



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 335 OF 2018

ALEX NGUMUO.....APPELLANT

VERSUS

EMMA MUTIO MBINYA.....1ST RESPONDENT

SARAH O. KUTAI.....2ND RESPONDENT

SAMUEL GITONYI MUIRURI.....3RD RESPONDENT

APOLLO NGUGI NGANGA.....4TH RESPONDENT

LINCOLN GEORGE KINYANJUI.....5TH RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 31st January 2019 and filed on 1st February 2019 was brought pursuant to the provisions of Section 1A, 3A, Section 63 (e) of the Civil Procedure Act, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the Law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT this Honourable Court be pleased to set aside the *ex parte* judgment entered by the lower court against the 5th defendant/applicant on 26th October 2012 and the consequential decree and certificate of costs emanating therefrom dated and issued on 1st March 2013 pending the hearing and determination of the appeal filed herein.

4. THAT the costs of this application be provided for.

2. The Appellant's Written Submissions were dated 15th October 2018 and filed on 22nd January 2019 while those of the 1st Respondent were dated 15th February 2019 and filed on 19th February 2019. The Ruling herein is therefore based on the said Written Submissions which both parties relied upon in their entirety.

THE APPELLANT'S CASE

3. On 15th October 2018, the Appellant swore an Affidavit in support of his present application.

4. He stated that he was never served with the Plaint or Summons to Enter Appearance and that he only learnt of the suit when he was served with a Notice to Show Cause Why Execution should not issue against him on 14th December 2018. He stated that his application to set aside the *ex parte* judgment was dismissed by the lower court on 20th June 2018 but that as at the time of filing the present application, his lawyers had never been served with a copy of the said Ruling.

5. He averred that he was dissatisfied with the said decision and consequently, his advocates had applied for the certified copies of the proceedings and the judgment and also filed a Memorandum of Appeal which evidenced his strong desire to defend himself in the suit that

had been filed.

6. He pointed out that his appeal was merited and had overwhelming chances of success. He added that he was willing to abide by any conditions that may be imposed by the court.

7. It was his contention that the granting of the orders he had sought would not cause injustice, prejudice and/or hardship to the 1st Respondents but that they would instead serve the interests of justice.

8. He thus urged this court to allow his said application as prayed.

THE 1ST RESPONDENT'S CASE

9. In response to the said application, on 3rd December 2018, the Recoveries Manager of Jubilee Insurance Company Limited who were the 1st Respondent's insurer of Motor Vehicle Registration Number KAD 429E which had been involved in an accident with the Appellant's Motor Vehicle Registration Number KAG 612B, Michael Amiani, swore the Replying Affidavit on behalf of the 1st Respondent herein. It was filed on 8th December 2018.

10. The 1st Respondent was emphatic that the Appellant was duly served with the Summons to Enter Appearance but that he failed to enter appearance. He relied on the maxim that **"equity aids the vigilant and not the indolent and that he who seeks equity must come with clean hands."** It was her contention that the Appellant was not entitled to any redress because he lacked interest to defend the suit.

11. She averred that the present application was misconceived and an abuse of the court process as the suit had been in court for over nine (9) years. She added that if the prayer sought therein was granted at this stage, it was tantamount to hearing the Appeal summarily and hence, hearing the present Appeal would be an academic exercise. In addition, she stated that the prayers the Appellant had sought were *res judicata*.

12. She thus urged this court to dismiss the present application with costs.

LEGAL ANALYSIS

13. This court considered all the parties' Written Submissions in respect of the grant of an order for stay of execution pending appeal. However, it noted that the Appellant had only sought the order for the stay of execution pending the hearing and determination of the application herein. As has been stated hereinabove, this prayer was spent.

14. To assume that the Appellant still wished to pursue the prayer for stay of execution pending appeal would definitely prejudice the 1st Respondent as it would seem that the court would be prosecuting the case on his behalf. Parties are bound by their pleadings and the court ought not to descend into the arena of the dispute because it is expected to be a neutral arbiter in the dispute.

15. Going further, this court agreed with the Appellant that it was necessary for the Appeal to be heard on merit. However, as was rightly pointed out by the 1st Respondent, the mandate of this court was limited to determining whether or not the magistrate who heard his application to set aside the *ex parte* judgment exercised his discretion judiciously when he refused to set the same aside. This court cannot hear a similar application at the appellate stage.

16. In this regard, this court agreed with the 1st Respondent that Prayer No (3) of the Appellant's present application was *res judicata*, it was not within the province of this court to determine and further it was tantamount to hearing the appeal summarily based on affidavit evidence without considering all the facts that had been placed before the lower court. This prayer was premature and formed the *substratum* of the main Appeal herein.

17. Despite noting that the Appellant had raised pertinent issues relating to his service of Summons to Enter Appearance, this court was not persuaded that it should grant him the orders that he had sought. He was at liberty to file an appropriate application seeking appropriate orders.

DISPOSITION

18. For the foregoing reasons, the upshot of this court's decision was that the Appellant's application dated 15th October 2018 and filed on 17th October 2018 was not merited and the same is hereby dismissed with costs.

19. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of February 2020

J. KAMAU

JUDGE