



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 593 OF 2018

NJENGA ORLALE.....1ST APPELLANT

LYDIA MUTHONI NJENGA.....2ND APPELLANT

VERSUS

OKONGO KIMARI ORLALE.....RESPONDENT

(Being an appeal from the judgment of Hon. D. A. Ocharo at the Chief Magistrate's Court at Nairobi (Milimani Commercial Courts) delivered on the 30th June 2017 in Civil Case no. 97 of 2016 and the subsequent ruling entered on 20th April 2018)

JUDGEMENT

- 1) The respondent herein filed an action against the 1st appellantherein seeking for damages for defamation before the Chief Magistrate's Court, vide the plaint dated 14th January 2016. The suit proceeded for hearing exparte when the 1st appellants failed to file an appearance and a defence.
- 2) The appellant was awarded a sum of ksh.400,000/= as general damages in a judgment delivered on 30th June 2017. Warrants of attachment were issued in execution of the decree and properties allegedly belonging to Lydia Muthoni Njenga the 1st appellant were attached.
- 3) The 2nd appellant filed objection proceedings which proceedings were heard and dismissed by the trial court vide a ruling delivered on 20th August 2018.
- 4) Being dissatisfied by the judgment and the aforesaid ruling the appellants preferred this appeal and put forward the following grounds:
 - i. That the learned trial magistrate erred in law and in fact by granting an order of summary judgment in favour of the respondent by ordering the 1st appellant to pay the respondent a sum of ksh.486,082,25/=.***
 - ii. The learned trial magistrate failed to thoroughly meticulously, and scrupulously check the contents of the affidavit of service on record to establish whether the 1st appellant was duly, properly and/or timely served with all the suit papers.***
 - iii. The learned trial magistrate erred in law and fact by allowing the respondent's plaint dated 14th January, 2016, failed to consider the Elements of Defamation as established by the Law of Tort.***
 - iv. That the learned trial magistrate was openly biased towards the appellants herein applying principles that are unknown, unacceptable and unestablished in law.***
 - v. The learned trial magistrate erred by deciding the matter summarily and failing to order conduct of a full trial denying the 1st appellant a chance to approach the judgment seat with the merits of his case.***
 - vi. The learned trial magistrate erred in law and fact by granting an order of summary judgment for ksh.486,082,25/= in addition to ordering interest and costs even though the respondents' claim for the said sums was unsubstantiated and services for which the respondent was required to pay this sum were not expressly pleaded in the plaint.***

vii. *The learned trial magistrate erred in law and fact by failing rule that the warrant of attachment of property and proclamation notice thereof are illegal and unlawful as they sought to attach properties that are owned by the 2nd appellant herein who is a THIRD PARTY who was not a party to Civil Suit Number 97 of 2016.*

viii. *The learned trial magistrate erred in law and fact by ruling that receipts are not proof of ownership and went on to dismiss the objector's proceedings dated 20th December 2017.*

ix. *The learned trial magistrate erred in law and fact by failing to indeed find that the respondent's warrant of attachment of property and proclamation notice does not conform to the judgment of the court wherefore it was meant to unjustly enrich the respondent.*

x. *That the learned trial magistrate was openly biased towards the applicant herein applying principles that are unknown, unacceptable and unestablished in law.*

xi. *The learned trial magistrate erred by considering the evidence before her in piece-meal rather than evaluate the evidence on record as a whole and she indulged in conjecture, speculations and took into account extraneous matters in arriving at his decision which resulted in a miscarriage of justice.*

xii. *The learned trial magistrate took into account irrelevant considerations that had no factual basis therefore reaching wrong conclusions in law thereby causing a miscarriage of justice.*

5) When the appeal came up for hearing, this court with the concurrence of learned counsels appearing in this matter directed the appeal to be disposed of by written submissions.

6) I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions.

7) Though the appellants put forward a total of twelve (12) grounds of appeal, I think those grounds can be disposed of by two main grounds. **First**, is whether there was proper service to warrant the trial court to proceed exparte. **Secondly**, is whether the trial court properly determined the 2nd appellant's objection proceedings.

8) On the first ground, it is the submission of the appellants that the 1st appellant was not personally served hence it was erroneous for the trial court to enter a default judgment. It was argued that the affidavit of service on record is fake and a sham and was only meant to mislead the court.

9) The appellants accused the trial magistrate of failing to critically examine and analyse the affidavit of service. It is pointed out that the affidavit of service did not identify the person the process server served since the deponent of the affidavit of service does not state that he knew the 1st appellant prior to the date of service.

10) In response to the appellants' submissions on service, the respondent is of the submission that the 1st appellant was properly served with the summons to enter appearance plus the plaint and failed to enter appearance. The respondent further argued that the trial magistrate proceeded with the hearing of the suit exparte upon getting satisfied that the 1st appellant was properly served.

11) In her judgment at page 2 delivered on 30th June 2017, the trial expressly stated in part as follows:

“The defendant inspite of being served with the plaint and summons to enter appearance failed to enter appearance and or file a defence within the period limited by law. Interlocutory judgment was therefore entered and the case proceeded for formal proof on 27.4.2017.”

12) I have on my part perused the affidavit of service of Benson Onyango Nganyi sworn on 21st March 2016. In paragraphs 4 and 5 of the aforesaid affidavit of service, the deponent averred as follows:

4. THAT on the 26th February, 2016 at around 7.00am in the morning, I a board matatu route no. 22 I went to the defendant's home as provided by the plaintiff and at around 8.00am I arrived at the defendant gate called ITHE WA MUTHONI residence, I knocked the gate and a lady came and opened for me and after a brief introduction to her she introduced herself to me as Miss Mercy and led me to the house of the defendant where I knocked and the guy opened the door.

5. THAT around 8.15am I introduced myself to him and enquired his name, he also introduced himself to me as Mr. Njenga Orlale the defendant herein. After salutation I explained to him my purpose of my visit and tendered upon him copies of the plaint and summon to enter appearance, he accepted the service by retaining his copies but refused to sign on my copies of the said summon to enter appearance as a sign of acknowledgement. Returned herewith is the same duly served upon the defendant.

13) The aforesaid affidavit is the one the learned trial magistrate relied in concluding that the 1st appellant was properly served and chose not to file an appearance and a defence. This court has been beseeched to find the affidavit as fake and a sham.

14) It is clear from the affidavit of service that the 1st appellant was personally served. The process server had made three unsuccessful attempts to effect service upon him in his business premises and only became successful when he visited his house in “Ithe wa Muthoni

residence.”

15) In the above quoted paragraphs of the affidavit of service it is apparent that the 1st appellant personally stated his name to the process. The 1st appellant did not apply to have the process server cross-examined over the averments he made in affidavit of service to determine its veracity. It is therefore not possible to determine whether or not the affidavit of service is fake or sham in the absence of cross-examination.

16) I am convinced therefore that the learned Senior Resident Magistrate arrived at the correct conclusion that the 1st appellant was properly served and that intentionally failed to enter appearance and file a defence, hence he cannot be faulted.

17) On the second ground, it is the submission of the appellants that the 2nd appellant’s objection proceedings were unfairly dismissed. It is pointed out that the learned Senior Resident Magistrate fell into error when he held that the receipts produced by the 2nd appellant are not proof of ownership of the items attached. The respondent urged this court to find that the trial magistrate arrived at the correct decision in concluding that the 2nd appellant had failed to prove any legal or equitable interest in the attached goods.

18) The record shows that 2nd appellant filed an application dated 20th December 2017 before the trial court claiming that the items proclaimed by the auctioneer belonged to her and not the 1st appellant. The respondent filed a replying affidavit to oppose the application.

19) The learned Senior Resident Magistrate noted that the 1st appellant attached purchase receipts. The learned Senior Resident Magistrate came to the conclusion that purchase receipts were not documents to prove ownership. He concluded that the attached items could have been purchased for and on behalf of another person.

20) For the above reason, the trial magistrate concluded that the objector (2nd appellant) did not explain to his satisfaction how the items found their way to her father’s house.

21) I have re-evaluated the arguments presented before the trial magistrate and I am convinced that the learned Senior Resident Magistrate fell into error when he dismissed the 2nd appellant’s objection proceedings.

22) The provisions of Order 22 rule 51 expressly states as follows:

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of the objection to the attachment of such property.”

23) I have perused the documents attached to the affidavit of Lydia Muthoni Njenga sworn on 20th December 2017 and filed in support of the motion of even date. It is clear that the deponent attached copies of a delivery note and receipts for a TV and other items. It is apparent that those documents are in the name of the 2nd appellant.

24) There was other evidence showing that the aforesaid goods belonged to someone else apart from the person whose name appears on the delivery note and purchase receipts. It was therefore clear that the 2nd appellant had established the legal and equitable ownership of the attached goods. The trial magistrate therefore erroneously dismissed the 2nd appellant’s objection.

25) In the end, the appeal by the 1st appellant lacks merit. The same is dismissed with costs to the respondent.

26) However, the 2nd appellant’s appeal is found to be meritorious. The same is allowed thus giving rise to issuance of the following orders:-

i. The order dismissing the motion dated 20th December 2017 is set aside and is substituted with an order allowing the aforesaid motion with costs of the motion being awarded to the 2nd appellant.

ii. The attached goods be returned to the 2nd appellant or in the alternative the value stated in the delivery notes and receipts attached to the affidavit of Lydia Muthoni Njenga filed in support of the motion dated 20th December 2017 be paid to the 2nd appellant by the 1st appellant.

iii. Costs of the 2nd appellant’s appeal to be paid by the 1st appellant.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 30th day of June, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent