



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 196 OF 2015

TITUS KAVUWA IVULLU

DEBORA TITUS IVULLU.....APPELLANTS

VERSUS

DOREEN WANZA KAMILE.....RESPONDENT

(Being an Appeal from the Ruling in Kitui Chief Magistrate's Court

Civil Case No. 154 of 2013 by Hon. A. S. Lesootia S R M on 09/07/14)

J U D G M E N T

1. The Appellants herein filed a suit against the Respondent claiming a liquidated sum of **Kshs. 520,500/=**, interest and costs. The claim was for money lent and advanced to the Respondent by the Appellants that she failed to pay back.

2. Having been served with the Plaint and summons to enter appearance, the Respondent failed and/or neglected to do so. Judgment was entered against her. Subsequently she engaged **M/s Kimuli & Co. Advocates**. Following issuance of the Decree and commencement of the execution process the Respondent offered to settle the debt. She made a proposal on how to settle the debt. The Respondent did not honour her commitment to settle the debt therefore execution was to proceed.

3. In the process she instructed **M/s Kinyua Musyoki and Company Advocates** who filed a Notice of Motion dated the **8th** day of **March, 2014** seeking *inter alia* setting aside the Judgment entered and the consequential Decree and orders. The application was premised on grounds that the Respondent had a good defence with a high probability of success and that the Respondent was condemned unheard.

4. In an affidavit in support of the application the Respondent deponed that the **2nd** Appellant loaned her **Kshs. 100,000/=** on the **10th November, 2010** at an agreed interest of **Kshs. 30,000/=** that she defaulted in payment and the repayment period was extended. Thereafter she made her sign a blank paper headed **Mr. & Mrs. Deborah Titus Ivullu**.

5. After the suit was filed she went to the Appellant's office and denied owing **Kshs. 520,000/=** but admitted owing **Kshs. 130,000/=** and her instructions to **Kimuli Advocate** were to admit the claim of **Kshs. 130,000/=** only. She therefore paid **Kshs. 50,000/=** leaving the outstanding balance of **Kshs. 80,000/=**.

6. The **1st** Appellant having been authorized by the **2nd** Appellant filed an affidavit in response where he deposed that he advanced **Kshs. 520,000/=** to the Respondent who duly signed a document committing herself. After she defaulted, a demand letter for **Kshs. 520,000/=** was sent to her through the firm of **Albert Kamunde and Co. Advocates** and she responded by pleading to pay the sum by installments of **Kshs. 50,000/=**. After service of summons she requested to settle the sum of **Kshs. 520,000/=** in equal installments of **Kshs. 10,000/=**. He denied having knowledge of the sum of **Kshs. 130,000/=**.

7. The learned trial Magistrate considered evidence presented and exercised his discretion of not condemning the Respondent unheard. Therefore he allowed the application.

8. Aggrieved, the Appellants appealed on grounds that service of the summons to enter appearance was personal and the Respondent admitted and made proposals on how to liquidate the sum by filing an affidavit of means. And pursuant to the claim she made part payment of the decretal sum. That the Court considered the application and allowed the Respondent to pay the decretal sum by installments. That the application to set aside the Judgment and Decree was an afterthought and abuse of the process of the Court.

9. Following directions given by the Court the Appeal was to be canvassed by way of written submissions but only the Appellant's Counsel filed submissions.

10. It was urged that the Respondent failed to honour her undertaking to settle the debt and after the suit was filed she made a proposal to settle the debt and even made part payment. She swore an affidavit admitting the claim while she was represented by Counsel. That having denied in an affidavit what had been unequivocally admitted in another affidavit was dishonesty, mischievous and a deliberate lie and in those circumstances the Respondent was not entitled to the discretion of the Court as the discretion of the Court is not meant to assist in miscarriage of justice.

11. This being the first Appellate Court, it is duty bound to reconsider what transpired before the trial Court and to come up with its independent conclusion.

12. The Lower Court in coming to its decision exercised its discretion. Prior to the application being filed the Court had complied with the law as provided by **Order 10 Rule 4(1)** of the **Civil Procedure Rules, 2010** that provides as follows:

“(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear

on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.”

In the case of **James Kanyita Nderitu & Another vs. Marios Philotas Glikas & Another (2016) eKLR** the Court of Appeal stated that:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a Judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

The discretion to be exercised by the Court is unfettered but must be on terms that are just (see **Shah vs. Mbogo (1969) EA 116**) and it was also observed that in exercising the discretion the Court must consider facts and circumstances that prevailed. The explanation given must have merit. (Also see **Patel vs. East African Cargo Handling Services (1975) EA 75**).

13. The learned trial Magistrate was of the view that the Respondent had a defence that raised triable issues.

14. The Respondent herein was a Teacher therefore not a lay person as insinuated by the trial Court. At the outset she received a demand letter from the firm of **Albert Kamunde & Co. Advocates** to which she responded admitting the claim and proposed in writing to settle the debt by paying it in three installments – **Kshs. 80,000/=**. In **April, 2012, Kshs. 50,000/=** in **August, 2012** and the balance of **Kshs. 420,000/=** in **January, 2013**. Having failed to honour the undertaking she sought for more time to settle the claim. The suit was instituted. She was duly served with summons on the **19th July, 2013**. Instead of entering appearance and or filing a defence as is expected in case of a person who is not liable, she wrote a letter to the Appellant admitting the claim of **Kshs. 520,000/=** and proposed to pay the same by installments of **Kshs. 10,000/=**. On the **17th September, 2013** she managed to pay **Kshs. 8,000/=**.

15. On the **14th October, 2013** she instructed **M/s M. M. Kimuli & Co. Advocates**. This was a day to hearing of the Notice to Show Cause why execution could not issue pursuant to the law. She filed an affidavit of means acknowledging indebtedness to the Respondent and expressed her willingness to pay the decretal amount. The amount on the Notice to Show Cause stood at **Kshs. 680,618/=**. She proposed to make an initial payment of **Kshs. 10,000/=** and thereafter monthly installments of **Kshs. 5,000/=** until payment in full. It is after she instructed her current Counsel that she changed the tune and swore another affidavit on **8th March, 2014** alleging that the loan was **Kshs. 100,000/=** with a compound interest of **Kshs. 30,000/=**.

16. I have perused the draft statement of defence that they came up with which is a denial of owing **Kshs. 520,000/=** and an admission of **Kshs. 130,000/=**.

17. A person having gone before two (2) Advocates and admitted the claim then changes her mind after instructing a second lawyer, despite evidence in writing of the admission is a person who seeks deliberately to evade payment of what she owes and in the process obstruct or delay the cause of justice.

18. In the premises I find the discretion of the Lower Court having not been exercised judicially.

19. In the result, I hereby set aside the order of the Lower Court, and reinstate the Judgment of the Court dated **12th August, 2013** and all consequential orders. Therefore the Appeal is allowed with costs to the Appellants.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of January, 2019.

L. N. MUTENDE

JUDGE