REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 32 OF 2019

JOHN WANGUCHE WERE.....APPELLANT

VERSUS

JOHN UMWEBULA KULUBI.....RESPONDENT

JUDGEMENT

The above named appellant being dissatisfied and aggrieved by the ruling of Hon. T.A. Odera in Senior Principal Magistrate's Environment & Land Case No. 12 of 2018 delivered on 16th day of August, 2019 referred an appeal to this honourable court on the following grounds:-

1. The learned trial magistrate erred in law and in fact by dismissing the appellant's application dated 23rd April, 2019 thereby occasioning gross miscarriage of justice.

2. The learned trial magistrate erred in law and in fact by failing to analyze the conditions of setting aside judgment in default of attendance thereby occasioning miscarriage of justice.

3. The learned trial magistrate erred in law and in fact by failing to appreciate that the appellant had a good defence which raised serious triable issues.

4. The learned trial magistrate erred in law and in fact by presuming that the appellant had not "instructed" his former advocate when the said advocate had infact entered appearance and filed defence.

5. The learned trial magistrate erred in law and in fact by visiting the mistake of an advocate upon a litigant.

6. The learned trial magistrate erred in law and in fact by failing to appreciate that the cause of action was land which is by its nature sentimental and emotive.

7. The learned trial magistrate erred in law and in fact by denying the appellant a chance to argue out his case in defence thereby occasioning gross miscarriage of justice and the trial magistrate's orders of 16th August, 2019 were infringement of the cardinal principles of natural justice.

8. The learned trial magistrate erred in law and in fact by dismissing the entire application thereby denying the appellant legal representation.

9. That the orders by the trial court were oppressive, biased and prejudicial to the appellant.

Reasons wherefore the appellant prays that:-

(a) The court sets aside the orders of 16th August, 2019 and substitutes the same with an order allowing the appellant's application dated 23rd April, 2019.

(b) The court do order that the file be re-heard de novo before another judicial officer other than the trial magistrate.

(c) Each party do bear its own costs.

The appellant submitted that the learned trial magistrate failed to grant the orders sought under the application and further failed to grant satisfactory reasons for the said decision against the overwhelming evidence that is clearly on record. He relied on the principle of stare decisis and the cases of Kidero & 5 Others Vs. Waititu & Others, Supreme Court Petition No. 18 of 2014 and Patel Vs. EA Cargo Handling Services Ltd (1974) EA 75 at 76 C and E among other authorities. The respondent did not file any submissions.

This court has considered the appeal and submissions therein. The appellant being dissatisfied and aggrieved by the ruling of Hon. T.A. Odera in Senior Principal Magistrate's Environment & Land Case No. 12 of 2018 delivered on 16th day of August, 2019. The application was one of setting aside judgment in default of attendance. Basically, setting aside an *ex parte* judgement is a matter of the discretion of the court. In the case of *Esther Wamaitha Njihia & two others vs. Safaricom Ltd (2014) eKLR* the court citing relevant cases on the issue held *inter alia*:-

> *"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali.)It also goes without saying that the reason for failure to attend should be considered."*

In the case of **Shah Vs Mbogo (1979) EA 116** gives guidelines on the exercise of discretion. It states thus;

> *"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 exparte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."*

In the case of Lucy Bosire v Nyankoni Manga Robi (2016) eKLR the court held that;

> *"Justice is a two way traffic, the plaintiff and the defendant each crave for justice. The plaintiff states she has a valid and regular judgment obtained after due process and argues the defendant is bent on frustrating her in enjoying the fruits of her judgment. "*

In the case of Samson K Ole Nampaso v Kaana Ka Arume Co Ltd (2010) eKLR the court held that;

> *"Whether or not to set aside an order or judgment obtained in default of attendance at the hearing of the suit is a matter of unfettered judicial discretion, the primary consideration by the court is to do justice between the parties. The discretion will be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. It is however, not exercised to assist those who have deliberately sought to obstruct or delay the course of justice."*

In the case of **Tree Shade Motors Limited Vs D.T Dobie 7 Company (K) Limited and Joseph Rading Wasambo CA 38 of 1998,** the Court observed that the Court must satisfy itself that the Applicant has a defence that raises triable issues to warrant the setting aside of an *ex parte* judgement.

The appellant has submitted that the court should set aside the judgment to afford the appellant/ defendant an opportunity to be heard and so that the case may substantively be determined on merits. I have perused the lower court record in detail. I find that he court after hearing the plaintiff gave a reasoned judgment upholding the plaintiff's claim and dismissing the defendant's defence and counter claim. The trial Magistrate also noted that;

> *"Also the defendant took his father to the Mumias Land Disputes Tribunal, Provincial Appeals Tribunal and High Court HCA No. 50 of 1989 Kakamaga but he lost the cases"*

I find that the defence does not raise any triable issues to warrant the setting aside of an *ex parte* judgement. I find that the appellant has not demonstrated any sufficient and/or reasonable cause to warrant me to exercise my discretion to set aside the judgment in his favour. In the instant case the court will not exercise its discretion to assist those who deliberately seek to obstruct or delay the course of justice.

In Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE