



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 45 OF 2019

BERNARD GITUMA MUNGANIA.....APPELLANT

VERSUS

JAMES MUTHOMI M'ARITHI.....RESPONDENT

(Being an appeal from the ruling of Hon. J. Irura in S.R.M.C.C. 143 of 2012 Nkubu delivered on 2nd November 2018)

JUDGMENT

1. The appellant was the defendant in the lower court where he was sued vide a plaint dated 26/11/2012 seeking specific performance, refund of the part payment plus the agreed liquidated damages or alternatively the executive officer of court be empowered to sign all relevant documents to facilitate sub-division and transfer of parcel no. NKUENE/L.MIKUMBUNE/1319 (the suit land), plus costs.

2. It was the respondent's case that vide an agreement dated 25/06/2012, he entered into a sale agreement with the appellant where he was to get a quarter acre to be excised from the appellant's suit land at a consideration price of Kshs. 280,000. That upon signing the agreement, he paid Kshs. 130,000 which the the appellant acknowledged but he later refused to transfer the said portion to the respondent. That all along, the respondent has been in exclusive use and possession of the suit property.

3. The appellant did not enter appearance, thus interlocutory judgment was entered on 19/12/2012. The matter proceeded for formal proof on 18/01/2013 and the final judgment was entered on 22/2/2013 in favour of the respondent. The appellant filed an application dated 22/05/2018 seeking to stay execution of the decree and to set aside the ex parte judgment. The application was prosecuted by way of written submissions and a ruling was delivered on 2/11/2018 where the trial court dismissed the application with costs to the respondent.

4. Aggrieved by the decision thereof, the appellant filed his memorandum of appeal dated 13/12/2018, raising four (4) grounds that the learned trial magistrate erred in law and fact in;-

“Failing to find that the appellant had a defence that raised triable issues, failing to use her discretion judiciously, failing to consider the weightily issues of law raised by the appellant in respect of the ex parte judgment and deciding the whole application against the weight of evidence”.

5. The appeal was canvassed by way of written submissions. The Appellant vide submissions dated 16/11/2020 where he stated that the trial magistrate erred in considering only the issue of service of summons, yet there were other relevant documents for consideration like the hearing notice and notice of entry of judgments. It is also submitted that the trial magistrate failed to consider that appellant had raised serious triable issues as evidenced in his draft defence. He also submitted that the land is registered in his name and that of his son who is a minor and thus he could not sell the land without involving his son, thus the purported sale is fraudulent. The appellant contends that if the decree is allowed to stand, it would cause great miscarriage of justice.

6. The respondent vide his submissions dated 15/02/2021 stated that the appellant was duly served with summons to enter appearance and the lower court found the same to be proper, thus the judgment entered was regular and the allegation to the contrary has no basis and should be disregarded.

Determination

7. The Civil Procedure Rules donate power to the Court to set aside judgments and the court has unfettered discretion to do so. The provisions of **Order 10 Rule 11 of the Civil Procedure Rules** states that;

“Where judgment has been entered under this order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

8. In **Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR**, the court stated that;

“Judicial discretion is always exercised judiciously and for reasons which are stated. The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the court process. Judicial discretion is never exercised capriciously or whimsically”

9. The question for determination is whether this court should exercise its discretion in favour of the appellant by setting aside the ruling by extension the judgment of the trial court.

10. Firstly, this court has taken into consideration that the judgment which the appellant had desired to be set aside was the one delivered on 22.2.2013. The application to set aside the said judgment is dated 22.5.2018. The almost 5 years delay has not been satisfactorily explained. The appellant did not avail the application and its supporting affidavit of 22.5.2018. However, the ruling of the trial court does capture the contents of the said application. The applicant had apparently made the following averment:

“The applicant only came to learn about this on 8.5.2018”.

11. However, what was captured as a response to that averment by the respondent as seen in page 9 of the magistrates ruling was that:

(i) “The applicant and the respondent agreed on the mode of payment of the balance of the purchase price and the final payment was made on the 14.1.2016 where he annexed a copy of the acknowledgement of receipt thereof.

(ii) The applicant and the respondent agreed that the defendant would effect transfer of the land in accordance with the judgment by the court where he annexed a copy of the said consent letter.

(iii) The defendant/applicant gave the respondent copies of his national identity card, pin certificate and title deed to facilitate transfer of the land which he annexed the said copies of the documents to the replying affidavit”.

12. The records of 27.6.2018 in the proceedings indicate that counsel for the appellant sought leave to put in a supplementary affidavit in response to the replying affidavit of the respondent of which that application was allowed.

13. However, and as noted by the trial magistrate in her ruling of 2.11.2018, the supplementary affidavit was never filed. Thus the appellant did not rebut the averments set forth by the respondent. It follows that not only was the delay of close to five years unexplained, but it appears that the appellant had entered into post judgment consensus with the respondent. The delay is inordinate and inexcusable.

14. I also find that the issue of service was aptly captured by the trial court who noted that the respondent had even offered to avail the process server for purposes of cross examination by the appellant. The appellant did not take up that offer.

15. Finally, I have seen the draft defence which save for the descriptive parts of paragraphs 1 and 2, the other paragraphs contain a general denial as follows:

“The defendant denies the contents of paragraph 4, 5, 6, 7, 8 and 10 of the plaintiff and puts plaintiff to strict proof thereof”. This is certainly a sham defence which raises no triable issues.

16. In the final analysis, I find that this suit is not merited. The same is dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 12TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Ashaba holding brief for L. Kimathi for appellant

Gatari Ringera for the respondent

HON. LUCY. N. MBUGUA

ELC JUDGE