



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 90 OF 2019

DANIEL METHUSELAH MOMANYI.....APPELLANT

VERSUS

WAKENYA PAMOJA SACCO SOCIETY LIMITED....RESPONDENT

(Being an appeal from the Ruling of Hon. Onjoro SRM dated the 12th July 2019 in Kisii CMCC No. 33 of 2019)

JUDGMENT

1. Daniel Methuselah Momanyi the appellant filed suit in CMCC No. 33 of 2019 against the respondent seeking a return of his cow valued at Kshs. 75000/-. He also sought general damages for breach of contract and illegal impounding of the cow without notice, plus costs and interest of the suit. The suit was filed on the 7th May 2019, the plaint is dated the 17th April 2019.

2. On the 7th May 2019 the appellant filed a Notice of Motion dated the 17th November 2018. In the said application he sought orders that the Court be pleased to order the return of the grade cow taken from his compound on the 15th day of November 2018 on running attachment until the application was heard interpartes. In the alternative he sought that the court issues a restraining order to the respondent not to sell or transfer the subject suit cow until the suit is heard and determined.

3. The trial court delivered its ruling on the said application on the 12th July 2019. The trial court dismissed the application on grounds that the appellant had not made out a prima facie case against the respondent.

4. Dissatisfied with the outcome of the said ruling the appellant filed this appeal on the 30th July 2019. The appellant's memorandum of appeal has 8 grounds as follows;

- i. That the trial magistrate erred in law and refused to enter a regular judgment and allowed the respondent's counsel to prosecute an application while request for default judgment had been filed and paid for.
- ii. That the trial magistrate erred by extending the period within which the respondent would file a statement of defence beyond the limits set by the law
- iii. That the trial magistrate erred in holding that the appellant's case had been overtaken by events when no evidence was provided to show how it was overtaken
- iv. That the trial magistrate erred and failed to take into consideration that some event had accrued that required some interim order
- v. That the trial magistrate erred in law and fact and went on to determine the case on merits as application stage
- vi. That the trial magistrate erred in law and fact by allowing deciding the issues not pleaded and canvassed by the litigants during the trial.
- vii. That the trial magistrate erred in law and fact by allowing a party who had come to court late beyond what was set in summons to enter appearance.
- viii. That the trial magistrate erred in law and fact and exercised his jurisdiction mala fide.

The appellant seeks that this court *enters a default judgment against the respondent and that he be given costs of the court below.*

5. As a first appellate court, this court is called upon to analyse and re-assess the lower court's record and reach its own conclusions (see ***Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348***).

6. Parties filed written submissions which I have read and considered. The appellant has raised 3 issues for determination, which are grounds (i), (iv) and (v) in his memorandum of appeal. This is what I garner from his submissions; that the trial magistrate erred by determining the application yet he had applied for a default judgment. The replying affidavit filed could not have been envisaged as a defence. Order 7 rule 5 (b) (c) provides for the documents to be filed upon receiving a plaint and summons to enter appearance. That the trial court should have entered a default judgment after the respondent failed to file a response within the stipulated period allowed in law. That the trial magistrate did not give reasons why he felt that the appellant had not proved his case. That there was no proof that the cow had been sold and that the trial court erred in holding that an injunction had been overtaken by events. That the averments in pleadings is not evidence. That the trial court entertained a party who was not properly on record. He cited quite a number of cases to support his appeal.

7. The respondent filed submissions on the 27th November 2019. The respondent raised four issues for determination; whether the respondent filed her statement of defence before the appellant's request for judgment, whether the respondent filed her response and defence on time, whether the appellant's appeal is merited and who should bear the costs of this appeal. It was submitted that that appellant filed his suit vide a plaint dated 17th April 2019 on the 7th May 2019. The respondent filed her memorandum of appearance on the 22nd May 2019 and her defence dated the 21st June 2019 on the 26th June 2019. The request for judgment was made on the 27th June 2019 a day after the defence was filed. That the request for judgment made a day later therefore could not stand. That the appellant did not bother to find out if a defence had been filed before his request for judgement. The defence was not made late. That the issue of filing the defence late was not raised before the trial court. It was further submitted that the appeal is anchored on the issue of default judgment and not the ruling delivered on the 12th July 2019. That the appellant filed the application after 7 months from November 2018. That the appellant failed to prove that he had a prima facie case when seeking the injunctive orders (see ***Geilla vs Cassman Brown Co.Ltd1973 E.A. 358***). That the appellant has raised the issue of evidence regarding the sale of the cow, which he should have raised before the trial court. That the appellant's suit was not dismissed and that the substantive suit is yet to be heard and determined. That there is no justifiable ground upon that warrant this court to disturb the trial court's ruling which was well reasoned and trial magistrate exercised his discretion properly and judiciously (see ***Mbogo & Another vs Shah [1968] EA***). On costs it was submitted that the appeal should be dismissed with costs.

