



REPUBLIC OF KENYA

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IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CIVIL APPEAL NO. 5 OF 2018

ISSA MGANGA MWAGUYA.....1ST APPELLANT

ABDALLA MIRAJ 2ND APPELLANT

SIKUKUU MUNYAKA..... 3RD APPELLANT

VERSUS

MACHARIA KARAGO.....1ST RESPONDENT

MAKINI AUCTIONEERS AGENCY.....2ND RESPONDENT

JUDGEMENT

1. The appellants who were plaintiffs in the case in the court below being dissatisfied with the ruling of Hon F. Kyambia SRM delivered on 16th February 2018 in CMCC No. 974 of 2014 lodged an appeal on 21st February 2018 listing the following grounds;

(a) That the learned magistrate totally erred in his finding on the principles to be applied on setting aside judgment entered ex-parte.

(b) That the learned magistrate fell into error in his evaluation of the reason for non-attendance by the plaintiffs/appellants advocate in court for hearing and visiting the mistake on the appellants against the well-known principles of law.

(c) That the learned magistrate erred in law in failing to apply the well-established principles of law in an application for setting aside judgment.

(d) That the learned magistrate erred in law and in fact by his failure to appreciate the facts leading to the dismissal of the plaintiff/appellants case in the lower court.

(e) That the learned magistrate exercised his discretion wrongly in failure to allow the application to set-aside and allow the matter heard on merit, as such the learned magistrate fell into error.

(f) That the failure by the magistrate to allow the application to set-aside the ex-parte judgment was based on a misinterpretation of the law and total miscarriage of justice.

(g) That the learned magistrate fell into error, both in law and facts, by trying to explain away the reason for the appellants' advocate non-attendance in court, as such he fell into error.

(h) That the learned magistrate erred in law by his misunderstanding the principles of setting-aside of judgment and the principle of natural justice of not condemning a party unheard as such he fell into error.

2. The appellants had moved the trial court through an interlocutory application dated 28th July 2015 praying for orders to set aside the exparte proceedings and or stay proceedings and or exparte orders that dismissed the appellants' suit pending delivery of the judgement that was slated for 5th August 2015. The impugned proceedings took place on 15th July 2015 in the absence of the plaintiff.

3. The appellants gave the reasons for their non-attendance in court on that day on the face of the application. The 1st and 2nd defendants

filed a replying affidavit dated 24th August 2015 in opposing the grant of the prayers in the motion.

4. The learned magistrate after considering the submissions given in support of and against the application rendered himself in the ruling as contained in the decree dated 16th February 2018. It is this ruling which the appellants wish to have this court set aside by allowing his appeal.

5. The appellant filed the record of appeal on 3rd July 2018. The record annexed copies of several documents from the court below which run from pages 4-265. The appellants refer to the impugned ruling appearing at pages 260-263 of the record and argues that the learned trial magistrate did not consider the laid down principles for setting aside a judgement entered ex-parte.

6. Setting aside is a discretionary remedy and this court is averse to the law that an appellate court ought not to interfere with a trial court's exercise of discretion unless the said court did not exercise that discretion judiciously by misdirecting oneself or acting on matters which should not have been acted on – see the holding in the case of **Mbogo & Another –versus- Shah (1968) EA 93**.

7. In the body of the ruling, the trial magistrate stated that **“I have noted that the plaintiff prior to the proceedings the subject of this ruling were enjoying injunctive orders. This may explain their reluctance to prosecute their case.”** The magistrate also found that although the mistake of counsels ought not to be visited on their clients, the litigants as owners of the case should be vigilant. That in the case before him, it was clear from the affidavit in support of the application that the plaintiffs were notified of the hearing date by their advocate vide the letter dated 7th June 2015. That it is not clear whether the plaintiffs themselves attended court on the hearing date.

8. Parties opted to argue the appeal by filing of written submissions. Directions on filing of written submissions was taken on 5th July 2018 with each party granted 21 days each to put in their submissions. On 26th September 2018, parties were granted more time to file their submissions and mention to confirm fixed for 8th November 2018. From the court record, I have not seen the appellants' submissions. I will therefore consider the appeal minus the appellants' submissions. The respondents filed theirs on 9th January 2019.

9. The case of **Mbogo –versus- Shah** cited above clearly lays grounds for setting aside exparte orders i.e where there is proof of inadvertence, error or excusable mistake. That the existence of the discretion is not intended to assist a person who is deliberately seeking whether by evasion or otherwise to obstruct or delay the cause of justice. The appellants argued as was expressed in their affidavit in support of the motion of 28th July 2015 that their advocate misdiarised the hearing date of 15th July 2015. That on that date, their advocate was in Kwale as per the diary extract annexed.

10. The trial magistrate considered the reasons given for the absence of the advocate pointing out two pertinent issues. First that the previous record did show that the appellants were not keen to prosecute their suit may be because they were enjoying interim orders. Secondly that the case belongs to a litigant and it was not made known to the trial court whether the plaintiff attended court having been informed of the hearing date as per the letter dated 7th June 2015.

11. Did the trial magistrate exercise his discretion judiciously by considering the reasons put forth by the appellants which reasons he found to be lacking in merit? One of the reasons the trial magistrate highlighted was the conduct of the appellant in the previous proceedings. I have perused the record and note that the previous proceedings related to the determination of an interlocutory application which the parties advocate had agreed to dispose off by filing of written submissions.

12. On 4th May 2015, the case was listed for pre-trial directions on 27th May 2015. On 27th May 2015, the matter was set down for hearing for 15th July 2015 when the plaintiff and his counsel did not attend court. Therefore I do not think it was right for the learned trial magistrate to hold that the actions of the appellants previously was intended at delaying this matter. The failure to attend court on just one day was explained thus the appellant should have been pardoned so that the dispute is settled on merits. The application to set aside the exparte proceedings was also filed without undue delay.

13. In light of the foregoing, I find there is merit in the appeal. I do allow it with the consequence that the orders of the learned magistrate vide the ruling delivered on 16th February 2018 and the subsequent judgment delivered on 18th August 2015 be and are hereby set aside. The orders sought in the appellants' application dated 28th July 2015 is granted with costs in the cause. The suit in the court below shall proceed on merit by a different magistrate other than Hon F. Kyambia.

Dated, Signed and Delivered at Mombasa this 17th day of July 2019.

A. OMOLLO

JUDGE.