REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 7 OF 2020

DAVID KIRIMI CHARLES (Suing as Legal Rep of ABRAHAM

KAILEMIA IKIUGU – Deceased)..... APPELLANT

VERSUS

MUNTU KIRUMANIA MUNGANIA (Sued as Legal Rep. of DORIS

KINANU KIRIMANIA – Deceased)..... RESPONDENT

(An appeal from the Ruling and Order of Hon. H. Ndungu CM. made on 4/12/2019 in Meru CMCC No. 262 of 2010)

J U D G M E N T

1. On 24/12/2008, **Doris Kinanu Kirimania ("the deceased")** was travelling as a lawful passenger in motor vehicle registration no. KAU 339B which was being driven by **Abraham Kailemia Ikiugu (deceased).** The said m/v was then involved in an accident along Meru-Nairobi highway as a result of which the deceased died.

2. Pursuant thereto, the respondent sued the appellant in the above noted suit ("the primary suit") before the Meru Chief Magistrate's Court for damages. The appellant entered appearance to the suit and filed his defence in person on 19/10/2010.

3. In the meantime, on 4/11/2009, the appellant had been appointed as the administrator of the estate of **Abraham Kailemia Ikiugu.** The grant was subsequently confirmed on 16/11/2010 whereby the appellant inherited all the properties of the said **Abraham Kailemia Ikiugu**. The properties included 5 plots in Mavoko, 3 plots at Athi River, a house at Embakasi, 2 plots in Nairobi and a plot at Embakasi. He also inherited all the proceeds in 4 bank accounts and death gratuity from Sadolin Paints Ltd.

4. On record is an Affidavit of service sworn by **Charles Mokua, Advocate** on 30/11/2011 deposing that, on 14/10/2011, he served a hearing notice dated 3/10/2011 for the hearing of that suit on 1/12/2011. The record shows that on the said 1/12/2011, the appellant did not appear and the matter proceeded ex-parte.

5. After hearing the respondent, the trial Court entered judgment in his favour on 20/1/2012 for Kshs.1,022,350/-. What followed that judgment is a specter to behold:-

a. The appellant lodged objection proceedings against the execution then being levied against m/v reg. nos. KBJ 634J and KAB 392H. The objection was dismissed on 15/3/2013.

b. He appellant appealed against dismissal vide **HCCC No. 234 of 2013**. The appeal was dismissed on 16/11/2017.

c. The respondent then attempted to execute the said decree by way of committal of the appellant to civil jail. The trial Court ordered for his committal on 19/6/2018.

d. The appellant appealed against that decision vide **HCCC No.74 of 2018.** The appeal was dismissed on 20/6/2019 and it was ordered that he serves his committal.

e. The appellant appealed against the order of committal to the Court of Appeal in Nyeri **CA No. 260 of 2019.** That appeal is still pending in the Court of Appeal.

f. The appellant also lodged **Meru Constitutional Pet. No. 16 of 2018** seeking to challenge the efficacy of the proceedings before the trial Court. That petition was dismissed on 6/5/2019.

g. The appellant appealed against that judgment and the appeal is still pending before the Court of Appeal at Nyeri.

6. All the foregoing proceedings spurned a period of 8 years. They were geared towards enabling the appellant to avoid the execution of the lawful judgment made by the trial Court in the aforesaid suit. Until then, the appellant had not challenged the judgment in the manner provided in law.

7. Having been cornered by the dismissal of all his aforesaid maneuvers, on 26/7/2019 the appellant now took out a Motion on Notice to set aside the said judgment of 20/1/2012. He set out therein, the grounds upon which the application was brought to include that; he had not been served; that he had been wrongly sued; that the judgment was oppressive and against natural justice.

8. Unimpressed by the application, the trial Court dismissed the same and made no orders as to costs. It is against the said ruling and order that the appellant has appealed to this Court and set out a total of 12 grounds of appeal which **Mr. Ondieki,** Learned Counsel for the appellant, summarized into 7 as follows: -

a. The trial Court erred that there is a time limit to set aside an ex-parte judgment.

b. The trial Court failed to consider that there was no proper service of the hearing date leading to the ex-parte judgment.

c. The trial Court failed to consider that the appellant was wrongly sued.

d. The trial Court failed to consider that m/v. reg. no. KAU 339B was comprehensively insured by Britam Insurance Company.

e. The trial Court failed to consider that the impugned judgment was procured through fraud, lies and blatant misleading of the Court.

f. The trial Court was biased against the appellant and failed to judiciously apply its mind to the facts and evidence.

g. The trial Court misapprehended the facts and applied wrong principles to the prejudice of the appellant.

9. The appellant filed his submissions which the Court has carefully considered. As at the time of writing the judgment, the respondent had not delivered his submissions despite having sufficient time to do so.

10. The first ground was that the trial Court erred that there is a time limit to set aside an ex-parte judgment. The appellant submitted that the law does not provide for time limit for the setting aside of an ex-parte judgment. That even where there are delays, a suit should as a matter of general rule be set down for hearing and not be dismissed. The cases of **Waweru v. Ndiga [1983] KLR 236, Patel v. E.A. Cargo Handling Services Ltd [1974] EA 75** and **SBI International v. Reuben Kipkorir J T Bore [2017] Eklr,** were cited in support of those submissions.

11. Under ***Order 10 Rule 11*** there is no time frame given within which an application for setting aside an ex-parte judgment is to be made. However, the setting aside of an ex-parte judgment is an exercise of discretion. In such exercise, the Court is entitled to consider the conduct of the applicant generally. The Court is entitled to inquire the reason for delay, if any, in view of the constitutional dictates in ***Article 159 of the Constitution*** that justice should not be delayed.

12. In the present case, the trial Court considered that the appellant had stayed for a record 8 years without challenging or applying for the setting aside of the subject judgment. To my mind, that was not a wrong exercise of discretion. The cases cited by the applicant are not applicable as the circumstances therein were completely different from the present case. That ground fails.

13. The second ground was that the trial Court failed to consider that there was no proper service of the hearing date leading to the ex-parte judgment. That the appellant had applied to cross-examine the process server but the trial Court declined. The case of **James Kanyiita Nderitu & another v. Marios Philotas Ghikas & another [2015] Eklr** was relied on in support of that submission.

14. From the record, shows that on 4/9/2019 when the matter came up for hearing, the appellant's Counsel applied for leave to file a further affidavit. After leave and adjournment was granted, the advocate applied that the process server be present at the next hearing to be cross-examined. That application was allowed.

15. On 16/10/2019, Mr. Mokua.advocate who had sworn the affidavit of service attended Court and informed the trial Court that the issue of his cross-examination was a non-issue. The advocate for the appellant did not respond to Mr. Mukua's submission. As a result, the trial Court ordered the parties to file their submissions on the application. Despite that order, the appellant's advocate did not protest at that order nor did he do so on 6/11/2019 when the matter came up once again to confirm the filing of submission.

16. On its part, this Court finds that for the following reasons, there was no need for the cross-examination of the process server. The appellant had been properly served with the hearing notice for the trial of the suit:-

a. Before the filing of the Motion dated 10/7/2019 for the setting aside of the subject judgment, the appellant had not sought to set

aside that judgment as per law provided on any ground. He had been engaged in a game of musical chairs until he was told firmly to stop his said games in **HCCA No. 234 of 2013, Const. Pet. No. 16 of 2018** and **HCCA no 74 of 2018**, respectively.

b. The appellant had not challenged the said judgment for alleged non-service of the hearing notice.

c. The Affidavit of service sworn on 30/11/2011 was very specific on how the appellant was served with the hearing notice. It stated as follows: -

> **"2. That on 14th October, 2011 at 2.00p.m I served a hearing notice dated 3/10/2011 upon the Defendant at his place of residence at Isiolo Public Works houses.**
>
> **3. That the Defendant accepted service but declined to sign my copy of the hearing notice which I return to this court as duly served".**

d. In both his supporting affidavit and further affidavit, there was no specific denial of such service. He did not deny that on the material day and time, he was at his residence and that he was served as stated.

e. To the contrary, the appellant only went into generalized denials and lied on oath. In his supporting affidavit, he swore as follows: -

"17. THAT I was not the administrator of the estate of of the owner of motor vehicle KAU 339B one CHARITY NYAWIRA KALEMIA (deceased) which was taken by his father JOSEPH MURIUKI MIGWI as per the certificate of confirmation of grants from Nyeri high court succession cause NO. 892 of 2009 and grant of letters of administration which was issued on 25th February 2011 as he is the beneficiary of the said policy NONGMP 31297 KAU 339B ……

…

21. That the judgment was entered ex-parte as the applicant was not served with any summons to enter appearance nor did he take part in the proceedings".

17. The above averments were factually incorrect for the following reasons: -

a) The appellant did take part in the proceedings by entering appearance and delivering a defence.

b) He failed to disclose that the **Nyeri Succ. Cause No. 892 of 2009** was consolidated with **Meru Succ. Cause No. 229 of 2009** wherein he was appointed the administrator of the estate of the late **Charity Nyawira Kailemia.** That vide the Certificate of confirmation issued on 16/11/2010, he inherited all the properties of that deceased save for those set out in the Nyeri grant. This was captured at paragraph 21 of the judgment of this Court in **HCCA No. 74 of 2018** at page 71 of the record.

18. Would such a litigant who is less than candid with the Court expect any exercise of discretion in his favour? I do not think so. That ground also fails.

19. The next grounds were that the trial Court failed to consider that the appellant had been erroneously sued. That the respondent did not have any cause of action against him and further that m/v reg. no. KAU 339B was comprehensively insured by Britam Insurance Company. That the judgment was obtained through fraud and lies.

20. It was submitted that since the subject vehicle belonged to the late **Charity Nyawira**, the respondent should have sued her and that the insurance company had declined to settle the claim because her estate had not been sued. That the plaint had lied that the said vehicle belonged to **Abraham Kailemia Ikiugu** which was not true. The case of **William Macharia Maina & another v. Francis Barchuro & 3 others [2019] Eklr,** was cited in support of those submissions.

21. It is not correct that the appellant was unsuited. He was the legal representative of the estates of both **Ibrahim Kailemia Ikiugu** and **Charity Nyawira Kailemia,** the driver and owner of m/v reg. no. KAU 339B, respectively. The respondent was perfectly entitled to sue the negligent driver and therefore his personal representative who happened to be the appellant.

22. Having sued the driver, who was to blame for the accident, it was for the appellant to join the owner of the subject vehicle by way of Third Party Proceedings. He did not do so and he could not because, he also doubled as the administrator of the estate of the owner of the vehicle vide **Meru Succ. Cause No. 229 of 2018.** Those grounds also fail.

23. The other grounds were that the trial Court was biased against the appellant, it failed to judiciously evaluate the evidence before it and that it applied wrong principles and failed to appreciate ***Articles 25(c), 27(1) and 50(1) of the Constitution.***

24. This Court has carefully considered the impugned ruling. The trial Court may not have specifically referred to the issues the appellant is referring to here. However, it considered that there had been laches in the making of the application before it. The appellant had taken over 8 years to challenge the judgment that was entered in 2012. The trial Court cannot be faulted for that. Litigation must come to an end.

25. Having considered the issues raised by the appellant, even if the trial Court had considered them as this Court has done here above, the

only irresistible conclusion would have been to dismiss the application. The appellant had already filed and prosecuted a Constitutional petition in **Meru Const. Pet. No. 16 of 2018.** He should have raised the issue of ***Articles 25, 27 and 50 of the Constitution*** in that petition. All constitutional issues should have been raised therein. By dint of ***section 7 of the Civil Procedure Act,*** all constitutional issues in relation to the primary suit are *res judicata.*

26. One thing is clear in this long and protracted litigation, as the trial Court correctly pointed out, litigation must come to an end at some point. The appellant has filed multiple proceedings with a view to frustrate the lawful judgment entered against him in 2012.

27. In the judgment delivered on 20/6/2019 in **Meru HCCA No. 74 of 2018,** the Court expressed itself thus: -

> **"23. It would seem that the appellant is playing musical chairs with both the courts and the respondent with the hope that with the passage of time, the decree will be rendered stale. Indeed, it is now 8 years since the judgment was passed in the primary suit and the 3rd respondent is yet to realize the fruits of that judgment. The decree has only a life of less than 3 years before it becomes stale.**
>
> **24. Is the appellant to be allowed to continue with the 'dance' of musical chairs? I do not think so. It is time that he is told, and firmly so, that once legal rights inure by way of a judgment, they are enforceable as per law provided".**

28. That pronouncement is now more applicable than ever before. The judgment having been passed in January, 2012, it has less than 2 years and 7 months before it is time barred under the ***Limitation of Actions Act, Cap 22***. All this time, the appellant has been engaged in side shows instead of facing the judgment and having it set aside in accordance with the law. Justice delayed is justice denied. Any further delay in its execution will be unfair to the respondent. Justice looks at both sides.

29. In this regard, it is clear that the application before the trial Court was brought so late in the day. There were no grounds upon which it could be allowed. Accordingly, I find the appeal to be without merit and I dismiss the same with costs to the respondent.

It is so decreed.

DATED and DELIVERED at Meru this 3rd day of June, 2020.

A. MABEYA

JUDGE