



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 131 OF 2012

1. SHABBAN KEAH
2. MILLSONS MANAGEMENT
3. GLADYS MUTISYA T/A

TROPHY AUCTIONEERSAPPELLANTS

VERSUS

PATRICK OMONDI OPIYO T/A

DALLAS PUBRESPONDENT

J U D G M E N T

1. The court is called upon to determine an appeal from the decisions of the Magistrates Court, Hon. T.L. Ole Tanchu dated the 7/8/2012 in the original Mombasa SRMCC No. 317 of 2009. The record has a ruling at pages 69-70 but the same is not dated, however, the original ruling in handwriting is indeed dated the 7/8/2012.

2. By that decision the trial court dismissed the appellant's application dated 29/2/2012 in which the appellant had sought from the court orders that the judgment entered against him and dated 18/10/2012 be set aside.

3. The reasons put forward for the orders of setting aside were that the appellants had not been served with summons to enter appearance hence the judgment was irregularly entered and the appellant had been denied the right to be heard in a matter in which the Respondent had no cause of action against the Respondent. The application was supported by an affidavit sworn by SHABAN KEAH which essentially reiterated the grounds on the face of the application but with the stress on the fact that he had the authority from the other defendants to swear the affidavit on their behalf.

4. The service of summons was denied however the service of notice for formal proof was admitted but contended to have been too short and that the applicants advocates were on that day engaged in the High court but the matter nevertheless proceeded in their absence. It was equally contended that there existed no landlord and tenant relationship between the Respondent and the Appellant.

5. That application was opposed by a replying affidavit sworn by the Respondent. In it, the Respondent laid a claim to legal entitlement to enjoy the fruits of his litigation having been obtained regularly after

service of court papers and the Appellants were thus at all material times aware of the existence of the case against them. The appellants were then accused of laxity in failing to take steps upon discovery of the default judgment and that no explanation was offered and no step was taken to attend at the formal proof notice thereof having been duly given.

6. That application was on the 8/5/2012 agreed to be canvassed by way of written submissions. The Appellant filed his submissions dated the 21/5/2012 which the Respondents' are dated the 13/6/2012. Having considered those submissions the trial court in the ruling now appealed against found and made a decision in the following words:-

“That the defendant have never made an application to court to have the interlocutory judgment set aside and that the defendants/applicants have not denied the fact that they were aware of the formal proof hearing but they chose not to attend court for the hearing. That the defendants are now seeking setting aside of the judgment herein which has been arrived after the merits of the case were heard. Clearly from the pleadings, the defendant were aware of the existence of this matter and infact the 1st defendant confirms having been served with the plaint and chamber summons. Even after interlocutory judgment was entered the defendants advocates have appeared in court several times and they have never sought orders for the interlocutory judgment to be set aside. It appears they were in agreement that the formal proof does proceed but they choose not to attend court”.

7. As crafted, drafted and filed the application before the trial court was challenging the judgment by the trial entered pursuant to formal proof itself founded on the fact that there had been an interlocutory judgment for failure to file a defence. There is indeed no record that the plaintiff/Respondent ever sought nor obtained any interlocutory judgment. To this court such an interlocutory judgment could only be sought and entered upon proof of service of summons to enter appearance. To that extent there having been no interlocutory judgment, how justified was the trial court entitled to fault the defendant for failure to apply to set it aside. I find that there was never any obligation upon the defendants/Appellant to seek setting aside of an interlocutory judgment that was non-existent.

8. My understanding of the law is that a defendant is entitled to file a defence any time before an interlocutory judgment is entered. Order 7 Rule 1 and Order 10 Rule 2 and 6 give an insight on how the court ought to have proceeded.

Order 7, rule 1.

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.

Order 10, rule 2.

Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant he shall file an affidavit of service of the summons unless the summons has been served by a process-server appointed by the court.

Order 10, rule 6.

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

9. As at the time the trial court proceeded with the alleged formal proof, presumably under order 10 Rule

6, I have said, there has not yet an interlocutory judgment, the plaint on record was the amended plaint dated 28/8/2009 and prayed for a permanent injunction and damages on account of loss of goods at Kshs.1,500/- per day from 30/1/2009 until the goods are restored to the plaintiff as stated in paragraph 10.

10. The suit therefore clearly sought a pecuniary damages that to this court begged for an interlocutory judgment followed with a formal proof. For an interlocutory judgment to be sought and entered there was need for an affidavit of service. My reading of the entire record has not revealed that any affidavit was ever filed as is mandatory under order 10 Rule 2 as well as order 7 Rule 1.

11. To me it is not enough that the defendant had attended court by their counsel to oppose an application for injunction. It was the duty of the plaintiff prior to seeking to proceed to formal proof, whether after or without an interlocutory judgment to demonstrate to court that summons had been served. In the absence of evidence of service of summons I am afraid there was no justification for the court to proceed as it did, with formal proof on the 20/3/2012.

12. In the absence of evidence of service even if there had been a duly endorsed interlocutory judgment, any resultant judgment was liable to be set aside as of right. It is not a justification that one has participated at trial or failed to take any steps for whatever amount of time. The service of summons is the very foundation upon which a civil litigation progresses. To the extent that the court seems to have unfettered discretion whether considering whether it was necessary to set aside a non-existent interlocutory judgment prior to set aside the final judgment, and to the extent that the trial court found that the judgment dated 18/10/2016 was entered after the hearing on the merits, the trial court did not exercise its discretion properly and the decision was marred by consideration of irrelevant factors while the relevant factor were ignored. That is one reason the decision, even although based on judicial discretion, must be set aside. I may only add that what was important for the court to consider was whether something had gone into the judgment sought to be set aside which ought not to have gone into it had it not been for the failure by the defendant to attend. It is not difficult to see that indeed the matter having proceeded *ex parte*, the court awarded to the plaintiff/respondent prayers among then for the value of the goods which was never sought. Kamau J, in *Atlas Copco Customer Finance Ltd –vs- Polarize Enterprises Ltd [2014]eKLR* had this to say of the need for the court to confine itself to the prayer sought by the parties:-

“The court cannot purport to assume to know what the plaintiff was actually seeking in its application... In view of the fact that the orders sought by the defendant were not properly couched, this court can only grant the orders sought to avoid descending into the arena of the dispute between the plaintiff and the defendant”.

13. It is a general principle of law that before a court delivers itself on the merits of a dispute, it reserves the right to undo any act done courtesy of a default. The very eloquent words of *Apaloo JA*, in *Philip Kipto Chemuolo & Anor vs Augustine Kibendet [1982-1988]1, KLR 1036*, best put the consideration for a court faced with an application for setting aside. The Judge said:-

“Blunders will continue to be made from time to time and it doesn’t follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no default that cannot be put right by payment of costs”

14. Put in the context of the appeal before me, the trial court ought to have excused the Applicant the penalty of being condemned unheard on the merits. There was sufficient material to warrant setting aside and the trial court was wrong in dismissing the Appellant’s application in that regard. Consequently I allow this appeal, set aside the trial courts decision dated the 7/8/2012 and in its place I substitute there with an order allowing the application on terms that the Appellant files a defence to the suit within 15 days from the date of this ruling.

15. I award the costs of the Appeal to the Appellant.

Dated and delivered on this 7th day of **November 2016**.

HON. P.J.O. OTIENO

JUDGE