REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO 30 OF 2001

JACOB MURITHI.....1ST APPELLANT

CHARLES KIRIMI.....2ND APPELLANT

VERSUS

JOHN FESTUS MURIUNGI.....1ST RESPONDENT

JERRICA MAKENA MURIUNG.....2ND RESPONDENT

J U D G M E N T

(Being an appeal against the Ruling and Orders of N.H. Oundu, Resident Magistrate, Meru,delivered on 23/02/2001 in CMCC No. 550 of 2000).

(1) In their Memorandum of Appeal, the appellants put forth the following grounds:-

1. THAT the Learned Magistrate erred in law and facts by failing to appreciate and implement and apply the basic principles of law and Natural Justice.

2. THAT the Learned Resident Magistrate erred in law and facts by failing to accord the Defendant a chance to defend the suit when it was so clear that service had not been effected either to the Appellants or to their Advocate on record.

3. THAT the Learned Resident Magistrate erred in Law and facts in disregarding the submissions of the Appellants Advocates including the Affidavit and the Court record to find that the date for hearing which had been taken was fraudulent as the Appellants Advocate did not participate and was unaware of the same.

4. THAT the Learned Resident Magistrate erred in law and facts in failing to see the Court record to the effect that the appellants Advocates clerk had not signed the Court record to confirm participation in taking the hearing date as is the normal and acceptable procedure.

5. THAT the Learned Resident Magistrate erred in law and facts by failing and refusing to accord the Appellants Natural Justice which (sic) to injustice on the part of Appellants and were condemned unheard, whereas they had filed defence and were ready to be heard.

6. THAT the Learned Resident Magistrate's ruling and orders of 23.3 2001 were bad in law and facts.

(2) Reliant upon the said grounds the appellants pray that the appeal be allowed and the Ruling of 23/02/2001 be set aside and be replaced with an Order setting aside the Exparte Judgment dated 06/11/2000 with costs being awarded to them.

(3) The appellants had filed an application dated 08/11/2000 which sought to set aside the apposite Judgment delivered on 06/11/2000. This application was dismissed by the Honourable Resident Magistrate 23/2/2001.

(4) The appellants say that their grounds 1, 2, and 5 were meant to show that the Learned Resident Magistrate failed to exercise his discretion in accordance with the tenet of Natural Justice with the result that the appellants were not allowed a chance to be heard and were, therefore, denied the right to defend the suit.

(5) In grounds 3 and 4 the appellants contend that the date for further hearing of the suit on 06/10/2000, which was part heard, was taken without the participation of the appellants. They say that even though the name of the Clerk of the appellants Advocate was written, the Clerk did not sign against his name. They contend that the said hearing date had been taken exparte.

(6) The appellants have told the Court that the project which spawned this appeal was no longer in existence. Nevertheless, they ask this Court to allow the appeal, set aside the lower Court's Judgment and award them costs.

(7) The respondents contend that the hearing date that spawned this appeal was obtained by Consent of both parties on 02/10/2000. They say that the appellants had not controverted the lower Courts finding that the date had been obtained by consent of the parties.

(8) The respondents argue that since both Advocates had participated in the proceedings on 25/08/2000 when the Plaintiffs testified, Judgment could not be termed exparte and could not be set aside for having been anExparte Judgment.

(9) The respondents have submitted that the lower Court had correctly held that if at all it had to set aside any proceedings, then it would have been the proceedings held on 06/10/2000, when the appellants' Advocate was not in Court, and not the other proceedings where the appellants' Advocate fully participated. They reiterate that the challenged Judgment was not exparte as the appellants' Advocate had participated in all the proceedings save for the proceedings of 06/10/2000.

(10) The respondents also say that the lower court had observed that the applicants had in their application dated 08/11/2000 claimed that there was no service of a Hearing Notice but had not substantiated their assertion. The respondents argue that this claim that there was no service of a Hearing Notice is misplaced as the disputed hearing date had been taken by consent at the registry.

(11) The Respondents submit that that the Honourable Magistrate in the lower Court had exercised his duties judiciously and had addressed all the facts and circumstances of the case before deciding the matter as heard. The respondents submitted that the locus classicus regarding setting aside of Judgments is the case of MBOGO & ANOTHER VERSUS SHAH- COURT OF APPEAL CIVIL APPEAL NO 5/1967 where the Court opined:-

> " ***That the Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice".***

(12) I have carefully considered the pleadings and the Submissions proffered by the Parties.

(13)I note that this appeal was filed in 2001, 15 years ago. It is not a complicated appeal. I unreservedly deprecate the parties' indolence in not having moved the Court to hear and determine the appeal in a

timely manner.

(14) I opine that the crucial issue for determination is if or not the hearing date fixed for 06/10/2000 at the registry had been obtained with the participation and consent of the appellants and the respondents. I do find that the finding by the lower Court that the date had been obtained by consent at the registry has not been controverted by the appellants. This is an issue that they should have canvassed seriously in their application dated 08/11/2000 which was dismissed by the learned Magistrate on 23/02/2001. I opine that the appellants handled this issue in a veritably insouciant manner.

(15) I do not agree with the appellants' claim that the challenged Judgment was an Exparte Judgment. Blacks Law Dictionary defines exparte as:-

> ***" Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested ; of or relating to Court action taken by one party without notice to the other, usually for temporary or emergency relief".***

(16) In this matter the parties had all participated in the proceedings except for the proceedings of 06/10/2000 when the appellants and their Advocate were not in Court. They were aware of the proceedings. They participated in the proceedings. Participation in proceedings, regardless of the extent, debunks any claim that proceedings can be deemed or termed exparte. We can describe them as anything else but not exparte. They can be challenged on other grounds but not on the ground that they were exparte.

(17) I need not say anything more because the Lower Court had found that the appellants were aware of the hearing date. If parties fail to come to Court during a hearing date, can the Courts be fettered by the inaction or indolence of any of the parties?. I say no. If such conduct is embraced by Courts, it would be a veritable tool and a convenient supercalifragilisticexpialidocious excuse for procrastination of cases. Such conduct should be discouraged and properly receive Judicial deprecation.

(18) I find that in his Ruling delivered on 23/02/2001 vide CMCC 550 of 2000 at Meru, the Learned Magistrate had properly exercised his discretion, had not misdirected himself and had not arrived at a wrong decision.

(19) In the Circumstances**, I dismiss this appeal and as per consent by the parties grant no order as to costs.**

(20) **It is so ordered .**

DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF JULY, 2016

IN THE PRESENCE OF:

CC:

Baikiata h/b Mbogo & Muriuki for the Respondent

P. M. NJOROGE

JUDGE