



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL CASE NO. 421 OF 2010

LUCY WAMBERE MUTHEE.....APPELLANT

VERSUS

SAMUEL GITHU MBURU.....RESPONDENT

(Being an Appeal from the Ruling/Order of 13th September, 2010 by Ms A. Ireri RM in Milimani CMCC 542 of 2009)

JUDGEMENT

1. The Appellant Lucy Wambere Muthee file suit before the Lower court claiming a sum of Kshs.173,500/= plus interest and costs from the defendant/respondent. The defendant failed to inter appearance or file a defence. Subsequently, *ex parte* judgment was entered against the defendant on 8th May, 2009.
2. On 20th August, 2010 the defendant filed an application seeking *inter alia*, the setting aside of the *ex parte* judgment. When the application came up for hearing, the plaintiff's counsel sought leave to file a replying affidavit. It was explained to the trial court that the plaintiff was out of the country and was expected back in less than two weeks. The leave sought was granted and the application stood over to 13th September, 2010.
3. On 13th September 2010, the defendant's side made an application to have the replying affidavit dated 9th September, 2010 struck out for being served out of time. The trial court went ahead and struck out the replying affidavit on the grounds that **Order 50 rule 16 of the Civil Procedure Rule(then)** had not been compiled with.
4. The Appellant was aggrieved by the said ruling and appealed to this court on the following grounds.

1. The Learned Magistrate erred both in law and in fact in striking out the Replying Affidavit sworn on 9th September, 2010 purportedly for being filed out of time and therefore not complying with order 50 rule 16, without having regard to the reason advanced by the Advocate for the Respondent that the Respondent works for Save the Children UK as the Regional Human Resource Manager East and Southern Africa Region, based in Addis Ababa and who has a very busy schedule travelling all over the world and that she could not manage to come to Nairobi well on time for her affidavit to be filed and served three (3) clear days to

the inter-parte Ruling of the Applicant's Chamber summons dated 20th August, 2010.

2. THAT the learned Magistrate's action for striking out the subject Replying Affidavit is a very drastic action that closes/shut the door of justice to the Respondent against the rules of natural justice.

3. THAT the learned magistrate's drastic action is unwarranted in the circumstances in that no prejudice whatsoever has been occasioned to the Applicant who would in any event have been granted extra time to respond to the Respondent's averments if need be.

5. The appeal was canvassed by way of written submissions. I have considered the said submissions and the authorities cited.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions (see for example the case of **Selle v Associated motor Boat Co. & others [1988] E.A. 123**)

7. Order 50 rule 16 (1) Civil Procedure Rules (then) provided as follows

“Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing.”

8. It is not in dispute that the replying affidavit was served late. What then is the effect of such late service?

Order 50 rule 16 (3) Civil Procedure Rules (then)

“If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard *ex parte*.”

9. The said provision of the law is not coached the mandatory terms. The court has the discretion to hear the Respondent's reasons for failure to file papers in time or for not filing them at all. It is not therefore correct to strike out documents filed out of time in response to an application as being invalid (see for example the case of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others (1995) eKLR.**)

10. The Appellant's replying affidavit was filed on 9th September, 2010. The application was for hearing on 13th September, 2010. There was a weekend in between. The delay in serving the replying affidavit was therefore not inordinate. The Respondent could not have suffered any prejudice that could not be compensated by an award of costs. The Respondent could have been given time to peruse the replying affidavit and respond to the same if they so wished. There were also interim orders in force which shielded the Applicant from execution. The trial court seems to have unduly relied on technicalities of procedure.

11. With the foregoing, I find the Appeal has merit and I allow the same. The orders in CMCC Milimani 542 of 2001 (Ms. Ileri, RM) made on 13th September, 2010 are hereby set aside. The replying affidavit sworn by the Appellant on 9th September, 2010 is hereby reinstated. The Chamber summons application dated 20th August, 2010 to proceed for hearing before any other magistrate. Taking into account the circumstances of this Appeal, each party to meet own costs.

Dated, signed and delivered at Nairobi this 28th day of July, 2016

B THURANIRA JADEN

JUDGE