



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELCA NO. 21 OF 2017

FIRDAUS ABDALLA KIBWANA..... APPELLANT

VERSUS

ABDULRAUF BIN NASSER..... RESPONDENT

JUDGMENT

(Appeal against an order declining to set aside judgment; matter having proceeded in the absence of the appellant as defendant in the suit before the Magistrate's Court and judgment entered for the respondent; appellant applying to set aside the judgment asserting that she was never served with the hearing notice; Magistrate not persuaded by these reasons and declining to set aside the judgment on the basis of an affidavit of service stating that the appellant was served; affidavit of service not annexing what was served and one cannot tell whether what was served actually bore the date for the hearing of the suit; affidavit of service merely stating that an occupant of a house was served thus not conclusive that it was the appellant who was served; erroneous for the Magistrate to have come to the conclusion that the appellant was properly served; appeal allowed; ex parte proceedings and the subsequent judgment set aside; matter to commence de novo)

1. Pursuant to a plaint filed on 20 June 2013, the respondent, through one Ibrahim Nasoor, who was said to be holding his power of attorney, filed suit against the appellant, and pleaded that he owned a house on the land parcel Mombasa/Block XVII/508. He averred that the appellant had without a colour of right entered the house and was illegally occupying it. In the suit, he asked for an order of vacant possession. The appellant filed defence in person. It is a rather convoluted pleading, but from what I can discern, he pleaded that the respondent and Ibrahim Nassor, are brothers of his mother Fathiya Nassir Issa. He pleaded that Fathiya was mentally ill and was living in the house with him (the appellant). He seemed to infer that Fathiya had a stake in the subject property and stated that Fathiya's family had 9 siblings all with a share in the suit property. He pleaded that the register of the land did not fully comply with the law of succession. He further pleaded that there was a case before the Kadhi's Court touching on how the suit property should be shared out, being Kadhi's Court Succession Case No. 106 of 2013.

2. The matter proceeded for hearing on 22 April 2016 before Hon. Njagi, Senior Principal Magistrate, in absence of the defendant who did not attend court. The respondent's said attorney, Ibrahim Nassor Issa testified on behalf of the respondent. He stated that the respondent lived in Dubai and needed the house back so that he can carry out renovations, and despite being asked to vacate, the appellant had refused to do so. The plaintiff's case was marked closed and the date of 29 April 2016 given for submissions. On 29 April 2016, the date of 20 May 2016 was given for judgment. There is no record of the matter going to court on 20 May 2016 nor on any subsequent date, until judgment was eventually delivered on 21 July 2016 by Hon. Rabera, on behalf of Hon. Njagi (who appears to have gone on transfer). Judgment was delivered in the presence of counsel for the respondent/plaintiff and in absence of the appellant. The judgment was in favour of the respondent and he quickly moved to execute it so as to evict the appellant.

3. The appellant then filed an application dated 8 September 2016 seeking orders to stay execution and have set aside the judgment of 21 July 2016. Within the application, she complained that all that she had ever been served with was a mention notice dated 19 November 2013 and only came to be aware of the judgment after the respondent moved to execute. The respondent opposed that application and contended that the appellant was served but failed to attend the hearing. He stated that the appellant was served with the notice of delivery of judgment from the court. The respondent also filed an application of his own where he inter alia sought orders to have the appellant ordered to vacate the premises. Within that application, he mentioned that the appellant had been evicted, but upon filing the application dated 8 September 2016, she obtained interim orders and regained possession of the suit premises.

4. The two applications were consolidated and heard together and a single ruling delivered on 16 August 2017. It is that ruling which is the subject of this appeal. In the ruling, the Honorable Magistrate found as follows on the allegation that the appellant was not served :-

“According to the record, the matter came up for hearing on 22.04.2016 but the defendant was absent. It appears from the affidavit of service of Gordon Odhiambo, a court process server sworn and filed in court on 21.04.2016 that the defendant was duly served with a hearing notice but did not attend court. The contents of this affidavit have not been challenged. The defendant has not in his affidavit in support to the application made any attempt to explain his absence in court on this day. He has only made general

allegations that he was indisposed for quite some time since 2013 without placing any material before court that this sickness continued until 22.04.2016 hence he could not attend court. What this means is that his failure to attend court on 22.04.2016 has not been explained. I cannot therefore fault Hon. Njagi, SPM who heard this case in his absence.”

5. The Magistrate thus declined to set aside the judgment and proceeded to dismiss the appellant’s application. The respondent’s application was allowed.

6. In this appeal, the appellant is of the view that the Magistrate erred and his decision needs to be overturned.

7. Both counsel for the appellant and respondent filed written submissions to argue the appeal which they fully relied on. I have taken note of these submissions filed.

8. The sole issue that I need to determine is whether the Magistrate was wrong in failing to set aside the judgment. The contention of the appellant was that she was never served with the hearing notice and it was therefore erroneous for the court to have proceeded to hear the matter. She also did state that she was never served with the notice of delivery of judgment.

9. The issue of whether or not service was effected is a question of fact which ought to be discernible from the record. It will be recalled that the Magistrate did hold the view that there was proof of service and referred to the affidavit of service sworn by Gordon Odhiambo, a court process server. I have looked at that affidavit and it states as follows where relevant :-

(i)...

(ii) That on the 21st March, 2016 I received a Hearing Notice which was dated 18th March 2016 from M/S J.O. Magolo & Company Advocates for the plaintiff with full instructions to effect service upon the defendant named herein above who was acting in person.

(iii) That on the same day around 9.00am, I proceeded to the defendant (sic) resident (sic) at Majengo behind Isaac Hardware within Mombasa County, whereupon arrival and stating the purpose of my visit to the house occupant who was well known to me as I had served her with several court documents.

(iv) That she therefore acknowledged service but decline (sic) to sign at the back of my principle (sic) copy which I return to this Honourable Court as duly served.

10. I have serious issues to raise regarding this affidavit of service. First, whatever hearing notice was served was never annexed to that affidavit. If at all there was a hearing notice dated 18 March 2016, nobody knows what date was indicated in that hearing notice, and nobody can tell whether it actually bore the date of 22 April 2016, for the simple reason that the said hearing notice was not annexed to the affidavit of service. We cannot assume, without seeing, that the date in the hearing notice was actually 22 April 2016. It behoved the respondent to demonstrate to court that what was served was a hearing notice for 22 April 2016, and without the hearing notice being displayed, I do not see how the court can be said to have been satisfied that the appellant had been served with a hearing notice for 22 April 2016. Secondly, assuming that there was a hearing notice dated 18 March 2016, and which bore the hearing date of 22 April 2016, was the defendant/appellant served? The process server does not state that he served the defendant. All he says is that he went to the residence of the defendant and found “the house occupant” and it is this “house occupant” who was served. Now, we cannot say unequivocally that “house occupant” and the appellant are the same person. If it was the appellant who was served, what was so hard in describing the person served as the appellant? Why use of the words “house occupant”? Who in fact this house occupant is, is not explained by the process server. I am afraid that with that ambiguity, I am unable to conclusively find that, if at all there existed a hearing notice as claimed, then it was duly served upon the appellant.

11. Before allowing the case to proceed for hearing, in the absence of the appellant, the Magistrate needed to be fully satisfied that the appellant had been served, as it is indeed required of Order 12 Rule 2 (a) which would only allow the court to proceed in absence of a defendant if satisfied “that notice of hearing was duly served.” I do not see how the Magistrate became satisfied that there was any hearing notice that had been served when no such hearing notice had been availed to him at all. I also do not see how the Magistrate became satisfied that the appellant was served when the process server never explicitly stated that the person who was served was the appellant. I am persuaded that the Magistrate was in error in finding that the appellant had been served with the hearing notice. I am further of the finding that the Magistrate who heard the application to set aside fell in error in stating that the affidavit of service was not challenged. The mere statement by the appellant that he had not been served was itself sufficient challenge to the affidavit of service. An interrogation of the affidavit of service, even within the hearing of the application to set aside the judgment, ought to have resulted in the court finding that there were serious question marks on whether or not the appellant had actually been served.

12. From the above discourse, it will be seen that I am persuaded that this appeal must succeed and it does succeed. I do not hesitate to set aside the proceedings of 22 April 2016 and the judgment delivered on 21 July 2016. I further direct that the matter starts de novo.

13. The appellant shall have the costs of this appeal.

14. Judgment accordingly.

DATED AND DELIVERED THIS 21ST DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA