REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 40 of 2000

JOHN MWAI KARENGA ………….……………….. APPELLANT

Versus

KENYA COMMERCIAL BANK (K) LTD ……. RESPONDENT

(Being an appeal from the Ruling of KIPYEGON KORIR,

Resident Magistrate in the Chief Magistrate's Civil Case

No. 38 of 1995 at NYERI)

JUDGMENT

The respondent filed a case against two defendants in the lower court the appellant being the first defendant. The respondent claim in the lower court was that appellant was advanced Kshs. 222,785.85 and that sum was guaranteed by the 2nd defendant who is not a party in this appeal. According to the affidavit of service dated 25th February 1995 the appellant was served through a shop attendant who worked at his shop with the summons and plaint. The appellant failed to file an appearance within the prescribed period and judgment in default was entered on 8th March 1995. The record of the lower court on 1st August 1995 shows that the parties appeared before court that is, an advocate representing the plaintiff judgment creditor and the two defendants in persons, the appellant being one of them. The following order was made by consent:

"*ORDER: By consent, the J/Ds do pay the decretal amount inclusive of today's costs out of Kenya shillings 285,306 or on before 12th September 1995. in default the J/C to be at liberty to execution. Mention on 12th September 1995."*

When the matter appeared on 12th September 1995 the same was marked as "SOG". The appellant filed in the lower court a Notice of Motion dated 21st February 2000. By that application the appellant sought his release from Civil Jail on the basis that he was suffering from a serious illness. Further he prayed for the interlocutory judgment entered against him on 8th March 1995 and all subsequent orders to be set aside. In support of that application the appellant swore an affidavit where he denied ever being served with the summons and plaint. He argued that the return of service filed in court did not comply with the law because it had not been commissioned by commissioner for oaths. The appellant further stated that he was a guarantor to the other defendant not in this appeal. That statement was contrary to the plaint filed in that case. The appellant stated that he had a good defence to the plaintiff's claim in that being a guarantor he could not be called upon to make payment until the plaintiff had exhausted its remedies

available to it against the other defendant. That application was heard by the lower court and after that hearing the learned magistrate delivered the considered ruling where by the court found that the appellant could not succeed in his prayers because of the consent that had been entered on 1st August 1995 for the payment of the decretal amount. The learned magistrate found that the appellant was attempting to set aside a consent order by using a backdoor. It is that ruling that has aggrieved the appellant the appellant has preferred this appeal. The appellant has brought the following grounds for consideration by this court;

1. The Learned Resident Magistrate erred in law and fact in not finding and holding that the appellant was never served with summons to enter appearance and a copy of the plaintiff as required by the law and the affidavit of service filed in court did not comply with the law as it was not even commissioned by the commissioner of oaths. A miscarriage of justice was thereby occasioned.

2. The Learned Resident Magistrate erred in law and fact in not holding that the appellant having been a guarantor, he cannot be called upon until the respondent has exhausted all remedies available to it against the second defendant (principal debtor). A miscarriage of justice was thereby occasioned.

3. The Learned Resident Magistrate erred in law and fact in also not finding and holding that where a loan is secured by a charge, the chargee cannot sue the charger or the guarantor for the loan until it has sold the charged property and therefore the appellant had a good defence and ought to have been given leave to defend the claim. A miscarriage of justice was thereby occasioned.

4. The Learned Resident Magistrate erred in not looking into the totality of the whole matter and holding that the appellant was aware of the claim all along when there is no evidence of proper service of even hearing notice. A miscarriage of justice was thereby occasioned.

5. The Learned Resident Magistrate erred in law and fact in not finding that the appellant had been condemned unheard contrary to the rules of natural justice though he had a good defence.

A miscarriage of justice was thereby occasioned.

I shall consider all the grounds together. The respondent has argued that Order V Rule 15 of the Civil Procedure Rules before its amendment in 1996 provided for the filing of a return of service which did not require the swearing before a commissioner of oaths. The appellant has argued that because that return of service was not sworn before a commissioner of oaths the same was invalid and could not be relied upon in entry of exparte judgment.

Order V Rule 15(1) before the amendment in 1996 provided:-

"*The serving officer shall complete and sign a return of service and forward the return together with the original summons without delay to the court which issued it, and such return of service shall be in form No. 8 of Appendix A with such variations as circumstances may require.*"

It is clear from this Rule and Form No. 8 of appendix A that a return of service did not need to be commissioned by a commissioner of oaths. That rule and form were the relevant format that the plaintiff needed to follow when the summons and plaint were served upon the first defendant, the appellant herein. The appellant has argued that the defence he would advance if the lower court had set aside the exparte judgment was is that the respondent did not exhaust the right it had against the other defendant. That is the chargee's rights. Section 74 of the Registered Land Act provides:-

" *that the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge.*"

The provisions of that section are clear that the court has discretion to stay a suit where a party has not exhausted its rights and remedies under a charge. Here the suit was not stayed. There was no application

for stay. That being so the defence raised by the appellant cannot succeed in setting aside the exparte judgment. Further I find that the appellant's claim that service was not proper is negated by the consent order entered on 1st August 1995 whereby the appellant consented to pay the decretal amount. It is not a coincidence that that consent order was entered into after the service of the summons and the plaint. I believe it was indicative of the service of summons and plaint upon the appellant. Having consented to pay the decretal amount I am in agreement with the finding of the learned magistrate that the appellant could not seek to set aside that very judgment. To allow it in my view would be to allow an abuse of the court process. It was argued by the appellant's advocate that his client the appellant was not present when the consent was recorded. Granted that when the consent was recorded the learned magistrate did not write the names of the parties before him. However looking at the consent it is clear that there were two judgment debtors before court. Those undoubtedly would be the two defendants, the appellant being one of them. I therefore reject that argument. The appellant in bringing this appeal has not shown any good reason why this court should interfere with the discretion of the learned magistrate in the lower court. I find that I am in agreement with that finding of the learned magistrate and I accordingly dismiss this appeal with costs to the respondent.

DATED AND DELIVERED THIS 23RD DAY OF SEPTEMBER 2008

MARY KASANGO

JUDGE