



REPUBLIC OF KENYA



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**Odek v Mwagi & another (Environment and Land Appeal E018 of 2022)
[2023] KEELC 953 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E018 OF 2022
MN KULLOW, J
FEBRUARY 13, 2023**

BETWEEN

EDWARD ODIWUOR ODEK APPELLANT

AND

JOSEPH ONYANGO MWAGI 1ST RESPONDENT

KARIERO PROPERTY 2ND RESPONDENT

JUDGMENT

1. This Appeal emanates from the Ruling and Order of Hon. P. Areri, Principal Magistrate in Migori CMCC No. 512 of 2018, delivered on December 22, 2020. The grounds in the Memorandum of Appeal are that: -
 - i. The Learned Trial Magistrate erred in law and in fact in finding that the Appellant had been served with Notice in respect of the hearing of November 8, 2018 and therefore the proceedings of that day and the subsequent judgment entered on September 3, 2019 were unconstitutional, irregular and null and void and had to be set aside ex debito justitiae.
 - ii. The Learned Magistrate erred in fact and in law in holding that the Appellant was guilty of laches on account of having brought the Application dated September 15, 2020 two years after the matter was heard and one year after judgment was delivered without giving consideration to the fact that the Appellant's counsel had not been aware of the hearing date and of the entry of judgment as well as the fact that no notice of the date of delivery of judgment was served on his counsel and no invitation to attend court for the assessment of costs was served. The uncontroverted evidence before the court the Appellant had come to realize that the matter had been heard and judgment delivered only in August 2020.



- iii. The Learned Magistrate erred in law and in fact in holding that allowing the Application would defeat the overriding the objective when the truth was that the refusal to allow the application was contrary to the letter and spirit of the overriding objective.
 - iv. The Learned Magistrate erred in law and in fact in failing to find that the proceedings leading up to the judgment were irregular and fundamentally flawed by reason of the fact that the pleadings had not closed by the time the matter was heard.
 - v. The Learned Magistrate erred in law and in fact in finding that the trial of the case was premature on account of the fact that the mandatory pre-trial processes prescribed by law had not been and were not undertaken to the prejudice of the appellant.
 - vi. The Learned Magistrate erred in fact and in law in failing to consider that the appellant had a very good defence on record to the Respondent's claim and that failure to allow the Appellant an opportunity to put forward that defence was inimical to established case law and to the letter and spirit of the overriding objective and was a failure to do justice in the case before him.
 - vii. The Ruling and orders of the Learned Magistrate was against the weight of the evidence before him.
2. The Appellant therefore prays for: -
- a. This Appeal be allowed.
 - b. The Ruling of Hon. P. Areri, Principal Magistrate, in the original Migori CMCC No. 512 of 2018, delivered on December 22, 2020, be set aside, Application dated September 15, 2020 be allowed.
 - c. The costs of this Appeal and of the Application be awarded to the Appellant.
3. A brief background to bring the Appeal herein into perspective; the Appellant filed an Application dated 15/09/2020 seeking to have the proceedings and the judgment delivered on 03/09/2019 set aside. It is his contention that the matter proceeded for hearing before the close of pleadings as per the provisions of the Civil Procedure Rules at the time the matter was heard on 08/11/2018; that he was denied an opportunity to be heard and defend himself in the proceedings.
4. It was further his claim that the matter proceeded ex-parte when in fact they were not served with any Hearing or Judgment notice and he only became aware of the judgment in the matter in August, 2020. The Respondent filed a Replying Affidavit; wherein he averred that the 1st Defendant was served with summons to enter appearance via EMS and an Affidavit of service was filed to that effect. He further stated that the 1st Defendant through his counsel on record have been served with several invitations to attend the registry for purposes of fixing a mutually convenient date, mention and hearing notices but the same have always been ignored and/or neglected. He thus urged the court to dismiss the Application. The Application was canvassed by way of written submissions and a Ruling delivered on the 22/12/2020 whose effect was to dismiss the said Application with costs to the Respondent, hence the instant Appeal.
5. The Appeal was disposed of by way of written submissions; both parties filed their rival written submissions, which I have read taken into consideration in arriving at my decision.
6. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the rival submissions in totality; I find that the main issue for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside trial court ruling delivered on December 22, 2020.



7. This being a first appeal, it is the duty of the court to analyze and re-assess the evidence on record and reach our own conclusions. The court in *Kenya Ports Authority v Kunston (Kenya) Ltd*, [2009] 2 EA 212 held as follows: -

“This being a first appeal to this court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”
8. This court’s jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The issue before the trial court was whether the proceedings of 08/11/2018 and judgment 03/09/2019 can be set aside and the matter be heard afresh for the reason that the matter proceeded ex-parte and the appellant was never served with any hearing notice. It is the appellant’s case that the proceedings and judgment ought to be set aside ex-debito justitiae.
9. I will now proceed to re-evaluate and re-assess each of the party’s claim from the trial court record and the Ruling in order to determine whether the trial magistrate rightly exercised his discretion in dismissing the said Application dated 15/9/2020.
10. The Appeal herein is centered on the issue of service of the Hearing and Judgment Notices. The Appellant maintains that he was not served with the requisite hearing notices and further when the matter proceeded for the hearing; pleadings had not been closed as stipulated by the provisions of the Civil Procedure Rules.
11. The [Civil Procedure Rules](#) provides strict timelines which govern the case management and ensures the expeditious disposal of matters filed in our courts. Order 7 Rule 1 provides the strict timelines within which to file a statement of Defence and the various accompanying documents as outlined under Order 7 Rule 5. Further, Order 11 Rule 2 provides for the filing and service of the Pretrial Questionnaire within 10 days after the close of pleadings and the convening of a pretrial conference within 30 days after the close of pleadings as stated under Order 11 Rule 3.
12. From the above provisions; it is my considered view that upon the filing of the Statement of Defence and all the accompanying documents within 14 days after entering appearance and service thereof within 14 days; pleadings shall be deemed to be closed. The pretrial conference and the filing of the pretrial questionnaire can thereafter be done within 30 days after the close of pleadings. It is common ground that pleadings cannot remain open infinitely or without limit, thus guided by the said provisions of the Civil Procedure Rules, I disagree with the position taken by the Appellant. Upon filing of the Statement of Defence and the accompanying documents, pleadings closed and the Appellant was duty bound to adhere with the strict timelines.
13. I have looked at the trial court record and I note that the Appellant filed his Statement of Defence without the necessary accompanying documents on 23.07.2018. On 25/9/2018, the matter proceeded for mention whereupon parties were directed to comply with Order 11 and thereafter fix a hearing date. Subsequently, the matter was scheduled for hearing on the 08/11/2018, being almost 3 months after the close of pleadings and almost 2 months after the pretrial conference. It is therefore my finding that the said averments by the Appellant are untenable in law.
14. It was also his contention that he only became aware of the judgment in the matter sometimes in August, 2020 when he discovered that the Respondent had since taken up possession of the suit land and was in the process of developing the same. That upon discovering that judgment had been delivered



- in the matter, he filed the Application within a month. It was therefore his case that the trial magistrate erred in finding that he was guilty of laches for failure to file the Application as soon as possible.
15. The Respondent on the other hand maintained that the Appellant was duly served with several mention and hearing notices including the for the 08/11/2018 which he seeks to set aside; but he ignored and neglected the same. That upon service of the said notices, an Affidavit of Service was filed to that effect.
 16. I have critically looked at the pleadings from the trial court record, particularly on the issue of service. I do note that there are several Affidavit of Service filed on diverse dates to wit; 22/07/2019, 6/11/2018 and 24/09/2018, wherein the process server clearly demonstrated how service was effected on the diverse dates. I have also looked at the sentiments by the trial court on the hearing date of 08/11/2018 and I note that the court only proceeded ex-parte upon being satisfied that the Defendants were duly served and were fully aware of the day's date before proceeding.
 17. The Court of Appeal in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2014] eKLR cited with approval the decision in *Miruka v Abok & another*, [1990] KLR 544, Platt, JA stated as follows: -

“There is a qualified presumption in favour of the process server recognized in *MB Automobile v Kampala Bus Service* [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitale and Annaji Rao: *The Code of Civil Procedure* Vol II p 1670, the learned commentators say: -

“3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.” (emphasis added)
 18. Guided by the Court of Appeal decision above; I find that there is a presumption of service in favor of the process server and the Respondent. The Appellant's contention was that he was not served with the hearing notice, however, he neither raised any contest as to the correctness and admissibility of the Affidavits of Service on record nor made an Application to be given an opportunity to cross-examine the said process server on the contents of the said Affidavits. In the absence of any contest on the Affidavit of Service on record, I find that the said Return of Service are sufficient and admissible evidence.
 19. In view of the foregoing, I find that the Appellant was duly served with the Hearing Notice and were aware of the hearing date of 08/11/2018 but chose not to attend court. The Judgment entered 03/09/2019 was therefore a regular judgment and is not in my opinion the sort of judgment that can be set aside ex debito justitiae.
 20. I have also looked at the Application dated 15/09/2020 and I have noted that the Appellant did not sufficiently demonstrate the inordinate delay in filing the said Application other than stating that he only became aware of the judgment in the case sometimes in the month of August 2020. There is no demonstration of the steps taken and/or efforts made to follow up on his case after filing the Statement of Defence on 23/07/2018 until August 2020 when he learnt of the judgment.



21. The principles for the setting aside of an ex parte judgment were considered in *Patel v East Africa Cargo Handling Services Ltd* [1974] E.A. 75 where William Duffus, P. stated; -

“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. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication”

22. I have also looked at the Appellant’s Statement of defence dated July 23, 2018 and I note that the same is marred with blanket denials without any plausible explanation or rebuttal of the allegations made by the Respondent in his Plaint. In view of the foregoing and in the absence of any justifiable explanation; this court is unable to exercise its discretion in favor of the Appellant.

Conclusion

23. In conclusion, I accordingly find that the Appeal is not merited and the Memorandum of Appeal dated 4th February 2021 is hereby dismissed with Costs to the 1st Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 13TH DAY OF FEBRUARY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -

Nonappearance for the Appellant

Nonappearance for the Respondents

Court Assistant - Tom Maurice/ Victor

