



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.115 OF 2019

BETWEEN

BRIDGET RIARA EUSTUS.....1ST APPELLANT

EDWIN MARANGU.....2ND APPELLANT

WASHINGTON KIMATHI.....3RD APPELLANT

ROSEMARY IGOKI.....4TH APPELLANT

ENID NCHABARI.....5TH APPELLANT

LINET NGEETA.....6TH APPELLANT

AND

EUSTACE KIRIMI M'ABURI.....1ST RESPONDENT

ZAKAYO THIURU MWARANI.....2ND RESPONDENT

(Being an Appeal from the Ruling, Order and Decree in Nkubu SRMCC No. 22 of 2015 by Hon. J.Irura (PM) on 11th September, 2019)

JUDGMENT

1. By a plaint dated 19th December, 2015, the 1st Respondent sued the 2nd Respondent seeking orders that:

- 1) An order of refund of Kshs. 724,000/- plus agreed interest of 10% from 02nd August, 2014 until payment in full**
- 2) Alternatively, the transfer of LR. NO. ABOGETA/L-KIUNGONE/760 to the Plaintiff (1st Respondent)**
- 3) General damages for breach of contract**
- 4) Costs and interest**

2. The record demonstrates that the 2nd Respondent did not defend the suit and interlocutory judgment was entered against him on 04th June, 2015.

3. Subsequently, the suit as heard by way of formal proof on 26th August, 2015.

4. By a judgment dated 30th September, 2015, judgment was entered for the 1st Respondent against the 2nd Respondent as follows:

- i. Defendant (2nd Respondent) to refund the Plaintiff (1st Respondent) Kshs. 724,000/-**

ii. Costs of the suit

iii. Interest on (i) and (ii) at court rates from date of judgment

5. On account of 2nd Respondent's failure to pay the judgment sum, the 1st applied Respondent applied for execution by way of approval to sell **LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760** which order was granted on 22nd May, 2019.

6. The Appellants who are wife and children of the 2nd Respondent respectively became aware of the intended sale and by a notice of motion dated 29th May, 2019 sought orders to be enjoined as defendants in the suit, leave to defend the suit and for review of orders approving conditions of sale of **LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760** on the grounds among others that:

- 1) These is family land registered in the name of the 2nd Respondent in trust for other family members,
- 2) Appellants have filed MERU ELC NO. 08 OF 2019 and have obtained orders of inhibition against **LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760**
- 3) Appellants are in actual possession and occupation and they were at the risk of being evicted
- 4) Respondents have conspired to sell matrimonial property

7. The application was heard *inter partes* and dismissed by a ruling dated 11th September, 2019.

The Appeal

8. The Appellants being dissatisfied with the lower court's decision on 20th September, 2019 filed a Memorandum of Appeal on grounds among others that: -

- 1) The Appellants were condemned unheard
- 2) The learned trial magistrate failed to appreciate a place for spousal consent in regard to matrimonial property

SUBMISSIONS BY THE PARTIES

9. When the appeal came before me for mention for directions on 27.07.2020, the court directed that the appeal be argued by way of written submissions which the Appellants and 1st Respondent dutifully filed.

Appellants' submissions

10. Appellants faulted the trial court for declining to enjoin them as parties to the case whereas that was the only forum that they could ventilate their case. They urge the court to allow the appeal so that they can be given an opportunity to be heard.

11. In support of their proposition, Appellants placed reliance on ***Patel v EA Cargo Handling Services Ltd [1974] EA 75*** where the court held that the main concern of the court is to do justice to the parties, ***Mbogo v Shah [1968] EA 93*** and urged the court to exercise its discretion to avoid injustice or hardship to the Appellants; ***Mbaki & Others V. Macharia & Another (2005) 2 EA 206***, where the Court of Appeal stated that the right to be heard is a valued right.

1st Respondent's submissions

12. The 1st Respondent's case is that the 2nd Respondent was properly served with the pleadings and that there is no reasonable cause to set aside the regular *exparte* judgment. The 1st Respondent further argues that the Appellants cannot be enjoined to a suit post judgment for the issues in dispute have already been determined. The Appellants were also faulted for moving the court with inordinate delay.

13. The respondent urged the court to be guided the holding in the case of ***Esther Wamaitha Njihia & 2 Others V Safaricom Limited [2012] eKLR*** which discussed the principles for setting aside a regular *exparte* judgment and the Court of Appeal decision in ***Butt v Rent Restriction Tribunal [1982] KLR 417*** that discretion ought to be exercised in a manner that would not cause injustice to any party.

