



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 299 OF 2015

PATRICK MWANGI MUREITHI.....APPELLANT

- V E R S U S -

ROBERT MUTHARA NJOKA.....RESPONDENT

(Being an appeal from the ruling of the Hon. Ngetich(Mrs) chief magistrate in CMCC 7909 OF 2013 delivered on defendants application dated 29th May 2015)

JUDGEMENT

1. Njoka Muthara, the respondent herein filed an action before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi vide the plaint dated 16th December 2013 against Patrick Mwangi Mureithi, the appellant herein. In the aforesaid plaint the respondent sought for judgment in the sum of ksh.1,400,000/= being money allegedly advanced to the appellant to supply to the respondent hides and skins. The respondent thereafter obtained judgment in default of appearance against the appellant on 7th May 2014. The appellant successfully applied for the default judgment to be set aside on condition that he deposits the decretal amount. The appellant found it extremely difficult to make the said deposit hence he was forced to apply for *inter alia* to substitute the decretal sum with a title deed vide the motion dated 29th April 2015. The aforesaid motion was heard and dismissed on 22.5.2015. Being aggrieved, the appellant filed this appeal to challenge the dismissal order.

2. On appeal, the appellant put forward the following grounds:

1. THAT the learned magistrate erred in law and in fact by misdirecting herself on the provision of Section 3 & 3A of the Civil Procedure Act and Order 10 Rule 11 of the Civil Procedure Rules.

2. THAT the learned magistrate erred in law by failing to consider the grounds and the evidence in support of the appellant's application dated 29th April 2015.

3. THAT the learned magistrate erred in law and fact by declining to consider the similar facts of CMCC No. 7909 of 2013 and as such not consolidating the two suits.

4. without prejudice to the above mentioned, the learned magistrate erred in law and fact by failing to substitute security of cash with of title of land.

5. THAT the learned magistrate erred in law and fact by failing to consider and to make a

finding on the appellant's submissions in support of the application dated 29th May 2015 and in particular the following points:-

c. That the appellant is not in a position to raise kshs.3,767,318/= being security to set aside the ex parte judgments in CMCC 7680 of 2013 and CMCC 7909 of 2013 within a short-stipulated period.

d. That the appellant's application being heard out of time, though filed within time disentitled the appellant from the prayers of annulling the condition of depositing security of any kind and/or substitution of security of cash with that of land title.

6. the learned magistrate erred in law by disregarding the numerous binding authorities cited by the appellants counsel and thereby basing the ruling on wrong principles.

7. THAT the orders if not reversed will occasion the appellant great hardships and irreparable loss.

8. THAT failure to set aside the ex-parte judgment will completely lock out the appellant from defending the claim against it.

9. THAT the respondent suffers no prejudice at all as the irregularly obtained ex parte judgement is already set aside.

10. THAT the appellant has a strong case and in fact has a counter-claim corroborated on record by the respondent's own list of documents and hence indispensable triable issues.

11. THAT the learned magistrate's ruling is miscarriage of justice.

12. Other grounds and reasons to be adduced at the hearing hereof.

3) When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the submissions made before the trial court. I have also taken into account the rival submissions. Though the appellant put forward various grounds to challenge service of summons and the plaint, what commends itself for determination by this court, is the question as to whether or not the order directing the appellant to deposit cash should be substituted with an order directing the appellant to instead deposit a title deed. The appellant has just, like he did before the trial court, beseeched this court to make the order. It is the appellant's submission that the learned Chief Magistrate had failed to consider his submissions in which he had stated that he was not in a position to raise the decretal sum of ksh.3.7 million. It is also the submission of the appellant that if the order for stay is not reversed he would be put in great hardship since he will be unable to defend the suit. It is not in dispute that the appellant and the respondent filed written submissions before the trial court. The learned Chief Magistrate indicated in her ruling that she considered the arguments of both counsels together with the facts deponed in the affidavits. She also noted that the default judgment was set aside on condition that the appellant deposits the decretal amount in court. She also stated that the appellant filed the application before her after the expiry of the period he was required to make a deposit of the decretal sum. The learned chief magistrate expressly stated that the appellant has no reason not to comply with the condition given for setting aside the ex parte judgment. With respect, the learned Chief Magistrate fell into error. It is very clear from the submissions and the averments presented before her that the appellant had clearly stated that he was not in a position to raise the decretal sum and that is why he sought for the cash deposit to be substituted by a title deed. In paragraph 6 of his supporting affidavit, Patrick Mwangi Muriithi stated that he found it exceedingly difficult to raise the cash within the short stipulated time since he had pressing business expenses and obligations to honour. It cannot therefore be said that the appellant did not give reasons. The question as to whether or not the security offered was appropriate was not therefore determined but instead was casually dismissed. Having come to the conclusion that the appellant had put forward reasons which were never taken into account, I think the appropriate order to make here is to set aside the dismissal

order and remit back the motion to be heard afresh by another magistrate of competent jurisdiction.

4) In the end, the appeal is found to be meritorious. It is allowed.

The order dismissing the appellant's motion dated 29.4.2015 is set aside. The motion is restored to be reheard afresh expeditiously before another magistrate of competent jurisdiction other than Hon. R. Ngetich.

5) I direct that each party meets its own costs.

6) This decision also applies to Nairobi H.C.C.A no. 300 of 2015. In the meantime there be a stay of execution pending the hearing and determination of the aforesaid application.

Dated, Signed and Delivered in open court this 16th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent