



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 145 OF 2013

THOMAS ONSONGO OBAGA.....APPELLANT

VERSUS

THE MANAGER KENYA COMMERCIAL BANK.....1ST RESPONDENT

KENYA COMMERCIAL BANK.....2ND RESPONDENT

(Being appeal from the judgment in Kisii SRM Civil Case No. 285 of 2002) (Hon. R.B.N. Maloba Ag. PM.)

JUDGMENT

1. The appellant, **Thomas Onsongo Obaga**, filed a suit against the respondent, **The Manager, Kenya Commercial Bank** and **the Kenya Commercial Bank**, being **CMCC No. 285 of 2002** at **Kisii**, claiming the sum of Kshs.244,000/= being pay of balance of Kshs.74,167/= and pension of Kshs.139,833/=.

The respondents denied the claim in their respective statements of defence and prayed for dismissal of the suit.

2. After the hearing of the suit in the absence of the respondents, judgment was entered in favour of the appellant on the 24th April 2013, for the sum of Ksh.139,833/= being pension payment and Ksh.200,000/= being general damages for wrongful sale of mortgaged property.

The pension amount was payable with interest from the date of termination of the appellant's employment with the respondents.

3. On 18th June 2013, the respondents filed a notice of motion seeking orders "*inter-alia*" that the proceedings of the **11th February 2013**, and the judgment of the **24th April 2013**, be set aside and the case be fixed for further hearing on priority basis.

The application was opposed by the respondent on the basis of the grounds contained in a replying affidavit dated **21st June 2013**.

Written submissions for and against the application were filed by the respective parties and the ruling respecting the application was delivered by the trial court on **9th October 2013**.

4. Being aggrieved by the said ruling, the appellant preferred the present appeal on the basis of the grounds contained in his memorandum of appeal dated **24th October 2013**, but filed herein on **25th**

October 2013.

On **9th July 2015**, the court directed that the appeal be heard by way of written submissions and in that regard the appellant filed his written submissions on **23rd July 2015** through **Messrs Koceyo & Company Advocates**. The respondent did not file any submissions.

5. Having considered the appeal on the basis of the supporting grounds and the written arguments in support thereof, the duty of this court was to reconsider the disputed application and ruling and draw its own conclusions.

The said disputed application was the one dated **18th June 2013**, in which the respondents /defendants sought orders to the effect that the proceedings of the **11th February 2013**, and the judgment of the **24th April 2013**, be set aside and the case be fixed for further hearing of the plaintiffs case on priority basis and that the amended plaint filed on the **21st January 2008**, be struck out for being an abuse of process of the court.

6. Apparently, the suit commenced on the **28th August 2007**, when the plaintiff/appellant appeared in person and gave his evidence in the presence of an advocate representing the second defendant/respondent. The first defendant/respondent was not recorded as having been present.

After giving his testimony, the plaintiff/appellant applies for an adjournment in order to call one witness. The second defendant/respondent did not object and the case was adjourned to the **12th September 2007**, when the plaintiff sought for a further adjournment in order to seek the services of an advocate.

7. On the **21st January 2008**, the plaintiff through the firm of **J.M. Nyagwencha & Co. Advocates**, filed a chamber summons dated 31st October 2007, seeking order for leave to amend the plaint dated **18th April 2002**.

The application came up for hearing on **9th July 2009** but did not proceed as the trial magistrate was away attending a seminar.

In a twist of events, the main suit was fixed for hearing on 11th November 2010, on which date it was adjourned and was eventually fixed for hearing on **24th September 2012**.

8. On that **24th September 2012**, the court ordered that the suit starts afresh (“*de-novo*”). Indeed the suit commenced “*de-novo*” on the **11th February 2013**” with the plaintiff/appellant testifying in the absence of the defendant who did not appear on that date.

After his testimony, the plaintiff/appellant closed his case and asked that the defence case be closed as well. The court ordered that the case be closed on both sides and fixed the case for submissions on the **27th February 2014**, on which date the plaintiff/appellant confirmed that his submission had already been filed and requested for a judgment date.

9. Judgment was eventually delivered on the **24th April 2013**, in favour of the plaintiff/appellant against the defendants/respondents.

The defendants/respondents were ordered to pay the plaintiff/appellant the sum of Kshs.139,833/= in pension or any sum thereof as per prayer (a) of the amended plaint and also to pay to the plaintiff/appellant the sum of Kshs.200,000/=-, in general damages for wrongful sale of mortgaged property together with the costs of the suit and interest on the sum of Kshs.139,833/= from time of termination and on the sum of Kshs.200,000/= from date of judgment. The judgment was apparently against the second defendant/respondent i.e Kenya Commercial Bank Ltd, as the first defendant/respondent who was its manager was removed from the suit by a ruling of the court made on

23rd February 2007.

10. The disputed application dated **18th June 2013**, was heard inter-parties by way of written submissions and the ruling thereof was delivered on **9th October 2013** in favour of the defendant/respondent to the extent that the ex-parte proceedings of the **11th February 2013** and the consequential judgment dated **24th April 2013**, together with all consequential orders were set aside. The matter was ordered to start a fresh and be heard on merits. The amended plaint was allowed to stand with orders that it be served upon the applicant/defendant within 14 days and the applicant to file and serve an amended defence also within 14 days. The costs of the application were granted to the applicant/defendant.

11. The plaintiff/appellant was dissatisfied with the said ruling and hence this appeal. The respondent/defendant did not file any response by way of written submission or otherwise.

Nonetheless, the basic issue for determination is whether the trial court erred in allowing the defendant/respondent application.

The application was brought under the provisions of Order 12 Rule (7) and Order 51 Rule (3) of the Civil Procedure Rules, 2010, together with **Section 1A** and **Section 3A** of the Civil Procedure Act.

12. Order 12 of the Civil Procedure Rules generally provides for hearing and consequence of non-attendance and Rule (7) of the order provides that where under the Order judgment has been entered or the suit has been dismissed, the court, on application may set aside or vary the judgment or Order upon such terms as may be just.

Herein, the suit was heard ex-parte on the **11th February 2013**, after the defendant/respondent failed to appear for hearing despite being allegedly served with a hearing notice.

The court proceeded with the hearing of the matter pursuant to Rule 2 of Order 12 on being satisfied that there was proper evidence of service. It was nonetheless noted by the court that the hearing date was fixed in the registry contrary to regulations but due to the age of the case the hearing had to proceed in the manner it did.

13. In support of its application, the defendant/respondent averred in the affidavit dated **18th June 2013**, that the matter proceeded to further hearing on **11th February 2013** and was concluded without its participation yet it was noted on the record that *“the date was taken in the registry contrary to regulations”* and that on the **17th April 2013**, the court deferred delivery of the judgment to the **24th April 2014** and ordered that *“judgment notice do issue to the firm of **Beham Okero & Co. Advocates**”*.

The defendant/respondent averred that the judgment notice was never issued to them with the result that they had no notice of the delivery of judgment.

14. The foregoing averments were duly considered by the trial court which somehow agreed with the defendant/respondent by stating that:-

“With regard to the hearing date of 11/2/2013, the court noted as was contended by the applicant that this particular date was taken by the plaintiff at the registry contrary to regulations. The applicant has not disputed that he was served with the hearing notice for this date. However, a look at the returned hearing notice indicates that the applicant’s advocates M/s. Bewan Okero & Co. Advocates received the same under protest on the grounds that they were engaged at Kisumu Law Courts. This issue was raised in the supporting affidavits by the applicants a fact not controverted by the respondent. I would find that the reason given by the applicant’s advocate for not attending court for hearing on 11.1.2013 and the fact that the date was fixed at the registry by the respondent ex-parte entitles the applicant orders of setting aside as prayed herein”.

This court having perused the lower court record and considered the grounds and submissions in support of the application would readily agree with the aforementioned findings by the learned trial magistrate.

15. The fact that the hearing date was irregularly fixed in the registry by the appellant amounted to an abuse of the court process by himself notwithstanding that the respondent was served with the hearing notice which was accepted reluctantly.

In the circumstances, the exercise of discretion by the trial court in favour of the respondent was proper. Indeed, the respondent was denied proper opportunity to defend the appellant's claim when the matter was heard in his absence and a judgment rendered without notice therefore being given to them.

It is for all the foregoing reasons that grounds 4,5,6,7,8,10 and 11 of the appeal must and are hereby overruled.

16. Grounds 1,2,3, and 9 of the appeal essentially relate to a monetary claim including payment of pension as pleaded in the amended plaint filed herein on 21st January 2008. The respondent contended that the amended plaint was an abuse of the court process as it was filed without necessary leave of the court. This point was not substantially or at all taken up by the appellant at the hearing of the disputed application.

The trial court in its disputed ruling of the **9th October 2013** noted that the amended plaint was irregularly filed without the leave of the court.

17. Indeed, on application for such leave was filed on **21st January 2008** by the appellant but was never heard and granted or dismissed yet the judgment of the trial court dated **24th April 2013** granted orders as prayed in the amended plaint. This meant that the trial court granted orders which were not prayed for in the original plaint dated **18th April 2002** thereby rendering the judgment improper and unlawful. It is apparent that the trial court realized the mistake and quite properly set aside the said judgment following the disputed application even though it allowed the amended plaint to stand as the matter was to start "*de-novo*".

18. It would follow therefore that grounds 1,2,3, and 9 of the appeal were irrelevant for the purposes of this appeal and ought to be canvassed at the hearing of the suit afresh in the lower court.

Basically, the power to set aside ex-parte judgment is a discretionary one. Such discretion is a free one and is intended to be exercised to avoid in-justice or hardship but not to assist a person guilty of deliberate conduct, intended to obstruct or delay the course of justice (see, **Waweru .vs. Ndun'gu (183) KLR 236** and **Kenya Commercial Bank .vs. Nyataige (1990) KLR 443**).

19. This court is satisfied that the foregoing legal principle was observed by the trial court when it allowed the respondent's disputed application dated **18th June 2013**. It is therefore the finding of this court that the trial court did not err when it set aside the ex-parte proceedings of the **11th February 2013** together with the consequential judgment dated **24th April 2013** and other consequential orders and ordered that the suit be heard afresh.

20. Ultimately, this appeal is dismissed with orders that the suit reverts to the lower court for fresh hearing before a magistrate of competent jurisdiction other than the former trial magistrate i.e **Hon. R.N.B. Maloba, SRM.**

Each party shall bear own costs of appeal.

Ordered accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 28th day of January 2016].