Analysis and Determination

14. I have considered the matter fully. This appeal turns on whether the learned magistrate exercised her discretion properly in rejecting the prayers made by the Appellants. Before I can interfere with such discretion, I must be satisfied that the learned Magistrate misdirected herself in some matter and as a result arrived at a wrong decision or that she misapprehended the law or failed to take into account some relevant matter.

15. **Madan, JA** (*as he then was*) captured the principle relating to interference with the discretionary decision of a judge more succinctly in ***United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898*** as follows:

"The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

16. From the totality of the submissions and cited authorities, I have deduced the following issues for determination.

1) **Whether the Appellants have made out a case for setting aside of the exparte judgment**

2) **Whether the Appellants made out a case to be enjoined to the suit**

Whether the Appellants have made out a case for setting aside of the exparte judgment

17. Appellants were not parties to the original suit. They were not served with the Plaint and subsequent proceedings to the suit

18. Consequently, I find that the trial court erred in faulting the Appellants for not moving the court promptly for two reasons, One, the Appellants had no obligation to move the court in a matter in which they were not parties and were not made aware of and secondly, the Appellants speedily moved the court when they became aware of the intended sale of **LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760** which they claim is matrimonial property.

19. In this case, the 1st Respondent's claim was specifically against the 2nd Respondent. There was no claim or judgment that the Appellants could defend and the trial magistrate's finding declining to set aside the judgment against the 2nd Respondent was therefore merited.

Whether the Appellants made out a case to be enjoined to the suit

20. I have considered whether the decision to reject the joinder of the Appellant as Defendants in the Respondents' case was judiciously arrived at.

21. **Rule 10 (2) of Order 1 of the Civil Procedure Rules (CPR)** provides that:

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added." (Emphasis added).

22. Numerous court decisions have construed the application of that Rule. The Court of Appeal stated thus in **J M K vs M W M & Another [2015] eKLR: -**

"Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties" (Emphasis added).

23. The trial magistrate in this matter was alive to those principles and stated them. The trial magistrate however misinterpreted the provision when she ruled that the case had been finalized yet execution was still pending.

24. The fact that Appellants were laying a claim to **LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760** which had been marked for sale in execution of the judgment against the 2nd Respondent, in my view, was a relevant consideration at that stage which the Appellants would have had the opportunity to agitate once the joinder issue was resolved.

25. Whereas the Appellants could not be enjoined as defendants, the court had discretion to enjoin them as interested parties particularly to grant them an opportunity to be heard in the application for settling the conditions of sale as of **LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760** which they claim is matrimonial property.

26. It is thought-provoking to note that 2nd Respondent who is husband to the 1st Appellant and father to the 2nd to 5th Appellants has not refuted Appellants' claim that **LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760** are matrimonial property that require spousal consent before any dealings on them can be sanctioned. He has similarly not disputed that Appellants have filed **MERU ELC NO. 08 OF 2019** and have obtained orders of inhibition against **LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760**.

27. As to why 2nd Respondent did not defend the suit, Appellants have accused him of conspiring to dispose off matrimonial property without due regard to their interests.

28. For the reasons given above, I am persuaded that it would offend all notions of justice if the rights of the Appellants are to be prejudiced or affected without them being afforded an opportunity to be heard.

29. In conclusion, I find that this is a proper case that the trial court ought to have exercised its discretion in favour of the Appellants.

30. In the end, I find that this appeal has merit and it is allowed in the following terms:

- 1) The order dated 11th September, 2019 dismissing the Appellants' Notice of Motion dated 29th May, 2019 is set aside**
- 2) The order granted on 22nd May, 2019 approving conditions of sale of LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760 is reviewed and set aside**
- 3) Appellants' Notice of Motion dated 29th May, 2019 is allowed to the extent of enjoining the Appellants to Nkubu SRMCC No. 22 of 2015 as interested parties for purposes of defending the execution proceedings in respect of intended sale of LR. NO. ABOGETA/L-KIUNGONE/757, 759 and 760.**
- 4) 2nd Respondent shall bear the costs of this appeal**

DATED AT MERU THIS 15TH DAY OF APRIL 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For the Appellants -N/A

For the 1st Respondent -Ms. Mukaburu for M/s Kiogora Ariithi & Associates Advocates

2nd Respondent - N/A