



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO 22 OF 2015

THOMAS ODHIAMBO OKELLO.....APPELLANT

VERSUS

PETER WANYAMA.....RESPONDENT

[An appeal from the judgment and ruling of in original Bungoma CMCC

204 'A' of 2012 delivered on 29.1.2015 by P.N.ARERI Principal Magistrate]

JUDGEMENT

The appeal arises from ruling delivered on 19/03/2015 of Notice of Motion dated 26th January 2015.

The background of this appeal is that by plaint dated 3/05/2012, the respondent in this appeal **Peter Wanyama** sued the Appellant **THOMAS ODHIAMBO OKELLO** seeking recovery of Kshs.810,000/= monies from the appellant with interest at commercial rates and cost of suit. The Appellant did not file his defence to the claim according the court records and an interlocutory judgment was entered as prayed and the Respondent proceeded to execute the decree. The defendant/Appellant moved to court vide application dated 12th March,2013 seeking stay of execution of the decree and to set aside interlocutory judgement and leave to file his defence. The parties agreed to dispose of the matter by written submissions and ruling was delivered on 10/3/2014 where application was allowed on condition that the Defendant/Appellant file defence within 14 days from 10/3/2014. The appellant did not file the defence as stipulated and on 16/09/2014 Advocate for respondent applied for Notice to show cause against Appellant and upon been served they filed the instant application dated 26/1/2015 seeking stay of execution of decree and enlargement of time to comply with order of 10/3/2014.

The application was opposed by replying affidavit of Peter Wanyama Omanyo sworn on 9/2/2015 on grounds that the application lacks merit. The parties also filed written submissions in respect to the application and the trial court upon consideration dismissed the Appellant's application on ground that it lacked merit because the appellant failed to annex a draft defence to its application that would enable the court to determine whether its defence has triable issues on merit.

The appellants then filed this appeal faulting the ruling and decision on the following grounds:

- i. That the learned magistrate erred in law and fact in dismissing application dated 26/1/201 by considering extenious matters that were not before the court.***
- ii. That the learned magistrate erred in law and fact in failing to consider that the defendant had been granted leave t file a defence in an earlier ruling of the court delivered on 10/3/14***
- iii. That the learned magistrate erred in law and fact in failing to exercise his discretion judiciously by denying the defendant a chance to be heard before a court of law.***
- iv. That the learned magistrate erred in law and fact in failing t appreciate that the ruling of 10/3/2014 was delivered in the absence of the defendant/appellant and without notice to the parties.***

By consent of the parties, this appeal was canvassed by way of written submissions Mr. Otieno for the appellant submits that the learned trial magistrate erred in law in dismissing application dated 26/1/15 on grounds that when ruling dated 10/03/2013 was delivered the defence should have been considered duly filed in court and that the learned magistrate failed to consider that that the Appellant had been granted leave to file the defence thereof contravened rules of natural justice. He submits that the trial court failed to consider evidence on record and arriving at a wrong decision. He submitted that ruling was delivered in absence of Appellant's Advocate who were not aware of the ruling date because they were not issued with a ruling notice to attend court on material date. He finally urged the court to allow the appeal with costs to the respondent.

The Respondent advocate Mr. Situma submitted that they oppose the appeal and sought its dismissal on ground that the trial court arrived at a decision by looking at the totality of the pleading filed before subordinate court. He submitted that in the application dated 26th January 2015 the appellant failed to attach draft defence thereof the application is bare and cannot rely annexure TOO-3 to the application dated 12th March 2013 which is separate from instant application. He also submitted that the appellant did not mention in the instant application his intention to rely on annexure TOO-3 on application dated 12th March 2013. He submitted that the appellant cannot contend that he was denied the right to be heard because there was a fundamental omission in his part or not annexing the draft defence which was fatal to his application and thus the court was not in any error either of fact or law. He finally submitted that the grounds of appeal are without merit and should be dismissed.

In *Patel V East Africa Cargo handling services Ltd (1974) EA 75 Duffins 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 in the rules. Where there is a regular judgement the court will not usually set aside unless it is satisfied that there is a defence on merits.

I have gone through the record herein and I find the defendant has not annexed his draft defence and there is no way the court can know whether he has a defence with triable issues (merit).

The plaintiff's case is clear in that on 3rd February, 2015 the defendant committed himself to refund cash Kshs.810,000/= to the Plaintiff money which he had borrowed from the plaintiff to settle his own issues including offsetting bank loans opening a chemist and paying school fees for his siblings. He was to start repaying the money on 2nd January, 2012. The agreement was reduced into writing and was signed by the plaintiff and the Defendant and was witnessed by family members for both sides. That being the case I find that it will travesty to justice to set aside the judgement herein as it will only serve to delay the conclusion of the matter between the parties.

I have considered the submissions made before this court by the appellant and the respondent. In my view, the issues for determination in this appeal are:

- i. Whether the learned magistrate erred in law and fact in dismissing the appellant's application dated 26th January 2015.
- ii. What orders should this court make.

The first issue for determination is whether the learned magistrate erred in law and fact in dismissing the appellant's application dated 26th January 2015 seeking stay of execution of decree and enlargement of time to comply with order of 10/3/2014. With regard to order dated 10/3/2014 the appellant was ordered to file a defence within 14 days from date therein but failed to do and they did not provide reasonable grounds on failing to comply with the order. Indeed, in granting this order the trial magistrate stated;

“I have considered the application dated 12/3/2013 and I will exercise my discretion under order 10 rule 11 and 12 rule 7 of the civil procedure Rules 2010 and set aside the interlocutory judgement entered on 11/2/2013 the decree and all the consequential orders and grant leave to defendant to file his defence. In furthering the overriding objective of the CIVIL PROCEDURE ACT and the rules made thereunder I direct the defendant and/or his advocates on record to file and serve his statement of defence within 14 days from date hereof and thereafter the suit be fixed for hearing. In the event the defendant or his advocates do not comply with this directive judgement to revert and execution to issue. Orders accordingly”.

The appellant did not file defence within the prescribed time given. No reason was adduced for failure to do so and the application for further extension of time to do so was properly rejected by the court.

The 2nd issue raised in this appeal is that the trial magistrate declined to set aside the interlocutory judgement on the ground that no draft defence was annexed to the application. The principles of setting aside interlocutory judgement on ground that no defence was annexed were properly stated in *Patel v East Africa Cargo handling services Ltd. (1974) EA 75*

In this case there is no evidence that the appellant demonstrated that he had a defence on merit or a defence at all as no draft defence was annexed to the application. This being so, the learned trial magistrate properly dismissed the application.

In the result I find no merit in this appeal which is hereby dismissed with costs.

Dated and Delivered at BUNGOMA this 24th day of July, 2019.

S.N.RIECHI

JUDGE