REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 73 of 2002

DANSON KIHARA KAIRU……...……..APPLICANT

Versus

JAMES MBUGUA KAIRU…….……RESPONDENT

(An appeal against interlocutory judgment entered on 30/08/00, Judgment dated 10/11/00, and Ruling dated 28/02/01 by Resident Magistrate J.B.A. Olukoye in the Senior Principal Magistrate Civil case No. 317 of 2000.)

JUDGMENT

The Respondent who was the Plaintiff in the Lower Court by his plaint sought judgment against the appellant that the appellant held in trust half of the property *LOC2/KANDERENDU/661* the appellant was served in the summons and plaint on the 7th August 2000. He failed to file a Memorandum of Appearance had on 3rd 30th August 2000. Interlocutory judgment was entered against him. The case proceeded for hearing on the basis of formal proof on the 5th October 2000. The appellant was also served with a hearing notice for that hearing. The respondent gave evidence to the effect that the appellant was his elder brother and that their late father had left half the suit property to be held by the appellant in trust for the Respondent. He stated that was the condition on which the appellant was registered as the owner of that property. That evidence was supported by the evidence of pw2 who was the brother to both the appellant and the Respondent. The appellant at the Lower Court filed an application for setting aside the exparte judgment. It ought to be noted that after the formal proof judgment was entered for the Respondent to the effect that the respondent was awarded half of the suit property. The appellant was successful not with his application to set aside judgment. At the time of hearing his application the respondent had already sub-divided the suit property and had obtained a title in his name. By that application to set aside the appellant alledged that he had not been served with the summons. He also faulted the judgment that had been given for division of the suit property when infact the suit property had a caution lodged against it. The Lower Court found that the appellant had been served in making that ruling the court relied on the affidavit of service which the court noted had not been controverted. The appellant being agreed by the dismissal of his application to set aside judgment filed this appeal. The appellant in that appeal has brought the following grounds of appeal:-

1. The Honourable learned magistrate erred in law and in fact by proceeding to enter interlocutory judgment without first ascertaining the issue of service.

2. The learned magistrate erred in law and in fact in proceeding to determine a matter when she had no

jurisdiction to do so.

3. The learned trial magistrate erred in law and in fact in entertaining a suit that was based on trust when she had no jurisdiction to deal with the same.

4. The learned trial magistrate erred in law and in fact in proceeding to hear the plaintiff's case when the rules of procedure had not been complied with.

5. The learned trial magistrate erred in law and in fact in proceeding to rule that service had been effected while in deed no service had been effected upon the appellant.

6. The learned magistrate erred in law and in fact in proceeding to enter judgment based on trust while no trust was ever proved.

7. The learned trial magistrate erred in law and in fact in ordering the *removal of a caution on the suit land while the cautioner was indeed not joined as party to the suit.*

8. The learned magistrate erred in law and in fact in failing to set aside exparte judgment and granting stay of execution when indeed the facts adduced and stated grounds warranted granting of such orders.

9. The learned magistrate erred in law and in fact in proceeding to award the Plaintiff half share of land parcel No. Loc. 2/Kanderendu/661 while indeed he had no claim over the said land.

In respects of grounds No. 1, 5 and 8 the court would respond by stating there was an affidavit of service and in deed that affidavit of service was not controverted by the appellant. The appellant did not cross examine the process server. This court therefore finds that service of summons was not challenged by the appellant. In this regard the court relies on the case of *Baiywo Bach (1986-1989) EA 27* .

"*There is qualified presumption in favour of the process server, and the burden lies on the party questioning it (MB Auto Mobile v Kampala Bus Service (1966)EA 480 approved). On that basis it must be accepted that the process server served the summons on the appellant's son-in-law."*

In respect grounds No. 2, 3 ,6 and 9 the same challenged the jurisdiction of the magistrate in hearing the matter. It is worthy to note that these grounds were not raised by the appellant at the hearing of his application to set aside judgment. However in response this court finds that section 159 of The Registered Land Act that section provides as follows:-

Civil suits and proceedings relating to the title to or the possession of ,land, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court or where the dispute comes within the provisions of section 3(1) of the Land disputes tribunals accordance with that part.

That section grants power to the magistrate to hear matters relating to trust for property valued at pounds 25,000/= which translates to Ksh. 50, 000/= since the appellant did not raise these issue at the Lower Court there is no evidence before court to show whether the suit property was valued for more than Ksh. 50,000/= accordingly those grounds also fails. This finding is supported by the judgment of the court of appeal in the case of *Francis Munene Paul Muthuita V Milka Wanoe W/o Paul Muthuita, John Nyamus S/O Paul Muthuita And George Mwaniki W/o Paul Muthuita(1982-88) 1 KAR 42.* The court of appeal in respect of section 159 had the following to say: *The jurisdiction of the resident magistrate was derived from s159 (now repealed) of the Registered Land Act. Where the Resident Magistrate had jurisdiction under that section by virtue of the value or location of the subject matter, his jurisdiction was as wide as that of the High Court.*

Judgment therefore of this court is that this appeals must and does fail and the same is dismissed with

costs to the Respondent. But perhaps before ending this judgment the court would wish to say that ground No. 4 was not easily understood by this court and the appellant did not elaborate on its meaning at the hearing of the appeal. Similarly ground No. 7 is rejected by this court because the appellant by that ground makes a plea on behalf of the cautioner who was not a party to the suit. Such a party cannot therefore be said to be aggrieved by the order of the Lower Court. The court therefore does not hesitate as stated herein before to dismiss this appeal with costs to the respondent.

Dated and delivered at Nyeri this 27th day of July 2007.

MARY KASANGO

JUDGE