RREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 42 OF 2007

MESHACK ANDREW MASHA.....APPELLANT

=VERSUS=

ARNOLD MUKARE JEFWA.....RESPONDENT

(From the Original Ruling in Civil Suit No. 415 of 2006 of the Principal Magistrate's Court at Kilifi – A.M. Obura, PM)

J U D G M E NT

This is an appeal from the ruling of Honourable P.M. Kiama, SRM delivered on 15th October 2007 in Kilifi SRMCC 415 of 2006. The main grounds of appeal are that the trial magistrate entertained matters that were res judicata, that the summons served upon the respondent were not defective, that the trial magistrate erroneously proceeded to hear the respondent's application dated 15th August 2007 without proof of service upon the appellant and that the trial court erred by entertaining the respondent's application dated 15th August 2007 yet the same supported by an affidavit commissioned by Mr. Katana Kalama Advocate who was on record for the objectors. It is further argued that the trial court erroneously proceeded to hear the application dated 15th August 2007 on 4th October 2007 yet that date was slated for a different ruling.

Parties agreed to determine the appeal by way of written submissions. Mr. Kithi, counsel for the appellant maintains that the respondent had filed an application dated 2nd October 2006 seeking to set aside a default Judgment but the same was dismissed. Once again the respondent filed an application dated 15th August 2007 seeking to set aside the ex-parte Judgment as well as staying execution. This second application was not served upon the appellant or his counsel. The second application was granted and is the subject of this appeal. It is contended that the second application was res-jidicata as the matter had already been dealt with via the respondent's application dated 2nd October 2006. Counsel relies on the provisions of Section 7 of the Civil Procedure Act and the cases of **UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA & 2 OTHERS[1996] e KLR**.

Counsel for the appellant further argues that the application dated 15th August 2007 had not been served upon the appellant. The trial court proceeded to hear the application without proof of service. Counsel relies on the case of **KYOGA HAULIERS LTD V LONG DISTANCE TRUCK DRIVERS & ALLIED WORKERS UNION (2015) e KLR** where it was held that where there is no proof of service by way of affidavit of service, then ex parte orders ought to be set aside. It is also submitted that counsel for the respondent was not properly on record.

Mr. Kithi also submitted that the application dated 15th August 2007 was supported by an affidavit sworn by the respondent but commissioned by Mr. Kalama Advocate. The commissioner for oaths was already on record for the objectors. This is contrary to the provisions of Section 4(1) of the oaths and Statutory Declaration Act, cap 15 laws of Kenya. On this issue counsel relies on the case of **CALTEX OIL (KENYA) LTD V NEW STADIUM SERVICE STATION LTD 7 ANOTHER [2002] e KLR.**

On their part, counsels for the respondent contend that the trial court had the powers to stay execution. The trial court properly exercised its discretion in granting the orders. There was no application of the wrong legal principles.

The record of the trial court gives the following picture in relation to this dispute.

(i) The plaint was filed on 18th July 2006 and gave the respondent fifteen (15) days to enter appearance.

(ii) The respondent entered appearance in person on 11th September, 2006.

(iii) On 26th September 2006, a request for judgment was filed. The judgment was entered on the same day for the liquidated sum of Kshs.467,455.

(iv) On 2nd October 2006 the respondent filed his defence. On the following day 3rd October 2006 a notice of entry of judgment was sent by post to the respondent.

(v) On 3rd October, 2006, the respondent filed his first application dated 2nd October 2006 seeking to set aside the judgment that was entered on 26th September 2006 as well as stay of execution.

The application dated 2nd October 2006 was heard and on 22nd February 2007 Ruling was reserved for 27th February 2007. The application was dismissed with costs on 27th February 2007. on 27th February 2007 the firm of Kanyi J & co. Advocates came on record for the respondent. The firm of Kalama Katana & Co. Advocates filed a Notice of Appointment of Advocates on 23rd May 2007. The said advocates appeared for two objectors namely Jamila Kibwana Mainge and Abdalla Kibwana whose goods had been attached.

The impugned application is dated 15th August 2007. It was prepared by the firm of Kanyi J & Co. Advocates and filed on 7th September, 2007. The affidavit of Arnold Mukere Jefwa sworn on 7th September 2007 was commissioned by Katana Kalama Advocates. The application dated 2nd October 2006 had sought the following orders.

1. THAT, the Judgment entered on 26th September 20006 be set aside and any execution to be filled to be stayed pending the outcome of this application.
2. THAT, costs of this application be provided for.

The application was brought under Order XX1 Rule 22 and Section 3A of the Civil Procedure Act. It was supported by the respondent's affidavit sworn before the court. The application dated 15th August 2007 was brought under Order XLIV Rule 1(1) of the Civil Procedure Rules. It sought the following order:-

1. THAT pending the hearing and determination of this application, this Honourable Court be pleased to grant a stay of execution against the Defendant of the Honourable Court's Order of 27th March 2007.
2. THAT this Honourable Court be pleased to review the Honourable Court Order of 23rd March 2007 and substitute it with an order allowing the Defendant's Chamber Summons Application dated 2nd October, 2006, or an order as to the re-hearing of the said application or any other order as the court may think just and fit to grant.

3. THAT the costs of this Application be in the cause.

On 2nd October 2007 counsels for both parties appeared before the trial court and argued on a preliminary objection relating to the appearance of counsels for the respondent. The contention was that the respondent's counsel required leave of the court before being appointed as there was already a judgment on record. The trial court held that since the said advocates were the first ones to be on record for the respondent, they did not require the leave of the court. The ruling for the preliminary objection was read on 4th October 2007. On 2nd October 2007 Mr. Kithi referred to the application of 15th August 2007 and stated that he had not been served. However, he told the court that the application was seeking review of the court orders of 27th March 2007 yet the respondent had request for a 30 days stay of execution.

On 4th October 2007, the trial court delivered the ruling on the preliminary objection and proceeded to hear the application dated 15th August 2007. Mr. Kithi's brief for the taking of the ruling was held by Mr. Kariuki who informed the court that his brief was to collect the ruling only. The record shows that application dated 15th August 2007 was certified as urgent on 13th September 2007 and listed for interpartes hearing on 20th September 2007. On that date counsel for the respondent informed the court that they were not able to serve and requested for another date. The court fixed the application for hearing on 4th October 2007. The trial court noted that Mr. Kithi was aware of the hearing date of 4th October 2007 as he had sent Mr. Kariuki to collect the ruling.

The ruling of the court which is the subject of the appeal noted that an application for setting aside the Judgment had been dismissed and the court could not re-open the matter. The court was convinced that if the default Judgment was entered before the required time, then the court could review its orders of 27th March 2007, the court went on and ordered for stay of execution and also ordered for a fresh re-hearing of the respondent's application dated 2nd October 2006. This application had been dismissed.

The essence of the application dated 15th August 2007 was that the respondent had entered appearance on 11th September 2006. According to the respondent, time for filing defence was 27th September 2006. The Judgment was entered on 26th September 2006 and was therefore erroneous. It was submitted that the 11th of September 2007 could not be counted for the 15 days to file defence. The defence was filed on 2nd October 2006 and is dated 29th October 2006.

The main issue for determination is whether the court entertained an issue that was res judicata, whether counsel for the respondent was properly on record and whether the trial court currently dealt with the application dated 15th August 2007. With regard to the appearance of counsel for the respondent, I entirely do agree with the findings of the trial court. The respondent initially acted in person. There was no change of advocates. M/s Kanyi J & Co. Advocates came on record as the first advocate on record. The order requiring leave of the court was meant to stop a mischief where advocates took over cases from their colleagues after Judgment had been entered. There was no advocate on record. The ruling on the preliminary objection was not the subject of an appeal. I do find that the advocates for the respondent were properly on record.

On the issues of res judicata, the trial court had dismissed the application dated 2nd October 2006 seeking stay of execution and setting aside the default judgment. The second application was for review of the orders of 27th March 2007 which had dismissed the application of 2nd October 2006. The basis for review was the computation of the time during which the defence ought to have been filed. It appears that after coming on record, counsel for the respondent noted that the Judgment was entered before the expiry of 15 days. The application for review was delayed as the respondent was in Uganda undertaking a masters degree course. The discovered new and important fact that the computation of time had been erroneously done by the court. It is true that Judgment was requested on 26th September 2006 and entered on the same day. Unfortunately, the trial court did not peruse the record and confirm if that was true and set aside the Judgment. The trial court, instead, re-admitted to hearing the application dated 2nd October 2007 which sought to set aside the Judgment and stay of execution. The court had dismissed that

application. It was within its powers of the court to entertain the 2nd application dated 15th August 2007. This was an application for review. There was no appeal filed against the ruling of 27th March 2007. it is normal for a party to seek a stay of execution once an adverse judgment order is made against such a party. That does not prohibit such a party from filing formal application for review or stay of execution.

Counsel for the applicant has emphasized on the issue of res-judicata. The two applications are different although the results are the same- setting aside of the default judgment. The application dated 2nd October 2006 sought to set aside the judgment and to stay execution. It was dismissed. The application dated 15th August 2007 sought to review the earlier orders dismissing the application dated 2nd October 2006. There was nothing res-judicata. The reasoning for the second application is well founded. All what the respondent was telling the court was that it wrongly computed the time. It is true that the defence was filed after the expiry of 15 days. However, there is no guarantee that the default judgment was going to be entered on 27th, 28th, 29th or 30th of September 2006. the main issue is whether judgment was entered in error.

The trial court ought to have either allowed the application for review and grant it or disallow it. Preferring the parties back to the application dated 2nd October 2006 was not the best orders although it was sought. The application dated 15th August 2007 sought review of the orders of 27th March 2007. Once review was granted, the next step was for the trial court to satisfy itself whether once reviewed, the outcome would have been to set aside the default judgment. Upon conducting such examination of the record, the court could have proceeded and set aside the judgment. Doing so cannot be fettered by the doctrine of res judicata. The application dated 2nd October 2006 was not based on the computation of time. The respondent in that application indicated that he had a good defence and that he would suffer irreparable damage if the judgment was not set aside. The respondent also averred that 26th September 2006 was the last day to file his defence but the ruling and the submissions did not dwell on that issue.

Under Order 50 rule 8, when computing time, the first day on the document is not counted. In essence therefore, the appearance having been entered on 11th September 2006, the defence was due fifteen days later from 12th September 2006. This was to be 27th September 2006. I do find that the default judgment was entered erroneously. I have tried to see the original endorsement of the judgment in the lower court file but all in vain. There is a court stamp with the respondent's name and resident magistrate's signature for 26th September 2006.

Counsel for the appellant is of the view that the affidavit in support of the application dated 15th August 2007 was commissioned by an advocate who was on record. It is true Mr. Kalama filled notice of appointment of advocates for the two objectors. The record shows that apart from the notice of objection dated 22nd May 2007 and notice of appointment of advocates of the same date, Mr. Kalama never appeared in court or conduct any other action in relation to the suit. The objection proceedings were never canvassed. Other than that, it is clear that what was being questioned was the court's decision to enter judgment before the expiry of the permitted time. Even without a supporting affidavit, it was within the court's powers to rectify the error which is apparent on the face of the record. I do not find that the fact that Mr. Kalama commissioned the affidavit can result to a different fact that the judgment was entered erroneously even if the affidavit is expunged from the record.

This suit was filed in 2006. The appeal was filed in 2007. It was taken almost ten (10) years for the appeal to be heard. The record of appeal was only field on 24th March 2015. It is prudent for parties to pursue their matters in court with much zeal and seriousness. The appeal was before Justice Ombija on 23rd November 2008 and since then nothing happened.

The court has to weigh the interest of each party. The appellant is claiming over Kshs.460,000 from the respondent. This is a substantial amount of money for any ordinary Kenyan. There is need for all the parties to be heard on merit. The defence having been filled within about five (5) days only after the expiry of the permitted time ought to have been allowed and the suit proceed to full hearing. The appellant should not emphasise on the default judgment. The overriding objective is for each party to

have his day in court. The defendant/respondent should not be condemned to pay Kshs.450,000 plus costs without being heard. This is not a case where the defendant took over several months to make an appearance. He entered appearance and filed his defence which I find to be raising triable issues.

In the end, I do find that the application dated 15th May 2007 was not res judicata. I do find that the appeal lacks merit and is hereby dismissed. For purposes of proper management of this dispute, I do hereby set aside the default judgment and find that the defence on record is properly filed. The lower court suit to proceed to full hearing on priority basis. Each party shall bare his own costs of this appeal.

Dated and delivered in Malindi this 7th day of April, 2016.

S.CHITEMBWE

JUDGE