REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KILGORIS

CIVIL APPEAL NO. 01 OF 2021

(FORMERLY NAROK HIGH COURT CIVIL APPEAL NO. 22 OF 2020)

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the Ruling of Hon R.M. Oanda (P.M)

Delivered on 11th March 2019 in Kilgoris PMCC No. 55 of 2019)

DANIEL TUKERO.....APPELLANT

-VERSUS-

TALEO KALAMOYO.....1ST RESPONDENT

NDISUAKO NASINTO.....2ND RESPONDENT

JUDGMENT

Impugned ruling

1. This appeal challenges the ruling of the Principal Magistrate's Court at Kilgoris in Civil Suit No. 55 of 2016 delivered on the 11th March 2019 in which the trial court dismissed the Appellant's application dated 1st March 2019.

2. The memorandum of appeal dated 6th October 2020 cited seven (7) grounds of appeal which faults the decision by the trial magistrate for not finding that he was not served with summons to enter appearance.

Appellant's Case

3. The Appellant's case was that the Respondents filed the lower court matter against the appellant seeking among other prayers general damages for alleged encroachment on the Respondents parcel of land by the Appellant.

4. The Respondents in their plaint alleged that the Appellant, his servants and/ or agents destroyed approximately 13 acres of sugarcane without justifiable cause occasioning the Respondents' irreparable loss and damage.

5. The Respondents filed a request for judgment on 28th October 2016 and the matter proceeded for formal proof. The trial court delivered judgment on 8th June 2018 against the Appellant in favour of the Respondents. He was ordered to pay the Respondents the sum of **Kshs. 2, 228, 296.**

6. After obtaining judgment against the Appellant, the Respondent went ahead and filed an *ex parte* notice of motion seeking police protection and/ or security in attaching the appellant's tractor, assorted household goods and heads of cattle. The application was allowed and orders consequently issued on 12th February 2019.

7. The Appellant filed an application dated 1st March 2019 for setting aside the interlocutory judgment. Vide the ruling delivered on 11th July 2019 the same was dismissed.

8. This being a first appeal, the appellant urged this court to reassess, reevaluate and reexamine the evidence and extracts adduced before the trial court and arrive at its own independent conclusions bearing in mind the fact that it neither heard or saw the witnesses as they testified. He cited Section 78 of the Civil Procedure Act and the case of ***Sielle Vs Associated Motor Boat Company Limited [1968] E.A. 123.***

9. The appellant is of the view that, in dismissing the application to set aside the interlocutory judgment, the learned trial magistrate improperly exercised his discretion, and misdirected himself in some matters thereby arriving at a wrong decision. The main contention is lack of service of summons to enter appearance, thus, he was not expected to enter appearance or file a defence as he would obviously not be aware of the suit.

10. The Appellant on learning about the impeding execution against him filed an application seeking stay of execution and that he be granted an opportunity to file his defence which application was denied vide ruling of 11th July 2019.

11. He faulted the trial magistrate for opining; (i) that the application by the appellant was brought to court nine months after judgment; and (ii) that the appellant did not state whether he was served with the notice of the entry of judgment and if so why he delayed before going to court. He stated that there was no notice of entry of judgment in the court file and it is not part of the record; he could not therefore, be expected to have been served with a non-existing document.

12. The appellant found more faults with the trial magistrate's opinion that the appellant did not seek to cross examine the deponent of the affidavit of service filed on 1/11/2016 and as such must have been aware of the existence of the suit. According to him, he challenged the affidavit of service relied on by the Respondents on the ground that it fell short of the requirement of Order 5 Rule 15 of the Civil Procedure Rules. He took the view that the learned trial magistrate for fail to take into consideration relevant matters such as whether the affidavit met the prerequisite in Order 5 Rule 15 of the Civil Procedure Rules and whether there was proper service. He blamed the learned magistrate for shifting the burden of proof to the Appellant to disprove service of the summons to enter appearance instead of requiring the Respondents to prove to court that indeed the Appellant was served with all court pleadings including the notice of entry of judgment.

13. The Appellant in his application to set aside the interlocutory judgment he was ready and willing to have the process server who allegedly served him with the court process cross examined before the court but he was not accorded the opportunity. He cited the cases of ***Pithon Waweru Maina Vs Thuka Mugira [1983] eKLR***, and ***Gulf Fabricators Vs County Government of Siaya [2020] eKLR.***

14. The Respondents in their pleadings before the trial court and specifically in the replying affidavit did not mention of any service being effected upon the Appellant either to notify him of any hearing date prior to the formal proof hearing and neither was there evidence of a notice of entry of judgment being effected on the Appellant. The request for judgment dated 28th October 2016 was never served upon the Appellant despite the same showing on the face of it that it was to be served upon him. He relied on the case of ***Secretary& Another Vs Lucial Ndinda Musyoka T/A Jocia Stores [2019] eKLR.***

15. The conduct of the Respondents can clearly be seen from the court record as he even went ahead to file an *ex parte* application dated 6th February 2019 seeking police protection to attach the Appellant's assorted household goods and cattle. The orders were readily granted yet there was no evidence of service of the proclamation notice upon the appellant. The actions by the respondents were in contravention of Order 22 Rule 6 of the Civil Procedure Rules.

16. The power of this court to set aside ex parte judgment is discretionary as stated in the celebrated case of ***Mbogo Vs Shah [1967] E.A.***

17. That the court proceeded to uphold its earlier judgment even in the face of such glaring evidence of fraud and concealment of material facts.

18. That the Appellant's appeal raises triable issues and therefore he urged the court to intervene in the interest of justice. The Appellant should be accorded the opportunity to ventilate his case and a verdict of the court reached on merit upon hearing all parties.

19. The Appellant prayed that this court do allow this appeal and the orders stipulated in the memorandum of appeal.

20. On the issue of costs, he cited Section 27 of the Civil Procedure Act that costs should be granted at the discretion of the court. He prayed for costs both in the appeal and at the lower court.

1st Respondent's Case

21. The 1st Respondent stated that he is filing his submissions under protest in response to the Appellant's submission filed on 13.11.2020 and served upon them on 19.11.2020. His reasons for the protest is that he was never served with either a memorandum of appeal and /or a record of appeal in the matter.

22. He is aware of the ruling delivered by Hon. R.M. Oanda P.M. in **Kilgoris PMCC No. 55 of 2016 o**n 7th July 2019 in which the Appellant's application dated 1st March 2019 was dismissed.

23. The Appellant vide application dated 15th July 2019 in **Narok High Court Miscellaneous Application No. 40 of 2019** sought an order of stay of execution of the judgment in **Kilgoris PMCC No. 55 of 2016**. Ruling was delivered on 21st May 2020 whereby the court allowed stay of execution of the judgment in **Kilgoris PMCC No. 55 of 2016** upon terms that

'the Appellant (defendant) deposits in court the decretal sum of Kshs.2,228,296 within 30 days failing which the order would lapse'.

24. In Narok Misc. Civil No. 40 Of 2019 on 30th July 2020 the court gave further directions following the ruling of 21st may 2020 as follows;

i. That the subject tractor is hereby ordered released.

ii. That M/S Saika to prepare and file a record of appeal.

iii. Mention on 8.10.2020 to confirm compliance.

25. On 13th November 2020 the appellant filed submissions in Civil Appeal No. 22 of 2020 without explaining what happened to Civil Appeal No. 4 of 2019 over the same subject matter.

26. That the submissions filed herein on 13th November 2020 have no legal basis as there are no pleadings upon which they are premised. The Appellant has filed two different appeals on the same subject matter. Therefore he submits that the same are bad for duplicity and are for striking out *ex debito justiciae.*

27. The record is expected to contain the decree, part of the decree or order appealed against in terms of the provisions of Order 42 Rule 4 of the Civil Procedure Rules. That none of the crucial documents stated in Order 42 Rule 4 of the Civil Procedure Rules was served upon the respondents hence the appeal cannot proceed to hearing.

28. Since the submissions served upon the Respondents counsel prompting the filing of the submissions have been filed in Civil Appeal No. 22 of 2020, it follows that the appeal herein has been filed without leave for extension of time as required Under Order 42 Rule 4(f) of the Civil Procedure Rules 2010. That the appeal being against the ruling delivered on 11th July 2019 ought to have been filed within 30 days and that should have been by 12.08.2019 by dint of section 79G of the Civil Procedure Act.

29. Therefore, he concludes that the record of appeal herein is incompetent and ought to be struck out with costs to the Respondents.

ANALYSIS AND DETERMINATION

30. As the first appellate court, I am guided by the principle laid down in **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123:** evaluate evidence afresh and come to own conclusions except having in mind that the court did not have the advantage of hearing witnesses.

31. The two inextricable issues in this appeal are;

i. Whether the ex parte judgment should be set aside on the basis of non-service of summons; and

ii. Whether the appellant should be granted leave to defend the suit in the lower court.

Affidavit of service

32. On the basis of the affidavit of service filed in court, the trial magistrate was satisfied that the defendant/appellant was served with summons to enter appearance. Accordingly, the case proceeded *ex parte.*

33. The trial magistrate in his ruling stated that the Appellant did not seek an order to cross-examine the process server in the application. However, a perusal of the Appellant's supporting affidavit dated 1st March 2019 shows at paragraph 10 that he prayed for leave of the court to cross examine the process server on his affidavit of service. There is however nothing to show that the appellant pursued this request or made out a basis for it.

Onus of disapproving report on service

34. The Appellant submitted that by requiring him to disapprove service, the trial magistrate shifted the burden of proof. Quite illuminating on this point is the eminent work by ***Chitaley and Annaji Rao; The Code of Civil Procedure*** **Volume II page 1670** where it was stated that:

> **There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service. [Underlining mine for emphasis]**

35. See also ***Shadrack arap Baiywo vs. Bodi Bach*** **KSM CA Civil Appeal No. 122 of 1986 [1987]** eKLR, where the Court of Appeal quoted with approval the foregoing eminent writing. ***M B Automobile v Kampala Bus Service, [1966] EA 480*** at page 484 is also pointedly relevant on this subject.

36. Accordingly, the burden lay the appellant who is the party questioning the return of service, to show that the return is incorrect. The Appellant did not attempt to discharge this burden as he was preoccupied with the notion that the burden lay on the respondent. As such, he did not discharge this burden. On that basis, it should be accepted that the Appellant was served as per the contents of the affidavit of service. The same has not been controverted. I so find.

Interest of justice

37. I do note that the Appellant has appealed to the unfettered discretion of the court to set aside *ex parte* judgment herein in the interest of justice. Under **Order 10 rule 11** of the ***Civil Procedure Rules***, the court has unfettered discretion to set aside judgment on such terms as it deems fit and just (see ***Shah v Mbogo and Another*** **[1967] EA 116**). Even where the party applying had been served, the court would still have discretion to set aside *ex parte* orders in the interest of justice. Is this such case for the exercise the unfettered discretion to set aside *ex parte* orders herein?

38. In the words of Harris J., in **SHAH v MBOGO & ANOTHER (1976) EA**, the discretion of the Court in setting aside ex parte order is only: -

> **"…exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"**.

39. The trial magistrate opined that the application by the appellant to set aside judgment was brought to court nine months after judgment. No explanation for the delay was offered. From the events on the record, the appellant was aware of the judgment but chose not to act in good time. His actions after judgment which have been described by the respondent, could easily be said to be aimed at obstructing or delaying the course of justice in this matter. Equity would never embrace such suitor; equity would fold its hands and refuse remedy.

Good defence

40. The second limb of the case-that he has a good defence- is also relevant to the foregoing finding. Nonetheless, no defence was put forward by the Appellant. He simply said he had a good defence. See Lord Atkin in **Evans v Bartlam, [1937] 2 All ER 646** on the point.

> **"The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, when the judgment was obtained regularly, there must be an affidavit of merits, meaning that the appellant must satisfy the court that he has a prima facie defence.…[Underlining mine]**
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> **The principle obviously is that, unless and until the court has pronounced a judgment upon the merits, or by consent, it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure."**

41. There is nothing on which to vouch that he has a good defence, or on which a judgment which had been obtained regularly should be set aside.

Conclusions and orders

42. Looking at all the circumstances, there is no ground upon which this court should exercise its discretion to vary or discharge the judgment entered by default. The upshot therefore is that this appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS 7TH DAY OF JULY, 2021

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F. GIKONYO M.

JUDGE