REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E099 OF 2023

GEORGE MUGAMBI GITUMA... APPELLANT

VERSUS

MUTWIRI JACOB LINTARI..1ST RESPONDENT

FAITH NTARARA MUKETHA.....................................2ND RESPONDENT

(Being an appeal from the orders and ruling of Hon. T.M Mwangi SPM in Meru CMCC No. 60 of 2019 delivered on 14th June,2023)

JUDGMENT

1. The Respondents **Mutwiri Jacob Lintari** and **Faith Ntarara Muketha** instituted the aforesaid suit before the lower court against the Appellant seeking for;

   a) Specific performance of the sale agreement dated 16th June, 2016 and in the alternative refund the

purchase price of Ksh. 1,800,000/= and penalty of Ksh. 1,800,000/= totaling to Ksh. 3,600,000/=

b) General Damages for breach of contract.

c) Costs of the suit.

d) Any other relief that this Honourable Court may deem fit and just to grant.

2. The Respondents' claim was that they entered into a sale agreement with the Appellant for a parcel of Land known as L.R No. Nyaki/Kithoka/4507 measuring approximately 0.101 Hectares at a cost of Ksh. 1,800,000/- and that upon payment of the purchase price, the Appellant refused to transfer the said land to them.

3. On 18th June,2019, an Interlocutory judgment was entered against the Appellant for failure to enter appearance or file defence within the prescribed period and the matter proceeded by way of a formal proof.

4. Upon conclusion of the formal proof hearing, the trial court delivered its judgment on 13th May, 2020, against the Appellant in the following terms: -

a. Ksh. 3,600,000/= being refund of the purchase price and penalty thereof as captured in clause 8 of the parties' agreement dated 16.6.2016 and as defined and prayed by the plaintiff in their plaint dated 20th March,2014.

b. Costs of the suit and interest thereof at court rates.

5. Vide an application dated 25thJanuary,2021, the Appellant moved the trial court to set aside the default judgment and to grant him leave to file defence in response to the Respondents' case. Through a ruling dated 23rd June, 2021, the trial court allowed the Application.

6. Thereafter, on 15th July 2021, the Appellant filed his statement of defence dated 14th July,2021 wherein he denied the Respondents' claim in its entirety and put them to strict proof.

7. On 6th December,2021, when the matter was scheduled for hearing, counsel holding brief for the Appellant's advocate sought an adjournment on the ground that the Appellant's counsel was attending to Civil Case No. 116 of 2021 before the Court of Appeal and that the hearing date had been fixed

ex- parte. The application was opposed by the Respondents' counsel on the basis that the hearing date had been duly served and that the adjournment request was a delaying tactic considering the suit was filed in 2019. The court declined the application for adjournment. At 11:40 a.m. when the matter was called out, neither the Appellant nor his counsel was present and the hearing proceeded ex parte.

8. On 23rd February 2022, the trial court delivered an ex parte judgment in the same terms as the earlier judgment dated 13th May, 2020 as outlined in paragraph 4 herein.

9. Through an application dated 6th April,2023, the Appellant sought for stay of execution of the ex parte judgement delivered on 23rd February,2022 and all consequential orders thereto, for enlargement of time to enable him produce his evidence and for all the witnesses to be recalled for cross examination.

10. He also filed an application dated 10th April,2023 seeking for the firm of Kiogora Mugambi & Co Advocates to be placed on record to represent him, an order of stay of

execution of warrant of arrest issued against him and for his release from civil jail.

11. The trial court determined both applications. Vide a ruling dated 14th June,2023 the trial court allowed the aforementioned firm to represent the Appellant, dismissed both applications but ordered a sum of Ksh. 200,000/- deposited into court by the defendant to be released to the plaintiffs through their advocates & the balance of the decretal sum to be liquidated by the defendant paying monthly instalments of Ksh. 100,000/- effective 15th July,2023 and on the 15th day of every succeeding month until full payment and in default of payment of any single instalment, the remaining balance shall fall due and execution shall automatically issue.

12. Aggrieved by the ruling, the Appellant filed this appeal on 7 grounds reproduced verbatim as follows: -

a) The Learned trial magistrate erred in Law and fact by failing to consider and or address the triable issues which the Appellant raised in his applications to

determine who breached the contract of sale of land and who was entitled to damages.

b) The Learned trial magistrate erred in Law and fact that the appellant counsel failed to keep him abreast of the case and failed to note that the Appellant was in hospital and could not have been following up with his previous advocates suffering from a very serious ailment of the brain hence the mistake of the counsel cannot be visited on innocent client.

c) The Learned trial magistrate erred in Law and fact by failing to find that the appellant cannot be denied an opportunity to defend the suit as he had already deposited security for costs in the tune of Ksh. 200,000/= which was to remain binding until conclusion of the case.

d) The Learned trial magistrate erred in Law in failing to appreciate that he had no legal capacity to determine that the appellant pay Ksh. 100,000/= monthly as he never ascertained the Appellant income of means and that this was not an issue for

determination before him and evaded the legal issues framed for determination and never had the respondent plead for release of monies or payment of Ksh. 100,000/= Total misdirection.

e) The Learned trial magistrate misdirected himself in ordering the release of monies deposited by the Appellant as security.

f) The Learned trial magistrate erred in Law and fact by failing to find that the appellant's application was not review application before him.

g) The Learned trial magistrate erred in Law and fact that has nowhere in the ruling determined whether the appellant has a valid defence raising triable issues or whether it is frivolous, scandalous or abuse of court process.

13. The Appellant thus prayed that the appeal be allowed with costs to him.

14. The Appeal was canvassed through written submissions.

15. Only the Respondents submissions are on record.

16. On ground one of the Appeal, the respondents submitted that the court's ruling was sound since the appellant despite being given several chances to defend himself he failed to do so.

17. On ground two, the respondent submitted that evidence by both parties were duly considered by the trial court. He argued that it is the duty of a serious litigant to follow every step of his case but the appellant decided not to attend court and opted to go to Maua Court to attend to his client's matters.

18. On the third ground of appeal, the Respondent submitted that the learned magistrate properly considered the facts noting that the deposit served as security for the Appellant's attendance in court. They argued that the Appellant failed to attend court on several occasions and defaulted on the agreed monthly installments all of which transpired before the impugned ruling was delivered.

19. With regard to the fourth ground of the Appeal, the respondents submitted that the magistrate took into account the Appellant's obligation to pay monthly installments of

Ksh. 250,000/- pursuant to the subordinate court's order of 1st December, 2022 and that the magistrate subsequently reduced the installments to Ksh. 100,000/- which was in favor of the Appellant.

20. Regarding the fifth ground of appeal, the Respondents submitted that the magistrate released a deposit of Ksh. 200,000/- to them as part of the installments that the Appellant had defaulted on to their detriment. They contended that since the Appellant had failed to pay previous installments, the learned magistrate applied the deposit toward the outstanding amount to facilitate the Appellant's continued payment of the remaining installments.

21. Concerning the sixth ground of appeal, the Respondent argued that the learned magistrate dismissed the Appellant's applications after considering the evidence presented by both parties as well as the material on record.

22. Regarding the seventh ground of appeal, the Respondent submitted that the learned magistrate rendered the ruling based solely on the application before the court

and was not required to evaluate the Appellant's defence at that stage. The respondents further argued that the subordinate court had previously issued three judgments at the Appellant's instance in which his defence was considered and he was afforded an opportunity to be heard.

23. From the foregoing, the respondents prayed that the ruling of the lower court be upheld.

Analysis & Determination

24. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. This position was held in ***Selle & Another v. Associated Motor Boat Company Ltd & Others*** ***(1968) EA 123*** where the court stated as follows: -

> ***"… This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen nor heard the witness and should***

made due allowance in that respect …" [See also <u>Jivanji vs Sanyo Electrical Company Ltd</u> (2003) KLR 425]

25. I have considered the entire record, the grounds of appeal, and submissions on record. The issues for determination are;

i. Whether the trial court erred in dismissing the Appellant's applications dated 6th April 2023 and 10th April 2023.

ii. Whether the trial magistrate erred in denying the Appellant an opportunity to defend the suit despite of having deposited Ksh. 200,000/- as security for costs and whether it erred in releasing this amount to the Respondents.

iii. Whether the trial magistrate erred in ordering the Appellant to pay monthly installments of Ksh. 100,000/= to the Respondents.

26. In the first application, the Appellant sought stay of the ex parte judgment delivered on 23rd February,2022, the ex parte decree and all consequential orders, enlargement of

time to adduce his evidence and recall of witnesses for cross-examination.

27. From the grounds and supporting affidavit on record, the application was based on the following: that the Appellant had a meritorious defence and that it was in the interest of justice to grant him an opportunity to present his case; that on 6th December, 2021, when the matter was scheduled for hearing, he was absent because his advocate had not informed him of the date and he was unwell at the time; that he was not served with the ex parte judgment, decree, or notice of entry of judgment dated 13th May 2020 and 23rd February 2022; that out of fear of being committed to civil jail, the Respondents coerced and fraudulently obtained Ksh. 300,000/= from him; and that warrants of arrest were issued against him without service of a notice to show cause.

28. In the second Application, the Appellant sought for stay of execution of warrant of arrest issued against him and for his release from civil jail. The application was founded on grounds substantially similar to those raised in the earlier

application. The Appellant contended that prior to the judgment, he was not afforded an opportunity to present his case; that his former advocates failed to diligently prosecute the matter; that he had been unwell; that he was never served with the ex parte judgment, decree, or the respondents’ application for notice to show cause; and that his defence raises triable issues

29. The trial court held that the second application was intertwined with the first and that its determination would hinge on the outcome of the earlier application. The court dismissed the first application on the basis that it had been filed with unreasonable delay which was unexplained and was therefore inexcusable. The court observed that on 19th October 2022, the Appellant was presented before it under a warrant of arrest and was released on condition that he pays Ksh. 150,000/- and proposes a mode of settling the balance of the decretal sum. The matter was then fixed for mention on 26th October, 2022. However, on the mention date, the Appellant neither attended court nor fully complied with the orders issued on 19th October, 2022. Subsequently, on 28th

November 2022, the Appellant was again presented to court under a warrant of arrest for purposes of committal to civil jail. On the same date, he filed an application seeking, inter alia, stay of his committal and leave to settle the decretal sum of Ksh. 1,800,000/= by way of monthly installments. That application was determined on 1st December, 2022 and the terms for liquidation of the decretal sum were set. The court further opined that if the Appellant intended to have the judgment of 23rd February 2022 set aside, he ought to have made such an application earlier, or raised the issue in the application dated 28th November, 2022 or provide an application for not doing so. The court concluded that the instant application having been filed four months after the application dated 28th November 2022, was an afterthought and a knee-jerk reaction aimed at delaying execution of the decree, precisely because the Appellant on 11th November 2022 and 1st December 2022 had sent a banker's cheque for Ksh.150,000/= and made payment of Ksh.150,000/= by Mpesa respectively.

30. Discretion to set aside judgment obtained *ex parte* has been pronounced in many decisions. In **Patel v E.A. Cargo Handling Services [1974] EA 75**, Sir William Duffus, P at page 76 stated:

> ***"The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

31. In **Philip Chemwolo & Another v Augustine Kebende [1982-88] KAR 1036** Apaloo J.A at P.1042, had this to say:

"I think a distinguished equity Judge has said:

"Blunders will continue to be made from time to time and it does follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits."

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

32. In **Sebei District Administration v Gasyali and others [1968] EA 300** Sheridan J of the High Court of Uganda made the following remarks:

"The nature of the action 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 last resort of the Court.".

33. Applying the above principles to the matter at hand, it is not in dispute that the exparte judgement was delivered on 23rd February,2022 and subsequently on 30th August,2022 a decree was issued. On 1st September, 2022, the respondents filed an application dated 31st August, 2022 seeking a notice to show cause against the Appellant for failure to pay Ksh. 4,119,425/=. In their supporting affidavit, the 1st Respondent claimed the notice of entry of judgment had been served, but while a copy was annexed, no affidavit of service was on record to demonstrate that service was actually effected.

34. The Appellant claimed that he was not served with the notice of entry of judgement. Order 22 Rule 6 of the Civil Procedure Rules provides as follows: -

> ***"Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."***

35. Pursuant to the above order, service of notice of entry of judgement is mandatory. However, the Respondents' choice to execute the decree by arrest and committal to civil jail rendered this requirement inapplicable. I am persuaded by the court's holding in the case **Elizabeth Kavere & another v Lilian Atho & another [2020] eKLR** in respect to this position. The court stated as follows: -

> ***" The requirement of notice applies to application for execution by way of 'payment, attachment or eviction' and may only have affected the initial attempt at attachment of the 1st defendant's movable property by application for execution dated 4th December 2018, which was unsuccessful prompting the application for execution dated 17th April 2019 seeking Notice to Show Cause why the judgment-debtor/applicant should not be committed to civil jail for failure to comply with the decree herein. The procedure for execution by arrest and detention already has***

statutory protections for notice to show cause, and the hearing thereof, making the notice of entry of judgment under Order 22 rule 6 of the Civil Procedure Rules <u>unnecessary</u>."

36. There is an affidavit of service on record showing that the notice to show cause application dated 31st August, 2022 together with the hearing notice was served on the Appellant on 8th September, 2022. The Appellant did not attend court on the scheduled hearing date and warrants of arrest were issued against him. Subsequently, the trial court afforded the Appellant an opportunity to settle the decretal sum as outlined in paragraph 29 herein but he failed to comply. The court was therefore correct in finding that the Appellant ought to have applied to set aside the ex parte judgment in his application dated 28th November, 2022 or provided reasons for failing to do so within a reasonable time. There is also sufficient evidence that the Appellant was aware of the ex parte judgment and the decretal sum which explains his later application to settle it by way of installments of Ksh.

300,000/=. Setting aside an ex parte judgment is discretionary, and in my view, the reasons given by the court for dismissing both applications were sound.

37. The Appellant further contended that his defence raised triable issues and on that ground he ought to have been afforded an opportunity to present his case.

38. What then constitutes a reasonable defence? The Court of Appeal's defined the same in the case of **Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR** as follows:

> ***"…a triable issue" is an issue which raises a prima facie defence and which should go to trial for adjudication..."***

The Court further held that;

> ***"…The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend."***

39. The Court of Appeal in the case of **Mugunga General Stores v Pepco Distributors Ltd [1987] eKLR** held that mere denial does not constitute a sufficient defence. The court stated as follows in this regard:

> ***"…a mere denial is not a sufficient defence in this type of case…It is not sufficient therefore simply to deny liability without some reason given."***

40. The trial magistrate did not determine this issue. However, as this is an appeal where I am required to reevaluate the evidence on record, I have reviewed the Appellant's defence dated 14th July, 2021. The defence does not raise any triable issues. It consists of mere denials as the Appellant advanced no reasons for disputing the Respondents' claim.

41. The trial court on 18th April,2023 stated inter alia as follows;

> ***"Meanwhile in respect of the Application dated 10th April,2023, the Applicant to deposit in court Ksh.200,000/- in cash as a part consideration of***

being released from civil jail pending the determination of the Application”

42. It is therefore patent that the deposit was issued as security pending the determination of the application and not the suit. As rightly submitted by the Respondents, the trial court properly exercised its discretion in the interest of justice and ordered the release of this amount to the Respondents to facilitate the Appellant’s continued payment of the remaining installments. I therefore opine that the trial court did not err in releasing the said sum to the Respondents.

43. The Appellant in his memorandum of appeal stated that the trial magistrate had no legal capacity to order him pay a monthly installment of Ksh.100,000/= as he never ascertained his income of means and that this was not an issue for determination. Having perused the aforementioned applications, I concur with the Appellant on the latter point. This was not an issue for determination and as noted by the

Appellant in the memorandum of appeal underground 7 his applications were not review applications.

44. Additionally, I observe that the Appellant by an application dated 28th November, 2022, sought a stay of execution of the warrants of committal to civil jail issued on the same date and requested to settle the decree of Ksh. 1,800,000/- in monthly installments of Ksh. 300,000/-. The trial court considered the application and delivered its ruling on 1st December 2022, where it inter alia ordered as follows:

> ***"..that the judgement debtor shall thereafter be paying monthly amount of Ksh. 250,000/= commencing on 30th January,2023 until payment in full otherwise he shall be susceptible and be committed to civil jail without issuance of any notice to show cause whatsoever".***

45. The court therefore erred by failing to consider that the applications on record were not for review. The orders of 1st December, 2022 had not been challenged and as such ought

to remain in force. For avoidance of doubt, I direct the Appellant to adhere to those orders.

46. In light of the foregoing, I find that the appeal is devoid of merit and is dismissed except for grounds 4 and 6 of the memorandum of appeal.

47. The parties to bear their own costs of this appeal.

48. It is so ordered.

Dated, Signed and Delivered at Meru this 13th day of October, 2025.

H. M. NYAGA

JUDGE