



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 318 OF 2017

HALIMA J KARIUKI.....APPELLANT

VERSUS

SERAH WANJIRU KURIA.....RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Nakuru (Hon. M. A. Otindo (RM)) dated 10th July 2015 in CMCC No. 977 of 2013)

JUDGMENT

1. The respondent herein moved the subordinate court pursuant to plaint dated 2nd October 2013 in which she averred that the appellant and herself entered into an agreement dated 5th March 2004 through which the respondent was to purchase a parcel of land measuring 1 acre which was to be excised from LR No Molo/Mau Summit Block 1/207 (the suit property) at a consideration of KShs 90,000. She further averred that she paid KShs 83,300 and that the appellant was to process title but which task the appellant failed to perform. She thus sought judgment for an order compelling the appellant to excise and transfer the said 1 acre of the suit property and in the alternative the appellant be compelled to refund the sum of KShs 83,300 plus interest and costs. The appellant filed a statement of defence in which she denied the respondent's allegations and urged the subordinate court to dismiss the case with costs.

2. The subordinate court matter was set down by consent for hearing on 17th February 2015, come which date neither the appellant nor her counsel attended before the trial court. The plaintiff's case was thus heard and closed. Judgment was later delivered on 31st March 2015, also in the absence of counsel for the appellant. The court found in favour of the respondent and ordered the appellant to transfer the suit property to the respondent within three months of delivery of the judgment and also authorized the executive officer of the said court to sign transfer in case of failure of the appellant to sign.

3. Aggrieved by the judgment, the appellant filed Notice of Motion dated 15th May 2015 seeking among others setting aside of the proceedings of 17th February 2015, the judgment and the decree. She deposed in the supporting affidavit that she called her advocate Mr Tengekyon on phone on 17th February 2015 and the advocate told her that he was on the way and that they would meet in court. She called later called him severally but there was no answer. Being her first time in court, she was not aware of court procedures. She enquired from a passer-by who looked like an advocate where land cases were being heard and he directed her to court number 6. On reaching court number 6 she found a notice to the effect that the said court was not sitting and that matters would be mentioned in court number 7. She waited in court number 7 and after the court had called out all its cases it asked if there was anyone whose case had not been called out. She raised her hand and was referred to the court assistant who in turn told her to wait. As she waited outside she tried once more to call the advocate but there was no answer. Later the court assistant left and did not return. She visited the advocate's office the next day but did not find him. She went back on 3 other occasions and found the office closed. To her shock, she was served with a decree on 9th May 2015.

4. The respondent opposed the application through a replying affidavit in which she deposed that the hearing started at around 11.30am and that she believes that the appellant was nowhere within the court precincts. She discounted the appellant's allegations about having gone to court number 7 or having called her advocate, adding that if those allegations were true, the appellant would have obtained and filed affidavits sworn by the court assistant and Mr Tengekyon. She accused the appellant of being indolent by waiting to be served with the decree before she could file the application.

5. Upon hearing the application the learned magistrate found no merit in it and dismissed it in a ruling delivered on 10th July 2015. The present appeal is against the said ruling and orders made on that date. The grounds of appeal as stated in the Memorandum of Appeal are:

- 1. That the learned trial magistrate erred in law and in fact in finding that the application was without merit.*
- 2. That the learned trial magistrate erred in law and in fact in finding that absence of an affidavit by counsel formerly on record for the appellant was fatal to the application.*

3. That the learned trial magistrate erred in law and in fact in finding that the errors or omissions of the appellant's counsel should be visited upon the appellant.

The appellant therefore urged this court to allow the appeal, set aside the aforesaid ruling and allow the Notice of Motion dated 15th May 2015.

6. The appeal was canvassed by way of written submissions. For the appellant it was argued while citing inter alia the case of **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** that the appellant was made to suffer because of her advocate's mistake when there was no intention on her part to delay the matter. That she was unjustly deprived of an opportunity to be heard. On the part of the respondent it was argued that the appellant is not serious since she neither visited the court registry on the material day to enquire nor returned to court the next day to check what happened to her case. Regarding the issue of mistake of counsel, the respondent argued that this was a case of negligence and cited the case of **Omwoyo v African Highlands & Produce Co Ltd [2002] 1 KLR 698** to support the argument that the advocate should be held to account. Finally, counsel for the respondent argued that the appellant had been indolent and discretion should not therefore be exercised in her favour.

7. I have considered the grounds of the appeal and parties' submissions. This is both a first appeal and an appeal against an order made in exercise of discretion. I therefore remind myself that my mission is to consider the material that was before the subordinate court, evaluate it myself and draw my own conclusions. While doing so I further remind myself that I should not interfere with the learned magistrate's exercise of discretion unless I am satisfied that the court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the facts that the magistrate was clearly wrong in the exercise of discretion and that as a result the decision has given rise to an injustice.

8. What was before the magistrate was an application seeking setting aside of a judgment that was made following a hearing that took place on a date that was taken by consent. The judgment is therefore what is usually termed a regular judgment. The principles guiding the court while considering an application which seeks setting aside of a regular judgment are well settled and were restated by the Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** thus:

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.

9. The appellant's main arguments were that although she was within the court premises, she could not locate the courtroom where the hearing was to take place and that although she had counsel on record, the counsel failed to attend court or even to answer her phone calls. While considering these matters the learned magistrate stated:

Clearly from the applicant's disposition her advocate never attended court. As submitted by Ms Njoroge for the respondent that the advocate ought to have shown goodwill by swearing an affidavit to explain his absence in court. This I find would persuade the court that due to excusable grounds or reasons. Counsel for applicant has submitted that the applicant should not be punished for mistakes of her advocate. This has been the position but I believe that this position has given advocates a lee way to abrogate them way of consent. ...

... I find in my opinion, it is high time advocates take responsibility for their negligence. In the instant matter I would have extended my discretion for the application (sic) if Mr Tengekyon had sworn an affidavit kindly informing the court on what happened on the 17/2/2015. ...

10. It will be recalled that the appellant had elaborately narrated her tribulations with her advocate. He was not answering her calls on the material date despite having talked to her earlier in the morning and assured her that he would be in court. She visited the advocates' office on at least 4 occasions after the 17th February 2015 without managing to meet him. Ultimately, she changed advocates and filed the subject application with the aid of a new firm of advocates. If the learned magistrate had considered these circumstances, she would most likely not have insisted on an affidavit from Mr Tengekyon. In my view, such an affidavit would hardly be forthcoming considering the circumstances explained by the appellant which perhaps would attract liability on the advocate's part. By insisting on the affidavit, the learned magistrate was wrong in the exercise of her discretion. She overly focused on making the advocate accountable for his actions and in the process lost sight of her immediate task: determining if in the circumstances, the appellant could be given an opportunity to be heard. I find that the appellant had explained the failure to attend court and discretion ought to have been exercised in her favour.

11. The dispute that was before the court as can be seen from the plaint and defence concerned title to land. While there is nothing spectacular in such a dispute, it must always be borne in mind land is generally cherished in this country and disputes of such nature need to be determined by going to the root of the matter. In a case where the defendant has entered appearance and filed defence, that can best be achieved by hearing both parties. While the court cannot be faulted for proceeding as it did on 17th February 2015, once an application for setting aside was placed before it the court was bound to see how best to do justice between the parties. Among others, the court ought to have weighed whether any injustice or hardship would result to the appellant by being driven from the seat of justice as against whether the respondent could be compensated by an award of costs. In this regard, I am satisfied that the learned magistrate misdirected herself and as a result arrived at a wrong decision. I find that the circumstances of the case warranted setting aside the judgment and compensating the respondent by an award of costs.

12. In view of the foregoing, I find merit in this appeal. I will allow it. Regarding costs, the appellant and her counsel's absence in court is what led to the judgment and by extension this appeal. Even though the appellant has succeeded, I do not find it just to saddle the respondent with costs of this appeal.

13. I therefore make the following orders:

i. This appeal is allowed.

ii. The ruling and order of the Chief Magistrate's Court at Nakuru (Hon. M. A. Otindo (RM)) dated 10th July 2015 in CMCC No. 977 of 2013 is hereby set aside.

iii. The proceedings of the subordinate court of 17th February 2015, the judgment and decree of the said court are hereby set aside.

iv. Each party shall bear own costs of this appeal but the appellant shall bear costs of Notice of Motion dated 15th May 2015.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Gikonyo holding brief for Mr Ngure for the appellant

Ms Njoroge for the respondent

Court Assistants: Beatrice & Lotkomoi