



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 9 OF 2020

MARY NJOKI WACHIRA.....APPELLANT

VS

JOHN MBUREMU MURIU.....RESPONDENT

(Being an Appeal from the exparte judgement and final orders of the Hon E. Wambo issued on the 14/9/2016 in CMCC No 155 of 2016-Muranga)

JUDGMENT

1. The Appellant (Previously the Defendant in CMCC No 155 of 2016-Muranga) has preferred 12 grounds of Appeal against the Respondent (Plaintiff in CMCC No 155 of 2016-Muranga).
2. The grounds of Appeal are set out as follows;
 - a. The Learned trial Magistrate erred in law and fact by proceeding with a matter that he did not have jurisdiction over.
 - b. The Learned trial Magistrate erred in law and fact by not cross examining the process servers in order to ascertain and be satisfied that they had effected service of all the pleadings upon the Appellant.
 - c. The Learned trial Magistrate erred in law and fact by issuing an ex-parte judgment without according the Appellant the right to be heard.
 - d. The Learned trial Magistrate erred in law and fact by issuing ex-parte judgment without issuing the Appellant with a notice of the same.
 - e. The Learned trial Magistrate erred in law and fact by issuing an ex-parte judgment without ascertaining and being satisfied that the Appellant was issued with a notice of the same.
 - f. The Learned trial Magistrate erred in law and fact by issuing prohibitory order against the Appellant while she was in prison.
 - g. The Learned trial Magistrate erred in law and fact by committing the Appellant to civil jail from 26th October 2016 until 24th March 2017.
 - h. The Learned trial Magistrate erred in law and fact by attaching all those parcels of land known as MARAGUA RIDGE/718 and LOC 20/GITHURI/2018 belonging to the Appellant.
 - i. The Learned trial Magistrate erred in law and fact by attaching MARAGUA RIDGE/718 and LOC 20/GITHURI/2018 without a valuation report in order to ascertain their true value.
 - j. The Learned trial Magistrate erred in law and fact by failing to distinguish the decretal sum and the value of the properties attached.
 - k. The Learned trial Magistrate erred in law and fact by failing to consider that by attaching all the Appellant's properties, her child would be left destitute.
 - l. The Learned trial Magistrate erred in law and fact by failing to appreciate the fact that should the Appellant's properties be sold, the Respondent would receive more than twice the decretal sum.

3. The Appellant sought the following orders;

- a. The Appeal be allowed and the ex-parte judgment delivered on 5th September, 2016 and the subsequent decree issued on 25th September, 2016 by Hon. Eric Wambo be set aside.
- b. All consequential orders ensuing thereafter be set aside.
- c. The Appellant be granted leave to defend the suit out of time.
- d. In the alternative, the Applicant be discharged from paying the decretal sum of Kshs. 3,239,200/-.
- e. Any further relief or order that the Court shall deem just and fit to grant.

4. The parties through their counsels on record elected to canvass the Appeal by way of written submissions which I have read and considered.

5. As to whether there was proper service the Appellant submitted that the exparte judgement was issued irregularly without proper service upon the Appellant. She challenged the affidavits of service on record and contended that the same did not give the description of the Appellant; nor include the land reference number of the alleged residence of the Appellant. That as a result of want of service the Appellant was condemned unheard. Equally that the execution and committal to civil jail pursuant to the exparte judgement was unlawful.

6. As to whether the Appellants statement of defense raises triable issues the Appellant averred that she sold 1 acre of land to the Respondent but unknown to her and due to her being illiterate, she signed an agreement in which the size of the land being sold was 3 acres instead of 1 acre. She contended that she was taken to the Respondent's lawyers office and she trusted the Respondent and signed the sale agreement believing she was selling 1 acre to the Respondent. Interalia she argues that the Respondent only paid part payment of the purchase price. Further no valuation was done in respect to the attached properties which in her opinion were undervalued. In conclusion that the Appellant has a defence that raises triable issues and should be accorded leave to defend the case.

7. The Appeal is opposed. The Respondent gave a lengthy history of the suit in the lower Court. He contends that the Appeal is incompetent in as far as it seeks to Appeal against the final orders of Hon E Wambo issued on the 14/9/2016. That throughout the proceedings and the record of the lower Court there are no orders issued or dated the 14/9/2016. He urged the Court to dismiss the Appeal on this ground.

8. With respect to the issue of service of summons on the Appellant the Respondents contended that the Appellant was served at every stage by a process server namely Simon G Kamau. That the claim of non-service is untrue.

9. The Respondent states that on the 28/10/16 the Appellant sought orders to set aside committal orders and review of the exparte judgement and or any consequent orders against the Appellant and dismiss them for want of jurisdiction. That at the hearing of the application the Appellant sought and obtained an amendment to the prayers seeking to set aside the exparte judgment to that of review of the said exparte judgement. That the Court dismissed the application. That as a result of which an exparte judgement was issued on the 5/9/16 which judgement has never been challenged todate. That the Appellant did not Appeal against the dismissal of that motion either.

10. Further the Respondent contends that the service of summons upon the Appellant has not been challenged too. In rebuttal to the claim of the Appellant that the process server was not cross examined by the Court, the Respondent submitted that the onus to apply for the cross examination of the process server is on the party who disputes service. In any event the Court has no business to examine or cause the examination of the process server without cause. That the service of summons by the process server upon the Appellant has never been challenged despite the Appellant having been represented by 3 advocates in a row in the lower Court.

11. The Respondent submitted that the draft defence is ordinarily annexed to the application to set aside the exparte judgement which in this case, no application for setting aside the exparte judgement has been filed.

12. I have considered the grounds of Appeal the entire record of the trial Court and the parties respective submissions in the Appeal. I have also considered the relevant law and the issues set out by the parties.

13. The key issues for the disposal of the Appeal are; whether there are orders issued by the Hon Eric Wambo on the 14/9/2016; whether the Court had jurisdiction to entertain the matter before it; whether the Appellant was served with the summons and proceedings in Court; whether the Court erred in issuing the exparte judgement and whether the same should be set aside; Whether the Court erred in not cross examining the Process server; whether the Court erred in issuing committal orders, prohibitory orders, orders of attachment of properties; What orders should the Court grant; who meets the cost of the Appeal.

14. This Court has power to review the facts and evidence and draw its own conclusions. In the case of **Abok James Odera & Associates – Vs- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the Court of Appeal restated the duty of first Appellate Court as thus:-

“This being a first Appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”.

15. A good starting point is a brief summary of the case. This is an Appeal against an exparte judgment and subsequent orders issued in the

Murang'a Chief Magistrate Court where the Respondent obtained interlocutory judgment on 5/9/16 pursuant to his liquidated claim in the amended plaint dated 27/7/16. The execution proceedings ensued and the Appellant was committed to civil jail. The Appellant's property was also attached. The intended sale was restrained. The Appellant filed an Appeal out of time pursuant to leave obtained in the ruling dated 14/3/19 delivered by High Court in Murang'a. The High Court subsequently transferred this Appeal to the ELC Court.

16. The Appellant has appealed against an *ex parte* judgment that was issued on 14/9/16 by Hon. E. Wambo. It can be noted from the onset that the *ex parte* judgment was granted on 5/9/16 and the subsequent decree was issued on 25/9/16. The proceedings in the lower Court which inform this Appeal were before different magistrates and on diverse dates. Notably, Honorable Mwigigi P.M issued the impugned judgment; the execution proceedings were presided over by Honorable J. Masiga who committed the Appellant to civil jail; Honorable E. Wambo who was placed with the Appellant's application to set aside the *ex parte* judgment and Honorable and Ochanda R.M issued prohibition in respect of the Appellant's property.

17. I have perused the record and there are no orders issued on the 14/9/16. It is trite that an Appeal to this Court must state in clear terms the orders being appealed against. It cannot be left to the conjecture of the court and the other parties to second guess what the Appellant is aggrieved about. The Appeal is found incompetent in this regard. This is sufficient ground to dismiss the appeal however I shall determine the appeal on its merits based on consistency with the record.

18. The Respondent filed suit by plaint dated 7/6/16 seeking for specific performance and execution of transfer forms and that title be registered in his favour. This was pursuant to an alleged conveyance for sale of land with the Defendant/Appellant, but was breached by the Defendant / Appellant who failed to transfer the land as per the sale agreement. The Respondent later amended the plaint to pursue a single claim for refund of Ksh 1,475,000/= as per amended plaint dated 27/7/16. The Respondent's request for judgment dated 2/8/16 was successful following interlocutory judgment as minuted on the face of the record on 5/9/16. The Court noted that the Defendant had failed to file defence within the time stipulated in the summons to enter appearance.

19. The affidavits of service of the process server were also on record. An affidavit of service dated the 1/7/16 sworn by one Simon G Kamau deponed that he served the Appellant on the 9/6/16 at her residence near Honey Pot Bar & Restaurant at Sabasaba along the Kenol-Muranga Highway.

20. On the 1/7/16 a request for judgement in favour of the Respondent for failure to file a memorandum of appearance and defence was filed. The same was entered on the 5/7/16.

21. Next the Respondent filed an amended Plaint on the 29/7/16 expressed to be amended on the 27/7/16. This was before the close of pleadings in the suit. There is evidence on record of service of the amended Plaint on the Appellant. Thereafter the Respondent filed another request for judgement against the Appellant for want of appearance and defence on the 2/8/16.

22. On the 13/8/2016 the process server filed the affidavit of service dated the 31/8/16 and filed on the 5/9/16.

23. On the 16/9/16 the Respondent filed a notice of entry of judgment dated the 14/9/2016 followed by an extracted decree dated the 25/9/2016 in the sum of Kshs 2,950,000/- against the Appellant. According to the affidavit of service filed on the 1/10/16 the entry of judgment notice was served upon the Appellant on the 22/9/2016.

24. On the 5/10/16 committal orders were issued against the Appellant in execution of the decree. It is on record that she was committed to civil jail from the 26/10/16- 24/3/17.

25. Simultaneously the Respondent lodged a caution on the suit land on the 15/8/16 claiming licensees' interest. On the 27/1/2017 the Respondent obtained a prohibitory order against the Appellant for the sum of Kshs 3,262,550/- and a notification of sale of her properties namely LOC20/GITHURI/2048 AND MARAGUA RIDGE /781 which sale was scheduled for the 15/3/17 in satisfaction of the decretal amount.

26. On the 26/10/16 before Hon. Masiga SRM the Appellant was committed for 2 months having failed to settle the decree. On 2/8/19 there was a proposal for terms of settlement which was suspended. The Appellant did not pay despite several representations in Court.

27. On 15/3/17 the Appellant informed the Court that she was desirous of selling the land herself to meet the decretal amount. On the 5/4/17 the matter came up for terms of settlement, parties agreed that the decretal amount would be liquidated within 30 days. The issue of settlement was postponed when the Appellant informed the Court that there was a caveat on the land. On the 4/10/17 when the Appellant appeared before Hon. Ochanda R.M the (See **page 18 of the proceedings**) the Appellant averred that she delayed in her proposal to sell the land because she did not have an Advocate and that people were afraid of buying the land.

28. The Respondent moved the Court to attach the Appellant's land and by the consent of the parties the Appellant was granted leave to dispose the property herself. This was on the same date that the Appellant informed the Court of the difficulty she had in her attempts to dispose the land. The Respondent took out warrants of attachment which were later issued to auctioneers, the Court was also entreated to issue a prohibition which was later to be registered against the Appellant's title No L.R BLOCK 20/ GITHURI /2048 AND MARAGUA RIDGE /781. The conditions of sale were set out as thus:

“That the sale was to be done in Murang'a town at 10; 30 am on date to be appointed date, the sale would be after 45 days of service of the Notification of Sale. The amount due was Ksh 3,271,550.00 plus Ksh 30, 0000/= for advertisement of sale of land”.

29. The Appellant /judgment debtor appended her signature the above consent. See Pg 20 where the Court upheld the conditions of terms of sale which were by consent.

30. Thereafter the Appellant filed an application seeking to Appeal the decision of Hon Wambo out of time. Leave was granted by the High Court. The matter was thereafter transferred to this court.

31. It is on record that the Appellant filed a Notice of Motion dated the 28/10/16 seeking inter alia the setting aside of the committal orders to civil jail of the Applicant as well as the *ex parte* judgment and all its consequent orders. On the 31/10/16 the Appellant through her Advocates on record then amended the application to read the review of the *ex parte* orders and all the consequent orders. It is unclear why the Advocate took a detour from setting aside the *ex parte* judgment to seeking a review. The grounds of the application were that the Appellant was committed to civil jail on the 26/10/16 in the execution of an *ex parte* judgement for which she was never served with the summons and only came to know of the existence of the case upon arrest and committal to civil jail. That the execution process was irregular; the Court did not have jurisdiction to issue *ex parte* judgement and order execution by way of committal to civil jail.

32. The Respondent opposed the application on the grounds that the application had been overtaken by events since the Appellant was already serving a lawful jail term pursuant to lawful procedure of execution under section 38 (d) of the Civil Procedure Act and that the only remedy available to the Appellant was either a review of the committal orders; that the Appellant was not setting aside the *ex parte* judgement at all ; the Appellant did not challenge the affidavit of service ; nor sought leave to enter appearance and file a statement of defence.

33. The Court in its ruling dated the 16/11/16 dismissed the application on the grounds that; the Court was cloth with jurisdiction to hear the matter; the Appellant failed to dispute the affidavit of service so as to controvert the Respondents averment that she was duly served; the Appellant did not annex a draft defence to challenge the contents of the contract upon which the *ex parte* judgement was anchored.

34. My reading of the Memorandum of Appeal alludes to the above ruling together with the committal orders, prohibitory orders, attachment orders as the source of the Appellants grievances. The High Court did not give him leave to Appeal against the orders of Hon. E. Wambo committing him to civil jail and orders of Hon. Ochanda R.M who by consent issued prohibition in lieu of the attachment proceedings that had commenced. The Appeal relates to the Appellant's incarceration and attachment of his property, the impugned execution proceedings must be however be distinguished from the *ex parte* judgment which founded this Appeal. The Appellant is estopped from addressing events that were not subject to the leave that was obtained from the High Court .The memorandum ought to have been amended before to reflect the appropriate orders and grounds of Appeal. Suffice, the Appeal turned out to be incurably defective and cannot be salvaged at the judgment stage.

35. As to whether the Court had jurisdiction to entertain the matter, the claim in issue was the refund of purchase monies plus penalties. The decision in the case of the **Owners of Motor Vehicle of Lillian'** (citation **The Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Ltd (1989) KLR 1**) set out the principles on jurisdiction .It is trite that jurisdiction is everything and where the Court lacks jurisdiction it must down its tools The sum disclosed was Kshs 1.4 million which was within the pecuniary jurisdiction of the Court. The Court was not bereft of jurisdiction to hear and determine the matter.

36. As to whether the Appellant was served with the proceedings in the lower Court suit, I have perused the Court record and it is clearly glaring that the Appellant was served several times with respect to the summons to enter appearance, the amended plaint, notice to enter judgment inter alia. In all these instances the process server namely Simon Kuria effected service and filed affidavits of service which are uncontroverted.

37. It is the Appellant's contention that the Court erred in failing to cross examine the process server to ascertain whether he duly effected service. With all due respect, it is trite that the burden to discount service lies with the person who is disputing service. In this case the Appellant ought to have applied to the Court to cross examine the process server to proof that she was not served. She did not. It is never a duty of the Court to do so.

38. The Plaintiff filed suit on the 7/6/2016 and amended it to remove the order of specific performance of the agreement for the sale of the suit land and pursued a claim of refund of the purchase price. On 5/9/2016 he obtained interlocutory judgement in default of appearance and defence.

39. Order 10 Rule 4 (1) states as follows;

“Where the plaintiff makes a liquidated demand only and the Defendant fails to appear on or before the day fixed in the summons or all the Defendants fail so to appear, the Court shall, on request in Form No. 13 of Appendix A, enter judgment against the Defendant or Defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the Court thinks reasonable, to the date of the judgment, and costs.

40. The claim of the Respondent having been for a liquidated sum the Court was right in issuing an *ex parte* judgement as per the above provision.

41. The provisions of Order 22 of the CPR give the Court unfettered discretion and set out procedure for execution of decrees. Rule 31 provides that the Court has discretion to issue notice for judgement debtor to appear before him to show cause why he should not be committed. Appearance is not made if decree holder so requires issues a warrant for arrest. Rule 33 provides that the decree holder shall pay for subsistence of the judgment debtor and the Court shall fix subsistence, Rule 34 is instructive that where a judgment debtor appears pursuant to a Notice to show cause , the Court may disallow detention and direct his release where the debtor due to poverty or sufficient reason is unable to pay the amount .The judgment debtor may be detained in prison if he has means to pay but neglects to pay or conceals or transfers property or the Court is of the view that he intends to obstruct or delay execution .The Court notes such reasons and proceeds to commit him to civil jail.

42. In *Charles Lutta Kasamani v Concord Insurance Co. Ltd & 2 others* Mwita J held that limitation is justifiable and permissible in a society guided by democratic principles and the rule of law that:-

“Without enforcing Court decrees through committal to civil jail where one has the means but has refused to pay, would infringe on the rights of those who have successfully gone through legal processes and obtained decrees, which they cannot enforce because judgment debtors who have refused to pay would rush to Court and obtain declarations of violation of fundamental rights and freedoms once they are committed to civil jail.”

43. The contention that the Court erred in issuing the committal orders, attachment orders interalia has no basis because from the provisions set out above, the Court had power to issue orders for the execution of a valid judgement that was in force. All these orders were in respect to a legal and lawful processes of execution. I find no ground to fault the Court.

44. It is to be noted that the Appellant entered into a consent to liquidate the suit land in satisfaction of the decretal amount. She cannot then turn around and challenge the said consented transaction. She is bound by the terms of the consent. There is no evidence that the consent has been set aside, appealed and or set aside.

45. The Appellant has sought orders for the setting aside of the exparte orders in this Appeal. It is trite that with respect to an Appeal the Appellate Court’s task is to determine the issue that arose in the lower Court. The Court is exercising Appellate jurisdiction. I say so because the matter of setting aside the exparte judgement was not determined in the lower Court. It therefore cannot be raised on Appeal. The view of the Court is that the exparte judgement has never been challenged. Neither has it been set aside, Appealed and or vacated.

46. The Learned Magistrate noted that the Appellant did not annex a statement of defence in the lower Court for purposes of challenging the contract. Equally the defence was introduced during the application for seeking leave to file an Appeal out of time.

47. The Appellant cannot plead her defence in submissions. The Appellate Court is not the appropriate forum to introduce her defence since the Court is bound by the record and cannot engage in a fact finding mission. The Court is also estopped from delving in extraneous matters and/or new grounds that were not urged before the trial Court. In the case of **George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015**, this Court reasoned as follows regarding new issues that are raised before it for the first time:

“In general a litigant is precluded from taking a completely new point of law for the first time on Appeal. The jurisdiction of this Court is not to decide a point, which has not been the subject of argument and decision of the lower Court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See Nyangau v. Nyakwara [1986] KLR 712)”

48. The finding of the Court is that the Appellant was heard throughout the case at the lower Court and her contention that she was not heard is untrue. The record shows she was duly served with the summons interalia. She filed a motion to set aside the exparte orders but amended it to review of the exparte orders which was duly heard. She attended Court at the attachment stage and consented to the terms of the sale of land. She was heard on her application to file an Appeal out of time. The record is clear that her right to be heard was preserved throughout. The Appellant’s actions were malafides. **In the case of Maina – Vs – Muriuki [1984] KLR 407, O’Kubasu J** (as he then was) held that

“The discretion to set aside exparte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed for a party which has deliberately sought to obstruct or delay the cause of justice”.

49. In the upshot the Appeal has no merit. It is dismissed.

50. The costs shall be in favour of the Respondent.

51. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANGA THIS 29TH DAY OF OCTOBER 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mr. Rono HB for Ms Maina for the Appellant

Kirubi for the Respondent

Njeri, Court Assistant.