



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 338 OF 2000

SAMUEL THIONGOAPPLICANT

VERSUS

GEORGE KIMANI & ANOTHERRESPONDENT

JUDGMENT

On 28th October 1999 the plaintiffs filed a suit in the court of the Principal Magistrates Nairobi to claim from the defendant a total sum of Kshs.387,523/= in respect of payment to the defendants for the purchase of plot number 9042/6/6 and 9042/6/8 or on account of expenses incurred in erecting housing structures on the said plots over which it came out later that the defendant had no title.

Though the defendant filed a memorandum of appearance to this suit within the prescribed period, he filed no defence thereto.

Consequent upon these developments the plaintiffs filed an application for entry of an interlocutory Judgment which was entered on 1st December, 1999.

Meanwhile, the defendant who had been acting in person, acquired services of a firm of lawyers known as Messrs Kimani & Muchuki, Advocates who then filed in court an application under a certificate of urgency for setting aside the interlocutory judgment and to be allowed to file defence out of time.

There was also a prayer for the stay of execution of the decree.

The application was supported by an affidavit which deponed about ignorance of legal procedures by the defendant and questioned the validity of the agreement subject to the suit.

This application was placed before the Senior Principal Magistrate (J.R. Karanja Esq). On 9th June 2000 for hearing and a ruling was made thereon on 13th June 2000 dismissing the application; This is why there is an appeal filed to this court.

The grounds of appeal attack the learned magistrates ruling because he failed to apply laid down principles in setting aside exparte judgment; that he failed to appreciate that delay in filing defence was not inordinate; that he failed to consider that the defendant had a good defence; and that he erred in making a finding on matters not pleaded.

The appeal was placed before this court on 22nd April 2002 wherein counsel for the defendant explained the grounds on the memorandum of appeal and said that if the learned magistrate had considered that the agreement subject to sale of the plots was verbal, which was against Section 3 of the law of contract Act, Cap 23 Laws of Kenya; or that if he put the interest of justice first, then he would not

have dismissed the application.

Counsel for the plaintiffs on the other hand, opposed the application saying the learned magistrate arrived at a good decision and made no error.

I have heard and recorded submissions of counsel for both parties on this appeal and considered them.

Under order 9A rule 10 of the Civil Procedure Rules, the court has an unfettered discretion to do justice to both parties but such discretion should not be exercised to assist anyone of the parties to delay the cause of justice – **Pithon W Maina v Mugiria [1982 – 88] 1 KAR 171.**

The application before the learned resident magistrate was based on the fact that the defendant was not conversant with legal procedures and/or that he had a good defence in that the agreement entered into for the sale of the plots was void since it was not in writing as required by law.

This latter argument would have been valid if the suit filed in court was for the enforcement of the contract but here the magistrate was dealing with a case of refund of the purchase price and damages for expenses incurred in putting up structures on the said plots which were later demolished by the Nairobi City Council, the rightful owner of the plot. In that even, Section 3 of the Law of Contract Act would not apply.

And as regards the defendant's ignorance of legal procedures, the simple maxim is "ignorance of the law is no defence."

When the magistrate perused the proposed defence, he was of the view that it had no merit and I dare add that having also perused that defence, allowing the application to set aside interlocutory judgment on it would simply be a means of delaying the course of justice, and that the learned Senior Principal Magistrate exercised his discretion correctly in refusing to set aside the said interlocutory judgment.

I dismiss this appeal with costs.

Delivered this 9th day of May, 2002.

D.K.S. AGANYANYA

JUDGE