



REPUBLIC OF KENYA

IN THE ELC COURT

AT KERUGOYA

ELC APPEAL CASE NO. 14 OF 2016

SAMMY GITURU MAGANJO.....APPELLANT

VERSUS

REBECCA WANGITHI NDIMU.....1ST RESPONDENT

REBECCA WANGITHI NGIGI..... 2ND RESPONDENT

GIKUNJU KIIGE.....3RD RESPONDENT

JUDGMENT

(AN APPEAL FROM THE RULING OF HON. S. JALANG'O SRM AT BARICHO IN PMCC NO. 1 OF 2010 DELIVERED ON 28TH JUNE, 2019)

INTRODUCTION

The Appellant, Sammy Gituru Maganjo was the 2nd Defendant in the Lower Court Case No. 1 of 2010 (Baricho) while the 1st and 2nd Respondents were Plaintiffs while the 3rd Respondent was the 1st Defendant therein.

In a plaint dated 19th January 2010, the Plaintiffs sought for a substantive order directing the District Land Registrar Kirinyaga to cancel some entries in the register of parcel No. KIINE/GACHARU/93 and cause the same to be registered in the names of the Plaintiffs. The Plaintiffs also sought an order to cancel title numbers KIINE/GACHARU/967 and 968 and/or any other title issued from the partition of the said land parcel No. KIINE/GACHARU/967 and 968 and to dispense with production of the original title documents in respect of the two parcels of land.

On 11th February, 2013 the trial court entered an interlocutory judgment and directed the matter to proceed for formal proof on 18th July 2013. In a Notice of Motion dated 12th March, 2015, the 2nd Defendant (Appellant) sought to set aside the said interlocutory judgment. The Defendants (1st and 2nd Respondents) filed a replying affidavit opposing the same and on 25th June 2015, the trial magistrate rendered himself on the said application by dismissing the same with costs. The dismissal of that application precipitated the present appeal where the Appellants have given the following five (5) grounds of Appeal:-

- 1. The learned Senior Resident Magistrate erred in law, and fact for failing to consider whether summons to enter appearance and plaint were properly served upon Appellant.**
- 2. The learned Senior Resident Magistrate erred in law and fact for failure to consider that the Appellant has a solid and credible defence to the claim.**
- 3. The learned Senior Resident Magistrate erred in law and fact for holding that the application dated 12th March 2015 did not raise any new issues.**
- 4. The learned Senior Resident Magistrate erred in law and fact for failure to consider that the Appellant would suffer irreparable loss if the judgment was not set aside and the suit heard afresh.**
- 5. The learned Senior Resident Magistrate erred in law and fact by failing to give reasons for his ruling hence a miscarriage of justice was occasioned.**

APPELLANT'S SUBMISSIONS

The Appellants submitted on a point of fact and stated that the young man who accompanied the Plaintiff and who identified the 1st Defendant as a man was all wrong in that the 1st Defendant is a woman and not a man. He stated that the process server made a false affidavit which is an offence under **Order 5 Rule 15 (2) CPR**. It is also submitted that on the same day, the same process server was also pointed out to the 2nd Defendant as a man and he also served him with summons to enter appearance.

The Appellant also faulted the process server who purported to have served the wrong Defendants and that the Court should have ordered for cross-examination of the process server to explain whom exactly he served since the Defendants are women and not men. On the issue of law, the Appellant cited the following cases:-

1. CMC Holdings Ltd Vs Nzioki (2014) e K.L.R
2. James Moenga Nyakweba & 2 Others Vs Jairo Atenya Asitiba (2012) e KLR
3. Beranco Arabe Espanol Vs Bank of Nganda (1999) 2 EA 22
4. Beatrice Wambui Mukunyi Vs Danson Maina Njuguna & 4 Others Civil Appeal No. 41 of 2011 (Embu)
5. Peter Wekesa Vs Peter Wangusi *Civil Appeal No. 62 of 2003*
6. Beatrice Wambui Mukunyi Vs Danson Maina Njuguna & 4 Others HCCA No. 41 of 2011 (Embu)
7. Henry Njoroge Kamau Vs Kenya Power & Lighting Co. Ltd. (2013) e KLR
8. Patel Vs Cargo Holdings Services Ltd. (1974) EA 75
9. Mbogo & another Vs Shah (1968) EA 93
10. Sebel District Administration Vs Gasyah (1968) EA 300

RESPONDENTS SUBMISSIONS

The Respondents submitted on points of law and cited the following cases:

1. Pater Vs Cargo Handling Services Ltd (1974) EA 75
2. Maina Vs Kariuki (1984) KLR 407
3. Pravinchandra Jamnadas Kakad Vs Lucas Oluoch Mumia (2015) e KLR

DISPOSITION

This is a first appeal against the decision of the Senior Resident Magistrate Hon. S. Jalang'o delivered on 25th June 2015. The Appellant had sought an order to set aside an interlocutory judgment entered and the formal proof that proceeded in his absence. The trial magistrate dismissed that application with costs.

The **Environment and Land Court Act No. 19 of 2011** created the Environment and Land Courts which are specialized Courts to deal with unique nature of land and environment disputes. **Order 10 Rule 9 CPR** provides as follows:-

“10 (a) subject to rule 4,

.... in all suits not otherwise specifically provided for by this order, where any party served does not appear the Plaintiff may set down the suit for hearing”.

My plain reading of that order and rule is that no interlocutory judgment can be entered in disputes relating to Environment and Land disputes where a party does not enter appearance or file defence but the Plaintiff may set down the suit for hearing and serve all the parties including those who did not enter appearance or file defence.

In this case, the Plaintiff made request for interlocutory judgment and the Court entered interlocutory judgment and proceeded with hearing the case by way of formal proof contrary to the law and the set down rules of procedure. When the application to set aside the interlocutory judgment and decision of the trial magistrate was made, numerous weighty issues were raised particularly the strength of the defence and whether the service of summons to enter appearance was regular or not.

The trial magistrate in my view failed to direct his mind to those pertinent issues and order for the summoning of the process server for purposes of cross-examination as to the contents of his affidavit of service.

I find that the trial magistrate misdirected himself both in law and fact by dismissing the application seeking to set aside the interlocutory judgment and the final judgment arising from the formal proof without addressing the serious issues that required the Court's investigations before satisfying himself that service of summons to enter appearance was proper.

In the case of *Peter Wekesa Vs Peter Wangusi Civil Appeal No. 62/2003* delivered on 23/3/2006. The Court of Appeal held:-

“In applications for setting aside ex-parte judgments, the defence of the Applicant if any is presented in draft, ought to be considered and where the dispute relates to land, special caution must be exercised to avoid determination of the dispute on pure technicalities.....”

Again in *Court of Appeal* case between Karatina *Garments Ltd. Vs Nganarua (1976) KLR 94*, the Court held as follows:-

“We have said time and again that in normal circumstances, the Court should lean towards a policy of deciding cases on their merits rather than encourage ex-parte judgment based on procedural technicalities”.

In *Beatrice Wambui Mukunyi Vs Danson Maina Njuguna & 4 others HCCA No. 41 of 2011* reported in (2013) e KLR, Ong'undi J. observed at *page 15* as follows:-

“Had the Court been concerned with doing justice to all parties herein the Learned trial magistrate could have set aside the ex-parte judgment and given a chance to the Appellant to file her defence and have her day in Court. It is indeed a human right for every person to be heard. This right can only be curtailed in the most deserving cases. I do find that this was not one of such deserving cases”.

For all the reasons I have given, I find that the denial to accord the Appellant a right to be heard in the circumstance of this case is not a just way of resolving the dispute between the parties.

I am therefore inclined to allow this appeal which I hereby do with each party to bear his own costs of both the trial Court and this Appeal. The mistake cannot in any way be attributed to the parties. It is so ordered.

READ and SIGNED in open Court at Kerugoya this 17th day of July, 2019.

E.C. CHERONO

ELC JUDGE

17TH JULY, 2019

In the presence of:

1. Mr. Ngigi for the Appellant
2. Mr. Ndana holding brief for M/S Kimani for Respondents