



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 161 OF 2011

MATUNGULU GIRLS SECONDARY SCHOOL.....APPELLANT

(Sued through the BOG Chairman)

VS

ALICE KALEKYE NDUNDA.....1ST RESPONDENT

PHILIP KILONZO KINYOWE.....2ND RESPONDENT

(Being an Appeal from the Ruling of the Honourable Senior Principal Magistrate J.K. Ngeno delivered on 13.10.2011 in Kangundo PMCC No. 232 of 2010)

JUDGMENT

Introduction

1. What is before this Court for determination is an Appeal by the Appellant having been aggrieved by the decision of Principal Magistrate J.K. Ngeno in Kangundo PMCC No. 232 of 2010 in respect of the Appellant's application dated 19th September 2011 on the following grounds:

- a. The learned Magistrate erred in law and in fact in failing to give any reasons for arriving at his considered ruling.
- b. The learned Magistrate erred in law and in fact in imposing harsh and oppressive conditions against the weight of the facts and circumstances surrounding the entry of ex-parte Judgment.
- c. The learned Magistrate erred in law and in fact in failing to put into consideration the issues raised in the Appellant's submissions which called for the setting aside the Judgment as a matter of right without imposing any condition.

2. That the suit herein was commenced vide a Plaintiff filed on 6/12/2010 and on 6th April 2011, the Plaintiff requested for Judgment in default of Appearance and the same was entered on 27/7/2011 which is subject to the Application dated 19/9/2011 which sought the following orders:

- a. That this Application be Certified Urgent and service of the same be dispensed at the first instance.
- b. That there be a stay of execution of the Judgment and decree herein pending the hearing and determination of this Application.
- c. That the ex-parte Judgment herein and all consequential Order be set aside, the Defendant be granted leave to defend this suit and the draft defence filed herewith be deemed as duly filed upon payment of the requisite Court fees.
- d. That costs be in the Cause.

3. That the Plaintiff/Respondent on 21/9/2011 filed grounds of opposition on the following grounds:

- a. The Defendants/Applicants application is previously, vexatious and an abuse of the Court process.
- b. That the current application will greatly occasion prejudice to the Plaintiff/Respondent in the terms of costs.

- c. That the Defendant/Applicants have not shown good grounds to warrant the granting of the Orders sought.
- d. That the 2nd Defendant/Applicant was served with the summons to enter appearance and he filed a Memorandum of Appearance (copy herein annexed)
- e. That all procedural requirements were followed during the hearing of this case and there should be an end to the litigation.
- f. That the Applicants came to Court with unclean hands.
- g. That the process server is willing and ready for cross-examination to prove service.

4. The 2nd Defendant/Applicant on the 8th October 2011 filed their submissions alleging that the return of service by Cyrus Makau is full of falsehoods and perjury. They also submit that the Memorandum of Appearance allegedly filed by the 2nd Defendant is also a forgery and the 2nd Defendant has denied ever signing or filing the said document. They also submit that the 1st Defendant was never served with the summons and thus the proceedings are a nullity.

5. The 2nd Defendant/Applicant also submits that there were two vehicles involved in the accident and that the other driver was also to blame to a certain extent for causing the accident and relied on the following authorities:

HCCC No. 1109 of 2001 Interconsult Engineers Ltd Versus Gabriel Mungai and Another, per Njagi, J. at page 5 of the Ruling:

“Even if a Judgment does not qualify to be set aside ex-debito justitide, it may be set aside in the exercise of the Court very wide discretionary powers.”

The Judge proceeded to make the quote observation from the case of **Jamnadas Sodha v. Gornandas Hermraj** [1952 UL.R11]

“The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs of any delay occasioned should be considered and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court.”

They further submitted and cited Nairobi Civil Appeal No. 64 of 1982, where Justice O’Kubasu observed that, “*if a Defendant has appeared, he ought to be notified of the formal proof date.*”

6. The Plaintiff/Respondent on 7th October 2011, filed submissions where they stated that the signature in the Memorandum of Appearance and the Supporting Affidavit of Gideon Kieti in this Application are the same, and that same Gideon Kieti never swore a further Affidavit stating that the signature in the Memorandum of Appearance is not his and a counsel who is not a party to this suit cannot allege the same in submissions as if he were a witness. They submit as alleged in the grounds of opposition that the process server was ready and willing to be called up for cross-examination but the Appellant did not explore this option.

7. The Plaintiff/Respondent further submits that the counsel herein acts for the 2nd Defendant only and cannot submit on the 1st Defendant as he does not act for him and that they come to Court with unclean hands and that they were served with the Summons and Complaint and thus it is why they entered appearance and thus urged the Court to dismiss the application dated 19th September 2011 with costs.

RULING OF TRIAL COURT

8. The Court made a ruling on the application on 13th October 2011 as follows:

“I have considered the submissions filed by both sides. I am satisfied that there is merit in setting aside the Judgment of the Court and I do Order so on condition that the whole decretal sum of Ksh. 670,000/= be deposited in a joint account between the Plaintiff’s and Defendant’s counsel within the next 30 days. Parties should then be prepared for trial of the suit inter parties.”

DETERMINATION

9. The issue before the court is whether the Appellate Court will interfere with the exercise of discretion by the Trial Court in this matter. There is no basis of holding that the Trial court did not consider the facts herein in making the ruling on the application dated 19th September 2011. Indeed, in express terms, the Court confirmed this as follows:

“I have considered submissions filed by both sides.....”

It is obvious from the terse ruling of the Court that it did not find that any party’s case, as disclosed at this stage, trumped the other as to warrant a summary determination of the matter, and therefore sought to secure the interests of both parties by an order for deposit of the disputed amount in a joint interest earning account.

10. When Judgment is entered in default of appearance and defence, Order 10 Rule 11 of the Civil Procedure Rules provides for the setting

aside of the default judgment as follows:

“Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or Order upon such terms as are just.”

11. The discretion of the Court in setting aside of default Judgment is unfettered. The law does not impose certain particular conditions as to be satisfied to set aside such a Judgment but the only condition is that the same be just. In this particular case there are two parties one which is seeking to set aside the judgment while the other which seeks to benefit from the Judgment, and as such each party will require to see justice being accorded to them.

12. The Respondent herein would have been one step closer to enjoying the fruits of their Judgment and thus should be allowed to remain one step closer to realizing the same, while the Applicant should be allowed to defend the suit to the reasonable conclusion. The Magistrate exercised his discretion in setting out the conditions to be met which shall be held in a joint account to the benefit of both parties and shall make it easier for either the execution or return to the respective parties. I take the view that in these circumstances, the Court should be guided by the case of *Mbogo v. Shah* [1968] E.A. 93 where De Lestang V-P observed at page 94:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision was clearly wrong, because it has misdirected itself or because it has acted on matters of which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

13. In conclusion, I find that the conditions set by the Trial Court are not prejudicial to any party as the money shall not be allocated to any party until the matter is heard and finally determined. The money will be paid out with interest earned over time to the party who eventually succeeds at the end of the trial.

ORDERS

14. Accordingly, for the reasons set out above, the court makes the following orders:

1. The Appeal is dismissed.
2. There shall be no orders as to costs.

15. The suit shall proceed to hearing on such dates convenient to the Trial Court and the parties.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 22ND DAY OF JANUARY 2019

G.V. ODUNGA

JUDGE

Appearances:-

M/S B.M. Mung'ata & Co. Advocates for the Appellant.

M/S Mutunga & Co. Advocates for the Respondents.