



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 18 OF 2012

SHAMSA MOHAMMED HASSAN.....1ST APPELLANT

MUNICIPAL OF GARISSA.....2ND APPELLANT

VERSUS

SALAH RAGE BULLE.....1ST RESPONDENT

YUSUF DABLE BULLE.....2ND RESPONDENT

(Being an appeal from the ruling and order delivered by the Hon. J. N. Onyiego Senior Principle Magistrate on 8th August, 2012)

JUDGEMENT

INTRODUCTION

1.This appeal arises from the ruling by the Principal Magistrate Hon J.N Onyiego(as he was) delivered on 8th August, 2012 dismissing the appellants application dated 12th March, 2012 seeking among others to stay execution and to set aside the Judgment delivered on 22nd February, 2012 on the following grounds:-

- 1) That the learned magistrate erred in fact and law and misdirected himself in finding that the appellant had never taken the proceedings of the court seriously.
- 2) That the learned magistrate erred in fact and in law by failing to appreciate that the failure by the appellant to attend court was not attributable to the appellants own failings but to their respective advocates in failing to inform them of the hearing dates or requiring them to attend court for the hearing
- 3) That the learned magistrate erred in law in failing to appreciate that the mistakes of the advocates previously on record warranted the setting aside of Judgment
- 4) The Learned magistrate failed to appreciate that by failing to set aside the judgment, he was denying the appellants the right to be heard and going against the overriding objective of the civil procedure Act in respect of facilitating a just resolution of disputes
- 5) The learned magistrate erred in law and fact by failing to set aside the judgment amounted to condemning the appellants unheard which is contrary to the right to fair administrative action under Article 50 of the Constitution of Kenya
- 6) The learned magistrate erred in law and misdirected himself by considering factors extraneous to the application.
- 7) The learned magistrate erred in law in failing to appreciate that land matters are sensitive and judicial officers are required to hear all parties in a full trial for Justice to be seen to be done.
- 8) The learned magistrate erred in law by failing to appreciate that a principal Magistrate had no Jurisdiction to preside over a case involving such an expensive parcel of land or to issue the decree in the terms he did
- 9) The learned Magistrate erred in law in failing to exercise his discretion in favour of the appellant.

2. The Appeal was disposed of by way of written submissions which the parties duly filed. The 1st Appellant filed their submissions dated

6th May, 2019 and filed on 8th May, 2019 and the 1st and 2nd Respondent filed their submissions dated 19th June, 2019 and filed on even date.

BACKGROUND

3. The genesis of this appeal is the Appellant application brought under Order 12 Rule 7 of the Civil Procedure Rules, 2010 and other enabling provisions of the law seeking to set aside the hereinabove judgment delivered on the 22nd February, 2012 and the Court Proceedings of 29th November, 2011. The application was premised on the grounds that appear on the body of the same and was supported by the affidavit sworn by Shamsa Mohammed Hassan deponed on 12th March 2012, the 1st Appellant herein.

4. The gist of the 1st appellant application was to reinstate the suit for defence hearing and the court setting aside of its judgment. It is the 1st appellant argument that she has a good defence, only that she was not given a hearing, as her Advocate never informed her of the hearing date of 29th November, 2011 when the matter was slated for defence hearing leading to her absence and subsequent entry of ex parte judgment.

5. She shifted the blame to her advocate for failing to inform her of the defence hearing date, and argued that the mistake of the advocate should not be visited upon her. And that she only became aware of the judgment upon being served with the orders therein resulting to her filing the application, which is the subject of this appeal.

6. Further, the 1st Appellant challenged the jurisdiction of the Court, arguing that the property value was beyond the pecuniary jurisdiction of the Principal Magistrate.

7. The 2nd Appellant also filed an application dated 6/6/2012 which is similar as the one filed by the 1st Appellant. Their argument being that they also have good defence, only that their Advocate on record then never informed them of the defence hearing slated for 29/11/2011. It is their claim that the mistake of their counsel should be visited upon them.

8. Counsel who was on record for the 1st Appellant at the lower court one Mr. Kullo swore an affidavit dated 12th March, 2012 stating that his failure to attend court for defence hearing on 29/11/2011 was not deliberate, as he was attending to the HIV/AIDS Tribunal where he was a member.

9. In response to the 1st and 2nd Appellants application, the Respondents opposed the two applications arguing that the said applications were frivolous and an abuse of the court process. They alleged that the 1st Appellant never attended court proceeding at any one time and that the hearing date of 29/11/2011 was taken by consent of their Counsels and that no communication thereafter was made to their Advocate regarding their unavailability on the said hearing date.

10. The Court upon hearing the parties reached a finding that the applications lacked merit and dismissed the same leading to this appeal

SUBMISSIONS

11. In her submissions, the 1st Appellant submitted on two issues. The first being whether the Court had the pecuniary jurisdiction to hear and determine the matter and secondly as to whether this court should set aside the judgment issued on 22nd February, 2012.

12. On the first issues of Jurisdiction, the 1st Appellant submitted that as at 2011 when the suit was filed the pecuniary jurisdiction of a Principal Magistrate was Kshs four Million(4,000,000/=),and that the suit property being approximately 25 acres and within Garissa town, it means that its value exceeding Kshs. 4,000,000/=.

13. In this regard the 1st appellant relied on the case of **Equity Bank Limited vs Patrick J.O Otieno(2018)e KLR** where the court affirmed the holding in the **Owners of Motor Vessel 'Lilian S' vs Caltex Oil Kenya Limited(1989)KLR 1**, that Jurisdiction is everything and without it the court should down its tools. It is their submission that the court failed to take cognizance of the value of the land, even without a valuation report, arguing that it exercised a jurisdiction that it did not have.

14. On the second issue as to whether this Court should set aside the subject Judgment, the 1st appellant submitted that this court has the unfettered discretion to set aside the exparte judgment and do justice to the parties. It is her further submissions that their non-attendance on the date the matter was fixed for defence hearing was not deliberate nor did they seek to obstruct or delay justice. In this relied on the case of **Shah vs Mbogo(1987)E.A 116**.

15. Furthermore, they submitted that the suggestion by Hon. Magistrate that they pursue indemnity from their advocates, who failed them, was not tenable as she would end up losing her property which she rightfully owns. She submits that it would be unfair and unjust to condemn them to suffer the consequences of their former Advocates mistake.

16. Moreover, she challenged the court finding that their defence was weak arguing that she was in possession of the property and that she has a letter of allotment from the second appellant and therefore the court ought to have given her an opportunity to tender her defence.

17. She prays that in the interest of Justice, this court sets aside the Judgment and decree issued on 22nd February, 2019 with costs to the appellant.

18. The Respondents in their submissions addressed the two issues identified by the 1st Appellant in their submissions, this being the issue of Jurisdiction and as to whether this court should set aside the subject Judgment.

19. In respect to the Jurisdiction of the trial court as challenged by the 1st Appellant, the Respondents submitted that the same was being raised as an afterthought, alleging that the same was only raised in the application the subject of this appeal as a ground to have the Judgment set aside. This they supported by the fact that vide the joint defence filed on 12th February, 2011 the defendants categorically at paragraph 12 admitted the Jurisdiction of the trial court.

20. In addition, they referred to the trial finding on the same where it held that there was no valuation report tendered by the appellants, thus the allegation lacked merit. In this they relied on the case of **Re Estate of Mutugi Mbutii(deceased)[2018]ekl**, where the court found that where the value of the property is in issue, it is the duty of the one who alleges to tender a valuation report.

21. Further, the respondents submitted that the suit land is located in the outskirts of Garissa town and was earmarked for development of an Army Camp, and that at the material time there was no development, the same was an open space and therefore it would not have been valued above Kshs. 4,000,000/=.

22. On the second issue regarding the setting aside the subject judgment, the Respondents submitted that the hearing date set for 29/11/2011 was taken by consent of all the parties advocates, and in any event all of the parties were on proper notice. The Respondents allude that the failure by the appellants to attend to the hearing is inexcusable as they were properly notified and date taken by consent as found by the lower court.

23. They submitted that in the circumstances of this case, in purview of the fact that 8 years have lapsed since they filed the suit whose outcome is yet to be determined, they urged this court to find that the mistakes of the appellants advocates herein would be best sorted out by the 1st and 2nd appellant seeking indemnity from their advocates. In this they relied in the case of **Municipal Council of Thika and Another vs Local Government Workers Union (Thika Branch) Civil Application No. 4 of 2001 Nairobi**.

24. Furthermore and without prejudice to the hereinabove submissions, the Respondents urged the court that in the unlikely event that they allow the appeal, they submitted that a throw away costs of Kshs. 1,000,000/= would be sufficient.

ISSUES AND ANALYSIS

25. In view of the foregoing there is only one issue for determination in this appeal, being as to whether this court ought to set aside the Judgment of the trial court delivered on 22nd February, 2012.

26. The matter before the trial court proceeded ex parte without the appellants tendering their defence as counsel for the Appellants did not attend court during the date set for defence hearing despite the allegation that they had notice of the date.

27. It is not denied that the 1st Appellant Counsel one Mr. Kullow was aware of the defence hearing date fixed for 29/11/2012, however he explained that his non attendance was because on that day he was attending to the HIV/AIDS Tribunal where he was a member.

28. The 2nd Appellant Counsel one Mr. Mbaluka equally failed to attend the hearing. The allegation of both the 1st and the 2nd appellant is that they were not notified of the hearing date by their respective counsel, thus leading to their non- attendance. They both have submitted that they have a good defence and therefore they ought not to be condemned unheard. In sum they argue that the mistakes of their counsel should not be visited upon them.

29. The Respondents on the other hand have argued that the appellants have been indolent in prosecuting their case, and that the defence hearing date slated for 29th November 2011 was properly fixed and that the appellants were properly on notice and thus their non-attendance that led to the impugned judgment is inexcusable, and in the circumstances, the injustice that would be visited upon the respondents demands in their view that they seek indemnity from their advocates.

30. In **Shah Vs Mbugo (1967) E.A. 166** the court of Appeal held that:

“This discretion to set aside as exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. “29”. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.

31. Further the court held that for such Orders to be issued inter alia the court must be satisfied about one of the two things namely:-

a. either that the defendant was not properly served with summons; or

b. that the defendant failed to appear in court at the hearing due to sufficient cause.

32. As to what constitutes sufficient cause, the court noted as follows:-

"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."

33. Consequently, this court notes that the setting aside of an ex parte judgment is the discretion of the court and in so doing, such discretion is unfettered but the same should be exercised judiciously and not capriciously.

34. In view of the circumstance of this case, it is not in dispute that the matter before the lower court proceeded exparte without the appellants tendering their defence as the Appellants and their respective counsels did not attend court. The reason given for non-attendance was that the appellants were not aware of the said defence hearing date. It is their case that their Counsels on record failed to inform them of the said date and as a consequence they failed to attend court and put their defence.

35. The appellants have submitted that, the omission was occasioned by the mistakes of both counsels and the same ought not to be visited upon the innocent clients. The learned magistrate on the other hands seems to attribute the said nonattendance to negligence of counsel and found the excuse not plausible and seems to be stating that failure by Counsel and the defendants to attend court was deliberate, and to back this up he states their defence was somehow weak or they did not have a defence at all.

36. Under Order 12 Rule 7 of the Civil Procedure Rules, where judgment is entered for the plaintiff in the absence of the defendant, the defendant may apply for setting aside of the exparte judgment.

37. In **Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd** the court in this regard held:-

"The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."

38. Furthermore, In **Patel vs East Africa Cargo Handling Service Duffus,V.P.** stated;

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

39. Moreover, the Supreme Court of India in the case of **Parimal vs Veena** attempted to describe what was "Sufficient cause" when it observed that:-

"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

40. In my considered view, the excuse tendered by counsel for the Appellant for his failure and that of Appellant to attend court is plausible and ought to have been a sufficient reason to persuade the trial magistrate to set aside the exparte proceedings and not drive the Appellant from the seat of justice without being given an opportunity to be heard. The justice of this case mandates the mistake of the counsel should not be visited on the Appellant. This is in recognition of the fact that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits.

41. The Appeal before the court lies squarely under the purview of the provisions of Order 12 of the Civil Procedure Rules and not Order 10. In his ruling, the learned magistrate stated that there exists no good defence on record and the application must fail. In my view, the trial court erred in taking into account the merits of the defence while dealing with the application. As pointed out hereinabove there was a defence on record and the application before the trial court was not to strike out the defence or to set aside an interlocutory judgment under Order 10.

42. The only issue that the learned magistrate ought to have considered is whether the Appellant had given a good reason for his failure to attend court and depending on the finding by the magistrate, he would then consider whether the ex parte proceedings would be set aside or not. The learned magistrate considered matters that were beyond what was before him for consideration.

43. In sum, the court finds that the Appeal has merit and ought to succeed. The Ruling delivered by the learned magistrate on 23rd November, 2011 and the judgment delivered on 2nd February, 2011 and the resultant decree issued on the 12th August, 2011 in CMCC No. 3 of 2011 are hereby set aside. The suit to be set down for hearing on merits before court.

44. Each party to bear its own costs of the Appeal.

Read and delivered in the Open Court this 31st day of July, 2019.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Nyibolo holding brief Paul Mwangi for Applicant.
2. J. K. Mwangi & Co. Advocates : Absent
3. Court Clerk: Taib