



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Appeal 13 of 2011

EDWARD ENGASHA SABATRIA.....APPELLANT

VERSUS

PAUL NDEGWA THIGA

T/A PANCOMM AGENCY.....1ST RESPONDENT

JEREMIAH KIMANI.....2ND RESPONDENT

(An Appeal from the Ruling of Hon. H. O. Baraza, Resident Magistrate, in Nakuru C.M.C.C.No.310 of 2010 dated 20th January, 2011)

JUDGMENT

The court below Mr. H.O. Baraza, Resident Magistrate struck out the pleadings filed by the respondent's erstwhile advocate on the ground that the advocate had not taken out a practicing certificate.

Following the striking out of the pleadings the appellant sought and obtained default judgment and proceeded to execute the decree. The respondent applied to the trial court to stay execution (the sale of the attached goods), grant a mandatory order of injunction directing the auctioneers to return to the respondent the attached goods and seeking further that the default judgment be set aside.

The appellant opposed the application saying that it was incompetent, defective and made in bad faith; that the judgment was properly entered and ought not to be disturbed.

The learned magistrate in his ruling found that although the judgment was obtained regularly, **Order XXI rule 6** of the **repealed Civil Procedure Rules** had not been complied with as the appellant had failed to serve the respondent with a notice of the entry of judgment. The learned magistrate also held that although the respondent's defence was improperly on record, in the interest of justice the court would not strike it out.

Ultimately, the learned magistrate allowed the application and granted all the prayers except that of costs which was to abide the outcome of the case. The decision aggrieved the appellant who has brought this appeal citing the following condensed grounds:

- i) that there was error on the part of the learned trial magistrate in setting aside the judgment;
- ii) that the court erred in allowing an application purportedly dated 22nd November, 2010 but stamped (received) by court on 22nd September, 2010;
- iii) that the court further erred in setting aside the judgment after appreciating that there was no valid defence on record.

The appeal was opposed on the grounds that it is against the exercise of discretionary powers of the court; that there was failure to serve the respondent with notice of entry of a judgment.

I have considered these arguments by counsel for both parties. There cannot be any doubt that in terms of **Order 9A rule 10** of the **repealed Civil Procedure Rules**, the court has an unfettered discretion to set aside its judgment upon such terms as are just.

In **Maina V. Mugiria**, (1983) KLR 78, the Court of Appeal set out the circumstances under which a default judgment may be set aside as follows:

“The court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just.....

This discretion 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 a person who has deliberately sought, whether by aversion or otherwise, to obstruct or delay the course of justice.....

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 matter 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.”

The respondent through his erstwhile advocate had filed defence in time. It, however, turned out that the advocate had no capacity to do so. It follows that there was a will on the part of the respondent but for the status of his advocate which he most likely was not aware of. The learned magistrate exercised his discretion in favour of the respondent to avoid injustice. By bringing that, it has not been suggested that the respondent’s intention was to evade or obstruct or delay the course of justice

Secondly the learned magistrate correctly found that the mandatory requirement to issue a notice of entry of judgment in terms of **Order XXI rule 6** of the **repealed Civil Procedure Rules** was not complied with.

For the reasons stated, this appeal fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 13th day of July, 2012.

**W. OUKO
JUDGE**