REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 153 of 2010

PETER MUNANDI SINYA ..... APPELLANT

VERSUS

JOHN NZAKA ..... RESPONDENT

JUDGMENT

This appeal arises from a ruling of the subordinate court delivered on 22nd October 2010. The learned trial magistrate dismissed an application which sought to set aside exparte judgment and to allow the appellant (defendant in the subordinate court) to file a defence. The reasons given by the subordinate court for the dismissal of the application were that the appellant, having filed appearance through counsel, deliberately failed to file defence, and that the ex-parte judgment entered was not irregular and, lastly, that the proposed defence did not raise triable issues,

Following that decision by the subordinate court, the appellant through counsel M/S Shitsama & Company filed this appeal on 5 grounds as follows:-

1. That the learned trial magistrate erred in law and fact in applying the wrong principles in dismissing the appellant's application to set aside the ex-parte judgment.

2. That the learned trial magistrate erred in law and fact in not setting aside the ex-parte judgment when the appellants who had entered appearance was not served with any or hearing notice for the formal proof of the case.

3. That the learned trial magistrate erred in law and fact in not exercising his discretion judiciously while dismissing the appellant's application to set aside the ex-parte judgment.

4. That the learned trial magistrate erred in law and fact in taking a draconian decision not to set aside the ex-parte judgment when the subject matter of the case was land.

5. That the learned trial magistrate erred in law and fact in making a finding that the draft statement of defence annexed to the appellant's application raised no triable issues when the contrary was true.

Parties counsel M/S Shitsama & Company for the appellant and M/S Momanyi, Manyoni & Company for the respondent filed written submissions. Mr. Kiveu who appeared at the hearing for the appellant, and Mr. Manyoni who appeared for the respondent relied on written submissions filed. I have perused the said submissions.

In an application for setting aside an ex-parte judgment the court is called upon to exercise its unfettered discretion. The court's main concern in such an exercise of discretion is to do justice. The exercise of that discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought either by evasion or otherwise to obstruct or delay the course of justice – *see* ***Patel –vs- E. A. Cargo Handling Services Ltd. [1975] EA 75***.

It is not disputed herein that the appellant was served or knew of the proceedings in the subordinate court. He knew of the proceedings commenced against him as he entered appearance through Shitsama & Company advocates on 1st April 2009. He also asked for particulars on 16th April 2009 and on 26th May 2009. He however, did not file a defence and judgment was sought for obtained, formal proof done and final judgment delivered.

In my view, the appellant has shown good grounds on which the learned magistrate should have exercised his discretion in his favour. This is because, though the appellant had asked for particulars presumably in order to file a defence, there is no indication by the respondent that such particulars were given to his counsel and when.

Secondly, I have perused the draft defence. I have also perused the plaint. Putting the two documents side by side, it is my view that the defence raises triable issues. It is not a mere or blanket denial. It raises an issue of fraud by the respondent in this land matter. It raises the issue of the application of the Limitation of Actions Act (Cap 22). It raised the issue of a purported gift of the subject land to the appellant by SINYA MULANDI, the late father of the respondent. It lastly raises the issue as to whether the subordinate court had jurisdiction to determine the suit.

In my view, the above are triable issues in which justice demands that they be canvassed substantially.

In case the appellant was found to be indolent in filing defence, an award of costs in my view would suffice. With the facts before me, I do not find any indolence in view of the fact that the appellant asked for particulars in order to assist him file a substantive defence. Balancing the interests of justice to both parties herein, I will allow the appeal but order that the costs of this appeal will follow the substantive decision in the case.

Consequently, I allow the appeal and order as follows –

1. The appeal is allowed. I set aside the judgment and subsequent orders of the lower court.

2. The appellant will file his defence in the subordinate court within the next fourteen (14) days.

3. Costs of this appeal will follow the substantive decision of the hearing of the case.

4. Failure of the appellant to file the defence within fourteen (14) days will mean the above orders 1, 2, 3 will have no effect, and stand
vacated.

Dated and delivered at Kakamega this 28th day of May, 2013

George Dulu
J U D G E