



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 8 of 2003

(Appeal arising from the decision of the Senior Resident Magistrate’s

court at Mumias in SRMCC. No.123 of 2003 delivered

on 10-12-02, (C. M. MWEBI, ESQ., SRM)

VICTORIA KHAKHUBI

LUCAS AFUBWA

SYLVESTER KASALA

JAVAN

NYONGESAAPPELLANTS

V E R S U S

JOSEPH MALOBA

ODHIAMBORESPONDENT

J U D G E M E N T

In their appeal to this court from the decision of the Senior Resident Magistrate, Mr. C. M. Mwebi at Mumias, dated 10.12.02 made in Mumias S.R.M.C.C. No.123 of 2002, the Four Appellants, Messrs Victoria Khakhubi, Lucas Afubwa, Sylvester Kasala and Javan Nyongesa, submitted in their Memorandum of Appeal dated 17-1-03 that the trial Magistrate erred in dismissing their application because he:-

- (1) had no due regard to the issues in the draft defence.*
- (2) failed to find that there was no proper case before the court.*
- (3) failed to appreciate the prejudicial effect of the dismissal and that;*
- (4) the fact that the dismissed application was filed timeously was not considered.*

The record of Appeal shows that the Respondent had sued the Appellants in the lower court in Mumias SRMCC No.123 of 2002 seeking an order for “**specific performance**” and their eviction from land parcel No. N/wanga/Lung’anyiro/249. No defence was filed to the suit within the stipulated time

and as a result a request for Judgement was made on 14-5-2002. Ex-parte judgement was entered on 17-5-2002 against all the appellants. No ex-parte hearing took place and therefore no evidence was adduced prior or subsequent to the judgement.

On 11-6-2002, the Appellants applied by way of Chamber Summons of that date seeking orders for the setting aside of the ex-parte judgement and (leave) to file defence, a draft of which was annexed. It was heard inter-partes on 5-10-02. In his Ruling dated 10-12-02, the trial magistrate dismissed the application with costs.

The record clearly shows that the claim in the suit in the trial court was for trespass to land. Under section 3(1) of the LAND DISPUTES TRIBUNALS ACT (NO.18 OF 1990), jurisdiction is vested in the Land Disputes Tribunal and not in the trial court. The trial magistrate therefore acted without jurisdiction and his judgement and dismissal order were null and void.

Even if the trial court had jurisdiction, which it did not have, there was no basis in the absence of evidence for the order of eviction. Unlike a claim for a liquidated sum in respect of which a judgement can be entered, an order for eviction requires the plaintiff to adduce evidence to show that he is legally entitled to the order. In the absence of such evidence, a court of law cannot on bare allegations in pleadings give such judgement. This was the case here.

The Appellants' complaint in this appeal is that the trial court erred in dismissing their application seeking to set aside the exparte judgement entered on 17-5-2002 against them. They had annexed a draft defence. The trial court rejected and dismissed the application on the ground that "no ground has been adduced for setting aside the ex-parte judgement. The Defendants (appellants) were served and did not enter any defence....."

Even assuming that the trial magistrate had jurisdiction to try the case, the dismissal of the application by the appellants was not premised on proper considerations. Under Rule 10 of Order IXA of the Civil Procedure Rules, "*where judgement has been entered under the order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.*" The reasons for the failure to file defence were stated. The draft defence showed that there were triable issues. The Plaintiff and the draft defence both showed that the court had no jurisdiction. The trial court had discretion to set aside the exparte judgement and it erred in not exercising that discretion properly (*see Maina v. Kariuki (1984) KLR 407 and Patel v. E.A. Cargo Handling Service Ltd. (1974) E.A. 75* which were referred to by Mr. Migosi, learned counsel for the appellants).

I find merit in the appeal. I allow it. I set aside the Judgement dated 10-12-02 in Mumias SRMCC No. 123 of 2002. The Appellants shall have the costs in the appeal and in the trial court.

As an obiter dicta, the trial court shall consider referring pursuant to Rule 7 of the Land Disputes Tribunals (Forms and Procedure) Rules 1993 the dispute between the parties for determination by the appropriate Land Disputes Tribunal.

Dated, signed and delivered at Kakamega this 5th day of May, 2006.

G. B. M. KARIUKI

J U D G E