



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC APPEAL CASE NO. 13 OF 2018

(Formerly Migori HC Civil Appeal No. 22 of 2016)

JOHN AWOUR ABILA.....APPELLANT

Versus

JOANES OJWANG.....RESPONDENT

(Being an Appeal made by Honourable M.M. Wachira Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 2074 of 2015 delivered on 21/04/2016)

JUDGMENT

1. The appellant, John Awour Abila filed the present appeal against the ruling and order dated 21st April, 2016 and issued on 11th April, 2017 by the learned trial Magistrate Honourable M.M. Wachira (Resident Magistrate, as he then was) in Migori Chief Magistrate's Court Civil Suit No. 2074 of 2015. The learned trial Magistrate dismissed with no orders as to costs, the appellant's application dated 7th March 2016 seeking stay of execution of the ex parte decree, setting aside the ex-parte Judgment dated 21st January 2016 and that the appellant be granted leave to file his defence out of time.
2. The appellant is represented by learned counsel, Mr. Omonde Kisera. The respondent is represented by learned counsel, Mr. Nelson Jura.
3. This being the first appeal from the trial court, I am entitled to reconsider the evidence on record a fresh and come to my own conclusions and inferences; see the Court of Appeal decision in the case of **Nkube –v- Nyamiro (1983) KLR 403**.
4. It must be appreciated that an appellate court will not ordinarily interfere with the trial court's findings of fact unless they are based on no evidence at all, or on a misapprehension of evidence or that the court is shown demonstrably to have acted on wrong principles in reaching the findings; see **Ephantus Mwangi and another –v- Duncan Mwangi Wambugu (1982-88) 1 KAR 278** .
5. The respondent's claim before the trial court was originated by a plaint (small claim) dated 8th September 2015 and filed on even date where he sought judgment against the appellant for the value of the **over mature** blue gum tree, costs of demand notice of Kshs. 5,489.60/= as well as cost of the suit and interest on the said value and cost. The respondent claimed that on 8th December 2014, the appellant trespassed into the respondent's land parcel number Suna East/Area "B" Kwa/470 (the suit land) and maliciously cut and chopped into logs the respondent's **over mature** blue gum tree grown and maintained thereon. That the respondent suffered loss and damage thus precipitating the suit before the trial court.
6. The appellant who was the defendant before the trial court, was duly served with summons to enter appearance dated 8th February 2018 as proved by an affidavit of service sworn on 14th October 2015 by Vitalis Onyango Akuku, a duly licenced court process server. The appellant failed to enter appearance and or file defence within the stipulated period of time.
7. As a consequence, the respondent's counsel, Mr. Owade of Owade and company Advocates filed a request for judgment dated 14th October 2015. Thus, inter locutory judgment was entered for the respondent against appellant on even date.
8. On 1st December 2015, the suit was heard by way of formal proof whereby the respondent (PW1) testified in favour of his claim. He relied on the following documents:-

a) A copy of title deed in respect of the suit land, LR No. Suna East/Area B Kwa/470 registered in his name (PEXhibit B 1).

b) Photographs of trees that PW1 planted on the suit land (PEXhibit B2)

c) *Kenya forest service assessment report in respect of the felled trees thereon (PExhibit B3).*

d) *Demand letter addressed to the appellant (PExhibit B4).*

e) *Receipt showing Kshs. 5,000/= fees paid to counsel by the respondent (PExhibit B5).*

9. The respondent's counsel filed submissions on 9/12/2015 before the trial court. The learned trial Magistrate rendered judgment in favour of the respondent on 21st January, 2016.

10. Mr. Kisera learned counsel for the appellant filed an application dated 7th March 2016 to set aside the ex-parte judgment with consequential orders. The same was dismissed on 21st April 2016 hence prompting the instant appeal.

11. The appellant mounted the instant appeal in the High Court of Kenya at Migori on 2nd May 2017. The appeal is anchored on seven (7) grounds of appeal which I need not to reproduce and are noted accordingly. He sought that ;-

i. The decision /order dated 21st April be quashed and be replaced with an order allowing the Appellant's application dated 7th March 2016.

ii. Costs of the Appeal and the application be awarded to the appellant.

12. On 21st May 2018, the court directed that the appeal be argued by written submissions. By a ruling dated 23rd November 2018, the High Court (Mrima J) declined jurisdiction over the instant appeal and transferred the same to this court bearing in mind the Supreme Court of Kenya decision in the case of **Republic –v- Karisa Chengo and 2 others (2017) eKLR.**

13. Learned counsel for the appellant filed submission dated 2nd July, 2018. Counsel submitted, inter alia, that requirements for setting aside ex-parte judgment are now settled. That the trial court committed fatal procedural technicalities and that the overriding duty of the court is to discharge justice to all litigants. Counsel urged the court to allow this appeal.

14. Learned counsel for the respondent filed submissions dated 20th July, 2018. Counsel identified and analysed three (3) issues for determination including whether the appellant was served with summons to enter appearance and whether the appellant had triable issues at the trial. That judgment sought to be set aside has been executed hence this appeal should be dismissed with costs.

15. I have considered the entire record of appeal and submissions by both counsel herein. I embrace the issues in the respondent's submissions.

Has the appellant satisfied the grounds of appeal for the grant of prayers sought in the instant appeal?

16. On the 1st ground of appeal, I note that interlocutory judgment was entered for the respondent in terms of orders (a) and (b) sought in the respondent's plaint dated 8th September 2015. It was a pecuniary demand as provided for under **Order 10 Rule 4 of the Civil Procedure Rules,2010**

17. I also note the trial court's ruling whereby the trial court relied on **Yamko and Shah cases (supra)**. Being guided by the Court of Appeal decision in **Mwanasokoni –v- Kenya Bus Services Ltd (1982-88) 1 KAR 278**, I find that the trial court's decision was based on the evidence of the respondent (PW1) and the application of correct legal principles.

18. On service of summons, I observe that the appellant was duly served with summons to enter appearance dated 8th February 2015 as proved by an affidavit of service sworn on 14th October 2015 by Vitalis Onyango Akuku, a duly licenced Court Process Server. Paragraphs 4 and 5 of the said affidavit reveal how the appellant was served on 24th September 2015 as envisaged under **Order 10 Rule 2 of Civil Procedure Rules ,2010.**

19. Notice of entry of Judgment dated 16th October 2015 was filed and issued. It was clearly addressed to the appellant.

20. There was demand notice dated 28th January 2015 issued to appellant by the respondent's counsel and receipt thereof. Furthermore, paragraph 5 of the judgment of the trial court reads;-

“The plaintiff also produced a receipt for Kshs. 5,000/= being legal fees for the demand notice. He is also entitled to the said amount from the defendant.”

21. On whether the draft defence has triable issues, paragraphs 1 to 9 of the draft defence of the appellant discern mere denial of the respondent's claim. I find the issues there are not triable. The ex-parte judgment and decree have long been executed in this matter.

22. Quite clearly, the entire case was heard and determined on the basis of pleadings including the draft defence duly filed. At paragraph 6 of his ruling the learned trial Magistrate held inter alia,

“ The court in an application to set aside judgment in default must also consider the defence sought to be filed and find if there

are triable issues which ought to go for trial. I have considered the draft defence filed by defendant. The learned counsel for plaintiff did not point out the triable issues raised in the defence. In my considered view, the draft filed defence do not raise triable issues prima facie to warrant the court set aside the ex-parte judgment.” (Emphasis added)

23. It is within this court’s discretion to set aside the ex-parte judgment and the ruling of the trial court. There existed a suit before the trial court for formal proof and the learned trial magistrate set it down accordingly. The court exercised its discretion for the purposes of upholding the law as far as possible. Therefore I would loath to interfere with that discretion.

24. Moreover, the ex-parte judgment was entered in consonant with the law as the respondent prove his claim to the requisite standard. It is trite law that the burden is always on the plaintiff to prove his case on a balance of probability even if the case is heard by way of formal proof; see **Kirugi and another –v- Kabiya and 3 others (1987) KLR 344**.

25. I take into account the fact that the suit was filed on 8th September 2015 and Judgment delivered on 21st January 2016. The learned trial Magistrate clearly and aptly addressed himself to **Articles 50 (1) and 159 (2) (b) of the Constitution of Kenya, 2010**. It is my finding that the learned trial magistrate correctly applied his mind to the facts of the case and the applicable law in arriving at his informed decision. There are no proper grounds to disturb the decision in the circumstances.

26. In the result, I am satisfied that the appeal is want of merit. I dismiss the same with costs to the respondent.

DELIVERED, DATED and SIGNED at MIGORI this 17TH day of JULY 2019.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Omonde Kisera learned counsel for the appellant.

Tom- Maurice – Court Assistant