REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.145 OF 2008

JAMES MBURU KAMAU.....APPELLANT

-VERSUS-

PETER MWANGI MBARIRE.....1ST RESPONDENT

JAMES MBURU KAMAU.....2ND RESPONDENT

FRANCIS WACHIRA NDUNGU.....3RD RESPONDENT

(Being an appeal from the judgment of Senior Principal Magistrate's Court at Nakuru by Hon. S. Mr. Kingori delivered on 14th August, 2008 in CMCC. No.542 of 2005)

JUDGMENT

INTRODUCTION

1. The plaintiff sued the defendant claiming Kshs.145,920 being money paid to the defendant for purchase of land which the defendant declined to transfer to the plaintiff. Plaintiff also sought costs of the suit and interest. The defendant failed to enter appearance and file defence within the prescribed period. Interlocutory judgment was entered which the defendant sought to set aside but the application was rejected.

APPELLANT SUBMISSIONS

2. The appellant argued that he never got an order in respect of application dated 4th April 2014 to evict people from his land. He relied on his record of appeal. In his grounds of appeal, the appellant submitted that prayer for leave for an Advocate to come on record had been consented to by counsel for the plaintiff. Appellant further submitted that he has never been a party to HCC 542 OF 2005 nor served with any legal notice.

3. In the letter on page 5 of the record of appeal, the appellant indicate that execution orders of 28th February 2008 and 11th July 2007 have been executed and the property Nakuru/Cedar Lodge/61 is being alienated further to other interested parties.

SUBMISSIONS BY RESPONDENT

4. Counsel for the respondent made oral submissions. He submitted that at the time the application was struck out, the Order 3 Rule 9a did not allow prayer for leave to act in person to be combined with other substantive prayers. He submitted that the provision has now been amended to allow a party to combine

prayer for leave to act in person with other prayers as long as it is argued first. He argued that the trial magistrate never erred in striking out the application as that was the legal position then.

5. Counsel further submitted that before ruling on preliminary objection, application to set aside interlocutory judgment had been rejected; that judgment has already been executed and allowing this appeal will be an academic exercise. He prayed that the appeal be dismissed.

ANALYSIS AND DETERMINATION

6. I have considered arguments by parties herein. I have also perused the court record. Record show that the firm of Nancy Njoroge & Company Advocates came on record for the appellant. This was after disposal of application to set aside exparte judgment.

7. On 21st September 2005 advocate for the plaintiff raised preliminary objection that the firm of Ms. Nancy Njoroge were not properly on record as the firm of Kinga Karuga had been on record before. He submitted that consent from the Advocate to come on record had been filed but thereafter advocate for the appellant/defendant filed notice of appointment instead of notice of change of Advocate. The trial magistrate ruled that it was necessary for the firm of Nancy Njoroge & Company Advocates to comply with order 3 rule 9A. Trial magistrate further indicated that the firm of Kinga and Company Advocates filed consent on 7th September 2005 but no application was made under Order 3 Rule 9A. He concluded that the consent could not therefore be sustained as the rule is coached in mandatory terms. He struck out documents filed by the firm of Nancy Njoroge including application dated 6th September 2005.

8. The appellant filed application dated 11th May 2006 seeking to set aside exparte judgment. In its ruling, the trial court held that, the defendant/appellant was aware of exparte judgment since May 2005 but only sought to set aside judgment when the property was advertised for sale. The trial magistrate declined to set aside exparte judgment.

9. The appellant later filed application dated 23rd June 2008. The application sought leave for the appellant to act in person and to have exparte judgment and all consequential orders set aside. Counsel for the plaintiff/respondent filed preliminary objection dated 14th July 2008. The ground raised was that, the firm of M/s. Makori Nyangau were still on record and appellant/defendant had not sought leave to come on record under Order 3 Rule 9A. The trial magistrate sustained the objection, found the application incompetent and struck out.

10. From record shown above, it is evident that the appellant made several attempts to be heard but due to provisions of Order 3 Rule 9A which have since been amended, he was not given opportunity to participate in the proceedings.

11. Before the said amendment and promulgation of the Kenya Constitution 2010 which give a right to fair hearing under Article 50 and provision under Article 159 for courts to give more attention to substantive issues and avoid undue technicalities, the constitution principles of natural justice existed, which included being given an opportunity to be heard.

12. Advocate for the appellant filed application dated 11th May 2006. In his arguments on 25th May 2006, he stated that the appellant's land which was valued at Kshs.900,000 had been advertised for sale to recover a debt of Kshs.149,000. He informed court that the judgment was obtained exparte and urged the court to allow the appellant to defend the case on merit. In response advocate for the plaintiff opposed the application and argued that the draft defence was an admission of plaintiff's claim. The trial magistrate in the ruling delivered on 28th June 2006 dismissed the application on the ground that the defendant/appellant was aware of the exparte judgment since May 2005 but had failed to take any action to set aside. The trial magistrate never expressed his mind on the defence attached to the application. He never said anything concerning the intended defence. He therefore never made any consideration as to whether it had triable issues or not; which would advise on whether exparte judgment could be interfered with.

13. From the forgoing, it is evident that the appellant was not granted opportunity to participate in the proceedings despite numerous attempt to be heard. Counsel for the respondent indicated that execution has taken place and allowing the appeal will be an academic exercise. My view is that in a situation where an act goes against principles of natural justice, the fact that other consequential orders or actions have followed does not mean the wrong should be swept under the carpet. My view is that despite the lapse of time and consequential actions, the appellant should be given an opportunity to be heard.

14. FINAL ORDERS

1. Exparte judgment entered in the lower court is set aside.

2. Appellant is hereby allowed to file defence within 14 days from the date of this ruling.

3. Upon compliance with Order 11 of the CPC the suit to be set down for hearing on priority basis.

4. Status quo to be maintained awaiting hearing and determination of the suit in the lower court.

Judgment Dated, signed and delivered at Nakuru this 20th day of June, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola Court Assistant

Appellant in person

M/s Sambu Counsel for Respondent