REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL 17 OF 1994

M'IKIUGU M'MURITHI ……..…….....……...…….. APPELLANT

V E R S U S

MUCHEKE MURITHI ……..……..…….....…….. 1ST RESPONDENT

SILAS MICHENI ……..……..……. 2ND RESPONDENT

ELIAS MURITHI ……..……..…….. 3RD RESPONDENT

(An appeal from the Ruling of Mary Mugo SPM on 24th January, 1994 in Meru CMCC No.552 of 1990)

J U D G M E N T

The Respondents in this appeal who were the plaintiffs in the main suit instituted proceedings against the appellant seeking, among other things, the sub-division and transfer of certain parcels of land.

The suit was heard partly exparte and judgment in favour of the respondents given. Being aggrieved the appellant sought to have the judgment set aside. The application was dismissed on 24th January 1994. Yet again the appellant was not satisfied and filed the present appeal challenging the ruling dismissing his application for setting aside the judgment. In the appeal he has cited 4 grounds which were reduced to three after learned counsel for the appellant abandoned the second ground. The three grounds left are, in summary;

1) That the trial magistrate erred in failing to find that there was no proper service.

2) That the decision of the court below was not supported by evidence.

3) That the trial magistrate relied on inconsistent and contradicting evidence.

I do not see the relevance of the last two grounds. Arguing the appeal on behalf of the respondents, counsel submitted that the trial magistrate judicially exercised her discretion in dismissing the application. He also maintained that the appellant was duly served.

I have duly considered these arguments. There is no controversy that the appellant was not represented or

present towards the end of the hearing of the suit in the lower court. The appellant was represented when the key witnesses, PW1 and PW2 testified. The main issue is whether the court below erred in refusing to set aside the judgment entered in favour of the respondents. When PW4, Gabriel Ndege Nathan, the Chief, testified on 10th March 1993 neither the appellant nor his counsel was in attendance. The respondent's case was closed and no evidence was called by the appellant.

The only quarrel the appellant has with the proceedings of 10th March, 1993 is that he was not aware of the same. The court below (Mugo, SPM) found no reason to set aside the judgment that was entered as a result. That judgment has been described as *exparte*. What then constitutes an *exparte* judgment? Black's Law Dictionary defines the term "*exparte*" to mean;

"***On or from one party only, usually without notice to or argument from the adverse party".***

To the extent that the appellant did not call witnesses or himself testify, the judgment may be described as *exparte*. Indeed the trial court approached the issue as if it proceeded exparte in accordance with order 9A of the Civil Procedure Rules. This is clear from the judgment which is a clear departure from the requirement of Order 20 rule 4 of the Civil Procedure Rules. It does not set out the case that was before the court, the points for determination, the decision therein, and the reasons for such decision. How does a court exercise its discretion to set aside an *exparte* judgment?

The applicable principles have been the subject of a long line of authorities, the leading ones being **Shah v Mbogo** (1967) EA 116, Mbogo v Shah (19680 EA 93, to which I was referred and the most recent case of **C.M.C. Holdings Ltd v Nzioki** (2004) I KLR 173, where the law was stated as follows;

"***We are fully aware that in an application before a court to set aside exparte judgment, the court exercises its discretion in allowing or rejecting the same. The discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition".***

The main issue in this appeal, therefore, is whether the court below judiciously and upon reason exercised its discretion in rejecting the appellant's application to set aside the *exparte* judgment. The lower court in dismissing the application expressed itself as follows;

"***So far I do not find any good reason to set aside the said Judgment of the learned Senior Resident Magistrate. I decline to confirm the order staying execution. I direct that execution shall proceed to facilitate finalization of this case. I grant applicant 28 days Right of Appeal. Costs to the Respondent".***

Indeed the above constitutes the whole ruling subject of this appeal, save for only one sentence. The court did not consider the submissions or indeed the application and the grounds relied upon by the appellant. But of greatest significance, the learned magistrate misdirected herself by failing to consider whether or not there was proper service in the primary suit. Service of the hearing date was the crux of the matter, yet the learned magistrate made no mention of it at all. She proceeded to dismiss the application dated 10th September, 1993 so casually that she could not have been exercising her discretion judiciously and with reason. For that reason this appeal must succeed. I was asked by learned counsel for the appellant to decide the matter in question finally. I propose to do so under the provisions of Section 78(1) of the Civil Procedure Act.

The appellant brought Chamber Summons on 10th September, 1993 seeking, in the main two substantive orders, namely stay of execution pending hearing and determination of the application and an order setting aside the *exparte* judgment and all subsequent orders made against the appellant. That application was based on the grounds that the hearing of the suit after the adjournment of 20th January 1993 proceeded without notice to the applicant.

In their replying affidavit the respondents maintained that the hearing date of 10th March 1993 was duly served on 12th February, 1992 upon one Salesio Muriithi, a clerk in the firm of M/S Kirugara & Co. Advocates, then on record for the appellant. The return of service filed in court on 30th September 1993 is part of the supplementary record of appeal. The service was effected by an advocate of this court, Kiautha Arithi, who swore that he served the said clerk, Salesio Muriithi, who refused to sign the original.

It is the respondent's contention that at this time his then advocate had relocated from Meru and therefore there was no point serving his clerk.

The trial magistrate (J. E. Ashioya, Ag SRM – deceased) in a very short and unreasoned judgment found for the respondent without considering the evidence on record or the defence filed by the appellant. He merely said;

"***The defendant did not turn up on 10.3.93 to conduct their (sic) defence. I therefore enter judgment for plaintiffs as prayed in paragraph 5(a) of the amended plaint*".**

The learned magistrate did not satisfy himself before proceeding with the hearing *exparte* on 10.3.93 that the defendant was duly served. Was service, if any, on the clerk of the appellant's erstwhile advocate proper? Service on the clerk was in clear contravention of order 5 rule 9 of the Civil Procedure Rules. There is no evidence that the clerk was an authorized agent of the appellant. For that reason I find that the appellant was not served and therefore was not aware of the hearing of 10th March 1993.

In the result this appeal is allowed with costs to the appellant, the judgment entered on 28th April 1993 is set aside. The case is remitted to the Chief Magistrate for retrial on priority basis in view of the age of the case. In the meantime the orders of stay granted on 12th May 1994 are extended pending the hearing and determination of the suit by the court below.

Dated and delivered at Meru this 21st day of September, 2007.

WILLIAM OUKO

J U D G E