



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Appeal 222 of 2002

(Being an appeal from the ruling of Resident Magistrate (P. K. SULTAN) in the Resident Magistrate's Court at Nakuru)

MARGARET W. KAMBO.....APPELLANT

VERSUS

DANNIS WILLY MICHUKI.....RESPONDENT

JUDGMENT

The respondent was the plaintiff in the aforesaid case where he claimed that he was the registered owner of a property known as **NAKURU MUNICIPALITY BLOCK 9/7** where he had leased a shop to the appellant. He stated that their lease agreement expired on 30th May 2001 when the appellant was supposed to vacate therefrom. He filed a suit seeking vacant possession of the said premises and effected service of the court process upon the appellant but the appellant failed to enter appearance or file any defence and the respondent's matter proceeded to formal proof. The trial magistrate entered judgment in favour of the respondent and declared that the appellant was in illegal occupation of the suit premise and ordered his eviction therefrom. The judgment was entered on 4th September 2002 and on 9th September 2002 the appellant filed an application seeking to set aside the said judgment on the ground that she had not been served with summons to enter appearance. The said application was not included in the appellant's record of appeal and the court is not in a position to know the exact orders which were sought therein. I may observe at this juncture that the said application ought to have been part of the record of appeal.

Among the averments put forward by the appellant in her application was that upon entry of the said judgment, the respondent instructed some people who went to the suit premises and started throwing out her goods and when she enquired from the said people as to why they were doing so, they informed her that they had been given a court order to evict her. The appellant further stated that she closed her shop at about 6.30 p.m. and went home and on the following day at about 6.30 a.m. she was telephoned by a good Samaritan who informed her that there were some people in her shop and they were removing her goods.

In response, the respondent stated that the applicant had been served with summons to enter appearance and an affidavit of service had been filed to that effect. He further stated that when auctioneers went to serve the appellant with an eviction notice on 7th September 2002, the appellant opted to remove her goods from the shop and left behind only a few items and an inventory to that effect was prepared and signed. The said inventory was attached to the respondent's replying affidavit. One Paul Ole Yiaile trading as Nasioki Auctioneers swore an affidavit in support of the respondent's averments. Three other people swore affidavits to corroborate the averments made by the respondent and Paul Ole Yiaile.

In her ruling, the learned trial magistrate stated that she was not convinced that the appellant had not been served with summons to enter appearance and gave her reasons for disbelieving the appellant. She further observed that the appellant had not annexed any draft defence to her application so as to convince the court that she had a meritorious defence to the respondent's claim. She further observed that there was no evidence that the appellant's goods had been unlawfully removed from the suit premises, considering the copy of an inventory signed between the parties which was on record. She therefore dismissed the appellant's application. That dismissal gave rise to the present appeal.

The appellant, in her memorandum of appeal, stated inter alia that the learned magistrate erred in law and in fact in refusing to set aside the *ex parte* judgment by misdirecting herself on the principles applicable in setting aside such judgments. She further stated that the learned trial magistrate erred in law and in fact by failing to hold that execution of the trial court's judgment was unlawful despite overwhelming evidence to the contrary.

In his submissions, Mr. Karanja Mbugua for the appellant faulted the learned trial magistrate for holding that the appellant had not satisfactorily shown to the court that she was not served with the plaint and summons to enter appearance. He further submitted that the respondent was not the actual landlord of the appellant, it was the respondent's brother who was the owner of the suit premises. He added that the manner in which the appellant was evicted from the suit premises was unlawful as no decree to that effect had been extracted as at the time of such eviction. The decree was extracted on 12th July 2004, he claimed. Mr. Karanja sought to rely on the Court of Appeal decision in *GUSII MWALIMU INVESTMENT COMPANY LTD & 2 OTHERS VS MWALIMU KISII HOTEL LTD* Civil Appeal No. 160 of 1995 and on *WILDLIFE LODGES LTD t/a LANDMARK HOTEL VS JAKARANDA HOTEL LTD* HCCC 521 of 1999 (unreported). In the *GUSII MWALIMU INVESTMENT* case, the court found that the landlord had unlawfully evicted the tenant and put someone else in possession of the suit premises and ordered that the third party be evicted and the lawful tenant reinstated to the suit premises. Mr. Karanja urged the court to hold likewise in this matter because the respondent had argued in the lower court that the suit premises had been occupied by a third party.

Mr. Chuma Mburu for the respondent opposed the appeal and submitted that the trial magistrate had properly exercised her discretion in rejecting the appellant's application to set aside the *ex-parte* judgment. He further pointed out that the respondent was not evicted from the suit premises but had moved out on her own and carried most of her merchandise from the shop. An inventory of the goods that she left therein was taken and she signed the same, he submitted. Counsel further faulted the appellant's appeal on the ground that the record of appeal was incomplete, the appellant having failed to include a copy of the application that gave rise to the ruling which was the subject of this appeal.

I have carefully considered all the submissions that were made by both counsel in this matter. In her ruling, the learned trial magistrate exercised her discretion in considering the appellant's application to set aside the *ex-parte* judgment. It is trite law that an appellate court will not interfere with the exercise of discretion by a trial court unless it has been shown that the trial court misdirected itself and thereby arrived at a wrong decision. It was so held in *WAWERU VS NDIGA [1983] KLR 236*. The learned trial magistrate gave her considered reasons for rejecting the appellant's application. It has not been shown that she misdirected herself in reaching her decision.

There was evidence to suggest that the appellant was aware that her tenancy in the suit premises had come to an end and that is why she had instructed her advocates to draft a new lease and forward the same to one Mr. Charles Kimita Willie whom she said was the lawful owner of the suit premises and whom she recognised as her landlord. The lease was not renewed and she was advised to vacate the suit premises and hand over vacant possession to the landlord.

Secondly, several affidavits were sworn by at least four people to the effect that the appellant, upon receiving the eviction notice, removed most of her items from the suit premises and signed an inventory regarding the ones that she left behind. The trial magistrate further observed that on 11th September 2002 she issued temporary orders reinstating the appellant to the suit premises but upto the time when the application was argued, the appellant had not made any application seeking to have the respondent

punished for contempt of court if he had indeed refused to reinstate the appellant back to the suit premises as ordered. In her view, that went to show that the appellant had voluntarily chosen to move out of the suit premises.

The trial magistrate was also right in stating that the appellant had not annexed to his application any draft defence to show that there were triable issues in the matter. This is an important issue in considering an application to set aside an ex parte judgment, see *MAINA VS MURIUKI* [1984] KLR 407.

In the circumstances of this case, I find that the two authorities that were cited by the appellant's counsel are not applicable because there was no evidence that the appellant herein was unlawfully evicted from the suit premises. All in all, I find that the trial magistrate exercised her judicial discretion properly and there is no basis for setting aside her judgment. I therefore dismiss this appeal with costs to the respondent.

DATED, SIGNED and DELIVERED at Nakuru this 28th day of September, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Karanja Mbugua for the appellant and N/A for the respondent.

D. MUSINGA

JUDGE