



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO.12 OF 2018

BERNARD RUTTO.....1ST APPELLANT

COSMAS LANGAT.....2ND APPELLANT

VERSUS

NELSON OCHIENG OISO.....RESPONDENT

(Being an appeal from the ruling and order of Hon. B. Omwansa (P.M) delivered on 3/5/2018 in Sotik PMCC No.247 of 2015)

JUDGMENT

1. This is an Appeal emanating from the ruling delivered on 3/5/2018 by Hon. B. Omwansa (P.M) in Sotik PMCC 247 of 2015 in the following terms;

“THAT the Defendant’s Application dated 26/3/2018 be and is hereby dismissed with no orders as to costs”

2. The Defendant/Applicant who is now the Appellant was seeking the following orders in the Application dated 26/3/2018;

i) THAT the court be pleased to set aside the Exparte judgment obtained by the plaintiff on 12.4.2016 and all consequential orders and proceedings arising therefrom.

ii) THAT the defendant be granted leave to file a defence out of time and to defend the suit on merit.

iii) THAT the plaintiff to bear the auctioneer’s fees.

3. A brief summary of this case is that an interlocutory judgment was entered in favour of the Respondent against the Appellants for General damages, special damages and costs for injuries sustained by the Respondent on 24/7/2014 when M. V RegNo.KBX 556S Toyota wish was involved in an accident with Motor Cycle Reg No. KMCT 762N where the Respondent was a passenger.

4. The matter proceeded to formal proof after the Applicants failed to enter appearance or file a defence and judgment was delivered in favour of the Respondent in the sum of Kshs.180,000/= as General damages and Kshs.3,500 as special damages plus cost of the suit.

5. Subsequently, Respondent’s costs were assessed at Kshs.43,389/= and the process of execution commenced.

6. It was at this stage that the Application dated 22/3/2018 was filed by the objector BERNARD KIPLANGAT KIRUI seeking the following orders:

i) THAT service of the Application be dispensed with in the first instance

ii) THAT the proclamation and attachment levied on 7/3/2018 upon the movable property of the objector by M/s Ongumwe Auctioneers be raised.

iii) THAT the judgment creditor be condemned to pay costs of the objection

7. The objection filed a Supporting Affidavit to the application in which he said that he is a total stranger to the proceedings leading to the Exparte judgment and subsequent proclamation of M. V Registration KXB 556S Toyota Wish.

8. The Objector/Applicant filed a sale agreement stating he had purchased the said motor vehicle from the 1st Appellant BERNARD KIPROTICH KIRUI for Kshs. 1,264,790/= and he paid a deposit of Kshs. 315,000/= and the rest was to be paid by the purchaser to NIC Bank to off-set a loan of Kshs. 949,790 borrowed by the 1st Appellant.

9. The court delivered a ruling dupped "RULING "A" dated 26/4/2018 stating that the objector had not demonstrated that he was not being used to defeat the ends of justice by the 1st Appellant. The court dismissed the Applicant's Application with costs.

10. The Appellant subsequently filed an Application dated 26/3/2018 seeking the following orders;

i) This application be certified as urgent and service be dispensed at the first instance.

ii) There be stay of sale of the defendants' movable properties namely KBX 556S and any other properties pending hearing and determination of this application inter-parties.

iii) There be a temporary stay of execution against the judgment and/or decree herein and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of this application inter-parties.

iv) This Honourable court be pleased to set aside the exparte judgment obtained by the plaintiff herein on 12.4.2016 and all the consequential orders and/or proceedings arising therefrom.

v) The defendant/Applicant be granted leave to file the defence out of time and defend this suit on merit.

vi) The plaintiff/respondent to bear the auctioneers fees.

vii) Costs of this application be provided for.

11. The said Application was supported by the Affidavit of the 1st Appellant in which he stated as follows;

i) THAT the Respondent proceeded with the case and obtained Exparte judgment on 12.4.2016 and warrants of attachment were issued to Ongumwe Auctioneers.

ii) THAT the Respondent became aware of the matter when he was served with a notification of sale of his motor vehicle KBX 556 S which was to take place on 23.3.2018.

iii) THAT he was not served with summons in the case and that the Affidavit of service filed by one BERNARD OBIERO a process server was totally false.

iv) THAT he had been condemned unheard which is against the rules of natural justice.

v) THAT he has a good and arguable defence and the court had unfettered discretion to grant the orders sought.

12. The court made the impugned ruling dupped "RULING "B" dated 03/05/2018 dismissing the Application dated 26/3/2018 and the 1st Appellant has now appealed to this on the following grounds;

i) THAT the Appellants were condemned unheard contrary to the rules of natural justice.

ii) THAT the Execution proceedings were irregular.

iii) THAT the Appellants did not have a chance to defend the suit and that they were not served with the summons as required by law.

iv) THAT the Appellants had a good and arguable defence and it is only fair that they be allowed to defend the suit.

v) THAT the Application had been filed in good faith and that the court had unfettered discretion to grant the orders sought.

13. The court granted orders 1, 2 and 3 of the Application dated 26/3/2018 but after the interpartes hearing the Application was dismissed with no orders as to costs.

14. The parties filed submissions in the appeal which I have duly considered.

15. This is a first appeal. It is therefore the duty of this Court to re-evaluate the evidence afresh, draw its own conclusions and make its own independent findings. (See **Selle -v- Associated Motor Boat Co. Limited 1968 E.A. 123**).

16. The defendant/Appellant is seeking to set aside the exparte judgment obtained by the plaintiff herein on 12.4.2016 and all the consequential orders and/or proceedings arising therefrom.

17. The defendant/Applicant is also seeking to be granted leave to file the defence out of time and defend this suit on merit.

18. The power of a court to set aside a judgment is to be found in Order 12 rule 7 of the Civil Procedure Rules which provides that:

“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.”

19. The power of a court to set aside is a discretionary power and is one that ought to be exercised judiciously and in order to avoid injustice to any parties. In the case of **JANEPHAR ASAMI & 3 OTHERS VS. AKAMBA BUS SERVICES, Eldoret HCCC No. 14 of 1990** it was held that:

“The court will only exercise its judicial discretion in the form of setting aside judgment in order to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or errors.....”

20. I find the Application was filed after the judgment had been executed and it is therefore overtaken by events. Resale of the motor vehicle was on 23/03/2018 and the Application was filed on 26/3/2018.

21. I accordingly find that the Appeal herein lacks in merit and I accordingly dismiss it with no orders as to costs.

22. Any party aggrieved by this judgment has a right of appeal to the Court of Appeal within 28 days of this date.

Delivered and signed at Bomet this 6th day of August 2020.

A. N. ONGERI

JUDGE