REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 26 of 2000

JENNIFER MWARI……..APPELLANT

V E R S U S

PETER M'AMANJA……..……..……..……RESPONDENT

(Being an Appeal from the Ruling of M.N. Gicheru Senior Resident Magistrate in RMCC No. 12 of 1996 dated 14.2.1997)

JUDGMENT

1. In her Memorandum of Appeal filed on 21.3.2000, the Appellant, Jennifer Mwari has listed the following grounds of Appeal against the Judgment and Ruling delivered on 30.9.1996 and 14.2.1997 respectively by M.N. Gicheru Esq. in SRMCC No. 12/1996;

i) The learned Magistrate erred in law and fact in entering judgment against the Defendant without satisfying himself that there had been proper service or any service at all of summons upon the Defendant.

ii) The learned Magistrate erred in law and fact in failing to find that there was no or no proper service of summons upon the Defendant as required by law.

iii) The learned Magistrate erred in law and fact in denying the Defendant a fair chance to defend the suit.

iv) The learned Magistrate erred in law and fact in failing to grant a stay of execution of the decree.

v) The learned Magistrate erred in law in applying the wrong principles for granting a stay of execution.

vi) The learned Magistrate erred in law and fact in finding that the Defendant would not suffer substantial loss.

vii) The learned Magistrate erred in dismissing the Defendant's Application for stay of execution.

viii) The learned Magistrate's Judgment and ruling were not supported by any evidence and the same were against the weight of evidence.

ix) The learned Magistrate's Judgment and ruling offends the rules of natural justice.

x) The illegal transfer of the appellant land LR. No. Njia/Buri-e-Ruri/1827 is null and void as it was made without the consent of the requite Land Control Board".

2. The Appellant in praying that her Appeal be allowed prays further for these orders:

(a) "**There was no proper service of summons to the Defendant** (*sic).*

(b) The Defendant's suit in the lower court be dismissed.

(c) The judgment of the learned Magistrate delivered on 30.9.1996 be set aside

(d) The ruling of the learned Magistrate delivered on 14.2.1997 and all orders pursuant thereto be set aside.

(e) The Appellant's application for stay of execution be allowed.

(f) The illegal transfer of LR. No. Njia/Buri-e-Ruri/1827 be declared null and void.

(g) Costs of this Appeal be awarded to the Appellant."

2. The advocate for the Appellant argued the grounds as filed, quoted no law or authority and I see no reason to reproduce his otherwise detailed submissions. The Advocate for the Respondent similarly answered each of the grounds in the negative but added one more thing; that the land subject of the original dispute has since been sold to a third party and the continued litigation is therefore in vain.

3. From the grounds of appeal, there are three stages of the case that are important to highlight; the interlocutory Judgment, the judgment and the Application for stay of execution. On the interlocutory judgment what happened was that the plaint was filed on 2.2.1996 and the claim was that the parties had entered into a lease agreement on 20.2.1993 whereby the Respondent would pluck miraa from title No. Njia/Buri-e-ruri/1827 belonging to the Appellant. That in September 1995, the Appellant chased away the Respondent as a result of which the Respondent lost Ksh.73,000/- being Ksh. 58,000/- for the remainder of the lease agreement and Ksh.14,500/- being lost profits and Ksh.500/- cost of issuing notice of intention to sue. He also claimed costs and interest arising from the suit.

4. Summons to enter appearance were issued on 5.2.1996. In an affidavit of service forming part of the duplicate copy of the summons, Japheth Mukiira, a Process Server depones that on 1.4.1996 at about 2.pm. at Maua Town he tendered a copy of the summons to enter appearance on the Appellant who accepted the same in the presence of her grandson Kimathi Kibundu. On 2.7.1996 and there being no appearance or defence entered the Senior Resident Magistrate entered interlocutory Judgment against the Appellant and on 6.9.1996 the suit was set down for formal proof. Upon hearing the Respondent, Judgment was reserved for 30.9.1996 and on that day the claim for Ksh.14,500/- was rejected and Judgment entered in the sum of Ksh.58,000/- plus costs and interest.

5. The Respondent commenced recovery of the above sum by way of sale of title number Njia/Burieruri/1827 and with that threat looming, the Appellant filed an Application to set aside the ex-

parte judgment and later another one for stay of the sale of the land and setting aside of the order for sale and transfer thereof. The first application was dismissed with costs and the sale of the land was conducted at a later date.

6. My view of the matters raised in the Appeal is this; if the Appellant was properly served with Summons to enter appearance and failed to do so, then she is the author of the misfortune that befell her. If she was not properly served, then the Judgment and all consequential orders would have to be set aside.

Order V Rules 7 and 9 provide as follows:-

Rule 7

"**Service of the summons shall be made by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court**"

Rule 9 (1) "**Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.**

(2) A summon may be delivered to an advocate who has instructions to accept service and to enter an appearance to the summons, but judgement in default of appearance may not be entered after such delivery.

