REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 77 OF 2011

ZAKAYO OKONGO……..…..……APPELLANT

VERSUS

OYENDE OKONGO…….……..1ST RESPONDENT

GWAKO OLWENY……..……..2ND RESPONDENT

(An appeal from decision dated 30th March, 2011 of

P.L. Shinyada, RM Kisii in CMCC. NO. 1582 OF 2004)

JUDGMENT

1. This case has a long history dating back to 2004 when the appellant(plaintiff) filed a suit against the respondents/defendants. In his plaint dated 4th December, 2004 he sought for the following order:-

a. **Declaration that defendants hold parts of their P/No. 2264 in trust for plaintiff.**
b. **Subdivision of original P/No. Bokimonge/1375 into P/Nos. 2263 and 2264 be nullified and registration of P/Nos. 2263 and 2264 expunged off register and a survey of P/No 1375 be carried to provide for legal occupants of original No. 1375.**
c. **General damages and compensation for damaged coffee plants.**
d. **Any other relief this Honourable court considers just and proper to grant.**
e. **Costs of this suit and interest (c) above at court rates.**

2. The appellant pleaded that he was the elder brother to the 1st respondent/defendant; that they were both original proprietors of LR.No. Bokimonge/1375 which they have occupied and used. That on 26th March, 1992 the 1st respondent/defendant with the services of a government surveyor caused subdivision of original LR.No. Bokimonge/1375 into two parcels i.e Bokimonge No.2263 measuring 5.70Ha left to appellant/plaintiff and P/No. Bokimonge No.2264 measuring 3.75 retained by 1st defendant. That the 1st respondent/defendant never laid new boundary marks for the above subdivisions; that appellant/plaintiff continued his occupation and use of his coffee to the year 2,000 unaware that his coffee was included in LR.No.2264 retained by 1st respondent/defendant on subdivision.
3. That the 1st respondent/defendant sold part of his P/No. 2264 to 2nd defendant/appellant and consequently the 2nd defendant uprooted appellant/plaintiff's coffee plants and caused damage assessed at Kshs. 51,750. That the 1st respondent/defendants unilateral subdivision was intentional and fraudulent to appellant/plaintiff interests over LR.No.1375 because by that

subdivision 1st respondent/defendant included appellant/ plaintiff's portion Bokimonge of coffee plants to 1st respondent/defendants side(No.2264).

4. Further he pleaded particulars of fraud as follows:-

i. **Falsely misrepresenting himself to District land Surveyor that P/No. 1375 belongs to 1st respondent/defendant alone.**
ii. **Falsely misrepresented himself to survey officer that ½ an acre developed by coffee belongs to him (1st defendant).**
iii. **By false misrepresentation 1st defendant deprived plaintiff interests over coffee plants.**
iv. **Further by misrepresentation sold plaintiff's coffee plants Ekimonge to 2nd defendant.**

5. Furthermore, he pleaded that the 2nd defendants purchased part of appellant/plaintiff's land No. 2264 aware that the coffee area belonged to appellant/plaintiff and the purported sale to 2nd defendant including his coffee area was illegal and void.
6. According to the record of proceedings, the 2nd defendant entered a memorandum of appearance in person on 12th May, 2005. No appearance was entered by the 1st respondent/defendant even though an affidavit of service was filed by Regere Ntabo a process server on 30th March, 2005.
7. The trial court, having established that the respondents/ defendants were served and failed to enter appearance and file their defences proceeded to hear the appellant's/plaintiff's matter ex-parte after entry of interlocutory judgment. The appellant/ plaintiff adduced oral evidence upon which the trial court found that he had established his case on a balance of probabilities; that the subdivision was fraudulent and therefore the registration was nullified. The trial court further made orders that the damage caused to the appellant/plaintiff's coffee plants amounting to Kshs. 51,750 should be borne by the 2nd defendant. This judgment was delivered on 13th October, 2006.

8. On 27th December, 2010, the defendants now applicants moved to court under certificate of urgency accompanied by a chamber summons under **Order 1XA Rule 10** and**11** and **Order XXI Rule 22** of the **Civil Procedure Rules** and a written statement of defence attached to the chamber summons filed by their advocate S. O. Omwenga & Co. Advocates seeking the following orders.

i. **That the Honourable court be pleased to certify this mater urgent and be heard ex-parte in the first instance.**
ii. **That pending the hearing and final determination of this application there be temporary stay of execution of the judgment dated 13th October 2006 and the ensuing decree issued on all consequential orders.**
iii. **That the honourable court be pleased to set aside the judgment dated 13th October, 2006 and all consequential orders.**
iv. **That the court be pleased to grant the 1st applicant/1st defendant and 2nd Applicant/2nd defendant leave to file their defence and the suit be heard and determined on merit.**

9. The application was supported by the affidavit of the 1st applicant/1st defendant Oyiende Okongo who averred and acknowledged that the respondent/plaintiff is his elder brother; that they shared their family land known as Majoge/Bokimonge/1375 between himself and respondent/plaintiff and he later got a title deed for his portion while the respondent/ plaintiff also got a title deed for his portion. That he sold a portion of his land to the 2nd applicant/2nd defendant upon payment of full consideration thus he transferred to him his portion being Majoge/Bokimonge/1679 and subsequently on 10th August, 1993 the 2nd applicant/2nd defendant was issued with a title deed for the parcel of land he sold to him.

10. However on 17th December, 2010 as he went to Kenyenya market for a walk in the evening he was informed by a relative that 4 men had been looking for him to arrest him on allegations that the respondent/plaintiff had sued him at Kisii Law Courts, that he did not know whether the

respondent/plaintiff had ever sued him in any court of law. He denied ever being served with a demand notice by the respondent/plaintiff that he had never been served with the plaint and summons and upon learning that he was being looked for over a case filed in Kisii law courts he instructed his advocates on record to make inquiries at Kisii law courts and take the necessary action.

11. He further averred that part of the claim of the respondent/plaintiff involves land and since the issue of land is sensitive all the parties in this suit ought to be heard by court to enable the court reach a fair and just decision. He denied fraudulently transferring the piece of land he sold to 2nd applicant/2nd defendant or ever seeing and meeting the process server by the name of Simon Regere. He contended that his failure to enter appearance and file his defence was not intentional as he was never served, that he had a good defence which raises numerous triable issues that require this matter to be heard and determined on merit and that when they shared their family land with the respondent/plaintiff and he got his share, there were no coffee plants or crops of any kind of the respondent/plaintiff on his share of land.
12. The 2nd applicant/2nd defendant also filed a supporting affidavit confirming that he indeed bought a piece of land being Majoge/Bokimonge/1679. That he paid the full purchase price, then proceeded to the Land Control Board which gave consent to the sale and on 16th August, 1993 he was issued with a title deed for the piece of land.
13. The respondent/plaintiff's counsel in turn filed an undated replying affidavit opposing the above applicant's/defendant's application averring that both applicants/defendants were actually served with the plaintiff's plaint and verifying affidavit as the 2nd applicant/2nd defendant entered appearance on 12th May, 2005 but failed to file a written statement of defence. He further averred that both defendants/applicants failed to enter appearance and defend the suit whereupon the respondent/plaintiff requested for interlocutory judgment and thereafter the matter proceeded to formal proof on 9th November, 2005. That the notice of entry of judgment and assessment of costs were served upon applicants/defendants on 17th August, 2007, and upon the District Land Registrar on 7th January, 2009. That the 2nd defendant at no point in his affidavit did he deny damage to plaintiff's coffee plants and the report of Agricultural Extension Officer.
14. The trial magistrate after evaluating the above application held that even though there was proof that the applicants defendants were duly served, she had looked at the draft defence and was satisfied that the same raises triable issues which ought to be adjudicated upon on merit. She further held that no prejudice would be occasioned to the plaintiff because he can be compensated by an award in costs. The applicants/defendants were then required to file and serve their defences within the next (14) fourteen days, throw away costs were assessed at Kshs. 16,000 which were to be paid within the next one month failure to which the judgment/decree on record would remain as it was.
15. The plaintiff now the appellant was dissatisfied with the above stated ruling and filed this appeal. In his memorandum of appeal dated 18th April, 2011 and filed in court on the same day the appellant/plaintiff raises the following 10 grounds:-

1. *THAT learned Resident Magistrate erred on point of law and fact when she allowed Respondents/Defendants chamber summons dated 27th December, 2010 brought under Order IXA rules 8 and 11 and order XXI Rules 22 and Sections 3,3A,63 (c) of the Civil Procedure Act, Cap 21 by which Respondents/Defendants sought to set aside a judgment dated 13th October, 2006 and all consequential orders.*
2. *THAT the honourable court having found as a matter of fact and evidence that the court procedure for serving summons to enter appearance, formal proof hearings, and notice to Enter Judgment and Notices to show cause were properly served upon the Respondents/Defendants should have dismissed the Respondents/Defendants' chamber summons dated 27th December, 2010 for being an abuse of court processes.*

3. *THAT the learned sitting magistrate erred on point of fact and law by not finding that the 2nd Respondent/2nd Defendant had earlier on entered appearance on 12th May, 2005 according to court record and therefore 2nd Respondent had no justification for his failure not to defend the*

suit from the first instance.

4. *THAT the learned sitting magistrate erred by failing not to hold that the Respondents/Defendants had sworn and deponed in their Chamber Summons Support Affidavits dated 27th December, 2011, their averments were false, frivolous and a perjury and did not come to court in clean hands.*
5. *THAT the learned sitting magistrate failed to consider that the implementation of Decree/Judgment dated 13 October, 2006 had been partly complete as land subdivisions Bokimonge/2263 and 2264 had been served upon District land Registrar Kisii for updating the register according to court order/decree.*
6. *THAT the learned sitting magistrate misdirected herself in or by holding that the Appellant/Plaintiff would have not suffered any prejudice or harm if the orders sought by Defendants/Respondents are granted, because upon subdivisions of LR.No.2263 and 2264 and purchase of part of LR.No. Bokimonge/2264 by 2nd Respondent/Defendant, 2nd Defendant moved onto plaintiff's portion Bokimonge/2263 and uprooted Appellant's/Plaintiff's coffee plants that resulted to assessed damage of Kshs. 51,750/- according to Agriculture Extension officer Report for which damage the Appellant has not been compensated todate.*
7. *THAT the learned sitting magistrate erred as a matter of fact and procedure that some evidence concerning damage to plaintiff's coffee and any exhibits concerning the same would not be retrieved when the suit goes for hearing afresh.*
8. *THAT to set aside a judgment which is given (7) years old is not doing justice to either side.*
9. *THAT the learned sitting magistrate erred in her ruling that by stating that by refusing or dismissing Respondent's application amount to denying them opportunity to be heard as required by Rules of Natural justice, which is not applicable to the defendants/Respondents herein because Defendants/Respondents refused or neglected to follow or respond to summonses and entered appearance and refused attendant to be heard.*
10. *THAT sitting magistrate failed to find or hold that Respondent chamber summons dated 27th December, 2010 was defective as new Civil Procedure Rules came to effect on that day and all application to court were to be by Notice of Motion application was defective and should have been struck off for not being made according to the Civil Procedure Rules in force.*

16. When the matter came before me on 1st October, 2013, it was agreed that the appeal be canvassed by way of filing and exchanging written submissions. Both counsel filed and exchanged their submissions. After carefully reading through the submissions, and after reconsidering and evaluating the record of proceedings in the lower court, the following are the issues for determination by this court:

i. **Was the application for setting aside the ex-parte judgment pegged on wrong rules of the civil procedure rules.**
ii. **Did the learned trial magistrate error in setting aside the ex-parte judgment even after evidence that the respondents/defendants had been duly served with summons to enter appearance.**

17. With regard to the first issue it is the appellants/plaintiff's submission that the respondents/defendants chamber summons dated 27th December, 2010 was made in contravention of the **Civil Procedure Rules 2010** which provided that all applications to the court should be made by way of Notice of Motion. Therefore, according to the appellants' plaintiff's contention the said chamber summons should have been struck off from court record as being contrary to the Civil Procedure Rules.
18. The appellants' application dated 27th December, 2010 was brought under **Order IXA Rule 10** and **11** and **Order XXX1 Rule 25** of the **Civil Procedure Rules**. However under the new rules of **Civil Procedure** which came into effect on the September, 2010 the above application should have been under **Order 10 rule 11**. However **Article 159 (2)(e)** of the **Constitution 2010** states that:- justice shall be administered without undue regard to procedural technicalities.
19. **Order 51 rule 10** of the new **Civil Procedure Rules** was revised in line with **Article 159 (2) (e)** of the **Constitution**. It now reads:

"S1.10(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

In effect, no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. It is also to be noted that under **Sections 1A** and **1B** of the **Civil Procedure Act**, the overriding objective of the **Civil Procedure Act** and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, and that courts should exercise their powers under the Act or the interpretation of any of its provisions in furtherance of the overriding objective. A reading of the two sections also clearly shows that justice shall not be sacrificed at the altar of expediency.

20. In view of the above provisions, the fact that the respondents/defendants brought their application under the old civil procedure rules was not fatal to their application.
21. With regard to the second issue, it is an undisputed fact that the 2nd respondent/defendant entered appearance on the 12th May, 2005 in person but he did not file a statement of defence to the appellant's/plaintiff's plaint. My view of the matter is that there is no way he could have entered appearance to a suit he did not know existed. The same applies to the 1st respondent/1st defendant who never bothered at all to enter appearance nor file any defence. His explanation that he was not served with the summons does not hold much water since there was no way the 2nd respondent/2nd defendant could have received the summons without the 1st respondent/1st defendant being served with the same and even if that were possible that indeed he was not served, he would have had an idea that there was a case filed against him from his co-defendant who indeed entered appearance.
22. I therefore find that the respondents/defendants both ignored the summons and were only alarmed when a warrant of arrest was issued against them otherwise, any person who raises the issue of non-service usually requests to cross-examine the process server which in this case both respondents/defendants never made attempts to do.
23. The learned trial magistrate being aware that both respondents/defendants had been served held in her ruling that the primary issue for consideration in an application of such nature was whether the defence annexed to the application raises triable issues. She quoted **Patel –vs- E.A. Cargo Handling Services Ltd.[1974 E.A) at page 75**. In that case, the Court adopted the principles set out by HARRIS J in the case of **Kimani –vs- Mc Connell [1966] EA 547** where the learned judge said,

"--- in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."

24. In addition, the trial court placed reliance on the case of **Sebei District Administration –vs- Gasyali & Others [1968] EA 300** where the High Court of Uganda sitting at Mbale (Sheridan J) held, *inter alia*, that:-

"The nature of the actions should be considered the defence if one has been brought to the notice of the court however irregularly should be considered the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject, a hearing should be the land resort of the court."

25. In line with the above holding, the Court of Appeal Kenya also expressed similar sentiments in **Shanzu Investiments Ltd vs. The Commissioner of Lands Civil Appeal No. 100 of 1993** where it held:

"Now in this instance, the judgment was regularly obtained and in such circumstances the court will not interfere unless satisfied that there is a defence on the merits. This means there

must be a triable issue that is an issue which raises a prima facie defence and which should go to trial for adjudication(See patel's case ibid)"

26.In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** the Court of Appeal expressed itself as follows:

"In an application for setting aside ex-parte judgment the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously……. In law the discretion that a court of law has in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake, or error."

27.The Court thus held the view that it would be improper for a court to use such discretion in a way that it turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. The exercise of the court's discretion in such a manner would be wrong in principle.

28.In **Branco Arabe Espanol –vs- Bank of Uganda [1999] 2 E.A. 22**, George CJ quoting the case of **Essaji –vs- Solanki [1968] EA 218 at 222** stated:-

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights. Unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes, should be fostered rather than hindered."

Also see **DT Dobie & Company (Kenya) Ltd. –vs- Muchina [1982] KLR 1**

29.In **Maina Kamau –vs- Mugiria [1983] KLR 78** the Court of Appeal held as follows under holding (2):-

"2. The principles governing the exercise of judicial discretion to set aside an ex-parte judgment obtained in default of either party to attend the hearing are:-

a. **Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.**
b. **Secondly, this discretion is intended so 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. Shah v. Mbogo [1967] E.A. 446 at 123B, Shabir Din V. Ram Parkash Anand (1955) 22 EACA 48.**
c. **Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo –v-Shah (1968) EA 93.**
d. **The court has no discretion where it appears there has been no proper service (Kanji Naran –v-Velji Ramji (1954) 21EACA 20).**
e. **A discretionary power should be exercised judicially and in a selective and discriminatory manner not arbitrarily and idiosyncratically."**

30.Also in **Jesse Kimani –vs- McConnel & another [1966] E.A. 547**, it was held *inter alia* that:- " some of the matters to be considered when an application is made are the facts and circumstances both prior and subsequent and all the respective merits of the parties together with any other material facts which appear to have entered into the passing of the judgment which would not or

might not have been present had the judgment not been ex-parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed."

31. Taking all the above principles into account, and upon perusal of the respondents defendants statement of defence vis-à-vis the appeal filed by the appellant/plaintiff urging this court not to set aside the ex-parte judgment, I am convinced for all purposes of justice and fairness that the ex-parte judgment ought to be set aside because firstly the cause of action arises from land which is a very emotive issue in this country and more so in Kisii County and secondly because both appellant and 1st respondent are siblings. In a way, adhering to the orders issued in the ex-parte judgment will only mean driving away one brother from the seat of justice unheard and thereby propagate hatred between them. Thirdly the issue of whether the 1st respondent/1st defendant sold land that does not belong to the 2nd respondent/2nd defendant is not yet established and fourthly whether indeed the appellant/plaintiff's coffee was destroyed by the 2nd respondent/2nd defendant still remains unclear and can only be uncovered during a full hearing.
32. I am therefore satisfied that the ruling by the learned trial magistrate setting aside the ex-parte judgment was well founded. The respondents should comply with the orders issued by the trial magistrate within those set timelines. The appeal is therefore dismissed.
33. As to costs for this appeal, I am of the considered view that the respondents/defendants who have caused the delay of this matter shall pay costs to the appellant, to be agreed or taxed.
34. Orders accordingly.

Dated and delivered at Kisii this 6th day of March, 2014

R.N. SITATI,

JUDGE.

In the presence of:-

Mr. Nyakongo Odongo (absent) for the Appellant

Mr. Okemwa for Mr. Omwega (present) for the Respondents

Mr. Bibu - Court Clerk