



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 135 OF 2018

(CORAM: F. GIKONYO J.)

ZAMZAM YUSUF.....APPELLANT

-VS-

ABDILLAH IGGE.....1ST RESPONDENT

MOHAMMED IGGE.....2ND RESPONDENT

(Being an appeal against the ruling and Order by Hon. Abdulharlim

H. Athman, Principal Kadhi delivered on 22/10/2009 and 4/12/2018 respectively)

JUDGMENT

[1] On 4/12/2018 the trial court dismissed the appellant's Notice of Motion dated 10/08/2018 with costs. In the Motion, the applicant and the other applicants sought for a stay of execution and the setting aside of the judgment and ruling delivered on 22/10/2009 and 26/07/2018 respectively, so that the appellant may enter her statement of defence in the primary suit.

[2] Being aggrieved by the decision the appellant filed this appeal based on five grounds:

- 1. THAT the learned Principal Kadhi erred in law and fact in finding the judgment delivered on the 22nd day of October, 2009 regular even after finding that the appellant has not been served with summons to enter appearance.**
- 2. THAT the learned Principal Kadhi erred in law and fact in finding the proceedings of the 14th day of October 2009 and 22nd day of October 2009 to be regular without any evidence of service for hearing notices on the appellant.**
- 3. THAT the learned Principal Kadhi misapprehended and misapplied the principles upon which a default judgment is set aside.**
- 4. THAT the learned Principal Kadhi erred in law and fact in distributing UND residential Plot No. 414 Bula Pesa Estate, Isiolo when the same was not part of the estate of the late Ibadu Farah.**
- 5. THAT the learned Principal Kadhi erred in law and fact in entertaining the suit by the petitioners against the respondent without any evidence that the latter was the Legal Representative of the Halima Igge.**

[3] This appeal was canvassed by way of written submissions. The appellant submitted that judgment entered on 22/10/2009 was a default judgment for the appellant had not been served with summons to enter appearance neither was she notified of the hearing dates. Thus, the judgment entered by the honorable Kadhi was irregular. Moreover, the Honorable Kadhi had no power to distribute UNS Residential Plot No. 414 Bula Pesa Estate Isiolo. It was not part of Ibadu Farah's free property as per the provisions of **Section 3 of the Law of Succession Act**. The property was already registered in the name of the late Halima Igge and Mohammed Yusuf was not her legal representative. Therefore, the appeal ought to be allowed and set aside the judgment entered on 22/10/2009 and remit the matter back to the Kadhi' court for hearing on merit. She relied on **Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others [2019] eKLR** and **Patrick Kiseki Mutisya (Suing as the Personal Representative to the estate of NZOMO MUTISYA (deceased) v K. B. Shaghani & Sons Limited & another [2012] eKLR** to support her submissions.

[4] The respondents submitted that the appellant's brother, Mohammed Yusuf was served with the hearing notice and her father was in court and sought time to contact the appellant to appear in court the next day. As for the application dated 11/07/2018 the appellant appeared in

court for the hearing. The appellant at all material time knew about the Kadhi's Court proceedings. As for Plot Number 414 Bula Pesa; this issue was settled in the judgment which should be upheld. The judgment was a regular default judgment that was issued nine years ago. The appellant was aware of the suit but choose not to participate in it. Therefore, it ought not to be stayed or set aside. They relied on several case law including Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2017] eKLR and Lazarus Chomba v Zakayo Gitonga Kabutha & another [2001] eKLR to support their submissions.

BACKGROUND

[5] The primary suit is a probate and administration cause instituted through a petition dated 8/07/2009 by the respondents against Mohammed Yusuf in the Kadhi's court. The respondents contended that their mother Ibadu Farah had left Plot No. 1301 Bula Pesa for them and their sister, the late Halima Igge. Since the respondents were in Saudi Arabia their sister took care of the plot. However, she subdivided it into Nos. 414 and 415 registering the bigger portion in her name and upon her death left the plot under the care of her son Mohammed Yusuf. The respondents sought orders that the subdivision be declared null and void and proper division of the plot be done under Islamic law of inheritance. Mohammed Yusuf was served with the hearing notice but failed to attend court. His father appeared for hearing and sought for adjournment to allow him to contact his daughter the appellant. The following day they did not appear for the hearing and the court entered judgment on 22/06/2009. The court subdivided Plot No. 1301 Bula Pesa into five equal shares. The respondents were to get two each and the late Halima Igge to get one share.

[6] When they wanted to implement the decree, they found that Mohamed Yusuf and his sisters allowed one Sadia Bakajo in the plot without their knowledge and she refused to vacate. This necessitated them to file application dated 22/07/2018 which was allowed on 26/07/2018.

ANALYSIS AND DETERMINATION

[7] The appellant seeks stay of execution and the setting aside of the judgment delivered on 22/10/2009.

[8] On setting aside the law is clear. In the case of Shah v Mbogo and Another [1967] EA 116, held that:-

“I have carefully, considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardships resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

[9] As was held in the case of Patel v E.A. Cargo Handling Services Ltd [1974] EA 75:-

“There are no limits or restrictions on the judge's discretion 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 fetter the wide discretion given it by the rules.”

[10] The first question is whether the default judgment herein regular or irregular? In James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR, the Court of Appeal has differentiated between a regular and irregular judgment. It held:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default 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 default is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move court to set aside the default judgment and to grant him leave to defend 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 raises 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. ... In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion.”

[11] It is the appellant's case that she was not served with summons, thus, making the judgment as well as the ensuing proceedings to be irregular. She also stated that, Plot No. 414 Bula Pesa was not part of the estate of the late Ibadu Farah but belonged to the late Halima Igge. According to the appellant, the Kadhi had no right to entertain the respondents' suit in the first place without any evidence that Mohammed Yusuf was the legal representative of the estate of Halima Igge.

[12] Every court exercising judicial authority must ensure that it is just in its determination, acts with impartiality and fairness to all the parties. The Kadhi is not accused of any such ill. According to the record the appellant's brother who was the defendant was served with the summons. Come day of the hearing he did not show up but their father was in court and sought an adjournment to inform the appellant. The appellant did not refute this fact. Again from record it seems, the following day the appellant, his brother or father did not appear. The Kadhi's court has acknowledged that in spite of the appellant having been served with summons personally she was aware of the matter. What is surprising is that she waited for nine (9) years to come to court on appeal. The judgment was entered into in 2009.

[13] Having said that, I do note that some proceedings took place after the judgment. The respondent filed the application dated 11/07/2018 seeking amongst other orders a mandatory injunction compelling the appellants to vacate Plot No. Bula Pesa 414/415 which was allowed.

This prompted the appellant to file their application dated 10/08/2018 to set aside the eviction order. Of great worth in this appeal is that the appellant is the daughter of Halima Igge. Her said mother is a beneficiary of the estate of late Ibadu Farah whose estate the proceedings before the Kadhi relates. She is also said to be the owner of plot number 414 which was distributed by the Kadhi court in the proceedings. It is notable that the respondents stated that Halima Igge fraudulently subdivided plot number 1301 which belonged to their late mother into plot number 414 and 415 and allocated herself the larger portion i.e. number 414. I have seen some allotment papers dated 20.02.1999 by the Department of Lands to Halima Igge over plot number 414 Bula Pesa Estate. There is clearly a contest on the estate property. Interestingly, the kadhi did not attempt to establish the estate property. He only wrote a terse ruling in which he merely alluded to the allegation of fraud made by the respondents against their sister Halima Igge. And without determining the estate property, the Kadhi quickly concluded that the matter was purely an inheritance matter between 2 uncles and their nephew; and went ahead to distribute property number 1301. It was not established that plot number 1301 was the estate property or that plot number 414 and 415 constituted the estate property. These are pertinent issues which must be determined by the court exercising probate and administration jurisdiction before distribution of the estate.

[14] The above recapitulation of salient facts justifies making of certain conclusions. First, whereas the Kadhi's court did enter a regular default judgment, he did not establish the estate property before distribution. Second, the "judgment" was devoid of proper evaluation of evidence. Third, it will be prejudicial to the estate of the late Halima Igge if the judgment is left standing. I am aware that the respondents are entitled to the fruits of their judgment. However, justice demands that you consider the account of the other side too in order to arrive at a just and fair determination. I am reminded, here, that *the discretion in setting aside judgment is intended so to be exercised to avoid injustice from occurring on a party. See Shah vs Mbogoh.*

[15] Even though the case is old, the matters I have discussed above are substantial and in the interest of justice, they commend the setting aside of the judgment. Accordingly, I set aside the judgment by the Kadhi with all consequential and subsequent orders thereto. The file shall be remitted back to the Kadhi court at Isiolo to be heard afresh by a competent court except the trial Kadhi herein. No orders as to costs. It is so ordered.

Dated, signed and delivered at Meru this 5th day of October 2020

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F. GIKONYO

JUDGE

Representation

Mapesa for Nkunja for appellant

M/s Munyungu for Kaberia for respondent

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F. GIKONYO

JUDGE