



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 70 OF 2016**

**CHARLES SIFUNA KIPKOLAN.....APPELLANT**

**VERSUS**

**ONG’ALE MULEKANO.....RESPONDENT**

***(An appeal arising from the judgment and decree of the Hon. F Makoyo, Resident Magistrate, in Kakamega CMCCC No. 275 of 2014 of 8<sup>th</sup> September 2016)***

**JUDGMENT**

1. The appellant lodged a memorandum of appeal herein dated 9<sup>th</sup> September 2016, in which it is averred that the trial court erred in declaring the appellant had been properly served with summons to appear and concluding that the *ex parte* judgement had been obtained regularly, erred in that the appellant’s intended defence had no triable issues, erred in declining to set aside the *ex parte* judgment, and that the matter fell within the jurisdiction of the Environment and Land Court. It is prayed that the impugned ruling of the trial court of 8<sup>th</sup> September 2016 be set aside and substituted with an order allowing the appellant’s Notice of Motion dated 24<sup>th</sup> May 2016 *in toto*.

2. The factual background to the matter, gleaned from the material on record, is that the respondent had lodged a suit in Kakamega CMCCC No. 275 of 2014 seeking to recover a sum of Kshs. 372, 000.00 from the appellant, being money that the former had paid to the latter as consideration for a piece of land known as Bunyala/Sirigoi/385, which land was never transferred to his name. According to an affidavit of service sworn on 22<sup>nd</sup> October 2014, and lodged in court on 26<sup>th</sup> November 2014, the appellant was served with the relevant court process on 18<sup>th</sup> October 2014. He did not enter appearance within the time allowed and a judgment was entered on 26<sup>th</sup> November 2014, upon a request for judgment dated 24<sup>th</sup> November 2014, lodged in the cause on 26<sup>th</sup> November 2014. The matter was thereafter formally proved, and a judgment was entered on 15<sup>th</sup> July 2015 and a decree issued thereon on 28<sup>th</sup> July 2015 for a sum of Kshs. 368, 000.00 plus interests and costs. An attachment in execution of the decree ensued, which prompted the appellant to file a Motion in the cause on 24<sup>th</sup> May 2016, principally to have the *ex parte* judgment set aside. To that application was attached a draft statement of defence dated 24<sup>th</sup> May 2016. The Motion was canvassed by way of written submissions, and was dismissed vide a ruling delivered on 8<sup>th</sup> September 2016, the trial court having been satisfied that the summons to enter appearance had been properly served and that the proposed defence offered or comprised of nothing more than mere denials. It is the ruling of 8<sup>th</sup> September 2016 that prompted the appeal herein.

3. Directions were given on 20<sup>th</sup> July 2017 that the appeal was to be canvassed by way of written submissions, to be highlighted. The parties have complied, and have each filed their respective written submissions, complete with the authorities that they rely on. On 2<sup>nd</sup> July 2018 they invited me to deliver judgment without the benefit of the highlighting of the submissions. I have perused through the submissions and noted the arguments advanced. I need not recite the substance of the respective written submissions in this judgement.

4. The appellant herein raises three principal grounds – that there was no proper service of the summons to enter appearance, that the appellant had a good defence and that the trial court had no jurisdiction to handle the matter.

5. On service of the process, I have had occasion to read through the affidavit of service sworn on 22<sup>nd</sup> October 2014. It indicates the date when the service was effected on the appellant and the place where he was served at, the manner in which the service was effected and it identifies the person who identified the person to be served to the process server. I see nothing in that affidavit that suggests that there was no proper service, or that the service did not comply with the established law. I agree with the trial court, the service cannot be faulted.

6. On the draft defence placed before the trial court, I have also had occasion to peruse through it. It comprises of what are known as mere denials. There is no defence to the allegation that the parties had a written agreement before them, the appellant merely denied the agreement, adding that if ever there was one then it must have failed at the instance of the respondent without giving any specifics. I note that the matter had been formally proved, and material, by way of exhibits, had been placed on record. The respondent’s case had been laid bare. It behooved the appellant to do more than merely deny the allegations made in the plaint. It is my view that setting aside the judgment would not achieve anything as the appellant does not appear to have any case against the respondent. All that he proposes to do at the trial, should one be ordered, is to deny the allegations and put the respondent to strict proof.

7. On jurisdiction, I do note that the suit before the trial court was for recovery of money, not land. I do not think then that it should be argued that the jurisdiction the trial court exercised was beyond it. The suit had nothing to do with title to land or use or occupation of land, which Article 162(2) of the Constitution isolated for the Environment and Land Court. In any event that jurisdiction has since been expanded to allow magistrate’s court to handle disputes in that realm.

8. In view of everything that I have said so far, it is my conclusion that the trial court did not fall into error in any way. It properly exercised its jurisdiction and came to the right conclusions. I shall therefore not disturb its findings. I shall accordingly disallow the appeal and uphold the decision of the trial court in the ruling delivered on 8<sup>th</sup> September 2016. I accordingly dismiss the appeal herein with costs to the

respondent. Should any party be dissatisfied with the outcome of these proceedings, there is a right of appeal to the Court of Appeal within twenty-eight (28) days.

**DATED, SIGNED and DELIVERED at KAKAMEGA this 3<sup>RD</sup> DAY OF DECEMBER , 2018**

**W. MUSYOKA**

**JUDGE**