REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO 6 OF 2019

1. **HAMISI SALIM DZILA**

2. **NIBUNDA MWABEHA DZILA.…….…… APPELLANTS**

VERSUS

IDDI GANGUMA..... RESPONDENT

JUDGMENT

1. The Appellants filed this appeal from the ruling and order of Honourable P. Wambugu, Senior Resident Magistrate in Kwale ELC No. 8 of 2018 delivered on 25th January 2019.

2. The appellants had filed an application dated 13th July 2018 seeking leave to enter appearance and file defence out of time and for the ex-parte orders issued by the trial court on 20th June 2018 to be set aside, discharged and or varied. The said application was opposed by the respondent. The subordinate court considered the said application and dismissed it with costs.

3. The appellants were dissatisfied with the said decision and filed the present appeal on the following grounds:

> **1. That the learned magistrate erred in fact and in law by failing to grant leave to the appellant/defendants to enter appearance and file a statement out of time.**
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> **2. That the learned magistrate erred in fact and in law by failing to set aside, discharge and/or vary the ex-parte orders issued on 20th June, 2018.**
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> **3. That the learned magistrate erred in fact and in law by denying the appellants/defendants their constitutional right to be granted fair trial and hearing.**
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> **4. That the learned magistrate erred in fact and in law by giving undue regard to procedural technicalities' at the expense of substantive justice**
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> **5. That the learned magistrate erred in fact and in law by totally disregarding the appellants/defendants pleadings and submissions thus arriving at a wrong conclusion.**
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> **6. That the learned magistrate erred in fact and in law by disregarding the evidence in the appellants/defendants pleadings thereby arriving at a wrong conclusion.**
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> **7. That the learned magistrate erred in fact and in law by disregarding what he ought to have considered and considering what he ought to have disregarded thus arriving at a wrong conclusion.**
>
> **8. That the learned magistrate erred in fact and in law by failing to apply the principles in granting leave to file pleadings out of time and the principles of setting aside ex-parte judgment thus arriving at a wrong conclusion**.

4. For those reasons, the appellants prayed that this court sets aside, vary and/or discharge the entire ruling and orders of the subordinate court delivered on 25th January 2019 and for the respondent to bear the costs of the appeal.

5. The appeal was canvassed by way of written submissions which were duly filed by both partes. The appellants submitted that this being a first appeal, the court can evaluate the evidence and arrive at its own conclusion. The appellant's counsel relied on the case of **Selle and Another –v- Associated Motor Boar Company Ltd and Other (1968) 1EA 123 (CAZ).**

6. The appellants also submitted that they ought to be granted leave to enter appearance and file a defence out of time because they stated in their application before the subordinate court that they were never served. That the application was made without inordinate delay because the suit had not even been set down for pre-trial directions. The appellants further submitted that the delay is excusable because they gave fundamental and material reasons that they were not served with the pleadings. That the affidavits of service filed by the respondent are full of discrepancies in the manner of service, such as failure to show service of the plaint, verifying affidavit, list of witnesses, statements and documents; failure to show the time of service contrary to the provisions of Order 5 Rule 15 of the Civil Procedure Rules; absence of certificate/license of the process server; and absence of affidavit of service for the hearing notice of 20th June 2018. It is the appellant's contention that if leave to defend is not granted, the appellants will be denied justice and will be highly prejudiced. That the appellants have a strong and genuine defence as exhibited by the draft defence on record. It is the appellants' submission that the delay in filing the defence is a procedural technicality which ought not to override the provisions of Article 159 (2) of the Constitution of Kenya. Replying on the case of **Beatrice Wanjiru Kamuri –v- Jon Kibira Muiruri (2016)eKLR**, the appellants urged the court to grant them leave to enter appearance and file defence out of time.

7. The appellants also submitted that the orders of the subordinate court ought to be set aside because the respondent never made a full and frank disclosure of facts and purposely misled the court by giving false information. That this include failure to disclose that the SUIT PROPERTY PLOT NUMBER KWALE/GOLINI/1019 is registered in the name of the appellants as trustees of the late Salimu Dsila; that the said plot is now non-existent as the same has been sub-divided into various plots known as KWALE/GOLINI/1420, 1421, 1422, 1423, and 1424. The appellants relied on the case of the **Owners of Motor Vessel "Lilian S" –v- Caltex Kenya Ltd (1989) KLR 1** and urged the court to set aside and discharge the orders of the subordinate court. It is the appellants submission that the appeal is merited and the same ought to be allowed with costs.

8. The respondent submitted that the appeal is incurably defective, incompetent, untenable, non-starter and a mere abuse of the court process. It is the respondent's submission that it is a settled point of law that courts should not solely concentrate on the appellant's excuse for not entering appearance or filing a defence within the prescribed time. Rather, to be considered are; the nature of the action; defence if one has been brought to the notice of the court, however irregularly; the question as to whether the respondent can reasonably be compensated by costs for any delay occasioned, and, finally where there is a regular judgment and/or ruling, the court will not usually set aside the judgment or ruling unless it is satisfied that there is a defence on the merits. The respondent relied on the case of **Patel –v- E. A Cargo Handling Services Ltd (1974) EA 75** and submitted that no defence was presented to the trial court. That the trial magistrate cannot be faulted for seeing the defence attached to the appellants' application to set aside to be a sham and full of mere denials and which did not raise any triable issues.

9. The respondent further submitted that the appellant failed to discharge the duty bestowed on them under the provisions of order 10 of the civil procedure rules and that the court must decline to exercise its discretion in their favour. The respondent submitted that statute law and rules of procedure exist to bring order and sanity in our judicial system, and that the court should not come to the aid of parties who intentionally choose to ignore the express provisions of statute laws and rules of procedure. The respondent argued that the law is not a technicality that can be cured by the provisions of Article 159)2) of the Constitution.

10. The respondent argued that the appellants were served with the pleadings and submitted that the appellants never sought orders to have the process server in the trial court examined as to the authenticity of the averments in the affidavits of service as required under Order 5 Rule 16 of the Civil Procedure Rules. The respondent wondered how the Appellants came to know of the existence of the suit before the trial court if indeed they were not served. The respondent submitted that the appellants are guilty of unexplained laches and that their contest of service is a failed attempt at offering an explanation of the inordinate delay. The respondent added that from the material on record, the trial court was justified in granting the orders of injunction to conserve the subject matter of the main suit, and relied on the case of **Giella –v- Cassman Brown & Co Ltd (1973) EA 360, Mrao –v- First American Bank of Kenya Ltd & 2 Others (2003) KLR 123; American Cynamid Co –v- Ethicon Ltd (1975) 1 ALL E.R and Filista Chemaiyo Sosten –v-Samson Mutai (2012)eKLR**. The Respondent further submitted that no prove of concealment of material facts or any justifiable reason has been given by the appellants to warrant the invocation of Order 40 Rule 7 of the Civil Procedure Rules, arguing that it will be in the interest of justice that the orders issued be maintained and the suit be set down for the main hearing. The respondent urged the court to dismiss the appeal with costs, adding that in the event the appeal is allowed, costs of the appeal and before the trial court be awarded to the respondent.

11. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate was justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the grounds of appeal are: -

i. Whether the trial magistrate wrongly exercised his discretion in denying the appellants leave to enter appearance and file defence out of time.

ii. Whether the appeal is merited or not.

12. The appellants have submitted that the learned trial magistrate should have exercised his discretion and grant the appellants leave to enter appearance and file defence out of time. The main reason given by the appellants is that they were never served with the summons to enter appearance and the pleadings. I have perused the ruling dated 25th January, 2019. In the said ruling, the learned trial magistrate stated that there was no reason given by the appellants as to why they failed to file an appearance and defence within time. The learned trial magistrate further stated that there was no convincing reason, reasons or reasonable explanation advanced by the appellants to satisfy the court that the delay (in entering appearance and filing defence) was not intentional and therefore excusable so as to enable the court exercise its discretion in their favor. The trial magistrate therefore declined to grant the appellants leave to defend the suit.

13. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

> "**Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just**."

14. In the case of **Patel –v- E. A. Cargo Handling Services Ltd (1974) EA 75** at page 76C and E the court held as follows:

> **"There is no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. "**

15. The court further held:

> "***That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. In this respect, defence on merits does not mean a defence that must succeed. It means a 'triable issue' that is an issue which raises a prima facie defence which should go to trial for adjudication***."

16. In **Shah –v- Mbogoh (1967) EA 166**, the court stated as follows:

> "**This discretion to set aside an ex-parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice**. "

17. From the foregoing, the principles and tests for setting aside an ex-parte judgment can be summarized thus: that the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgment, whether there is a defence on merits; whether there would be any prejudice to the plaintiff; and the explanation for any delay.

18. I have perused the Notice of Motion dated 13th July 2018 by the Applicants seeking to be granted leave to enter appearance and file defence out of time. In it, the Appellants explained that they failed to enter appearance and or file defence within the stipulated time because they were never served with the summons, plaint and the notice of motion application dated 2nd February 2018. I have also perused the replying affidavit filed by the respondent in response to that application. The respondent maintained that the appellants were duly served with the summons together with the application. I have perused the affidavits of service filed by the court process server, Mr. Musyoka Samuel. In the first affidavit of service, the process server has deposed that on 8th March 2018, he received the order dated 7th March 2018 and proceeded to Sansiro Hall, Kwale where he met Mr. Hamisi, the 1st defendant herein whom he introduced himself to, the purpose of his visit and served him, but the defendant declined to sign on the principal copy. In the affidavit of service dated 14th April 2018, the same process server averred that he proceeded to Wiyani Village, Kwale where he met and served Mrs. Nibunda Mwabeha, the 2nd defendant herein, with the summons. Again, he avers that the defendant declined to sign on the principal copy. What is not clear is how the process server came to know the respondents. It is not indicated who pointed them out to him or if he knew them himself. Besides in the application, the respondents have annexed a proposed defence. The proposed defence on record in my view, raises triable issues, considering that the respondents have exhibited titles of the suit property in their names. In my view, the learned trial magistrate failed to consider the explanation given by respondents. Further, the trial magistrate failed to exercise his discretion judicially and therefore reached at a wrong conclusion. The respondent has not demonstrated that he will suffer prejudice if the appellants are granted leave to defend the suit as its effect would be to allow the court hear and determine the case on merit.

19. In the result I allow the appeal, set aside the ruling of the subordinate court dated 25th January 2018 and substitute thereof an order allowing the Appellants' notice of motion dated 13th July 2018 in terms of prayer 2 thereof. The appellants to file and serve their defence within 14 days of the delivery of this ruling. I decline to set aside the ex-parte orders issued by the trial magistrate on 20th June 2108 as the same was meant to preserve the subject matter of the suit pending hearing and determination.

I order that each party to bear their own costs.

20. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to covid-19 pandemic this 22nd day of July 2020

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE