REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 69 of 1998

LABAN MUKANGAI

MIRIAM

KHAVOTSI .....APPELLANT

VERSUS

SIMON

MUSEVE .....RESPONDENT

JUDGMENT

The two appellants, Laban Mukangai and Miriam Khavotsi, filed appeal in this court on 8.8.2000 against the ruling of the District Magistrate II R. Oganyo delivered on 21.10.98 at Kakamega in the SPM C.Civil Case No. 31 of 1998 in which they (the appellants) were the Defendants and one Simon Museve Shibwa was the plaintiff. The appellants had applied to the District Magistrate for setting aside of the ex parte judgment entered in the said suit with a view to getting an opportunity to file defence. They had also sought an order for stay of execution of the decree and return of the property attached pursuant to the said decree.

The trial magistrate did not find merit in the application and she therefore dismissed it on that ground.

The suit in the lower court concerned marriage. The Respondent, who was the plaintiff in the lower court, had sued the 1st Appellant and the 2nd Appellant who were the 1st and 2nd Defendants respectively for dissolution of marriage contracted in 1980 between him and the 2nd Defendant under the African Customary Law and for custody of the issues of the said marriage and refund of dowry consisting of 4 heads of cattle and shs. 1,000/- under Isukha customary law as well as costs of the suit.

The plaint which was not elegantly drafted did not bring out the capacity in which the dowry was paid to the 1st Appellant as the relationship of the 1st and 2nd Appellants was not pleaded. It seems however, that the marriage broke down later and the Respondent sought to recover the dowry he had paid.

On 22.4.98, there was ex parte hearing of the suit. Mr. Amasakha, learned counsel for the respondent, appeared and called six witnesses. Judgment was delivered on 19.5.98 in favour of the plaintiff. On 4.9.98, the Appellant filed the chamber summons application for setting aside of the judgment. The application was dismissed by the court ruling of 21.10.98 giving rise to the present appeal. In his affidavit in support of the application to set aside the ex parte judgment, the 1st Appellant averred that he became aware of the suit when his property was attached ostensibly in execution of the decree. He

admitted that he had been served with court papers (summons) and had signed acknowledgement but was under the mistaken belief that the papers related to Kaka mega SPM Juvenile criminal case No. 272 of 1998 in which he had been a witness and Respondent had been charged with wilfully neglecting and abandoning his children with the 2nd Appellant. The 2nd Appellant, in her affidavit in support of the application for setting aside the ex parte judgment had admitted having received court papers which she thought related to the said juvenile case No. 272 of 1998.

Mr. Amasakha, Advocate, in his replying affidavit in the lower court in opposition to the Appellant's application to set aside averred that he had himself served the 2nd Appellant with the summons to enter appearance while a process server had served the 1st Appellant.

When the appeal came up for hearing before me on 11.2.2004, Mr. Akwala Advocate, appeared for the Appellants while Mr. Amasakha Advocate appeared for the Respondent.

Mr. Akwala contended that the lower court's finding that there was proper service of summons to enter appearance upon the Appellants was wrong because service was disputed and "in view of the facts on record and the circumstances of the case". Mr. Akwala argued that the trial magistrate had failed to consider if the Appellants had a defence to the claim inspite of the fact that there was a draft statement of defence which, in his view, raised triable issues. He submitted that the trial court ought to have given the Appellants the opportunity to be heard on merit. He relied on two authorities namely Philip Keptoo Chemwolo and another versus Augustine Kubede, C.A. Civil Appeal No. 103 of 1984 (unreported) and Tree Shade Motors Ltd versus D.T. Dobie & Co. (K) Ltd. C.A. Civil Appeal No. 38 of 1998. (unreported). In sum, the 5 grounds of appeal contained in the memorandum of appeal dated 28.10.98 were thus argued together. On his part, Mr. Amasakha opposed the appeal. He submitted that the Appellants had not denied having been served with summons to enter appearance. He conceded that the Respondents having ignored the summons must take the consequences thereof.

The decision I am called upon to make is whether the lower court was right in dismissing the Appellants application to set aside the ex parte judgment and decree.

The court has discretionary power under rule 10 of Order IXA of the Civil Procedure Rules to set aside or vary ex parte judgment and any consequential decree or order upon such terms as are just. This rule does not limit the power of the court to set aside ex parte judgment. The jurisdiction to do so is unfettered. But courts have over the years developed principles on which such discretionary power ought to be exercised. The exercise of this discretionary power is intended to mete out justice to litigants. In exercising this discretionary power the court will examine the circumstances of each particular case. It is now accepted principle that "unless and until the court has pronounced a judgment on merit or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure," see Lord Atkin in EVANS vs BARTLAM(1937) AC 473 at page 480. A consistent set of factors to be considered in the exercise of this court's discretionary power has developed which inter alia show that where a regular judgment has been entered, the court would not usually set it aside unless it was satisfied that there were triable issues which raised prima facie defence that should go to trial. In effect, a regular judgment would be vacated on grounds other than non-service of summons (see Kingsway Tyres and Automart Ltd versus Rafiki enterprises Ltd(C.A. Civil Appeal No. 220 of 1995, un reported). This means that notwithstanding the regularity of the judgment, the court may set it aside if satisfied that the defendant has shown he has a reasonable defence on the merits. It seems settled law now that the criterion is not that an applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default such as mistake, accident, fraud, or the like. These are but factors the court will have regard to while exercising its discretionary power whether to set aside an ex parte judgment or not.

In the present application the lower court failed and erred in the process in my view, to consider whether the Appellants' intended defence raised triable issues. In the circumstances of this case, and on the basis of the authorities, I am constrained to give the appellants an opportunity to be heard on merit as there are triable issues disclosed by their statement of defence. Accordingly, the appeal is allowed. The order of the lower court dismissing the Appellant's application to set aside the ex parte judgment is set

aside and in its place is substituted an order allowing the application to set aside and giving the appellants 30 days within which to appear and thereafter file defence within the period prescribed by the Civil Procedure Rules.

The thrown away costs shall abide the result of the suit in the lower court. It is so ordered.

Dated at Kakamega this 15th day of October 2004

G.B.M. KARIUKI

J U D G E