, 2022. To avoid further delays in this matter, on July 27, 2022 I directed that I would deliver both the judgment on the appeal and the ruling on the Notice of Motion simultaneously by way of electronic mail.
3. This is therefore the judgment on the appeal. The ruling on the notice of motion dated July 18, 2022 shall be delivered separately but simultaneously.

4. By a plaint dated November 21, 2007 and filed in the subordinate court, Philip Simiyu Zakali (the Respondent) sought the main remedy that Rasoa Muchelesi, John Muchelesi, Wanyonyi Muchelelesi and Emma Mayabi (the 1st to 4th Appellants) be evicted from the land parcel No East Bukusu/South Nalondo/1915 (suit land). He also sought an order for costs and interest.

5. The record of appeal appears to be incomplete but looking through the trial court's proceedings, the matter came up for hearing before Hon Kyambia Resident Magistrate on July 8, 2008 and proceeded *ex-parte* in the absence of the Appellants who had been served. Judgment was delivered on the same day granting the Respondent the orders prayed for. A decree was issued on July 2, 2008 and on July 3, 2008, the Court Bailiff Bungoma Court was directed to ensure that the Appellants are evicted from the suit land.

6. The Appellants approached the trial court with two applications. In the first application dated February 20, 2008, the 4th Appellant sought the following remedies:

    1. Spent

    2. Spent

    3. The Honourable Court to set aside all the *ex-parte* orders and proceedings against the 4th Appellant and grant her leave to defend.

    4. That the defence on record be deemed as duly filed upon payment of the requisite court fees.

    5. That in the alternative, the Court be pleased to dismiss the suit against the 4th Appellant for disclosing no cause of action against him.

    6. Costs be in the cause.

    The application was opposed by the Respondent through his replying affidavit dated August 13, 2008.

    7. The 1st, 2nd and 3rd Appellant on their part filed an application dated July 18, 2008 also seeking the following orders:

        1. Spent

        2. There be a stay of execution of the decree pending the hearing and determination of the application.

        3. The judgment and all consequential orders be set aside and the 1st, 2nd and 3rd Appellants be granted leave to defend the suit.

        4. The process server one Hudson Chango Wamacho be cross-examined.

        5. Costs of the application.

        That application was also opposed by the Respondent vide his replying affidavit dated October 3, 2008.

8. Both applications fell for hearing before Hon F. Kyambia who dismissed them with costs vide a ruling delivered on June 4, 2009.

9. The ruling provoked this appeal in which only the 1st, 2nd and 3rd Appellants appear to be the ones appealing as per the record of appeal and the submissions filed. The following seven (7) grounds of appeal have been proffered in seeking to have the said ruling set aside:

1. The learned magistrate erred both in law and fact when he dismissed the Appellants application for stay and setting aside of the *ex-parte* judgment.

2. The learned magistrate erred both in law and fact as to the issues to determine the application upon.

3. The learned magistrate erred in law when he perversely exercised his discretion in a land matter.

4. The learned magistrate erred in failing to make cognizance of the first and second defendant's title to land.

5. The learned magistrate failed to properly analyze the submissions placed before him on behalf of the Appellants.

6. The learned magistrate erred in law and fact when he entertained a matter without jurisdiction.

7. The learned magistrate misapprehended the law and fell into error and thereby caused a miscarriage of justice to be occasioned to the Appellants.

   The Appellants therefore sought the following orders from this Court:

   a. The ruling of the learned magistrate be set aside and the order of June 4, 2009 be quashed.

   b. The Respondents suit before the lower court be dismissed and struck out for want of jurisdiction.

   c. Costs of the appeal.

10. When the appeal was placed before me for directions on July 6, 2022, I directed that it be canvassed by way of written submissions. Those have been filed both by Mr Waswa instructed by the firm of Wabwile & Company Advocates for the Appellants and by Mr Kundu instructed by the firm of Situma & Company Advocates for the Respondent.

11. I need to clarify at this stage that from both the Memorandum of Appeal and the submissions on record, only the 1st, 2nd and 3rd Appellants appear to have approached this Court on appeal.

12. I have considered the record of appeal, incomplete as it is, the proceedings of the trial magistrate and the submissions by counsel.

13. As a first appellate court, my duty is to re-evaluate the evidence that was before the trial magistrate and subject it to a fresh and exhaustive scrutiny before making my own conclusion on the ruling the subject of this appeal. In doing so, I must remember that I neither saw nor heard the parties. Those guidelines are well captured in the cases of *Selle & another v Associates Motor Boat Company Ltd* 1968 E.A 123, *Peter v Sunday Post Ltd* 1958 EA 424 among others.

14. I shall first consider grounds Nos 3, 4 and 6 together in which the trial magistrate is faulted for perversely exercising his discretion in a land matter, failing to take cognizance of the 1st and 2nd Appellants' title to land and entertaining a matter in which he had no jurisdiction.

15. The law applies equally to all the parties before the Court irrespective of the subject matter before it. It does not therefore matter that the subject matter is land and the suggestion by the Appellants that they should have been treated differently has no basis in law.

16. The dispute was heard *ex-parte* with only the Respondent and his father Jeremiah Khaemba Sakari testifying. The trial magistrate therefore did not hear the testimony of the Appellants and he had no

other evidence before him which he could take cognizance of. That could only have been possible if he had heard all the parties involved.

17. On the issue of jurisdiction, there is really nothing to suggest that this dispute which involved the ownership of a parcel of land measuring 1.64 Hectares (4.0 acres) was beyond the pecuniary jurisdiction of the subordinate court. Certainly, it was not a matter for the then Land Disputes Tribunal established under Section 4 of the repealed *Land Disputes Tribunal Act*. The dispute before the trial magistrate involved ownership of registered land. It was therefore beyond the jurisdiction of the Tribunal as circumscribed under Section 3(1) of the repealed *Act* – Jonathan Amunavi v Sabatia Division Land Disputes Tribunal & another CA Civil Appeal No 256 of 2002 (Kisumu).

18. Clearly, there can be no merit in grounds No 3, 4 and 6 of the Memorandum of Appeal. They are accordingly dismissed.

19. Grounds No 1, 2, 5, 7 and 8 shall be considered together. Therein, the trial magistrate is assailed for failing to analyse the issues and submissions, misapprehending the law and thereby dismissing the Appellants' application and occasioning a miscarriage of justice.

20. The applications before the trial magistrate were predicated upon the provisions of Section 3A of the *Civil Procedure Act* and the then Order IXA rules 10 and 11 of the *Civil Procedure Rules*. It sought the remedies already stated above in this judgment being;

    1. Setting aside of the exparte judgement.
    2. Stay of execution.
    3. Leave to defend.
    4. In the alternative, dismissal of the Respondent's suit.
    5. Cross-examination of the process server.

21. The plank of the Appellants' applications was that they were not served. In paragraphs 4 and 5 of his affidavit in support of the application dated 18th July 2008, John Juma Muchelesi the 2nd Appellant has pleaded that:

    4: "No service whatsoever was effected upon any of the defendants.

    5: "We have a good defence given we own the land parcels we reside in with unchallenged titles thereto. Copy of defence is annexed."

    On her part, and although as I have stated above that she does not appear to be among the Appellants as per the memorandum of appeal, the 4th Appellant also filed a separate application dated February 20, 2008. As already mentioned above, the record of appeal filed by Wabwile & Company Advocates leaves a lot to be desired. Nonetheless, and for abundance of caution, I shall consider her application as well. In her supporting affidavit dated 20th February 2008, she simply states that she does not live on the suit land. There is no averment as to whether or not she was served with the plaint and summon to enter appearance. Indeed in her application she appears to be referring to a different parcel of land other than the suit land. In paragraph 2 and 3 of that affidavit, she states:

    2: "That I have been impleaded by the plaintiff in respect of a parcel of land known as E. Bukusu/S. Nalondo/1915 yet I am the registered proprietor of E. Bukusu/S. Nalondo/2965. Find certificate marked EM – 1".

3: “That I have built a home where I stay on parcel No E. Bukusu/S. Nalondo/2965 and have never had any relationship or proprietary interests in respect of the land parcel known as E. Bukusu/S. Nalondo/1915 as pleaded. Find copy of official search marked EM-2”.

In response to the application by the 1st, 2nd and 3rd Appellants dated July 18, 2008, the Respondent filed a replying affidavit dated October 3, 2008 in opposition thereto and averred at paragraph 11 as follows:

11: “That the defendants were duly served with summon to enter appearance on the November 23, 2007 as stated by the process server Hudson Chango – see copies of summon to enter appearance marked PSS-IV (a), (b), (C) and (d).”

And in response to the application by the 4th Appellant, the Respondent deponed in paragraph 5 of his replying affidavit dated August 13, 2008 as follows:

5: “That on the 31/1/2008, my process server proceeded to Busia Lands Department where the 4th defendant works and she was duly served with summons to enter appearance which she did receive by signing at the back and dating on the same. See a copy of the same marked PSS-1”.

On his part, Hudson Chango Wamucho a process server of this court filed an affidavit of service dated February 18, 2008 in which he has averred in paragraph 3, 5 7 and 10 as follows:

3: “That on the same day i.e. November 23, 2007, the plaintiff herein took me upto the first (3) defendants’ home situated near Sikata along Bungoma – Webuye road. He pointed out to me the said first three defendants whom we found at around 11.38A.M.”

5: “That I then tendered copies of the said documents to them.”

7: “That on the January 31, 2008, the said plaintiff then further took me upto Busia District Lands Office where the 4th defendant herein Emma Mayabi works.”

10: “That she then acknowledged service by signing and dating of the back of my copy of the summon to enter appearance and she further retained a copy of the same.”

The documents which the said process server served upon the Appellants are described in paragraph 2 of the same affidavit as:

> “ … copies of summon to enter appearance, a plaint and affidavit verifying the plaint from the firm of M/s Bulimo & Company Advocates to serve upon the four defendants.”

In the case of the 4th Appellant, a copy of the signed Summons to Enter Appearance (STEA) is even annexed to the process server’s affidavit of the service. The application by the Appellants were premised on the allegations that they were not served. As is clear from the above, however, they were all duly served and therefore the complaint of lack of service was really made in bad faith. This is how the trial magistrate addressed the issues of service in the impugned ruling:

> “This being an application to set aside an exparte judgement, the main consideration is whether the defendants were duly served with summons to enter appearance and if they have defence which raises triable issues. In as far as the 4th Appellants’ application is concerned, I have perused the affidavit of service and I note that she was duly served and acknowledge service by endorsing her name and signature at the back of the summons. Indeed she has not all started that she was never served. I do find that she was duly served. Again I do find that she had not at all stated that she has any defence nor annexed a drat to the application

to demonstrate that she has a triable defence. I find her application lacking in merit and the same is dismissed with costs."

22. With regard to the application by the 1st, 2nd and 3rd Appellants, this is what the trial magistrate said:

> "In as far as the application by the 1st, 2nd and 3rd defendants is concerned, they had denied that they were served with summons to enter appearance. However, according to the process server Hudson Chango Wamocho in his affidavit of service, he states that the was taken to the 1st, 2nd and 3rd defendants' home situated at SIKATA by the plaintiff and served there. The defendants declined to sign at the back of the copy of summons. The process server was also exact at what time he effected service. I am inclined to accept that the 1st, 2nd and 3rd defendants were properly served and the judgment herein is regular."

23. The Court has a discretion on whether or not to set aside an exparte judgement. That discretion is however not at large. It is to be exercised judiciously. The Court of Appeal captured the exercise of that discretion as follows in the case of *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR:

> "From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another v Shah (supra), Patel v E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioki [2004] 1 KLR 173).
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> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v Attorney General [1986-1989] EA 456)."

In *Shah v Mbogo* 1967 E.A 116, Harris J had this to say on the Court's discretion to set aside an exparte judgment:

> "The 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

That decision was approved by the Court of Appeal in Mbogo v Shah 1968 E.A 93.

24. In *CMC Holdings v Nzioki* 2004 1 KLR 173, the Court held that:

> "The law is now well settled that in an application for setting aside an ex parte judgment, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the defendant has a reasonable defence which is usually referred as whether the defence if filed already or if a defence is annexed to the application, raises triable issues."

Such a defence, as was held in Patel v East Africa Cargo Handling Services Ltd 1974 EA 75, need not be a defence that must succeed so long as it raises triable issues which ought to go for trial.

25. I have analyzed the impugned ruling and although the trial magistrate did not make reference to the above case law, I have no doubt in my mind that he appreciated what the Appellants needed to establish in order to be entitled to the setting aside of the judgment. With regard to service, the trial magistrate found, and I agree with his assessment, that there was proper service of the plaint and summons to enter appearance upon the Appellants. Notwithstanding their blanket denial, the affidavit of service by HUDSON CHANGO WAMOCHO was detailed on how the Respondent led him to the Appellants, pointed them out to him and he effected service. In the case of the 4th Appellant, she even signed the documents as evidence of service. There was nothing before the trial magistrate to suggest that the process server had any reasons to swear a false affidavit. It must also be remembered that a party seeking the exercise of the court's discretion in their favour must approach the court with clean hands and give full disclosure. Having been duly served as the trial magistrate correctly found, no reasons were advanced by the Appellants as to why they did not enter appearance or file their defences. Evidence is the basis upon which any court exercises its discretion one way or the other. In my view, the trial magistrate cannot be faulted in the manner in which he exercised his discretion.

26. This appeal invites me to interfere with the discretion of the trial magistrate in declining to set aside the ex parte judgment. I must therefore be guided by the decision in Mbogo & another v Shah 1968 EA 93 where the court stated that:

> "An Appellate Court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising it's discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

27. I see no reason to interfere with that exercise of discretion by the trial magistrate.

28. With regard to the prayer for stay of execution, this is governed by the provisions of Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*. The Appellants were required to show the following:

    1. Sufficient cause.

2. That they will suffer substantial loss.

3. Approach the court without unreasonable delay.

4. Offer security.

Nowhere in their applications, or supporting affidavits did the Appellants make even a fleeting reference to the above provision of the law while arguing their application before the trial magistrate.

29. It is also clear that by the time the impugned ruling was being delivered on June 4, 2009, there was nothing to be stayed. In paragraphs 5 and 6 of his replying affidavit dated 3rd October 2008, and filed in response to the application dated July 18, 2008, the Respondent has deponed as follows:

> 5: "That I am also advised that the application is overtaken by events hence there is nothing to be stayed."
>
> 6: "That in compliance with court order issued on July 3, 2008, I did evict the Defendants/Appellants in this application from the land parcel No East Bukusu/South Nalondo 1915 by putting down 2 houses, the fence of the fourth defendant which had encroached on my land and some parts of the shop which had also encroached on my land. See copy of the order and photographs taken there after marked PSS-1(a), (b), (c), (d)."

And in response to the application dated February 20, 2008 filed by the 4th Appellant, the Respondent deponed in paragraph 12 as follows:

> 12: "That on the day the co-defendants were evicted from land parcel No East Bukusu/South Nalondo/1915, she did not raise a finger neither did she report to the police officers who were present hence this is an attempt to frustrate me from recovering my costs of the suit."

It follows from the above that there was really nothing left for the trial magistrate to issue any orders of stay of execution.

30. Finally, there was a prayer by the 4th Appellant seeking the dismissal of the Respondent's suit. That prayer could not be granted in the application before the trial magistrate especially after he had rejected the prayer to set aside the *ex-parte* judgement.

31. On the issue of costs, as I have already stated above, the record of appeal was rather disjointed. It is not even clear if the 4th Appellant [Emma Mayabi] was infact also appealing. Her name is missing from the memorandum of appeal. It is my finding therefore that the 4th Appellant is not a party in this appeal. She cannot be made to meet the costs of this appeal.

32. Costs nonetheless follow the event unless there are good reasons why the Court should decide otherwise. In the circumstances, therefore, the 1st, 2nd and 3rd Appellants shall meet the Respondent's costs of this appeal.

33. The up-shot of all the above is that having considered the record of appeal and the submissions by counsel, I am not persuaded that the trial magistrate mis-directed himself and erred either in law or in fact in arriving at the decision which he did.

34. This appeal is devoid of any merit. It is accordingly dismissed with costs to be borne by the 1st, 2nd and 3rd Appellants.

BOAZ N. OLAO

JUDGE

14TH FEBRUARY 2023

Judgment dated, signed and delivered at BUSIA on this 14th day of February 2023 by way of electronic mail with notice to the parties.

BOAZ N. OLAO

JUDGE

14TH FEBRUARY 2023