7. Order V Rule 15 then provides as follows:

(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No. 8 of Appendix A with such variations as circumstances may require.

(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both.

The importance of the above provisions is that in her Affidavit sworn on 22.1.1998, the Appellant deponed that;

"**the allegation by one JAPHET M. MUKIIRA that he served me on the 1st day of April 1996 at Maua Town in presence of my grandson is untrue and misleading.**" I have elsewhere above set out the name of the Appellant's grandson and reading Rule 15 above, the Process Server was right in naming the person who witnessed the service. The Appellant it is noted does not deny that she has a grandson called Kimathi Kibundu. More importantly, if the Appellant wanted to she could have invoked Order V Rule 16 and seek examination of the Process Server and at paragraph 14 of her Affidavit aforesaid, she indeed stated as follows:

"**That I will crave leave herein to cross-examine the process server."**

8. Although represented at that time by M/S Kariuki and Co Advocates the Appellant did not prior to the hearing of the Application for setting aside seek the cross-examination of the process-server. It would also seem to me that the Application for stay of sale of land and transfer thereof was not prosecuted.

9. I shall at this stage back-track and say something about the Application for stay of execution of the judgment and decree. That application came for hearing on 14.2.1997 before M.N. Gicheru Esq. At the ex-parte stage, the learned Magistrate said in part;

"The Applicant…….says this in her supporting Affidavit that she became aware of this case when she

read an advertisement in the newspapers, I find this to be a lie because the applicant has been to my chambers (about two months ago) seeking of what to do about this case. I am therefore personally aware that she knew of this matter at least some two months back"

10. The advocate for the Appellant has taken issue with the above statement but I was not told how it affected the eventual outcome of the application. Granted, Private visits of enquiry to a presiding Judicial Officer should be discouraged but the other side of the coin is equally true; if the Appellant had known of the pendency of the case and sought from the court what the position was, why then swear an Affidavit to state that in fact she knew nothing of the matter until she saw an advertisement in the "**Nation**" Newspaper? If it is true that she then went to the court Registry to look at the court file why would it take her another two months to seek not the setting aside of the judgment but stay of execution and one year to seek setting aside and then not prosecute that application?

11. I am not all convinced that the Appellant was not served and that she was unaware of the pending suit. But suppose I am otherwise wrong? Then I should look to the merits of her case, vis-à-vis that of the Respondent. I have seen a draft Defence annexed to her Affidavit in support of the Application for setting aside of Judgment. In that Defence, the agreement to lease is admitted but breach is denied. The counter-claim relates to events after the conclusion of the suit and has nothing to do with the substantive claim. In his evidence during the trial the Respondent produced an agreement dated 20.2.1993 and one of the conditions of that agreement was that any party breaching the agreement would "**pay the innocent party twice the balance of unutilized consideration**." The unutilized consideration was equivalent to Ksh.29,000/- and twice that amount would have been Ksh.58,000/- the eventual amount given in Judgment. I do not see from the draft defence filed that there would have been any serious defence to the claim in the Plaint.

12. It is my understanding that the principles governing setting aside of default judgments were well set out by Lord Wright in Evans vs Bartham [1937] AC 473 when he stated thus;

"In a case like the present, there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to it aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication……. Here the Applicant shows merits….He clearly shows an issue which the court should try…….The court might also have regard to the Applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the court in its discretion is empowered by the rule to impose."

13. I have said elsewhere above that there may not be a good defence to the suit based on the agreement between parties but one other issue has caused me great concern and apprehension in this case; upon obtaining judgment for Ksh.58,000/- the Respondent very quickly commenced proceedings to sell the Appellant's land without attempting other modes of execution for a simple money decree. The land is ½ acre and the purchase price was Ksh.90,000/- which coincidentally was nearly the same as the decretal amount plus interest and costs. I am not certain that this was the proper manner to recover a money decree without other options. This point was however not pressed by the advocate for the Appellant and all I should say is that land being a sensitive item and a means of livelihood to rural folk should be the last item to be sold in execution of a decree arising from anything other than a charge to that land and where the land is offered as security. I say this well aware of related issues regarding execution of decrees but that is a matter outside the realm of this Judgment.

14. In closure, I must say that one would look to the Appellant with sympathy for loss of her land but on the facts and the law as I understand it, the Appeal is without merit for all the reasons expressed above.

15. The Appeal is dismissed but costs shall not be paid to the Respondents who by his conduct which has been expressed above, deprived the Appellant of all her land and cannot and should not now be allowed to pursue her for a penny more.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF FEBRUARY 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

N/A Advocate for the Appellant

Mr. Mwanzia Advocate for the Respondent

ISAAC LENAOLA

JUDGE