REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO.19 OF 2018

WILLIAM K. LANGAT.....APPELLANT

VERSUS

JOSEPH K. SINDAI.....RESPONDENT

(Being an Appeal from the from the Order and Ruling of Honorable B.Atiang' (SRM) issued on the 20th of October 2011 in Nakuru Chief Magistrate Land Dispute Number 13 of 2007.)

J U D G M E N T

1.The present appeal was provoked by the ruling delivered by B. Atiang, SRM on 26th October, 2011 in Nakuru Chief Magistrate's Court Land Dispute No. 13 of 2007. By the ruling the learned Senior Resident Magistrate dismissed the appellant's application dated 20th June 2011 vide which the appellant had sought to set aside the order given by the Court on 7th June 2011 and issued on 14th June 2011. The appellant had *inter alia* premised his application on the grounds that he had not been served with the application that gave rise to the orders given by the court; that he would suffer irreparably as he was not heard prior to the orders being given; that the order of the tribunal adopted by the court did not order his eviction; and that there was another suit Nakuru CMCC No.195 of 2008 whose orders were in conflict with the orders issued by the learned magistrate.

2.The learned trial magistrate in dismissing the appellant's application stated that he was satisfied the appellant had been properly served with the application dated 3rd May 2011. The learned trial magistrate further stated the appellant had not sought to cross examined the process server on the filed affidavit of service and consequently the learned trial magistrate held that no basis had been laid to warrant him to interfere with the orders sought to be set aside by the appellant.

3. The appellant being aggrieved by the ruling of the learned trial magistrate has appealed to this court and by the memorandum of appeal dated 8th November 2011 has set out the following grounds of appeal : -

> *1. That the learned Honorable magistrate erred in law and in fact by ignoring many serious issues of law and fact raised in the appellant's application.*
>
> *2. That the learned honorable magistrate erred in law and fact in holding that the appellant (the then applicant) was properly served.*
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> *3. That the learned honorable magistrate erred in law and in fact in failing to note that the orders that were to be set side were granted when the same had not been prayed for and/or terms of the decree in Nakuru Magistrate court land case no 13 of 2007 in the application dated 3rd day of May 2011.*
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> *4. That the learned honorable magistrate erred in law and in fact in ignoring the fact that the orders he granted conflicted with proceedings decree and orders in Nakuru Chief Magistrates Court Civil suit no 195 of 2008 between William K Langat versus John Cheres and John Sigei.*
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> *5. That the learned honorable magistrate erred in law and in fact in ignoring the fact that the decree and judgment and subsequent orders in Nakuru Chief Magistrate Court Civil suit no 195 of 2008 between William J Langat versus John Cheres and John Sigei were superior to the order he issued in Nakuru Chief Magistrate court land dispute No. 13 of 2007 between Joseph K Sindai versus William Langat.*

4. The appeal was initially lodged before the High Court as High court appeal No.190 of 2011 and was domiciled there until 18th December

2018 when Mulwa J made an order transferring the file to the Environment and Land Court for hearing and determination.

5. The file remained inactive until 3rd February 2021 when the matter was listed for directions. The court on the date directed that the appeal be argued by way of written submissions. The appellant filed his submissions on 3rd February 2021 and the respondent his on 17th March 2021. The Appellant filed supplementary submissions on 29th March 2021.

6. The appellant in his filed submissions argued that the orders that emanated from the Respondents application dated 3rd May 2011 were not part of the order granted by the Land Tribunal.

7. The appellant argued the orders granted were not part of the orders that the Land Disputes Tribunal gave and which were adopted by the court on 27th May 2009. The appellant contended that the orders issued by the Court on 3rd May 2011 were prejudicial to him and amounted to him being condemned without being heard. He submitted that the court ordered his eviction yet the Tribunal never gave such an order. He argued the Tribunal only awarded the suit land to the respondent and never ordered any eviction.

8. The application dated 3rd May 2011 was heard exparte on 7th June 2011 the appellant was absent. The application prayed for the following orders:-

> *1. That the honorable court be pleased to order for immediate eviction of the respondent herein William K Langat, his representatives, servants and or agents from the applicant's parcel of land known as Nakuru Sururu/1561.*
>
> *2. That the OCS Mau Narok police station assists in execution of the order as below.*
>
> 3. *That the costs of executing of the orders above be borne by the respondent.*

9. From the record when the application came for hearing on 7th June 2011 only the respondent's counsel was present and the Appellant was absent and was unrepresented. The respondent's counsel indicated the application had been served and was unopposed. He prayed for the same to be allowed. The learned trial magistrate held the service was proper and in the absence of any opposition allowed the application as prayed. The orders issued were extracted and issued on 14th June 2011 and upon the appellant being served he filed the Notice of Motion dated 20th June 2011 which was heard on 13th September 2011 and a ruling delivered on 26th October 2011. The appellant in the application sought the following orders:-

> *(a) This Honorable court be pleased to certify this application as urgent and service thereof be dispensed with in the first instant.*
>
> *(b) Pending the hearing and determination of this application this Honorable court be pleased to stay the orders given on the 7th day of June 2011 and issued on the 14th June 2011.*
>
> *(c) The Honorable court be pleased to set aside the orders given on the 7th day of June 2011 and issued on the 14th day of June 2011.*
>
> *(d) The plaintiff /respondent do bear the costs of this application.*

10.The appellant's said application as earlier indicated in this judgment was anchored on the allegations that he had not been served with the respondent's application dated 3rd May 2011 and therefore he was not heard on the application before the orders were given. The trial magistrate in a rather brief ruling dismissed the appellant's application. The relevant part of the ruling states:-

> *"When the application dated 3rd May 2011 came up for hearing on the 7th June 2011, this court went through the affidavit of service sworn by the process server on 6th June 2011 and I was satisfied that service was proper. If at all the applicant was not served with the application dated 3rd May 2011, then I wonder why the applicant failed to apply to call the process server to cross examine him with a view to establish the issue of service. Having failed to do so, I do not see any reasons why I should interfere with the orders given on the 7th June 2011 and issued on 14th June 2011."*

11. This court as an appellate court of first instance is obligated to reevaluate the facts and evidence before the lower court to determine whether the decision reached by the lower court was justified. This is in accord with the principle established by the Court of Appeal in the case of ***Selle -vs- Associated Motor Boat Company Ltd (1968) EA 123***. The court in the case stated thus:-

> *" –this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that his court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."*

12. The appellant principally predicates his appeal on the grounds that he was not served with the application dated 3rd May 2011 that gave rise to the orders dated 7th June 2011 and issued on 14th June 2011, that adopted award of the Tribunal did not order for his eviction; and that there was another suit Nakuru CMCC No.195 of 2008 whose orders/decree was in conflict with orders issued by the court on 7th June 2011.

13. The respondent in his submissions supported the decision of the learned trial magistrate arguing that the appellant was properly served

with the application dated 3rd May 2011 as evidenced by the affidavit of service by the process server dated 6th June 2011. The respondent argued that mere denial of service was not sufficient in the face of an affidavit of service affirming that service was effected. The burden remained on the party alleging nonservice to demonstrate that the affidavit of service was false. The Court takes judicial notice that in the majority of services of process effected on opposing parties, such parties decline to affix their signatures on the documents returned to court. The content and particulars set out in the affidavit of service however should sufficiently explain how the service was effected and how the recipient of the process was identified by the process server. In the event the recipient refutes service, one of the ways to demonstrate no service was effected is to have the process server summoned to be cross examined on the contents of the affidavit. The other way would be for the applicant to demonstrate that the affidavit of service was false in material particulars. For example if the process server stated that he effected service on the recipient at a particular place, at a particular time, the applicant could disapprove such particulars by showing and proving that he was not at the indicated place at the stated time as alleged by for instance, showing and proving he was in a different location at the time.

14. Order 5 Rule 13 of the Civil Procedure Rules requires the person served with court process to endorse in acknowledgment of service though vide the proviso thereto it is provided that where a party refuses to endorse, the service is nonetheless effectual if the court is satisfied service was duly effected. Order 5 Rule 13 provides:-

> *Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons:*
>
> *Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served.*

15. An affidavit of service under Order 5 Rule 15 (1) is required to state the time when the service was effected and the manner in which the service was effected. In case there was a person who identified the person served, the name of such person and his address need to be given. Subsection 2 of Rule 15 provides that it is an offence for a person to knowingly make a false affidavit of service and such person would be liable to a fine not exceeding Kshs.5,000/= or one month's imprisonment or both.

16. Under Order 5 Rule 16 where there is allegation that a summons had not been properly served, the court may have the process server summoned to be cross examined on the service. A reading of this Rule suggests the court may at its own motion make an order for the process server to be examined. One would however expect that the applicant who disputes service to be on the frontline in seeking to have the process server summoned to be examined. The court it appears did not make any order for the examination of the process server and no request was made by the applicant to have the process server summoned for examination. The trial court however upheld the service as proper.

17. It is imperative for this court to consider the impugned affidavit of service dated 6th June 2011 to determine whether the learned trial magistrate's decision that the service was proper was justified.

18. In the affidavit of service sworn by Boniface Philip Ownoche he stated that he on 10th May 2011 received from M/s Ndeda & Associates Advocates two copies of the application dated 3rd May 2011 for service upon the defendant respondent (appellant herein). Paragraphs 3,4 and 5 of the affidavit of service were as follows:-

> *3. That on the same day, I proceeded to Nakuru Boys High School where the defendant works for gain as a bursar but informed by the secretary that he has gone to town.*
>
> *4. That at around 1.30pm I spotted Mr. Langat whom I personally know at C.K Patel Building and explained to him the purpose of my meeting in which he perused the said application, retained his copy but declined to acknowledge service on my copy for the reason that he has to meet his advocate first for further direction.*
>
> *5. That Mr. Langat assured me that he is going to instruct his advocate to take the matter on his behalf and I hereby return my copy properly served upon him.*

19. From the foregoing paragraphs it is evident the process server knew where the appellant worked at Nakuru Boys High School proceeded there and was informed the appellant had left for the town. He stated that he later on the same date at about 1.30 p.m spotted the appellant whom he personally knew at C K Patel Building in the Town where he personally served the appellant who accepted service but declined to endorse his acknowledgment of service on the copy of the application. The appellant allegedly indicated he would first require to meet with this advocate for directions. On the face of it, the service was in conformity with Order 5 Rule 15 as the time, place and manner of service is disclosed.

20. In the application dated 20th June 2011 the appellant acknowledged having been served with the order given by the court on 7th June 2011 but denied having been served with the application dated 3rd May 2011 which gave rise to the orders. The appellant did not in any way contest, the process server's affidavit of service. In the affidavit in support of the application the appellant made no mention of the process server's affidavit of service. The thrust of the appellant's supporting affidavit was to the effect that the tribunal had not given any orders of eviction and that there was another suit Nakuru CMCC No.195 of 2008 where the orders given were in conflict with the orders the court had given on 7th June 2011.

21. The appellant on the body of the application dated 20th June 2011 apart from the ground that he was not served with the application dated 3rd May 2011 also laid other grounds as follows:-

(i) That he would suffer irreparably as he was not heard prior to issuance of the orders.

(ii) That the adopted order of the tribunal and ruling of the Dispute Tribunal did not order for eviction of the appellant.

(iii) That an order of eviction could not be obtained without a formal Civil suit.

(iv) That already the appellant had in Nakuru CMCC No. 195 of 2008 been decreed as the owner of the suit land and an eviction order had been issued against the defendants in the suit.

22. In the affidavit in support of the application the appellant reiterated the above grounds and under paragraphs 5 and 6 of the affidavit deponed as follows :-

5. That I am aware that the tribunal does not have Powers to order for an eviction or cancellation of titles to land titles to land but even then, I still have in possession a title that has not been cancelled by any person in authority and neither has the plaintiff/Respondent pursued enforcement of the orders of the tribunal meaning that even the tribunal was erroneous in its verdict; There is therefore no justification whatsoever why the plaintiff should be granted the prayers for eviction without instituting a suit.

6. That I will suffer irreparably as I am intending to develop my land and the orders in Nakuru CMCC No.195 of 2008 have not been stayed or set aside.

23. In the instant appeal the primary issue is whether the trial court should have exercised its discretion in favour of the appellant and set aside the order of 7th June 2011 so that the application dated 3rd May 2011 could be heard inter partes. The court's power to set aside an exparte judgment or order is discretionary and such discretion is wide and unfettered save that the discretion ought to be exercised judicially and not whimsically. In the case of Patel ***-vs- EA Cargo Handling Services Ltd (1974) EA 75*** the court of Appeal laid the principle as follows: -

"there are no limits or restrictions on the Judge's discretion to set aside or vary an exparte judgment except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to better the wide discretion given it by the rules".

24. In the same case the court proceeded to state as follows:-

"That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean a defence that must succeed. It means a "Triable issue" that is an issue that raises a prima facie defence should go to trial for adjudication".

25. Further in the case of ***Tree Shade Motor Ltd -vs- D T Dobie & Another (1995-1998) OEA 32*** the court stated: -

"Even if service of summons is valid the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the Court could set the exparte judgment aside.

26. In the matter before me, it is clear that the appellant sought to have the orders given on 7th June 2011 exparte on the application dated 3rd May 2011 set aside. The appellant's application dated 20th June 2011 was on 26th October 2011 apparently on the singular ground that the learned trial magistrate upheld service of the application dated 3rd May, 2011 on the appellant. The learned trial magistrate did not consider the other grounds upon which the application was predicated. The appellant had averred that the decree emanating from the adopted award of the Tribunal did not order the appellant's eviction from the suit land. The appellant had contended the order of eviction made was not in conformity with the decree issued and that the appellant held title to the land which had not been cancelled and further contended the Tribunal lacked jurisdiction to order cancellation of title. The appellant additionally averred that there was another case Nakuru CMCC No.195 of 2008 where he had obtained a decree to the effect that he was the owner of the disputed land and where an eviction order had issued against the defendants who were in possession of the land. He argued there was therefore a conflicting order to the one issued by the trial court.

27. The trial magistrate fell in error in failing to consider these issues which were pertinent and had he considered them he may very well have reached a different decision. The issues are arguable and if successfully argued could dislodge the orders made on the respondent's application dated 3rd May 2011. I am in the premises persuaded that the appellant should have been granted an opportunity to defend the respondent's application dated 3rd May 2011.

28. I therefore allow this appeal and set aside the ruling delivered by the learned trial magistrate on 26th October 2011 dismissing the Appellant's application dated 20th June 2011 and in place thereof substitute an order allowing the application. Accordingly, the order given by the learned trial Magistrate on 7th June 2011 and issued 14th June 2011 is hereby set aside. The application dated 3rd May 2011 to be heard before any another Magistrate other than B Atiang'.

29. Each party to bear their own costs of the appeal.

30. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF JULY 2021.

J M MUTUNGI

JUDGE