



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 270 of 2006

MARAGWA SUPERMARKET LTD.....1ST APPELLANT
GRACE WARUGURU NJOROGE.....2ND APPELLANT

VERSUS

METRO CASH & CARRY.....RESPONDENT

*(Being an appeal against the whole ruling and order of the
Senior Principal Magistrate at the Chief Magistrate's Court
given on 27th April, 2006 by Hon. C.W. Meoli
in Milimani CMCC No.11439 of 2003)*

J U D G M E N T

1. The appellants are aggrieved by a ruling which was delivered on 27th April, 2006 by the Ag. Chief Magistrate at Milimani Commercial Courts. The ruling was in respect of an application dated 5th April, 2006, in which the appellants who were the 1st and 3rd defendant respectively in the lower court, sought to have the *ex-parte* judgment entered against them on 29th July, 2004, set aside and leave granted to them to file their defence out of time. The application was anchored on the following grounds:
 - (i) That the judgment debt was fully paid.
 - (ii) That the appellants had a reasonable defence that raised triable issues.
 - (iii) That the 2nd appellant was not served with summons.
 - (iv) That the 2nd appellant was unwell during the year 2005 and had reasonable cause to believe that the matter was settled.
 - (v) That the delay in applying for the setting aside of the judgment was caused by excusable reasons.
2. In support of the application, the 2nd appellant swore an affidavit in which she deponed that she suffered a fracture on the leg, and was immobilized for the whole of the year 2005. She therefore thought that her husband who was the 2nd defendant in the lower court was sorting out the matter. The 2nd appellant maintains that she has a good defence, a draft of which she annexed to her affidavit.
3. The respondent raised a preliminary objection to the hearing of the appellant's application on the ground that the application was *res judicata*, in view of the ruling of 17th September, 2004, 17th February, 2006, 15th March, 2006.
4. The respondent also filed an application dated 6th April, 2006 in which the respondent sought an order that the Officer Commanding Maragua Police Station do assist the court bailiffs to execute the warrant of arrest which had been issued against the 2nd appellant. Two court bailiffs, Dorcas Wangechi and Elizabeth Okwengu swore affidavits in which they deponed that they had made several efforts to arrest the 2nd appellant but their attempts were unsuccessful as the 2nd appellant appeared to have gone into hiding.
5. In a replying affidavit sworn on 7th April, 2006, the 2nd appellant denied having gone into hiding to avoid arrest. She denied that

the court bailiffs had gone to her premises or that they were unable to trace her. The appellant's application dated 5th April, 2006 and the respondent's application dated 6th April, 2006 were both listed for hearing on 27th April, 2006. In support of the respondent's preliminary objection, it was argued that the appellant's application was an abuse of the court process as the court had already dealt with, and delivered rulings in 3 applications involving similar issues. The court was therefore urged to strike out the application.

6. The appellant opposed the preliminary objection maintaining that the 3 rulings did not involve the same parties. The appellant pointed out that they were not party to the application brought by the 2nd defendant for setting aside the *ex-parte* judgment. It was contended that the court had to determine whether the appellant was ever served with summonses.

7. In her ruling which was delivered the same day, the trial magistrate ruled that the application brought by the 2nd appellant was *res judicata*. She referred to her 3 earlier rulings dated 17th September, 2004, 30th July, 2004 and 15th June, 2004. She therefore found that the 2nd appellant's application was incompetent and an abuse of the court process and ordered the application struck out with costs to the respondent. She further directed that the appellant should not file any other application without first seeking leave of the court.

8.

Being aggrieved by that ruling, the appellants have lodged this appeal raising 4 grounds as follows:

(i)

The learned Magistrate erred in law and in fact in finding that the appellant's application dated 5th April, 2006 was *res judicata* yet the issues raised by the appellants had not been finally decided, on the part of the appellants, by the Court as the appellants were not represented at the making of an application by the 2nd defendant for setting aside judgment.

(ii) The learned Magistrate erred in law and in fact in failing to consider or to deal with the appellants' application dated 5th April, 2006.

(iii) The learned Magistrate erred in law and in fact in upholding the respondent's preliminary objection dated 16th April, 2006 when she ought not to have done so.

(iv) The learned Magistrate's decision was contrary to law and against natural justice.

9.

