



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 54 OF 2016

WILLIAM KAMUNGE.....1ST APPELLANT

ALICE KAMUNGE.....2ND APPELLANT

SAMUEL NDERITU MAIRO.....3RD APPELLANT

VERSUS

MURIUKI MBITHI.....RESPONDENT

(Being an appeal and order of the Chief Magistrate's Court, Milimani Commercial by Rachael Ngetich delivered on 5th February, 2016, CMCC Case No. 3318 of 2015)

J U D G M E N T

The appellants herein sued the respondent for recovery of a sum of Ksh.6,312,535/- which had been paid to the respondent for a purchase of some land that the respondent had undertaken to procure on behalf of the appellants. The land was never procured and therefore, the appellants demanded the refund of the said sum from the respondent. Upon failure by the respondent to refund the money, the appellants moved to court.

The Respondent was said to have been served with summons to enter appearance but did not do so leading to entry of an interlocutory judgment against him in favour of the appellants.

Following that, judgment the respondent filed an application to set aside the said *ex parte* judgment whereupon the lower court allowed the application and set aside the *ex parte* judgment and all consequential order, on condition that the respondent paid ksh.20,000/- being the thrown away costs.

It is that ruling that aggrieved the appellant who then filed this appeal. In the Memorandum of appeal dated 18th February, 2016 the lower court was faulted for setting aside the said judgment which was regular, because the court had found and held the respondent was served with summons to enter appearance. The lower court was also faulted for failing to exercise its discretion judicially and fairly in setting aside the said judgment. Further it was the appellants' position that the court should have ordered the respondent to deposit the entire decretal sum in court as a condition for setting aside the default judgment. In any case, the court was wrong for not finding that the respondent's proposed defence did not raise any triable issues and did not answer the claim by the 2nd and 3rd appellants.

I am required at this stage to evaluate the record before the lower court with the view to arriving at independent conclusions. Both parties have filed submissions which I have considered.

The application that led to the contested ruling was by the of Notice of Motion under Section 3A of the Civil Procedure Act, Order X Rule 11, Order 22 Rule 22, Order 50 Rule 6 and order 51 Rule 1 of the Civil Procedure Rules.

In the contested ruling delivered on 5th February, 2016 the lower court said as follows: -

“The process server has detailed how he effected service on the defendant on 15th June, 2015 in the presence of the area Assistant chief. From the contents of the affidavit it appears clearly service was effected on the defendant and it would not be necessary to summon the process server. I now wish to consider whether the defence raises triable issues to warrant giving the defendant an opportunity to be heard. Having perused the pleadings herein and annexures to the plaintiff (sic) I find that for the ends of justice to be met it would be necessary for the defendant to be given a chance to state his case as concerns money allegedly advance to him by the plaintiffs herein. Owing to the large claim and the fact that the defendant is indicating that there is money owing to him from the 1st plaintiff it would be necessary to give opportunity to all the parties herein to be given

opportunity to adduce evidence to enable court arrive at a decision on merit.”

One would have expected the court to find that once service of summons to enter appearance was proved, and the respondent having failed to comply, then there was a regular judgment capable of being executed. The court did not do so and instead set aside the ex parte judgment for reasons set out above.

The provisions of law cited by the respondent in the application to set aside the ex parte judgment called upon the lower court to exercise its discretion. In so doing, the lower court cited several reasons in the extract cited above. These included a court ***“ends of justice to be met”, “defendant to be given a chance to state his case”, “owing to the large claim”, and “parties to be given opportunity to adduce evidence to enable court to arrive at a decision on merit”***

It is not hard to read what was playing in the mind of the lower court when the said judgement was set aside. It is clear from the foregoing that, a party should not be locked out of the seat of justice before being heard.

Further, there is a draft defence that had been presented by the respondent which required interrogation by a way of a trial and, however weak it may appear, it should not be disregarded. An appellate court may not interfere with the discretion of the lower court unless it clearly appears to be prejudicial to one of the parties. In this case, I see no prejudice whatsoever that has been, or likely to be visited upon the appellants. I am therefore unable interfere with the discretion of the lower court in setting aside the said ex parte judgment.

The costs awarded at Ksh.20, 000/- may appear unsatisfactory but again, that was the discretion of the court and I have no reason to interfere with the same. I can only add that this appeal has contributed to the delay in the final determination of the matter in the lower court.

I find no merit in the appeal which is hereby dismissed but the costs shall be in the cause.

On 13 October, 2016 this court granted a stay of proceedings in the lower court. Following the decision of this appeal, the said order is now lifted and the lower court file shall be remitted for trial before another magistrate of competent jurisdiction. This being an old case, priority shall be given in compliance with the procedures and listing for hearing.

Dated, signed and delivered at Nairobi this 8th day of October, 2019.

A MBOGHOLI MSAGHA

JUDGE