ANALYSIS AND DETERMINATION

8. After considering the submission and proceedings before the trial court I find that these are the issues for determination; *whether the trial court erred in failing to enter judgment against the respondent and whether the trial court erred in failing to grant the orders sought by the applicant in his application dated the 17th November 2018.*

9. From the Record of Appeal dated the 23rd August 2019, Supplementary Record of Appeal dated 11th November 2019, the Respondent's supplementary record of appeal dated the 6th November 2019 and courtfile, the plaint dated the 17th April 2019 was filed on the 7th May 2019. Simultaneously the appellant filed the Notice of Motion dated the 17th November 2018 *seeking a return of the cow or orders to restrain the respondent from selling the said cow.* The summons to enter appearance is dated the 8th May 2019. A memorandum of appearance was filed on the 22nd May 2019 by Ms Ochoki & Company advocates for the defendant. A defence dated 21st June 2019 was filed on the 26th June 2019. The appellant's request for judgment dated 22nd May 2019 was filed in court on the 22nd June 2019. Order 7 rule 1 provides as follows;

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service”

The respondent filed its memorandum of appearance on the 22nd May 2019. As per the provisions of Order 7 rule1 the defendant was to file its defence within 14 days after filing his memorandum of appearance. The defence was to be filed 14 days after 22nd May 2019. The defence was filed on the 22nd June 2019. The appellant has now raised the issue that the defence was filed beyond the period provided in law. I note that this issue was not raised by the appellant before the trial court. In the case of ***Kenya Commercial Bank Ltd vs Osebe (1982) KLR*** the Court of Appeal held as follows;

“It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the appellant is improper, as the appellant had no fair notice of this issue. Such an issue should not be decided on appeal

The substantive suit has not been heard and determined, in my view the issue of defence raised by the appellant can still be raised before the trial court. To ask this court to enter judgment against the respondent yet this issue was not raised before the trial court is improper. The appellant has to exhaust all avenues open to him before the trial court and is at liberty to file an appeal against the ruling delivered if he feels aggrieved.

10. The second issue is on the trial court's ruling dismissing the order of injunction sought. In his application dated the 17th November 2018 the appellant sought orders to return the grade cow or issue an injunction stopping the sale or transfer of the cow. The trial magistrate stated that he had considered the pleadings and the submissions and found that the appellant had not fulfilled the pre-requisites for grant of an injunction. The trial magistrate noted that it was not clear that the cow was attached by his self-help group or the respondent and that such clarification could only be obtained in a full hearing and that the value of the cow could also be ascertained and that the appellant could not be said that he will suffer loss not capable to be compensated by costs.

11. The appellant claims that the trial magistrate did not consider the respondent's submission that he did not know the status of the cow. The replying affidavit filed by the respondent by Grace Omare indicates at paragraph 6 that he appellant vide the loan security declaration form offered three Friesian cows white and black, Sony TV set, sofa set and a wall unit as security of the same and that the same was consented to by the spouse. At paragraph 11 of her affidavit she states that the proclaimed cow had long been sold for the recovery of the amount owed.

12. In considering an application for injunction a court will consider the facts before and exercise its discretion and either grant or decline in line with the principles in the case of *Geilla vs Cassman Brown co. Ltd (supra)*. In the case of *Mbogo vs Another vs Shah [1968] EA Sir Clement de Lestang V.P* held that, it was settled that a court will not interfere with the exercise of the discretion of an inferior court unless it was satisfied that its discretion is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or it failed to take consideration which it should have taken into consideration and in so doing arrived at wrong conclusion. The trial magistrate considered the application and noted that the appellant was indebted to the respondent and that the cow had been sold and further that he could be compensated. In my view the trial magistrate exercised his discretion judiciously.

13. All in all, I find that the appeal has no merit. The lower court file shall be returned back to the lower court for hearing and determination. The appeal is dismissed with costs to the respondent.

Dated, signed and delivered at KISII this 7th day of July 2020.

R.E. OUGO

JUDGE

In the presence of:

Appellant Absent

Miss Ndemo For the Respondent

Ms Rael Court Assistant