REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 53 OF 1996

SOLOMON K. NJUGUNA.....APPELLANT

AND

KENYA SAVINGS & MORTGAGES LTD.....1ST RESPONDENT

CHRISTINE M. KAIGU.....2ND RESPONDENT

(Appeal from a ruling/order of the High Court of Kenya at Nairobi (Hayanga J)

dated 13th day of December, 1995

in

H.C.C.C. NO. 1929 OF 1988

****

JUDGMENT OF THE COURT

The appellant, Solomon Kamau Njuguna, (the appellant) was the Plaintiff in Nai. High Court Civil case No. 1929 of 1988, and Savings & Mortgages Ltd, and Christine M. Gitau, (the first and second respondent respectively), were the defendants. That suit involved a parcel of land known as L. R. No. 37/749/8, situate in Nairobi. The appellant had charged it in favour of the 1st respondent to secure repayment by him of money the latter had advanced to him. The appellant's case, as pleaded, was that the 1st respondent, in a wrongful exercise of their statutory right of sale, sold the land to the 2nd respondent and later transferred ownership to her. The sale was wrongful because no statutory notice was served on him before the sale, which in any event was irregular and in bad faith because the property was knocked down to the 2nd respondent at an unreasonably low price. He therefore prayed for a declaration that the sale was invalid, and for an order cancelling the 2nd respondent's name from the land register.

In an amended joint defence which included a counterclaim making a liquidated demand of Kshs92,289.65 alleged to be the unpaid balance of the amount due by the appellant to the 1st respondent in respect of the loan give; the respondents as defendants in the suit averred, inter alia, that the suit did not lie. The averred that the prayers in the plaint were incapable of enforcement; that it was in any case incompetent because there was a pending previously instituted suit, to wit Nairobi High Court Civil Case No. 2598 of 1986, in which the matters in issue were substantially and directly in issue in the later suit; and that the suit was frivolous, vexatious and an abuse of the process of the court. The appellant denied

the counterclaim in a reply and defence to the counterclaim.

The pleadings closed. Issues were settled and the matter was eventually set down to come for trial. It came on 29th November, 1994, before Hayanga, J. and it was called. According to the record, Mrs. Onyango appeared as counsel for the defendant but counsel then on record for the appellant was absent. Mrs. Onyango is recorded to have stated as follows:

"This hearing date was taken by consent of the parties. This morning I saw the Plaintiff in court. I have a counterclaim and I want to go on in terms of the amended defence. I ask that plaint be dismissed with costs."

From the foregoing it would appear to us that the matter was first called at the appointed time, but was stood over to later in the afternoon of the same day. It was then that Mrs. Onyango made the remarks, above. After those remarks the learned judge made an order as follows:

"The case can go on on the basis of amended defence. This date was taken by consent of the parties, the Plaintiff is not here although the matter has been repeatedly called out. I order the suit by the Plaintiff dismissed under 0.9B rule 4. Counterclaim to be heard"

The learned judge then proceeded to receive evidence in support of the counterclaim from the 1st respondent. No evidence was called from nor was any adduced by the 2nd respondent. That was because none was necessary as she had not raised any counterclaim. At the close of the first respondent's case the learned Judge reserved his judgement which he delivered on 31st January, 1995, in favour of the counterclaimant but in the absence of both the appellant and his Counsel then on record.

The trial Judge in his order earlier on reproduced, did not at all allude to the fact that the appellant had been seen in court earlier the same day. That was a fact which we think was relevant in determining whether or not the appellant's suit was a fit case for dismissal under 0.IXB rule 4(1) of the Civil Procedure Rules. We will return to that aspect later on in this judgement.

It would appear to us, also, that the failure by his Counsel to appear in court on 29th November, 1994, inspite of the fact that he had due notice of the date, time and place the hearing of the suit, upset the appellant. That is because on 9th April, 1995, he filed in court a notice of intention to act in person, and on the next day he filed a notice of appeal, though filed out of time, indicating his intention to appeal against the decision of that court dismissing his suit and entering judgement against him in the counterclaim. It should be noted at the outset that the appellant did not take steps to have the order of dismissal and the judgment set aside until 20th April, 1995. By an application by chamber summons of that date, but which was filed in court on 3rd May, 1995, he prayed for an order that the ex parte dismissal of his suit and the ex parte judgement in favour of the 1st respondent be set aside. The application was expressed to be brought under 0.1XB rule 8 of the Civil Procedure Rules and S.3A of the Civil Procedure Act, (Cap 21 Laws of Kenya).

An application under 0.IXB rule 8, above, is in the nature of a review application. It is an application which should preferably be heard by the same Judge who either entered judgement or dismissed a suit under the provisions of that order. It would appear to us that in this case the application was placed before Hayanga, J. for hearing on that account. There is an anomaly in the application in that it is shown to have been drawn by the appellant's advocates presently on record for him, but the record of appeal clearly shows that they did not file their Notice of change of Advocates, until about 10th July 1995, which was a period in excess of two months after the application was filed. We think that it was improper for the advocates to have filed the application on behalf of the appellant before properly coming on record. However, as they soon regularized their appointment we refrain from taking adverse view on the matter.

In his affidavit in support of the application the appellant deponed thus. His suit was set down to come for hearing on 29th and 30th November, 1994. He attended the court at the appointed time on 29th

November, 1994, but did not see his advocate. By 9.30 a.m. on that day the advocate had not appeared. So he felt compelled to go to look for him at his office. The advocate, Dr. Khaminwa, was neither at his office nor within the precincts of the Law Court building in Nairobi, where the case was to be heard. Having failed to get his advocate he returned to particular court room where his case was scheduled to be heard, but found that the case had been dealt with in his absence. Subsequently, he learnt that his case had been dismissed and judgement entered against him respecting the counterclaim. He then instructed his said advocate to either apply to set aside the judgement or appeal against it but the advocate did neither and offered no explanation for his inaction. That he had a good case and a valid and good defence to the counterclaim.

The first respondent does not appear to have filed a replying affidavit but it filed grounds of opposition to the effect that the application lacked merit, was filed purposely to buy time, was intended to deny the 1st respondent the enjoyment of the fruits of the judgement in its favour, having been filed belatedly it was an afterthought, and it was an abuse of the process of the court and, consequently it was fit for striking out.

Hayanga, J. after hearing submission from counsel on the application ruled, firstly, that the fact that the appellant had filed a notice of appeal to challenge the decisions he sought to have set aside he was divested of jurisdiction to entertain the application. Secondly, that even if he had jurisdiction to entertain the application, the circumstances preceding and subsequent to the order and judgement which were sought to be vacated militated against granting the orders sought. He therefore proceeded to dismiss the application with costs and thereby provoked this appeal.

There are eight grounds of appeal, but the gravamen of the matter is that the learned Judge in the court below did not properly exercise his judicial discretion in the application and, consequently, arrived at a wrong decision.

At the hearing of the appeal Mr. Kiage appeared for the appellant. We must commend him for the admirable manner in which he argued the appeal. His submission was as follows. On the date of trial of his suit the appellant attended court. By doing so it showed he was keen in pursuing it. He could not find his advocate; so he went looking for him. He was not aware thereafter, that his case had been adjourned to be heard at 2.30 p. m on the same day; so he could not and did not attend the court at that time. When he finally did so later, he found his case had been dealt with and there was nothing he could do or did until after judgement in the case had been pronounced. When eventually he became aware of the judgement he instructed his then advocate to take the necessary steps to challenge it but the advocate let him down. Consequently, he was compelled to file a notice of intention to act in person, and indeed took steps towards challenging the decision. Whatever lapses he was guilty of were as a result of ignorance on his part. The steps he took either personally or through counsel showed he was concerned about his case and any delay on his part in filing the application to set aside the order and judgment against him was not inordinate and was excusable. In those circumstances he submitted, the learned Judge in the court below improperly exercised his discretion in refusing to allow the application. He further submitted that although the suit property may have been lost, the appellant needs an opportunity of being heard on a possible alternative claim of damages and, also, on the counterclaim. We note that no damages are claimed in the plaint.

Miss Njoroge who appeared for both respondents submitted, inter alia, that the burden lay on the appellant, which he failed to discharge, to show that Hayanga, J. improperly exercised his discretion in the matter; that the facts and circumstances of this matter show that the appellant was not diligent, and had delayed inordinately in bringing the application to set aside; that the ruling under attack was well considered and correct and should not therefore, be interfered with; and that setting aside the judgment and order against the appellant will be an exercise in futility as the suit property is presently in the hands of the 2nd respondent who, in her view, is an innocent purchaser for value without notice. Finally that the appellant has no valid defence to the counterclaim, his defence being a mere denial.

The facts upon which Hayanga, J.'s decision was based, are not in dispute. It is his exercise of discretion which has been called into question. The principles on which the court acts in application under O.1XB rule 8, as also under O.1XA rule 10, of the Civil Procedure Rules, are well enunciated in several decisions

of this court and its predecessor the Court of Appeal For East Africa. The notable ones are Shah .v. Mbogo [1968] EA 93, Patel v Cargo Handling Services Ltd. [1974] EA 75; Cromwell Kitana v John Mwema Mboni Civil Appeal No 50 of 1984 (unreported); and Chemwolo & Another v Augustino Kubende Civil Appeal No 103 of 1984 (unreported), just to cite a few. It is also trite that this court will not interfere with the exercise of judicial discretion in such cases unless the exercise was on wrong principle or the Judge acted perversely. (See, Jackson Gatere v Mount Kenya Bottlers Ltd. Civil Appeal No 107 of 1995 – unreported).

An issue of jurisdiction of the superior court to entertain the application to set aside was raised before the Judge in the court below, but because neither Counsel appearing in this matter commented on the issue nor was it made a ground of appeal we consider it proper not to express any view on the matter.

O 1XB rule 4(1) provides:

"If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

The record of proceeding in the court below is silent on why the case had to be adjourned to 2.30 p. m. on the 29th November, 1994. As we said earlier, the appellant was seen in court on the morning of that day. The trial Judge having been told as much, it meant that he would only properly dismiss the appellant's suit if he satisfied himself that the appellant had been clearly told that his case would come at a later time on that day. In absence of such evidence the suit was improperly dismissed under O.IXB rule 4(1) of the Civil Procedure Rules, as the facts fell outside its purview. We agree with Mr. Kiage, that O.IXB rule 4(1), above, is designed to deal with those cases in which the plaintiffs in them appear not to show any seriousness in pursuing them, and we are of the view that the appellant's was not such a case and, accordingly, we come to the conclusion that the dismissal of the suit was in the circumstances improper.

Regarding the issue of delay on the part of the appellant to move the superior court to set aside the ex parte order of dismissal and judgement against him, Miss Njoroge, submitted before us that it was inordinate. To determine whether or not the delay was inordinate all the circumstances of the case have to be considered. It is clear tous, and Miss Njoroge appeared to concede, that the appellant was let down by his advocate. Her complaint was that the appellant could not possibly have been looking for his advocate the whole day on 29th November, 1994, after he became aware of his absence in court. But, as was rightly pointed out by Mr. Kiage, the appellant is a layman. He may not have been alive to the fact that his absence and that of his counsel would lead the court to dismiss his suit and to give judgement to the 1st respondent on the counterclaim. We also think that the appellant satisfactorily explained his delay in moving the superior court for orders. The delay which we think has not as yet been explained is by the appellant's legal advisors in lodging in court the application to set aside. As we stated earlier, the application was ready for lodgment by 21st April, 1995, but was not lodged in court until 8th May 1995. The blame for that delay rests with the advocates, and in the circumstances of this case could not properly be visited upon the appellant.

Miss Njoroge, also, raised the issue that setting aside the ex parte order and judgement of the superior court will be an exercise in futility. Determining that issue will necessitate consideration of the merits of the appellant's suit and his defence to the counterclaim. Considering the decision we have come to, the inevitable course is to allow the appeal, set aside both the ex parte order dismissing the appellant's case and the ex parte judgment on the counterclaim. It then follows that expressing a view on the merits or otherwise of the appellant's case and his defence on the counterclaim will inevitably interfere with the jurisdiction of the Judge who will eventually hear the case, which will be undesirable. We eschew any attempt to do so.

In the above circumstances and for the reasons we have endevoured to give, we come to the conclusion that the learned trial Judge improperly exercised his discretion in declining to set aside his order dismissing the appellants case and the ex parte judgement. In the result we allow the appeal, set aside both the ex parte order of dismissal and he ex parte judgement on the counterclaim and order that the

claim and the counterclaim do proceed to hearing in the superior court. We award the appellant the costs of this appeal and the application before the superior court.

Dated at Nairobi this 18th day of August 1997.

A.M. AKIWUMI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR