



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 307 OF 2019**

**ASSOCIATED CONSTRUCTION**

**COMPANY (K) LIMITED.....APPELLANT**

**-VERSUS-**

**JUNE WANJUGU KOINANGE**

**JANE NJERI NGURE**

**SAMUEL GITAU MBUTHIA (Suing as the**

**Administrators of the estate of DINAH**

**MUTHONI MBUTHIA).....RESPONDENTS**

*(Being an appeal from the ruling of Hon. Gesora C.M. delivered on 7<sup>th</sup> December, 2017 in Nairobi Milimani CMCC no. 4639 of 2014 )*

**JUDGEMENT**

1) The respondents herein filed a compensatory suit in their capacity as the administrators of the estate of Dina Muthoni Mbuthia, deceased against the appellant before the chief Magistrate's Court, Milimani. On 20<sup>th</sup> February 2015, the respondents obtained judgment in default of appearance and defence against the appellant.

2) The appellant took out the motion dated 7<sup>th</sup> July 2017 seeking to have the default judgment set aside. Hon. Gesora, learned Chief Magistrate heard and dismissed the aforesaid application vide his ruling delivered on 7<sup>th</sup> December 2017.

3) The appellant being aggrieved preferred this appeal and put forward the following grounds:

***i. THAT he learned magistrate erred in law and in fact in finding that the ex-parte judgment entered on 20<sup>th</sup> February 2015 is regular.***

***ii. THAT the learned magistrate erred in law and in fact in finding that the court that entered the ex-parte judgment on 20<sup>th</sup> February 2015 had jurisdiction to do so.***

***iii. THAT the learned magistrate erred in law and fact in failing to find that there is no obligation to file a defence where summons are not served upon a defendant.***

***iv. THAT the learned magistrate erred in law and in fact in failing to find that a party to a suit should never be punished for the mistakes of its advocates if any.***

***v. THAT the learned magistrate erred in law and in fact in failing to find that a party to a suit should never be condemned unheard***

4) When the appeal came up for hearing, with the concurrence of the advocates, this court directed the same to be disposed of by written submission. I have re-evaluated the arguments put forward in support and against the motion dated 7<sup>th</sup> July 2017 before the trial court.

- 5) I have also considered the rival submissions and the authorities cited by the parties. It is the submission of the appellant that the learned Chief Magistrate failed to appreciate the fact that it was not served with the summons to enter appearance but was instead served with the plaint, the verifying affidavit plus a certificate of urgency and an accompanying motion dated 11<sup>th</sup> August 2014. The appellant further argued that the court record shows that the summons were served upon one **Maggie Nyagah**, a receptionist instead of being served upon the company's principal officer or the secretary or any director.
- 6) It was argued that the trial magistrate erred when he failed to find that such service was defective hence the exparte judgment was obtained irregularly. The appellant also argued that the trial court lacked jurisdiction to handle a land dispute therefore the judgment should have been set aside and the appellant given a conditional leave to defend the suit.
- 7) The respondents on their part argued that the appellant's motion was properly dismissed. It was pointed out that there was ample evidence that it was served with documents that included the summons to enter appearance but it ignored the same by not filing a defence therefore the respondents obtained a regular default judgment.
- 8) The respondents further pointed out that the appellant had raised a preliminary objection stating that the court had no jurisdiction to entertain the suit which objection was heard and dismissed by Hon. Kabaria and no appeal has been preferred hence the appellant cannot raise the same issue.
- 9) Though the appellant put forward a total of five grounds on appeal, the main ground which commends itself to be determined is whether the trial magistrate considered the principles for setting aside exparte judgement before dismissing the appellant's motion dated 7<sup>th</sup> July 2017. I have already set out the rival arguments over the issue.
- 10) The principles to be considered in determining application to set aside exparte judgments were restated in the case of **James Kanyiita nderity & Another vs= Marios Philotas Ghika & Another (2016) eKLR**, where the court expressed itself as follows:

**“In a regular judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raised triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other....”**

- 11) Upon re-evaluating the material placed before the trial court, it is clear that though the appellant outrightly denied being served with the summons to enter appearance, it is apparent that the same was served upon the appellant's office receptionist. In its submissions made before this court, the appellant appears to acknowledge the fact that its receptionist was served.
- 12) It is also apparent from the ruling of Hon. Gesora that the learned Chief Magistrate noted that the appellant was served and it failed to explain why it did not enter a defence. With respect the learned Chief Magistrate cannot be faulted in the manner he determined the motion.
- 13) The other issue which the appellant argued on appeal is the question of jurisdiction. It is the appellant's argument that the magistrate's court lacks jurisdiction to determine a land dispute. The respondent has argued that the issue was argued before Hon. M/s Kabaria but was dismissed. The court record shows that the question touching on jurisdiction was heard and determined. There is no evidence that the appellant appealed against the decision dismissing the appellant's preliminary objection.
- 14) It is now clear that the issue touching on jurisdiction is not one of the grounds of appeal put forward in this appeal. The appellant having failed to enter appearance nor file a defence, despite having been served with the summons to enter appearance and the pleadings has itself to blame. The appellant's motion dated 7<sup>th</sup> July 2017 was properly dismissed.
- 15) In the end, I find no merit in this appeal. The same is dismissed with costs being awarded to the respondents.

**Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 3<sup>rd</sup> day of July, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent