REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NUMBER 146 OF 2002

ROSE AUMA KHABEKO.....PLAINTIFF/APPELLANT
VERSUS
PETER MWALIMU.....DEFENDANT/RESPONDENT

J U D G M E N T

1. This is an appeal from the Ruling of Honourable Kimwele Muneeni, Resident Magistrate in CMCC 1363 of 2002 Mombasa, in which he dismissed the Appellant's Chamber Summons application to set aside the default judgment vide his Ruling of 30th September, 2002. The application had been brought under the provisions of the old Civil Procedure Rules *viz* Order 9A Rule 11, Order 5 Rules 15(1) (2) (16), Order 6 Rule 12(1) (d), Order 39 Rule (5) (a), and Section 3A of Civil Procedure Act.

2. The background of the matter is that by a Sale Agreement dated 2nd April, 2002, the Respondent purchased a house without land on Plot Number 2134/Magongo, Santana. The tenants in the premises were notified and, according to the Respondent, all but the Appellant vacated, saying she was the wife of the vendor and had not been involved in the sale. The Respondent therefore, instituted a suit against her for vacant possession and her eviction. Summons dated the same date was issued. The Respondent did not file any appearance or defence despite, according to the Respondent, being properly served with summons. Interlocutory judgment in default of defence was requested on 7th May, 2002 and 10th May, 2002. Proceedings for formal proof were conducted on 3rd June, 2002 and Judgment in favour of the Respondent was given on 6th June, 2002.

3. On the 16th, July, 2002, Appellant filed an application under urgency seeking, *inter alia*, an injunction restraining her eviction, a request to orally examine the process server who allegedly served the Appellant with summons, and a prayer that the *ex parte* interlocutory judgment be set aside. Honourable B.Thuranira, allowed the temporary injunction and the prayer for cross-examination of the process server. After the cross-examination, the Appellant sought to be allowed to give evidence to contradict the process server. This was however opposed by the Respondent on the ground that she had sworn an affidavit which could be relied upon. The honourable Magistrate agreed with the Respondent. The substantive application was then heard, and the honourable Magistrate dismissed it, held that personal service had been effected, and therefore that the judgment entered against the Appellant was regular.

4. The Memorandum of Appeal raises eight grounds of appeal and I now deal with each ground. In the process, I will employ the court's appellate powers under Section 78 of the Civil Procedure Act, being cautious to note that I did not have the benefit of hearing the Process Server at cross examination, or observing his demeanour.

5. On whether the Magistrate's finding that the process server was honest, and had affected personal service of the summons and hearing notice when oral evidence at his cross examination pointed otherwise. From the record of evidence, the Process Server's evidence tallied with that in his Affidavits of service dated 22nd April and 21st May, 2002. He gave details concerning the Appellant's house, gate, walls, compound and surrounding areas. He said that on the second day, he went to the Appellant's house alone as he now knew the place. He went to serve the hearing notice and served the Appellant personally.

I find nothing in the record on the cross examination of the process server *vis a vis his* depositions on which to criticise the Magistrate's finding and observations on demeanour, or on his finding that there was personal service.

6. Grounds 2 and 6 of the appeal, on whether the Magistrate erred in finding that the Appellant was unco-operative while being served and sought to delay the trial, in the absence of evidence. At page 78 lines 5-6 of the Record of Appeal, the proceedings show as follows:

" She (the Appellant) was pointed out to him by the Plaintiff. Thus, the process server effected personal service on her. She was not co-operative…"

And at lines 17-19 of page 80, the judgment reads:

"She chose to ignore the summons and out of her own choice, she did not attend the hearing…she appeared contemptuous of the whole process. I have no good reason why I should exercise discretion under Order 9A Rule 10. Instead, I dismiss the Defendant's application with costs."

In fact, the Process Server's Affidavit of 23rd April, 2002 at paragraph 3 shows the opposite:

"…I showed her the summons…, she was co-operative in that she confirmed to me that she was the Defendant named…. She accepted service…"

7. It is clear, therefore, that the Appellant was therefore, not unco-operative. Further, since she did not give evidence, the finding by the Magistrate that she was unco-operative and appeared contemptuous, were not factually grounded findings, nor are they based on evidence. The Magistrate's mind finding that the Applicant was unco-operative appears to have so influenced his mind, that he decided he would abandon the exercise of his discretion in respect of Order IXA rule 10, when he stated:

"I have no good reason why I should why I should exercise the discretion under Order 9A Rule 10. Instead, I dismiss the Defendant's application with costs" Page 80 line 18 Records of Appeal).

I find that that was a grave misdirection as it must always be open to a court to set aside a judgment entered for non-appearance or in default of defence. The courts have long held that it is undesirable to keep a party from the judgment seat when there is a flicker of life in their case.

8. Grounds of Appeal 3 and 4 and concern the Magistrate's finding that equity cannot override the law, without hearing substantive arguments or appreciating that statute cannot be employed to aid fraud. There is nowhere, either in the proceedings or draft defence annexed to the Appellant's Affidavit in support of her application, where any reference to fraud is indicated, particularised or made an issue. The use by the Magistrate of the maxim **"law overrides Equity law"** was within the context of the contest as to the ownership of the plot. In that respect the Respondent had adduced evidence of the sale transaction and transfer of the house. For the Applicant, not having pleaded, there was nothing on record. Accordingly, the Magistrate applied the classical law of contract, in the circumstances, as against the Appellant's allegation that she was an equitable owner, and, correctly in my view found in favour of the Respondent.

9. On the alleged error under ground 5, the Magistrate stated that he had granted leave to Appellant's counsel to cross examine. However, the record clearly shows that it was Honourable B. Thuranira that granted such leave. This ground of appeal is successful but in the event, it does not go to the root or

substance of the issues in appeal, as this appears to be a rectifiable slip of a purely technical nature.

10. Ground 7 of the appeal was that the Magistrate erred in finding that the Appellant was a mere tenant and not a landlady without granting her leave to contradict the same. During the submissions on the application, the Appellant/Applicant pointed to the draft defence stating that the Appellant was not a tenant but an equitable owner (Paragraph 4). In the submissions of counsel, he said that the Appellant was the rent collector at the premises. On her part, she also averred (paragraph 5) that the tenants still in occupation recognize her as the landlady.

I agree with the Appellant that the Honourable Magistrate could not, on the evidence, make a formal finding that the Appellant was a tenant in the face of the allegation to the contrary, without hearing her. It is a cardinal principle of our law that summary judgment should not be entered where the defence raises at least some triable issue. This, the honourable Magistrate wholly ignored. He had already taken the decision in his mind that he would ignore and not even exercise his discretion to set aside under Order 9A Rule 10. This ground therefore succeeds, and on that ground alone, the whole would succeed. In **Joseph Waweru vs Joel Ndiga** (1982-88) 1 KAR 201 the Court of Appeal held that in fact there is no requirement to show sufficient reasons why judgment should be set aside.

In Nimrod Nchugu vs Jsoeph Momanyi(1982-88) Civil Appeal Number 13 of 1998, the Court of Appeal again held that a court, in an application for setting aside judgment, should look at the nature of the defence even if there is no sufficient cause for non-attendance by the defaulting party.

11. On ground 8 of the grounds of appeal, I again agree that the Honourable Magistrate did not have evidence to find that all tenants co-operated with Respondent and vacated whilst the Appellant had sworn she is a landlady and that the tenants do pay rent to her.

12. The upshot of the foregoing is that on the grounds in, and for the reasons shown in paragraphs 6 and 10 herein, the appeal succeeds, and the judgment of the trial Magistrate is hereby set aside. The appropriate order herein is that the matter shall be remitted back to the Magistrate's court. The Appellant shall file her defence within 14 days from the date of this judgment, and the Respondent may file a reply to Defence within ten (10) days thereafter. All other pre-trial procedures should be completed within thirty (30) days thereafter, and the suit set down promptly for an expeditious hearing.

Orders accordingly.

Dated and delivered this…29th.Day of March, 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:
1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a) ……
b) ……
c) ……
d) ……..