



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 17 OF 2016

ANGELINA MINA KYAMBI.....APPELLANT

VERSUS

JOSEPH MULI KALAVI.....RESPONDENT

J U D G M E N T

1. The Respondent, **Joseph Muli Kalavi** approached the Court by way of Plaint seeking orders *inter alia* that a permanent injunction do issue restraining the Appellant, **Angelina Mina Kyambi** from interfering in any way with the property comprising the Estate of the Deceased **Robert Kyambi Kalavi**.

2. It was pleaded that the Appellant was the 1st wife of the Deceased **Robert Kyambi Kavali** who died on the **23rd June, 1994** having left a written will whereof the Respondent was named as the Executor. The matter was heard in **Nairobi Succession Cause No. 1790 of 1994** and on the **12th July, 1995** he was granted probate of the will as the Executor. Consequently the grant was confirmed. It was further pleaded that the Appellant wrongfully and fraudulently caused a parcel of land **No. Mutonguni/Kauni/3261** forming the Estate of the Deceased to be transferred to herself hence the same had to be recovered so as to remain as part of the Estate of the Deceased and further to account for proceeds of motor tractor **No. KVF 509** which was an asset of the Estate of the Deceased.

3. On the **14th April, 2010** an interlocutory Judgment was entered against the Appellant. Following a formal proof done, on the **15th November, 2011** Judgment was entered in favour of the Respondent. Land Parcel **No. Kauni Adjudication Section (Mutonguni/Kauni/3261)** was to be recovered; the Appellant was to be evicted from **Plot No. 93 Kabati Market**; if she did not vacate it within 45 days. An account for proceeds of motor tractor **No. KVF 509** and any other property comprising of the Estate of the Deceased **Robert Kyambi Kalavi** was to be done and the Appellant stood restrained from interfering with the Estate of the Deceased.

4. On the **3rd day of December, 2012** the Appellant filed a Notice of Motion seeking to set aside the Judgment entered and all consequential orders and to be allowed to defend the suit. She annexed a draft defence to the affidavit. The application was based on grounds that she was never served with summons to enter appearance and she had a good defence with triable issues. Further in an affidavit in support of the application she averred that she learned of the existence of the matter on being notified to pay **Kshs. 42,900/=**.

5. The Respondent filed grounds of opposition where he stated that service was personal and the Appellant had no defence to his case since he holds Letters of Administration from the High Court therefore he is administering the Estate of the Deceased.

6. The trial Court considered the application and dismissed it. It reached a finding that service was personal and that issues raised in defence were addressed in **High Court Succession Cause No. 1799 of 1994** therefore no triable issues were raised.

7. Aggrieved by the decision of the Court the Appellant appealed on grounds that: The finding that there were no triable issues raised was erroneous; **Order 10 Rule 11** of the **Civil Procedure Rules** was not complied with; the Appellant was condemned unheard and the decision reached was against the weight of evidence.

8. The Appeal was canvassed by way of written submissions. It was urged on behalf of the Appellant that the Court was required to do justice to all parties but she was condemned unheard. The case of **Patel vs. EA Cargo Handling Services Limited (1974) EA 75** was cited where the Court stated that:

“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 to it by the rules. I agree that where it is a regular as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

9. That the draft defence did raise triable issues that could only be determined during full hearing. The case of **CMC Holding Limited vs. James Mumo Nzioka (2004) eKLR** was cited where it was stated that:

“The law is well settled that in application for setting aside ex-parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether defence if filed already or draft defence is annexed to the application, raises triable issues.”

10. That failure to enter appearance and file a defence was not deliberate.

11. In response it was submitted on behalf of the Respondent that the Appellant was served with summons and she acknowledged receipt by signing. That objections to the distribution of the Estate of the Deceased was dismissed and the Estate distributed. That the holding by the trial Magistrate that there were no triable issues was not erroneous.

12. That **Order 10 Rule 11** of the **Civil Procedure Rules** does not tell the Court to always exercise discretion in favour of the Applicant. That the Appellant was not condemned unheard. That the Respondent was seeking orders to enforce execution of the will and administer the Estate and that the right of evidence adduced was in favour of the Respondent.

13. I have reconsidered and re-evaluated what transpired in the Lower Court and I must come up with my own conclusions (**See Selle vs. Associated Motor Boat Co. LTD (1968) EA 123**).

14. **Order 10 Rule 11** of the **Civil Procedure Rules** provides thus:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

From the reading of that provision of the law, the Court has unfettered discretionary powers under the order either to set aside or vary the Judgment entered. This principle was enunciated in the case of **Patel vs. East African Cargo Services Limited (1974) EA 75 (Supra)** where it was stated that:

“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 to it by the rules.....”

15. It was deposed by **Petronillar K. Mutia** a Process Server that upon service the Appellant acknowledged receipt of summons by signing at the back though the document was not exhibited. Further it was averred that soon after she went to the office of the Respondent’s Counsel where she stated that following her spiritual conviction she was not putting up any defence. The Appellant on the other hand denied having been served with summons and averred that she came to learn of the matter at the execution stage. Failure to seek to cross examine the Process Server suggested it could be truth. What was however not demonstrated is if notice of Judgment was served upon the Appellant.

16. It is urged that the draft defence that was rejected by the trial Magistrate raised triable issues. In the case of **Gupta W. Continental Builders Ltd (1976 – 80) I KLR 809 Madan JA** stated that:

“... A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing.....”

17. In the case of **Moi University vs. Vishva Builders Limited Civil Appeal No. 296 of 2004** (Unreported) the Court of Appeal stated:

“The law is now settled that is the defence raises even one bonafide triable issue, then the defendant must be given leave to defend..... As we know even one triable issue would be sufficient. See HD Hasmani vs. Banque DO Congo Belge (1938) 5 EACA 89. We must however hasten to add that a triable issue does not mean one that will succeed.....”

18. The impugned Judgment was entered without the Appellant being heard. Considering the nature of the matter, it would have been in the interest of justice for both parties to be given a hearing since the draft defence did raise some triable issues. The learned Magistrate should have allowed the Appellant to defend the suit.

19. In the result of the foregoing I find the Appeal having merit and I allow it. Therefore the Ruling of the Lower Court is hereby set aside and is substituted by an order setting aside the impugned default Judgment. Further, I do direct that the Appellant shall file a defence within 14 days from the date of this Judgment. The consequence of this order is that the Appellant shall pay the Respondent costs.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 13th day of November, 2018.

L. N. MUTENDE

JUDGE