



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 52 OF 2019

SIBOTA JOHN.....APPELLANT

VERSUS

JOSEPH OGEKA ONGERI (Suing as Personal Representative of the .

Estate of JOHN MOMANYI ONGERI (DECEASED))....RESPONDENT

{Being an appeal against the Ruling of Hon. A. C. Towett – SRM – Nyamira dated and delivered on the 25th day of September 2019 in the original Nyamira Chief Magistrate’s Court Civil Case No. 17 of 2014}

JUDGEMENT

By a ruling dated 25th September 2019, the trial Magistrate dismissed the appellant’s application dated 26th February 2019 and gave reasons that the same was similar to another application dated 14th November 2017 which she had decided on 6th December 2017 and it was therefore *Res-judicata* and an abuse of the court process. The appeal is premised on grounds that: -

- “1. THAT the Learned Trial Magistrate erred in law and infact in finding for the respondent and was biased in her findings when her credibility was in question having failed to recuse herself from the conduct of matter.**
- 2. THAT the Learned Trial Magistrate erred in law and infact failing to evaluate the issue of summons to enter appearance as there were two summons purportedly served upon the Appellant and a third party.**
- 3. THAT the Learned Trial Magistrate erred in law and infact in failing to establish that at the time of the alleged accident in the court below the appellant was not the owner of the subject motor vehicle.**
- 4. THAT the Learned Trial Magistrate erred in law and infact in endorsing warrants of attachment and sale of the suit motor vehicle whereas further court fees of Kshs. 66,000/= had not been paid thus invalidating the execution process.**
- 5. THAT the Learned Trial Magistrate erred in law and infact in finding that the motion before court was res-judicata when the facts raised in that motion were at variance with the earlier motion.**
- 6. THAT the Learned Trial Magistrate erred in law and infact in basing her findings on suppositions, conjunctives and on extraneous matters.**
- 7. THAT the Learned Trial Magistrate erred in law and infact in failing to summon one WILLIAM OGWARA (process server) to clarify on the mode of service of summons to enter appearance upon the appellant herein.”**

Counsel for the parties appeared before me for directions on 5th March 2020 and consented to canvass the appeal by way of written submissions. Those of the respondent were received on 12th March 2020 and those of the appellant on 28th April 2020.

The background of this appeal is that the respondent obtained interlocutory judgement against the appellant for failure to enter appearance and file defence and when the case went for formal proof the judgement was made final and the respondents were awarded a sum of Kshs. 1,526,000/= with interest and costs of the suit. The appellant made various attempts to set aside the judgement which were all dismissed by the lower court.

In his submissions, Learned Counsel for the appellant posed the following three issues: -

“(i) Was the appellant served with the plaint and summons to enter appearance in the court below?

(ii) Was the appellant the registered owner of motor (sic) vehicle Reg. No. KBH 502J at the time of the accident?

(iii) Was the attachment and rate (sic) of the appellant’s motor vehicle lawful?”

Counsel then submitted that it is evident from the record of the lower court that the appellant was never served with summons to enter appearance and that the affidavit of service was devoid of legal requirements as it did not state the time and place of service. Counsel submitted that in the affidavit in support of the application the subject of this appeal, the appellant disputed being the owner of the premises where it was alleged he was served with the summons but the trial Magistrate refused to consider this although it was a novel issue.

On issue (ii) Counsel submitted that the appellant maintains that as at 25th January 2012 when the accident occurred he was not the owner of the subject motor vehicle; that he purchased it on 22nd June 2013 and that the respondent did not conduct due diligence to establish ownership of the vehicle as at the time of the accident. Counsel also submitted that the appellant was not served with notice of entry of judgement.

On issue (iii) Counsel submitted that after judgement and formal proof the respondent proceeded to execute the decree and the appellant’s motor vehicle was sold by Moco Auctioneers at Kshs. 420,000/=. Counsel wondered how the trial Magistrate signed the warrants of attachment and sale yet the respondent had not complied with her order that no execution would proceed until payment of further court fees amounting to Kshs. 66,000/=. Counsel took issue with the trial Magistrate’s failure to recuse herself in the face of an affidavit by the appellant expressing his misgivings. Counsel further observed that the appellant had deposited a sum of Kshs. 850,000/= as a condition for stay of execution and urged this court to allow this appeal.

The appeal is vehemently opposed. Counsel for the respondent answered each and every ground of appeal. On the issue of recusal, Counsel submitted that save for filing the affidavit referred to above, the appellant did not canvass the same and the trial Magistrate could not therefore have been expected to make a determination on the same. On ground 1 of the appeal Counsel submitted that the trial Magistrate considered the issue of service in her ruling dated 6th December 2017 and set aside the interlocutory judgement and granted the appellant conditional leave to defend the suit but the appellant did not fulfil the condition and execution followed. On ownership of the vehicle Counsel submitted that the copy of records relied upon by the respondent was as at 21st January 2012 and that the accident occurred on 25th January 2012. In regard to the non-payment of further court fees Counsel submitted that the same could only affect any future steps and that the issue as raised in this appeal is out of time and unmerited. On ground 5, Counsel submitted that the trial Magistrate correctly ruled that the appellant’s application was res-judicata. He urged this court to uphold that finding. Counsel further contended that the appellant did not move the trial court to summon the process server for cross examination and as such the court could not make a determination on that issue. Counsel urged this court to find the appeal unmerited and to dismiss it with costs to the respondents.

As the first appellate court my duty is to reconsider and re-evaluate the proceedings in the court below so as to arrive at my own independent conclusion (**See Selles Vs. Associated Motor Boat Company Ltd (1968) EA 123**).

Counsel for the appellant has raised many issues pertaining to the interlocutory judgement but in my view the real issue for determination in this appeal is whether or not the issues raised in the notice of motion dated 26th February 2019 were res judicata.

I have considered the Notice of Motion dated 26th February 2019, the affidavit in support, the replying affidavit, submissions of Counsel, the ruling of the trial Magistrate thereto and indeed the entire record of the lower court. Interlocutory judgement was entered against the appellant on 14th August 2014. The matter then proceeded to formal proof and in a judgement delivered on 16th September 2015 the respondent was awarded a total sum of Kshs. 1,526,000/= under different heads of damages. The appellant’s first attempt at setting aside that judgement was on 14th September 2017 when by a Notice of Motion of that date he sought orders inter alia: -

“..... the Defendant be granted leave to file a defence and the matter be heard and determined on merit.

7.”

That application was heard inter partes on 11th October 2017 but in her ruling delivered on 8th November 2017 the trial Magistrate observed that the appellant did not include a prayer to set aside the judgement and held: -

“..... Further M/s Sagwa for the defendant/applicant pointed out that the applicant has never made any application to set aside the judgement and reiterated that the court cannot grant what has not been sought.

On my part am acutely aware that the defendant/applicant has not sought for the default judgement to be set aside. What the defendant is seeking from this court is an order for unconditional release of the motor vehicle registration No. KBH 502. The court cannot release the suit motor vehicle at this stage with the interlocutory judgement in place.....”

I agree with this finding of the trial Magistrate.

Thereafter on 14th November 2011 the appellant filed another Notice of Motion in which he expressly prayed: -

- “1. THAT this Honourable Court be pleased to set aside the interlocutory judgement on 16th September 2016.**
- 2. THAT the defendant be granted leave to defend and its defence already on record be deemed as duly filed.**
- 3.”**

The application was heard on 22nd November 2017. In the subsequent ruling delivered on 6th December 2017 the court allowed the appellant’s prayers, set aside the interlocutory judgement and granted the appellant leave to defend on condition that he deposited the entire decretal sum in court within 30 days failing which the respondent would be at liberty to execute. It is evident that the appellant did not fulfil the condition and on 5th November 2018 he filed another Notice of Motion this time seeking orders of stay of execution as well as review of the judgement and decree principally on the ground that he was not the owner of the motor vehicle. That application was however struck out as the advocate who filed it had not sought leave to come on record after judgement. The appellant regularized this by filing the Notice of Motion dated 26th February 2019 which also sought an order that: -

“That the exparte judgement herein be set aside and the Defendant be given unconditional leave to defend this suit.”

It was this last application that culminated in the ruling the subject of this appeal. I have myself considered that application and I agree with the trial Magistrate that it was res judicata. The same prayers it sought had been sought in the application dated 14th November 2017 and the judgement had been set aside, and conditional leave to defend granted. The application dated 26th February 2019 did nothing other than seek the same prayers without giving an explanation for not fulfilling the condition. Conditions are set so that parties can demonstrate their bona fides. By this appeal the appellant seeks the same prayers he sought in the four applications in the lower court yet he offers no explanation at all for his failure to fulfil the condition set by the court. Rather than comply with the court order or seek a review of the condition, he chose the path of filing application after application in an effort to buy time. The issues raised in the grounds were raised at the time the application was heard and conditional leave to defend granted. I am not persuaded that any issue was raised in the trial court that was not dealt with appropriately. The appellant has not even in this court given any explanation for not fulfilling the condition set by the court. Litigation must come to an end. The appeal clearly lacks merit and the same is dismissed with costs to the respondent.

Signed, dated and delivered in Nyamira this 25th day of June 2020.

E. N. MAINA

JUDGE

Judgement delivered electronically via Microsoft Teams