In support of the appeal, counsel for the appellant maintained that the application dated 5th April, 2006, was not *res judicata*. She pointed out that the 3 requirements upon which the principal of *res judicata* is based were not met. She noted that in her ruling the trial magistrate referred to the ruling of 17th September, 2004, which was in respect of an application filed by Francis Njoroge Mwangi, who was not party to this appeal. Moreover, the appellants were not party to the application subject of the ruling of 17th September, 2004, and therefore the subsequent application could not be *res judicata*. Counsel further submitted that the application of Francis Njoroge Mwangi was not dismissed on merit but was dismissed on a technicality.

10.

The advocate pointed out that the 2nd application dated 23rd May, 2005 was withdrawn, while the 3rd application dated 20th June, 2005 was also brought by Francis Njoroge Mwangi who was not party to the appeal. Counsel further submitted that the 3rd application was for extension of time and therefore it raised different issues. Counsel for the appellants contended that the trial magistrate did not give the appellants an opportunity to be heard. Counsel pointed out that in the reply to the defence the respondent did admit repossessing the motor vehicle although there was no mention of it in the plaint. The court was therefore urged to allow the appeal.

11.

For the respondent, it was submitted that the ruling of the trial magistrate was well reasoned. It was noted that the 2nd defendant not being a party to the appeal, the judgment against the 2nd defendant should stand whatever the outcome of the appeal. Counsel submitted that the application dated 5th April 2006, was *res judicata* as the court was dealing with an *ex-parte* judgment entered against the appellants. Counsel pointed out that in the lower court proceedings, the 2nd defendant stated that he had authority to swear the affidavit by virtue of being a director of 1st appellant and husband of 2nd

appellant. Therefore, all the parties were represented. Counsel further noted that what was in issue was the setting aside of the *ex-parte* judgment and that the court ordered that the judgment be set aside on terms against the appellants and the 2nd defendant. The issue of setting aside the judgment was therefore determined and is now *res judicata*. It was maintained that the 1st appellant did not deny having given authority to the 2nd defendant under Order III Rule 2(c) of the Civil Procedure Rules. The court was therefore urged to dismiss the appeal.

12.

I have given due consideration to this application. I have also perused the proceedings of the lower court and also considered the pleadings and submissions made before me. It is clear from the record of the lower court, that there was an earlier application dated 30th July, 2004, in which Francis Njoroge Mwangi who was the 2nd defendant in the lower court, sought orders to set aside the *ex-parte* judgment entered in favour of the respondents on 29th July, 2004. That judgment was against the appellants and Francis Njoroge Mwangi. In his supporting affidavit sworn on 30th July, 2004, Francis Njoroge Mwangi, indicated that he had authority to swear the affidavit on behalf of the appellants. It has not been disputed that the 2nd defendant is a director of the 1st appellant and the husband to the 2nd appellant. Indeed, the 2nd appellant, in her affidavit in support of her application in the lower court, did depone that she was immobilized for the whole of the year 2005, and she thought that her husband, the 2nd defendant would sought out the matter. Moreover, the 2nd appellant did swear a further affidavit on 6th August, 2004, in support of the same application, in which she denied having been served with summons to enter appearance and claimed to have a good defence to the respondent's suit. The appellants cannot therefore feign ignorance of the notice of motion dated 30th July, 2004

13.

In her ruling delivered on 17th September, 2004, the trial magistrate considered the *ex-parte* judgment and the issue of service, and concluded that the defendants were duly served with summons to enter appearance but failed to respond. The trial magistrate however, having considered the draft defence, allowed the application and set aside the *ex-parte* judgment against the appellants and the 2nd defendant on terms. It is evident that the competence of the application which was made by the 2nd defendant on behalf of himself and the appellants was questionable. Nonetheless, both appellants appear to have tacitly given the 2nd defendant the go ahead to act on their behalf. They are therefore estopped from questioning his authority.

14.

In the circumstances, the application dated 5th April, 2006 brought by the appellants, for setting aside the *ex-parte* judgment entered against them on 29th July, 2004, was *res judicata*, and the trial magistrate cannot be faulted for upholding the preliminary objection. I therefore find no merit in this appeal and accordingly, dismiss it with costs.

Dated and delivered this 19th day of February, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Githinji H/B for Chokaa for the appellant

Advocate for the respondent absent

Eric - Court clerk