REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.18 OF 2018

CONSOLIDATED WITH

CIVIL APPEALS Nos 58 OF 2018 AND 59 OF 2018

LYDIA WANGARI.....APPELLANT

VERSUS

ANDREW GITHINJI MWIHURI.....RESPONDENT

(***Being an appeal from the judgment and decree of the Honourable Wendy Kagendo, Chief Magistrate dated 28th June 2017, the ruling and order of the Honourable Christine Wekesa Ag. SRM dated 4th June 2014 and the ruling and order of the Hon. Wendy Kagendo Chief Magistrate dated 14th March 2018 all arising from Nyeri CMCC No. 509 of 2012)***

JUDGMENT

1. The respondent *(Andrew Githinji Mwihuri)* sued the appellant (Lydia Wangari) in Nyeri Civil Case 509 of 2012) vide an amended plaint dated 18th February 2016 praying and seeking the following orders;

> ***a) An order that the defendants pays the plaintiff the money both parties agreed as the commission totaling to Kshs.2,400,000/=at court interest rate which is 14%.***
>
> ***b) An order restraining the Cabinet Secretary and the National Land Commission Chairman –Dr. Swathuli and all other servants, agents from issuing leases or title deeds from the subdivision of LR 12145,221747 of former Naromoru/NarumoruBlock 3/1Nyeri district of formerly Narumoru Enterprises Ltd until this suit is determined or judgment is delivered.***
>
> ***c) Courts interest of the said amount from 13/2/2000 at courts rate.***
>
> ***d) Costs of the suit.***

2. The respondent had initially sued the appellant and three others by a plaint dated 28th of November 2012 and later an amended one dated 17th January 2013 and another amended one dated 18th February 2016. Subsequently he brought an application which allowed the 1st and 2nd Defendants to be substituted by the 3rd defendant as she held a power of attorney. The ruling is dated 4th June 2014.

3. The appellant filed a defence dated 21st of December, 2012 setting out the history of the entire matter and only admitted being a witness of the respondent doing a commendable job. Judgment was entered on 28th June, 2017 against the appellant for Kshs 2,400,000/= plus costs and interest. The appellant sought to set aside the judgment and decree vide an application dated 1st December 2017. The same was heard and dismissed on 14th March 2018 and is the subject of Nyeri Civil Appeal No. 18 of 2018.

4. The appellant being aggrieved by the orders proceeded to file HCA No. 18 of 2018 dated 27th March 2018 raising the following grounds;

> *a) That the learned trial magistrate erred in law in failing to consider the constitutional provisions, the law and the precedent relied on by the appellant.*
>
> *b) That the learned trial magistrate erred in law in failing to take into consideration the principles for setting aside judgment under order 12 of the Civil Procedure Rules,2010.*

c) That the learned magistrate erred in law and fact in finding that there was proper service of court process.

d) That the learned magistrate erred in law and fact in trivializing the issue of legal representation as a component of a fair hearing and the right to be heard and therefore arrived at an erroneous decision.

e) That the learned trial magistrate erred in law for failing to find that the decree as extracted by the respondent was void for non-compliance with order 21 rules 2,3,4 and 5 of the Civil Procedure Rules,2010.

f) That the learned trial magistrate erred in law and fact for failing to consider that the appellant was a disclosed agent of a known principal and could not bear personal liability.

g) That the learned trial magistrate erred in law and fact for failing to appreciate that the contract, the subject of the suit, was entered in 1998, long before the appellant was appointed attorney of the 4th Defendant.

h) That the learned trial magistrate erred in law and fact for failing to appreciate that there was no privity of contract between the appellant and respondent.

i) That the learned trial magistrate erred in law and fact in failing to resolve the issue whether the appellant could legally be substituted in the place of the 1st and 2nd defendants.

j) That the learned trial magistrate erred in law and fact in failing to resolve the issue whether the respondent had any cause of action against the appellant.

k) That the learned trial magistrate erred in law and fact in failing to resolve the issue of liability of the 4th defendant.

l) That the learned trial magistrate erred in law and fact for failing to resolve the issue whether execution by way of arrest and imprisonment could proceed in the right of the admission by the respondent that there is land in the name of the 4th defendant which is available for attachment.

m) That the learned trial magistrate erred in law and fact in failing to resolve the issue whether the appellant as a holder of power of attorney, could be sued or jailed on behalf of the donor of the power of attorney.

n) That the learned trial magistrate erred in law for failing to find that the judgment was not regular or final.

o) That the judgment of the trial magistrate did not comply with provisions of order 21 of the Civil Procedure Rules,2010 as to the regards of the contents of the judgment and the reasons for decision on each framed issue as well as the preparation of the decree.

p) That the learned trial magistrate erred in law and fact in failing to take into account the relevant law on execution of decree as set out at order 22 of the Civil Procedure Rules 2010 and therefore fell into error.

q) That the learned trial magistrate erred in law and fact in failing to resolve all the issues raised.

r) That the ruling of the learned trial magistrate failed to take into account the appellant's written submissions.

s) That the learned trial magistrate failed to exercise her discretion in the matter in accordance and hereby fell into error.

5. In challenging the ruling dated 4th June 2014 the appellant filed HCA No. 58 of 2018 citing the following grounds:

1. The learned trial magistrate erred in law and fact in finding that there was proper service of court process.

2. The learned trial magistrate erred in law and fact in failing to consider that the appellant was a disclosed agent of a known principal and could not bear personal liability.

3. The learned trial magistrate erred in law and fact for failing to appreciate that the contract, the subject of the suit, was entered in 1998, long before the appellant was appointed attorney of Naromoru Enterprises.

4. The learned trial magistrate erred in law and fact in failing to appreciate that there was no privity of contract between the appellant and the respondent.

5. The learned trial magistrate erred in law and fact in failing to resolve the issue whether the appellant could legally be substituted in the place of the 1st and 2nd defendants in the trial court.

6. The learned trial magistrate erred in law and fact in failing to resolve the issue whether the respondent had any cause of action against the appellant.

7. The learned trial magistrate erred in law and fact in failing to resolve the issue of liability of the 4th defendant in the suit.

8. The learned trial magistrate erred in law for failing to find that the ruling was not regular or final.

6. Upon delivery of the judgment on 28th June 2017 the appellant being dissatisfied filed HCA No. 59 of 2018. He relied on the following grounds:

1. The learned trial magistrate erred in law and fact in finding that there was proper service of court process.

2. The learned trial magistrate erred in law and fact for failing to consider that the appellant was a disclosed agent of a known principal and could not bear personal liability.

3. The learned trial magistrate erred in law and fact for failing to appreciate that the contract, the subject of the suit, was entered in 1998, long before the appellant was appointed attorney of Naromoru Enterprises.

4. The learned trial magistrate erred in law and fact in failing to appreciate that there was no privity of contract between the appellant and the respondent.

5. The learned trial magistrate erred law and fact in failing to resolve the issue whether the appellant could legally be substituted in the place of the 1st and 2nd defendants in the trial court.

6. The learned trial magistrate erred in law and fact in failing to resolve the issue whether respondent had any cause of action against the appellant.

7. The learned trial magistrate erred in law and fact in failing to resolve the issue of liability of the 4th defendant in the suit.

8. The learned trial magistrate erred in law for failing to find that the judgment was not regular or final.

9. The judgment of the trial magistrate did not comply with the provisions of order 21 of the Civil Procedure Rules, 2010 as regards the contents of judgment and reasons for decision on each framed issue as well as the preparation of the decree.

10. The learned trial magistrate erred in law and fact in failing to resolve all the issues raised.

7. The matter before the trial court proceeded exparte since the appellant did not turn up in court even after being served. The respondent is the only witness who testified. His claim was based on a commission amounting to Kshs 2,400,000/=.

8. The respondent was instructed to negotiate with Trust Bank, Wanjiru & Co. Advocates, Ndungu Njoroge and Kwach Advocates on behalf of Naromuru Enterprises for the deposit and protection fund. The bank was demanding Kshs.14,000,000 but the respondent negotiated and they agreed to waive the interests to Kshs.2.2 million valid for fifteen days. The 1st defendant had given the 2nd defendant instructions to pay the respondent 1,200,000/= as his fees for negotiating on their behalf.

9. The firm of Wanjiru Mwai & Co. Advocates did not pay the money to the bank hence forcing it to withdraw its offer. The firm did not also pay the respondent as they had been instructed by the 1st defendant to pay him from the sales of Naromuru plots.

10. The respondent agreed to re-open the negotiations after a meeting with the appellant and the 2nd defendant on condition that he would be paid double the payment. A new deal was reached as well as a second offer to pay the respondent Kshs 2,400,000/=.The Trust Bank released the discharge of charge to the respondent for the subdivisions of LR No.12145-(22174) Nyeri after all the money was paid. The appellant and the other three defendants refused to pay the respondent his negotiation fees to date.

11. Despite having filed a defence in which she did not dispute the respondent's pleadings the appellant failed to turn up in court for the hearing. In the defence she indeed confirms that the respondent did the work and is entitled to the commission. Failure to make the payment led to delay in release of the discharge of the charge for the Naromoru Enterprises plots.

12. Prior to the hearing and vide an application dated 13th February 2014 the respondent sought to have the 1st defendant (who had relocated) and the 2nd defendant (who had passed on) to be represented by the 3rd defendant (now appellant) who had the power of attorney for the family business (Naromoru Enterprises) - 4th defendant. The respondent was served with the said application but did not turn up on the date of hearing. The orders sought were granted vide the ruling dated 4th June 2014.

13. The Ruling the subject of HCA No. 18 of 2018 is dated 14th March 2018 and it is in respect to the application dated 1st December 2017 which sought to set aside the judgment and decree of 28th June 2017, on various grounds. The learned trial magistrate considered them and the submissions and concluded that it lacked merit. She therefore dismissed it.

14. The three appeals were consolidated and were later disposed of by way of written submissions.

15. The firm of Waweru Macharia & Co. Advocates for the appellant submitted on the application dated 1st of December 2017 on the issue

to commit the appellant to civil jail and argued that the learned magistrate never considered the constitutional and judicial precedents in her ruling and urged the court to find in favour of the appellant on the same.

16. Counsel while relying on Order 12 Rule 7 of the Civil Procedure Rules submitted that the learned magistrate failed to be guided by the principles of setting aside a judgment. The said Rule provides ***that where judgement has been entered, or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*** That the said principles were restated in the Court of Appeal decision of ***Pithon Waweru Maina vs Thuku Mugiria (1983) eKLR as follows:-***

a) There are no limits or restrictions on the judge's discretion.

b) The discretion is meant to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.

c) The discretion is not designed to assist the person/who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

d) The setting aside should be on terms.

17. She further submitted that the appellant was not represented and had followed up the matter upto the time she was arrested a fact that the court should have taken into consideration but did not do so.

18. Counsel submitted that service was not effected upon the 1st and 4th defendants hence no final judgment should have been entered against them without proof of service. She further submitted that the substitution of the defendants by the appellant was tainted with illegality and relied on ***Order 12 of the Civil Procedure Rules, 2010*** which is clear on what should happen in default of defence or appearance.

19. Counsel further contended that where parties are not represented by advocates, lack of service, the failure to resolve the issues of law *i.e* privity of contract or whether the appellant could be sued at all or be substituted for the other co-defendants are issues which if the learned trial magistrate had considered, would have led to a different finding.

20. On grounds 6, 7, 8,9,10 and 11 on the issues of privity of contract as well as liability counsel submitted that the appellant was not privy to the contract between the respondent and the other defendants. Further that her appointment as an attorney for the 4th defendant did not apply retrospectively and in any event she had nothing to do with the 1998 contract. Counsel relied on the case of ***City Council vs Wilfred Kamau Githua t/a Githua Associates and another (2016) eKLR***.

21. He contended that there was no legal basis for substituting a living party to a suit and Mr. John Hosea (deceased) as the donee of the power of the attorney. He added that there was no direct relationship between the 1st defendant and the appellant as would justify such a situation. Counsel relied on ***Order 24 of the Civil Procedure Rules which states that: "deceased party to a suit can only be substituted by a holder of a grant of letters of administration".***

22. He also relied on Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya on the definition of a legal representative and Section 45 of the law of Succession Act chapter 160 Laws of Kenya on who can deal with the estate of a deceased person. He referred to the Court of Appeal decision in ***Troustik Union International and another vs Jane Mbeyu and another (1993) KLR*** which was cited with approval in ***Sarah Kobilo and Another vs David K. Chesang (2019) eKLR*** *where Judgment entered against wrongly substituted defendants was set aside by the high court.*

23. On ground 12, 13, 14, 15, 16 and 17 counsel submitted that where there is attachable property, committal to civil jail is usually frowned upon and especially where the respondent admitted that there was land that would have been sold to recover the decretal sum.

Counsel further submitted that the trial magistrate did not take into account the issues raised in the 2nd defendant's defence which were fatal to the judgment. He relied on the Court of Appeal decision in ***Cosmas Maweliwe Wepukhulu vs. Sameer Africa Limited (previously known as Fire stone East Africa (1969) Limited (2018) eKLR*** *where judgment was set aside for failure of the learned judge to determine issues framed for determination.*

24. On the issue of whether the judgment was not regular counsel submitted that the 1st and 4th defendants were never served with summons to enter appearance hence no interlocutory judgment was entered against them. He argued that the judgment against them was irregular, null and void and as such should have been set aside *ex debito justiciae*.

He relied on the case of:

Gulf Fabricators vs. county Government of Siaya (2020) eKLR *where it was held that where there is no evidence of service of summons to enter appearance and no interlocutory judgment is entered, any final judgment against the defendant is irregular and is for setting aside as of right.*

25. It is his contention that the trial magistrate did not exercise her discretion properly by failing to consider very crucial factors. As a result she arrived at a wrong decision which should be set aside.

26. The respondent filed his submissions in person. He relied on the fact the appellant admitted having been served with the initial hearing notice and that the court was well within its power to proceed ex-parte after she failed to attend court.

27. The respondent further submitted that the appellant was served in her capacity as the director of Naromuru Enterprises and she even filed a defence. He relied on ***Order 5 rule 3 of the Civil Procedure Rule 2010*** which states that:

> ***"Subject to any other written law, where a suit is against a corporation the summons may be served – on the secretary, director or other principal officer of the corporation."***

28. It is his contention that on the issue of liability, the appellant admitted that her appointment involved overseeing the transaction between the respondent and the 4th defendant and she would fulfill what the 1st and 4th defendants had promised to pay during negotiations. The respondent relied on the case of:

> ***John Mbuta Nziu Vs Kenya Orient Insurance Co. Ltd (2015) KLR which cited the Nigerian Supreme Court's decision in Adetoun Oladeji (NIG) Ltd Vs Nigeria Breweries PLC. S. C. 91/2002 expressing*** itself as follows:
>
> ***"…. it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

29. On the issue of lack of representation, the respondent submitted that he echos the ruling against the appellant where the learned magistrate held that every party has a right to legal counsel but such should not be used to delay or frustrate the other.

Analysis and Determination

30. It is now settled that the duty of a first appellant court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses *See* ***Selle and Another Vs Associated Motor Boat Co. Ltd and Others (1968) E.A 123; Williamson Diamonds Ltd vs Brown 1970 E.A. 1.***

31. Having considered the grounds of appeal, the rival submissions and the entire record it is my considered view that the following issues arise for determination;

a) *Whether the appellant was liable and could be legally substituted in place of the 1st, 2nd and 4th defendants.*

b) *Whether the learned trial magistrate erred by failing to set aside the judgment delivered on 28th June 2017.*

c) *Whether the judgment delivered on 4th March 2018 should be interfered with by this court.*

Issue (a) Whether the appellant was liable and could be legally substituted in place of the 1st, 2nd and 4th defendants

32. First and foremost the judgment delivered in this case on 28th June 2017 shows the parties as follows:

Andrew Githinji Mwihuri – Plaintiff/Respondent

Versus

Kate Nyambura Karuku ----------1st defendant

John Hosea Karingiti----------2nd defendant

Lydia Wangari----------3rd defendant

Naromoru Enterprises----------4th defendant

The Ruling substituting the 3rd defendant (Appellant) for the 1st and 2nd defendants was made on 4th June 2014. Why would the judgment delivered three (3) years down the line still be reflecting the 1st and 2nd defendants names and even stating that judgment is against the said defendants?

33. Secondly the Respondent who was the applicant ought to have demonstrated the steps he had taken to serve the 1st defendant, in vain. Nothing whatsoever was placed before the court to show that indeed the said defendant was residing in America and had no intention of returning to Kenya. Finally the Respondent did not seek any orders for substituted service. I have read the chamber summons dated 13th February 2014 plus the supporting affidavit. It has no annextures, to confirm the averments. The said averments ought to have been supported by evidence. Infact the best the Respondent should have done was to seek to withdraw his claim against the 1st defendant if he was satisfied that the appellant would meet his demands.

34. Coming to the 2nd defendant it was claimed he had died. Again nothing was placed before the court to demonstrate the said death. So what made the learned trial magistrate to believe that indeed the 2nd defendant had died? Assuming that he had died, then the provisions of

Order 24 Civil Procedure Rules ought to have been applied. The Respondent herein had no legal capacity to apply for substitution since he was not the 2nd defendant's legal representative.

35. My finding on this issue is that in both instances the trial court ought not to have allowed the substitution. Even the judgment delivered on 4th March 2018 still shows that indeed no substitution had taken place.

Issue (b) whether the learned trial magistrate erred by failing to set aside the judgment delivered on 28th June 2017 and **Issue (c) – whether the judgment delivered on 28th June 2017 should be interfered with by this court.**

36. The record shows that it is only the 2nd and 3rd defendants who filed defences. The 1st and 4th defendants did not file any defences. No interlocutory judgment was ever entered against them.

37. It is true that the appellant (3rd defendant) is a director of the 4th defendant *(in the amended plaint).* There are affidavits of service showing she was served with hearing notices on her own behalf and on behalf of the 4th defendant in the lower court.

38. Judgment was entered against the said defendants on 28th June 2017 while the application seeking to set aside the judgment and dated 1st December 2017 was heard on 6th December 2017 and Ruling delivered on 14th March 2018. In her Ruling the learned trial magistrate found that the service on the appellant was proper. Secondly that there was no irregularity as there was no privy of contract. The court considered the defence filed by the appellant *(in person)* and found that the claim was undisputed. She therefore dismissed the application.

39. Order 12 Rule 7 of the Civil Procedure Rules 2010 provides:

> ***"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."***

40. What then are the principles guiding the setting aside of an exparte judgment? Basically setting aside an exparte judgment is an issue of judicial discretion. The Court of Appeal in the case of **Pithon Waweru Maina vs Thuku Mugiria [1983] eKLR** addressed the issue of exercise of discretionary power in setting aside or varying a judgment. The principles to be followed as stated by the Court of Appeal have been well captured by counsel for the appellant Mr. Waweru Macharia at page 7 of his submissions as follows:

> *(a)There are no limits or restrictions on the judge's discretion.*
>
> *(b) The discretion is meant to be exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error.*
>
> *(c) The discretion is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.*
>
> *(d) The setting aside should be on terms.*

41. In the case of **Patel v East Africa Cargo Handling Services Ltd (1974) E.A. 75** as per **Duffus P** the Court of Appeal stated thus:

> ***"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 to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on 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."***

42. When all the principles above are applied to the facts herein all that this court is left to consider is whether the learned trial magistrate in exercising her discretion caused any injustice to the appellant. As already stated above the substitution of the appellant for the 1st and 2nd defendants was unprocedural. Secondly the appellant filed the application seeking to set aside the exparte judgment within a reasonable time. Infact the delay in determining the application was by the court itself.

43. Thirdly since the appellant had already filed a defence, what the court should have done in the circumstances was to give the appellant an opportunity to cross examine the Respondent before testifying. Shutting her out completely even if her defence was without merit was not fair. Infact the refusal to set aside the exparte judgment had caused more delays in the determination of the case. Denying a party an opportunity to be heard and put up his/her case should always be a last resort.

44. In this case I find that the exparte judgment ought to have been set aside and the appellant given an opportunity to defend herself. This was not done. The upshot is that the 3 appeals have merit and the following orders are made:

> (a) The Ruling of 4th June 2014 is set aside and the names of all the four (4) defendants reinstated. The proper procedure for substitution to be adhered to if there is need.
>
> (b) The judgment and decree of 28th June 2017 is hereby set aside.

(c) The Ruling of 14th March 2018 is hereby set aside.

(d) The matter to be remitted back to the Chief Magistrate's Court Nyeri for directions and hearing by any magistrate with competent jurisdiction besides Hon. Wendy Kagendo *(Chief Magistrate)* and Hon. Christine Wekesa *(Senior Resident Magistrate).*

(e) The case to be heard and determined within 12 months from the date of delivery of this judgment.

(f) Costs of the appeal to the appellant.

Signed and dated this 21st day of May 2021 at Milimani Nairobi.

H. I. ONG'UDI

JUDGE

Delivered in open court at Nyeri by:

FLORENCE MUCHEMI

JUDGE

03/06/2021