**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO.33 OF 2010**

**JOSEPH KINYUTI NDUNG'U……..……APPELLANT**

**Versus**

**SAMSON KAMANDE MUIHAMI……..RESPONDENT**

***(Appeal arising from the ruling of Hon. A.K. Kaniaru , Principal Magistrate in Murang'a Civil Case no. 65 of 2009 made on 12th February 2010***

**JUDGMENT**

This is an appeal against the ruling of Principal Magistrate's court Murang'a in Murang'a Civil Case No. 65 of 2009, wherein the same dismissed the appellants application for setting aside the interlocutory judgment and subsequent orders therefrom.

The Appellant being dissatisfied with the said order has now appealed against the same to this court and has filed memorandum of appeal with nine (9) ground set out therein.

When this matter came up for direction the parties agreed that the appeal be determined by way of written submissions both of which were filed on 14th October 2011.

I have had the benefit of reading both submissions, the records of the pleadings and the ruling appealed against. I have also looked at the proceedings before the lower court.

From the submissions and the pleadings before this honourable court, this court is able to identify three main issued for determination in this appeal:-

***(i) Did the trial court exercise his discretion properly in failing to set aside the interlocutory judgment.***

***(ii) Did the court err in ruling that the Appellant reliance on section 3A of the Civil Procedure Act was unlawful and improper.***

***(iii) Did the Appellant raise issues weighty enough to enable the court set aside the interlocutory judgment.***

The Appellant in his submission is of the view that the trial magistrate erred in law and in fact in failing to set aside the interlocutory judgment. His main ground is that he was not served with summons to enter appearance. He further submits that the court took into account extraneous issues which he ought not to

have considered at the stage of the application.

The Respondent on the other hand feels that the trial magistrate was right in declining to set aside the interlocutory judgment and is of the view that the appeal is purely academic. He supports the lower court reasoning that the court has looked at the defence annexed and that "***it does not persuade that discretion to set aside".***

The Appellant had raised the issue of service as is required by law and further stated that it was on 20th July 2009 when Thames Traders forcefully evicted him flashing court orders emanating from the suit appealed against that he became aware of the said suit.

He also raised the issues of his defence by stating that there were two pending suits before the Business Rent Tribunal in Nairobi and therefore the suit was resjudicata and or subjudice. He further alleges that the trial court did not have jurisdiction on this matter since there was tenancy subsisting between the parties herein which was subject to Business Rent Tribunal.

The Respondent on the other hand contended that the Appellant had been properly served and that the alleged tenancy had been lawfully terminated.

The above reflect the disputed facts upon which this court has to make a ruling.

It is proper to note that at the time of the application whose ruling is appealed against what the court was dealing with was the setting aside of an interlocutory judgment. Whereas the trial court had ruled that the Appellant had been properly served the court properly observed that it still had discretion to set aside the judgment provided that the discretion was exercised judiciously and in accordance with settled principles. That it should be based as such terms as may be just because the main concern of the court is to do justice to the parties among others issue set out in the courts judgment.

Arising from the facts of this case did the trial court exercise his discretion properly in refusing to set aside the interlocutory judgment herein?

In ***CENEAST AIRLINES LTD vs KENYA SHELL LTD (2000)2 E.A.***The Court of Appeal quoted with approval DUFFUS P. in ***PATEL vs EA CARGO HANDLING SERVICES LTD (1994) E.A. 75.***

***"The main concern of the court is to do justice to the parties and the court will not impose condition on itself to fetter the wide discretion given to it by the rule (order ix A rule 10) I agree that where it is a regular judgment as in the case herein the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merit does not mean in my view a defence that must succeed it means as Sheridan J. put it" a triable issue" this is an issue which raised a prima facie defence and think should go for trial for adjudication"*** Emphasis added

Did the Appellant in this case present issues that raised a noble defence?. To my mind the Appellant affidavit in support of his application to set aside the interlocutory judgment raised issues that the court ought to have considered at that stage and to have allowed the matter to proceed for full trial so that the said issues could be adjudicated upon. There was the issue of tenancy, the issue of the suit pending at the Business Tribunal and there was the issue as to whether order xxi rule 6 of the Civil Procedure was complied with. These were wrongly issues which could not be ignored by the trial court. There was also the issue as to whether the court was seized with jurisdiction.

Thus even if this court found out that the Appellant had been served properly the court should not have locked the Appellant from being heard on the issues raised herein.

I have been guided by the holding in ***SEBEI DISTRICT ADMINISTRATION vs GESYALI (1968)E.A. 300*** as regard other consideration where the court stated;

"***The nature of the action should be considered, the question as to whether the plaintiff can reasonably***

***be compensated by costs for any delay occasioned should be considered and finally I think that to deny the subject a hearing should be the last result of court."***

From the above authorities and for the pleadings and record of appeal I am persuaded that the Appellant had raised issues and established a case to enable the trial court to be persuaded to exercise its unfettered discretion in favour of the Appellant. There is no evidence to show that the Appellant had deliberately sough to obstruct or delay the course of justice. It is also clear from the judgment that the trial court took into account issues which should have been left to the time of trial. It is also clear that the trial court was at fault in stating that failure to specify a specific law that exist to cover a given situation was fatal to the Appellant case at that stage of the application to set aside judgment, and neither was the court called upon at that stage to grant a mandatory injunction.

I therefore allow the appeal herein and set aside the orders of the principal magistrate's court in Murang'a made on 12th February 2010 and order that the matter proceed for interpartes hearing before the Principal Magistrate court at Murang'a and costs to be in the cause.

Dated and delivered at Nyeri this 11th day of November 2011.

J. WAKIAGA
JUDGE