REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 19 OF 2016

MARY RUGURU KARUA.....APPELLANT

VERSUS

ROBERT KARANJA KAMAU.....RESPONDENT

J U D G E M E N T

The appellant was dissatisfied with the ruling of Embu Principal Magistrate delivered on 23/03/2016 in CMCC NO.257 of 2014 in which prompted the lodging of this Appeal. The Memorandum of Appeal sets out several grounds:-

1. THAT the learned Magistrate erred in law and fact in allowing the application dated 27/11/2015 which sought for a host of prayers and which had been filed by a stranger.

2. THAT the preliminary objection raised by the appellant was disregarded which if heard would have resulted in a different outcome of the case.

3. THAT the said application was allowed despite the fact that there was delay in filing it and was riddled with other flaws.

4. THAT the respondent's advocate had been given leave to file his pleadings but failed to do so, yet the Magistrate allowed the application which was erroneous.

5. THAT the applicant's submissions on the application were disregarded.

Directions in this appeal were given on 13/02/2017 whereas the parties agreed to file written submissions. The appellants filed her submissions on 05/05/2017. However, the respondent did not file his submissions despite being granted several adjournments.

The application dated 27/11/2015 forms the subject of this appeal. It sought for the following orders:-

1. That this application be certified urgent, its services be dispensed with and heard in the first instance.

2. This Honourable court be pleased to stay admission of the matter herein to formal proof as scheduled and all consequential orders pending the hearing of this application inter parties.

3. The 1st defendant/applicant be granted leave to cross-examine the process server named in the affidavit of service accompanying the request for judgment.

4. The judgment in default entered on the 12th day of November, 2015 and all consequential orders be set aside.

5. This Honourable court be pleased to strike out the amended plaint dated 13th July, 2015 for being fatally defective.

6. Costs of this application be provided for.

7. Any other order as this Honourable Court may find just to issue.

The grounds in support of the application were contained on the face of the application and on the replying affidavit of Robert Karanja

Kamau, the applicant/respondent. The applicant alleged that the affidavit of James K. Thuo the Process Server was not genuine for he was never served with the summons to enter appearance. It was deposed that the appellant who was the respondent in the application dated 27/11/2018 conducted himself like he was in a hurry to have the matter finalized to the disadvantage of the respondent herein. He applied for interlocutory judgment on 11/11/2015 and it was entered one day later.

The respondent was given time to engage a Counsel and when the matter came for mention on 25/11/2015, the appellant said it was the date for formal proof which was not the case. The respondent deposed further that he was not given time to be heard and was accordingly condemned.

The learned Magistrate said considering the applications and the submissions of the respondent and found the application merited. He therefore allowed the application in its entirety.

On perusal of the ruling I find that the learned Magistrate gave background facts of the application and then made a brief ruling as follows"-

> ***"I have carefully considered the papers filed for and against the application and I am satisfied that the application has merit and shall allow it as prayed."***

From the nature and content of the prayers in the application several issues arose and ought to have been considered in view of the submissions filed by the parties so as to determine each prayer on its merit. The grounds relied on in the application generated several issues.

Firstly, there was the issue of disputed service of the summons to enter appearance. The respondent's affidavit devoted eight (8) paragraphs on the issue of service.

The second issue was that the respondent was not served with the judgment notice after the exparte judgment was entered. Thirdly, the respondent raised the issue of being condemned without being heard.

In his ruling, the Magistrate did not identify the issues raised in the application dated 27/11/2015 neither did he deal with any of the issues in the application. The gist of the ruling was to allow the application containing four prayers which were quite distinct in one sentence as quoted herein. The ruling was a blanket one allowing all the prayers together.

The parties had filed submissions which were not considered in the ruling. The relevant law relating to service of summons, service or issue of judgment notice and the right to be heard was not applied.

Interestingly, the Magistrate struck out the plaint thus bringing to an end the appellant's case in the plaint. Similarly, the court allowed prayer of the application which was interlocutory in nature. In this regard, the decree reads in part that:-

> ***" That the 1st defendant is hereby granted leave to cross-examine the process server named in the affidavit of service accompanying the request for judgment."***

The issue arising herein is how that order was to be enforced or how it was to benefit the party in whose favour it was made in a case which does not exist after the plaint was struck out.

The ruling of the Magistrate cannot qualify to a ruling in the real sense in that it failed to address the issues in the application and failed to give any reasoning for the orders made. The issues of service and of being denied a chance to be heard were of serious nature and deserved to be addressed and determined on merit.

The appellant raised the issue that his preliminary location was disregarded on 09/03/2016 when the case came for mention. I have perused the record and find that the matter was coming for a ruling date. The both parties had already taken directions to have the application heard by way of written submissions. The respondent's Counsel had filed submissions of 26/02/2016. The appellant was yet to file his. Infact he filed his submissions later on 21/03/2016.

It is during the mention date of 09/03/2016 that the appellant's Counsel talked of his intention to file a preliminary objection and he was referred to present it to the registry and take a date for hearing. The Magistrate had already set a date for ruling of the application by then.

It is my considered view that the preliminary objection came a bit too late in the day. The application was already concluded and a date for the ruling set. The Magistrate could not be expected to hold his ruling preparation in abeyance and take a few steps backwards to entertain a preliminary objection against the very application that had been set for a ruling. The court had a good reason to disregard the preliminary objection.

In striking out the plaint, the learned Magistrate did not, even for a moment give due consideration to the provisions of **Order 2 Rule 15 of the Civil Procedure Rules** which provides:-

> ***(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:—***
>
> ***(a) It discloses no reasonable cause of action or defence in law; or***

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

The principles set out in several decided cases over a long period is that the power to strike out a pleading or a party from the suit is draconian measure which ought to be employed only as the last resort or even then, in the clearest of cases.

It was held in the case of **D.T. DOBIE LIMITED – VS – MUCHINA [1982] KLR (Pg.9)** that:

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action,* and *is so weak as to be beyond redemption."***

The respondent had argued that the amended plaint was fatally defective without giving reasons for its incompetence. In the submissions, the respondent addressed the issues of service of summons and the injunctive orders given earlier in favour of the respondent.

The appellant in his submissions cited some authorities arguing that it is not a mandatory requirement that a plaint must be filed without summons as required by Order 5 Rule 1(3).

It was explained that the plaint was amended under the provisions of Order VIA Rule 1 which provides for amendment without leave before closing of pleadings. The Magistrate did not refer to the authorities which could have quite enlightened him on the subject.

It is my considered view that the prayer for striking out the amended plaint was not supported by any material from the respondent and that it was a misdirection on the part of the Magistrate.

It was argued that the respondent's advocate Messrs. Maina Ngaruya & Co. had not filed a notice of change of Advocates to take over from Messrs. Gachoro & Co. Advocates who were on record. The learned Magistrate did not address this issue at all let alone making a finding on it.

I have perused the appeal record and note that the firm of Maina Ngaruiya & Co. Advocates filed two notices of appointment of Advocates. The first is dated 09/10/2015. It was not explained why the two notices were filed in one case at different dates.

The record shows that one Mr. Gachomo was still on record for the 1st respondent. The firm of Maina Ngaruiya & Co. ought to have filed a notice of change of Advocates and not a notice of appointment.

The matter was brought to the notice of the court in open court and it was not resolved. It was also raised during the hearing of the application dated 27/11/2015 but the court did not deal with it.

I wish to state that irrespective of the finding that the firm of Maina Ngaruiya & Co. Advocates was not properly on record, the ruling of the learned Magistrate, delivered in this case by the learned Magistrate on 25/03/2016 is flawed as explained above.

For the foregoing reasons, I find that this appeal is merited and allow it in the following terms:

1. ***That the ruling delivered on 23/03/2016 for the application dated 27/12/2015 is hereby set aside.***

2. ***That in the interests of justice the exparte judgment entered in CMCC No.257 of 2014 is hereby set aside.***

3. ***That the respondent is hereby allowed to defend the suit.***

4. ***That each party meets its own costs of this application.***

It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT EMBU THIS 9TH DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Nabutete for Maina for Respondent

Ms. Ndorongo for Andande for Applicant