REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 130 of 2002

MURIUNGI LYRIA T/A NDIUNGI AGENCIES …….…….. APPELLANT

VERSUS

JOEL MATHERE MWITARI …….. RESPONDENT

(An appeal against the ruling of the Honourable District Magistrate Mr. D.J. Nyaga delivered on 19th November, 2002)

JUDGMENT

This is an appeal from one of the many rulings in Tigania District Magistrate Court, Civil Suit No. 30 of 1994. The dispute, which was a claim for a paltry Kshs. 5,000/= for trees, beans and maize removed from the plaintiff's shamba, has become protracted resulting in this appeal.

The plaintiff's testimony was cut short to enable his advocate to formally apply to amend the plaint. That was on 15th July 1997. On 11th February 1999, moving *suo motu* under order 16 rules 2 and 5 of the Civil Procedure Rules court below dismissed the suit for want of prosecution. The defendant's bill of costs was finally assessed at Kshs. 16,070/=.

This marked the beginning of endless applications that has now culminated in the instant appeal. As I have observed earlier, there have been many applications arising from the assessed costs. This appeal only challenges the decision made on 19th November 2002. That decision arose from an application by the present applicant (the 2nd respondent in the application under consideration) for orders to set aside *ex parte* orders issued on 4th June 2002 in yet another application for orders that the plaintiff's attached cattle be returned.

On 17th September, 2002 the application dated 27th August 2002 was placed before D.J. Nyaga, DM I at Tigania Law Courts. That application, as I have said, sought the setting aside of *ex parte* orders made on 4th June 2002. The learned magistrate in a short reserved ruling delivered on 19th November, 2002 found no merit in the same and dismissed it with costs, prompting this appeal. The appellant has challenged the above decision on three grounds, namely,

(i) that the appellant was not given the opportunity of being heard

(ii) that the learned magistrate failed to hold that although the appellant appeared in court during the hearing of the application he was not given a chance to present his case, and

(iii) that the finding of the learned magistrate are against the rules of natural justice.

The application of 27th August 2002 was premised on Order 9B Rule 8 of the Civil Procedure Rules as well as sections 3 and 3A of the Civil Procedure Act.

Order 9B Rule 8 stipulates that:-

"***8. Where under this order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just."***

The court's unfettered discretion to set aside a judgment in situations envisaged under Order IXB are only subject to the court ensuring that the terms of setting aside are just. It is well settled that this court in the exercise of its appellate jurisdiction will not interfere with the exercise of a discretion by the subordinate court unless it is satisfied that the exercise of the discretion was wrong because that court misdirected itself or because it acted on matters on which it ought not to have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. See **Mbogo V. Shah,** (1968) EA 93.

The court will exercise its discretion to set aside a judgment or order to avoid injustice or hardship resulting from inadvertence or excusable mistake or error so long as the party seeking the relief has not deliberately sought to obstruct or delay the course of justice. See **Shah V. Mbogo,** (1967) EA 116. See also **Sabastian Ben Aduordi V. AG** Civil Appeal No. 196 of 2006. How did the learned trial magistrate exercise his discretion in this matter? The court below considered the application for setting aside orders made on 4th June 2002, found no merit and held that:-

"***After going through the proceedings of 21.5.2002 in this file, I find nothing irregular. Both parties in that application were present and were asked if they wished to proceed in absence (sic) of their advocates. They opted to proceed and were heard …… There is nothing wrong with hearing any proceedings at lunch hour. …… I find also that the application was overtaken by events."***

I may at this stage recapitulate the proceedings of 21st May 2005 when the application by the objector dated 22nd March 2006 was heard, giving rise to the orders sought to be set aside. The application dated 22nd March 2006 was brought by the objector. For the return of nine (9) head of cattle belonging to the objector attached by the auctioneer, the appellant herein in execution of a decree in favour of the defendant against the plaintiff in the dismissed suit.

The application, in the alternative, sought that in case the cattle had been sold, that there be a declaration that the sale was illegal and an order that both the defendant and auctioneer/court broker to pay the objector Kshs. 80,000/= being the value of nine (9) head of cattle. That application was brought by the objector, the son of the plaintiff who asserted that the attached cattle belonged to him and not the plaintiff. The application was brought against the defendant and E.M. Lyria T/A Ndiungi Agencies – the court broker, the appellant herein.

That application was by way of chamber summons pursuant to Order 21 Rules 56 and 57 of the Civil Procedure Rules. The only affidavit in reply to that application is that filed by the appellant. The plaintiff did not file any response to the application. Although the application was by way of chamber summons, for some unknown reasons, the learned magistrate received oral evidence from the objector and the plaintiff. The proceedings were recorded at 1.20pm. The appellant is shown in the proceedings to have arrived at 2.15pm after the hearing of the application. He explained that he had been in attendance from 8am but was informed by the court clerk that the matter would be heard at 2pm. He was surprised that the matter proceeded in his absence. The court ordered that the applicant having come after the arguments had been closed could only make a formal application. It is not clear to me what kind of application he was to make. The ruling was subsequently delivered.

Before considering that ruling, I only wish to observe that there is no dispute that the magistrate was on relief duty at Tigania court. That the parties, although represented by counsel elected to proceed in the

absence of their counsel. The magistrate in a detailed ruling providing the background of the dispute and considered the evidence adduced before him including the appellant's replying affidavit and the law applicable in the circumstances of the matter before him. He was convinced that the attached and sold cattle belonged to the objector, that the attachment and sale of the objector's cattle was irregular.

I have studied the ruling and find that the learned magistrate would have arrived at the same conclusion even if the appellant gave oral evidence. As a matter of fact the appellant's replying affidavit was considered by the learned magistrate albeit not in detail.

For these reasons, I find no merit in this appeal. It is dismissed with costs to the respondent.

Dated and delivered at Meru this 7th day of October 2008.

W. OUKO

JUDGE