ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO 5 OF 2018

(FORMERLY NAKURU HIGH COURT CIVIL APPEAL NO. 47 OF 2014)

MARY WAMBUI KAROKI.....APPELLANT

VERSUS

LUKA MACHARIA CHEGE.....RESPONDENT

Being an appeal against the Ruling of the Principal Magistrate's Court at Nyahururu by the Hon. Mrs A. Mukenga (RM) delivered on the 7th April 2014 in PMCC No. 128 of 2014

JUDGEMENT

1. This Appeal was initially filed at the Nakuru High Court as Nakuru HCCCA No. 47 of 2014, with the establishment of this court, the same was transferred herein. What is therefore before me for determination on Appeal is a matter wherein the honorable trial Magistrate, delivered her ruling on the 7th April 2014 in Nyahururu PMCC No. 128 of 2014 where she dismissed the Appellant's application dated the 14th August 2010 primarily on its determination that the application was time barred as per the provisions of Section 4(4) of the Limitation of Actions Act.

2. The Appellant, being dissatisfied with the ruling of the trial Magistrate has filed the present Appeal before this court.

3. The grounds upon which the Appellant has raised in his Memorandum of Appeal include

i. That the learned trial Magistrate erred in fact and law in refusing to *set aside a default judgment that had been entered against the Appellant since there was no proper service.*

ii. That the learned trial Magistrate erred in fact and law in failing to uphold the law that there was no proper service upon Simon Kanyati Waweru (deceased) as he was of unsound mind and a medical report to that effect was produced.

iii. That the learned trial Magistrate erred in fact and law by failing to uphold that the purported agreement entered into for the purported sale of land was not between the registered proprietor of the suit land namely Simon Kanyati Waweru (deceased) and the Respondent, hence offending the law as to proprietary rights that one cannot sale what it does not own.

iv. That the learned trial Magistrate erred in fact and law by failing to uphold the nemo dat quod habet rule yet she found that the purported sale agreement was not entered into by the registered proprietor of the land.

v. That the learned trial Magistrate erred in fact and law in relying on letters that were not produced by either party in the matter as proof of knowledge of the judgment by the Appellant and failing to take into account the letters from the ministry of health as conclusive prove of the mental illness the appellant's father suffered.

vi. That the learned trial Magistrate erred in fact and law in relying on documents that were not produced by either party and the Appellant was not given a chance to a dispute the said documents

vii. That the learned trial Magistrate erred in fact and law by finding that Section 4(4) of the Limitation of Actions Act applies to setting aside of default judgment and not on enforcement of judgments.

viii. That the learned trial Magistrate erred in fact and law by failing to take into consideration that the appellant and her family had applied to take letters of Guardianship and could not have set aside the judgment without the same.

ix. That the learned trial Magistrate erred in fact and law in reaching a decision that did not take into account that it was a manifest denial of justice to refuse to set aside the default judgment and hear the matter on merit were good and sufficient cause to be shown, more so in view of the fact that the appellant's deceased's father was mentally incompetent.

x. That the learned trial Magistrate erred in fact and law in failing to take into consideration all the authorities cited in support of the Appellant's application in deciding this matter.

xi. That the learned trial Magistrate erred in fact and law in finding that the Appellant's father must have been aware of the suit failing to take into consideration the letters from the Ministry of Health showing that he was mentally incompetent.

xii. That the learned trial Magistrate misunderstood, misapprehended and failed to consider and appreciate the appellant's supporting affidavit and annexures thereto.

xiii. That the learned trial Magistrate erred in fact and law in reaching a decision but did not take into account the good and sufficient cause given for the delay.

xiv. That the learned trial Magistrate erred in fact and law reaching a decision that did not take into account that the delay in making the application was not inordinately wrong (sic) as the same was caused by lack of proper service upon the deceased.

xv. That the learned trial Magistrate erred in fact and law by failing to set aside the default judgment on terms that are just as is provided for in the law.

xvi. That the learned trial Magistrate erred in fact and law in taking into consideration the wrong factors in refusing to set aside the default judgment.

xvii. That the learned trial Magistrate erred in fact and law in failing to exercise her discretion in terms that have being laid down in various precedent.

xviii. That the learned trial Magistrate erred in fact and law in reaching a decision but did not take into account that it was in the wider interest of justice that there were real issues that can be tried.

4. The Appellant thus sought for;

i. The appeal be allowed.

ii. The ruling of the lower court refusing the default judgment entered on the 12th June 2001 to be set aside, to be quashed.

iii. Default judgment entered on the 12th June 2001 be set aside and leave granted to the Appellant to file and serve their defence.

iv. Spent

v. Cost of this Appeal be awarded to the appellant.

5. The Appeal having been filed on the 20th July 2015, was admitted to hearing on the 31st October 2018 wherein by consent parties agreed to dispose of the same by way of written submissions.

Appellant's submission.

6. It was the Appellant's submission that whereas the application dated 14th February 2014 had sought to set aside the judgment granted on 20th April 2005 and the suit to be heard a fresh, the trial learned Magistrate had reverted to the interlocutory judgment entered on the 12 th June 2001 wherein she had determined that the Appellant's application was time barred under Section 4(4) of the Limitations of Actions Act.

7. It was the Appellant's submission that whereas the said interlocutory judgment of 12th June 2001 had sought for specific performance and/or recovery of the purchase price of a purported sale agreement with the deceased Simeon Kinyati for the sale of 0.5 acres within the suit property known as Nyandarua/Tulaga/84, the Respondents herein had obtained ex- parte orders to excise 8 acres of land from the deceased's estate and a warrant to evict the deceased and members of his family from the said 8 acres, which orders, varied the interlocutory judgment. These were the orders that the Appellant had sought to challenge.

8. That the judgment which the application sought to set side was dated 20th April 2005 whilst the disputed orders to excise 8 acres was issued on 28th July 2004. The notice of motion Application against which the impugned judgment was delivered was dated 14th February 2014 less than 10 years from the orders it sought to set aside. The application was therefore within the time limit as set under the Limitation of Actions Act. The trial Magistrate had thus perpetuated an unjust review and execution of the judgment by preventing the Appellants from challenging the same.

9. It was further the Appellant's submission that although in their Notice of Motion application, they had raised the issue that the deceased could not participate in the legal proceedings by virtue of his mental incapacity, which fact the court, in its earlier decision of 6 th July 2012,

in civil case No.74 of 2008 had acknowledged, in the impugned decision appealed against, the court had disregarded its earlier view and instead penalized the deceased's inability to participate in court proceedings leading to the prejudice against him. This was a failure by the trial court to apply substantive justice.

10. The appellant relied on Order 10 Rule1 (1) of the Civil Procedure Rules to submit that all the proceedings that had been filed and prosecuted by the Respondent had been done ex-parte. Interlocutory judgment had been entered against the deceased for his failure to enter appearance wherein an unjust execution process was subsequently initiated against his estate ex- parte, thus leading to aggravated injustice herein.

11. That further, the court had erred in law wherein upon being notified and ascertaining for itself of the deceased's lack of mental capacity, none the less failed to uphold the provisions of Order 10 Rule 1 (1) of the Civil Procedure Rules to find that the deceased had neither been properly served nor enjoined through a guardian to enable his participation in the suit, which led to the detriment and prejudice of the Appellant thus perpetuating the violation of the Appellant's Constitutional right to be heard.

12. The Appellant's further submission was that the trial court erred in failing to take into consideration her submission and when she pleaded for substantive justice to be accorded in the matter which submission is herein reiterated in this Appeal. In so submitting, the Appellant relied on the case of **Mbogo vs Shah [1968] EA 93** to pray that this appeal be allowed.

Respondent's Submission.

13. The Appeal was opposed by the Respondent who submitted that this being a first appeal, the first Appellate Court's duty was settled in the decided case of **Selle and Another vs Associated Motor Boat Company Ltd and Others [1968] EA 123.**

14. The Respondent considered the prayers sought in the application dated 14th February 2010 and submitted that this application was opposed through the Respondent's replying affidavit sworn on the 5th March 2014. That in the ruling delivered on the 7th April 2014, the trial Magistrate allowed the prayer for substitution of the Appellant in place of the deceased 1st Defendant. The Magistrate was however not convinced that the delay and failure to enter appearance was occasioned by excusable mistake on the part of the Applicant.

15. That the trial Magistrate had also found that the deceased 1st Defendant had been aware of the judgment as early as the year 2003 wherein he had tried to redeem his property by bidding for it but had not applied for setting aside of the proceedings whereby the court had gone ahead to find that the delay in bringing the application for over 12 years was inexcusable and offended the provisions of Section 4(4) of the Limitation of Actions Act. She thus declined to set aside the judgment.

16. That the court, for good reasons declined to allow the prayer for maintenance of status quo and transfer of the suit to the Environment and Land Court in Nakuru. The impugned ruling was made by the trial court in exercise of its judicial discretion to set aside an ex-parte judgment.

17. That the principles upon which the appellate court can interfere with exercise of judicial discretion to set aside an ex parte judgment are well settled. The Respondent relied on the case of **Shah vs Mbogo and Another [1967] EA 116** to buttress their submission**.**

18. That the Appellant had not demonstrated that the trial court exercised its discretion to set aside the judgment on the wrong principles. That the judgment sought to be set aside had been entered on the 12th June 2001 contrary to the Appellant's application seeking to set aside a judgment that had been entered on 20th April 2005. There was no judgment entered on 20th April 2005.

19. That the trial court was therefore right in concluding that the Appellant was seeking to set aside a judgment which was more than 12 years old and contrary to the provisions of Section 4(4) of the Limitation of Actions Act. The delay was inexplicable.

20. The said judgment had long been executed and eviction carried out by the time the application was brought against the Respondent. That it was also important to note that the Applicants did not annexed any draft defence and counterclaim to the application to give good reasons why the original defendant failed to defend the suit.

21. That contrary to the Appellant's submission, that the judgment sought to be set aside related to an order of 28th July 2004, the Appellant's application sought to set aside a non-existent judgment of 28th April 2005. The Respondent submitted that a party is bound by its own pleadings.

22. That the ruling of the trial court delivered on 21st July 2004 was never under challenge and did not allude to the application dated 14th February 2010 nor the affidavit in support. Indeed it was not even a subject of the ruling appealed from.

23. The respondent further submitted that the court had held that if indeed the 1st Defendant was mentally incapacitated, no action had been taken to safeguard his estate until the year 2008 when the application to appoint a guardian was filed in the High Court. That in the circumstance it could not be said that the delay and failure to enter appearance was occasioned by an excusable mistake on the part of the Applicant. In any case the 1st Defendant was sued alongside two other defendants who neither entered appearance nor challenged the judgment.

24. That the 1st Defendant's medical report annexed as MWIK 2 was prepared on the 4th June 2007 while the application to set aside the judgment had been filed on 14th February 2014, seven years later, where no explanation for the delay was offered.

25. That by the time of filing the Appellant's application, the lower court judgment had been executed and a title deed issued in favour of the Respondent on the 9th March 2005. The Appellant's application to set aside the ex-parte judgment had already been overtaken by events and the court of law cannot act in vain. To buttress their submission the Respondent relied on the case of **Kimeo Stores Ltd vs Minister for Lands & 2 Others [2011] eKLR** and sought for the appeal to be dismissed with costs for lack of merit. **Analyses and determination**

26. I have considered the appeal herein, counsel's submission and the annexed authorities. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).*** *I* also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. ***(See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

27. Briefly, the matter that gave rise to the present appeal is that a suit was filed in the year 2001 against the 1st Defendant and 2 others, wherein the Plaintiff claimed that in the year 1996, the 1st Defendant (Appellant) had entered into a sale agreement with him to sell him ½ acre of land which was to be excised from parcel No. Nyandarua/Tulga/84. The sale did not go through and therefor the suit was for a refund of Ksh 160,000/ and interest at 24% per annum from the year 1996, and costs.

28. Service of the pleadings having been effected upon the 1st Defendant and there being no defence or memorandum of appearance filed, an interlocutory judgment was entered against him on the 12th of July 2001, in default of appearance,

29. On the 24th February 2004, the plaintiff filed a notice of motion seeking to have 8 acres excised from the suit property in settlement of the decretal sum together with costs and interest. Orders were granted ex parte vide an order dated 28th July 2004 where the original land was subdivided into two with the Plaintiff acquiring title to parcel No. Nyandarua/Tulga/5343. The final judgment was granted on 20th April 2005.

30. In the year 2008, the Plaintiff filed suit against the 1st Defendant and others in PMCC No. 74 of 2008 where he sought eviction orders against them in regard to land parcel No. Nyandarua/Tulga/5343. The Defendant's (deceased) son filed a defence and counterclaim which suit and counterclaim were both dismissed for being res judicata and for lack of locus standi respectively, vide a judgment which was read on 6th July 2012.

31. That alongside the defence and counterclaim which, defendant's son had filed an application being Misc Application 2 of 2008 wherein he had sought to be appointed guardian to the 1st Defendant. The 1st defendant died on 12th October 2013 making the application moot. The Plaintiff thus obtained warrant to the bailiff to give possession of the land on the 4th December 2013. The same were served upon the 1st Defendant's beneficiaries on the 8th January 2014 by auctioneers.

32. It was thus against this backdrop that the Applicant/Appellant filed his Application dated the 14th February 2014 in which he sought;

i. The court to grant leave to the applicant to substitute the 1st deceased defendant Simon Kinyati Waweru with the appellant herein.

ii. That pending its hearing and determination, an injunction be placed on the suit property restraining the plaintiff or his agents from evicting or otherwise dealing with the suit property

iii. For stay of any further proceedings and all consequential orders of 4th December 2013, issued in the warrant to the bailiff to give possession of the land.

iv. That the judgment of 20th April 2005 be set aside and the suit to be heard a fresh.

v. That the legal representative of the estate of the 1st deceased defendant be granted leave to file a defence and counterclaim.

vi. The status quo be maintained pending the hearing and determination of the application and main suit.

vii. The matter to be transferred to the Nakuru Environment and Land Court to be heard and determined and for costs incidental to the application.

33. One of the main grounds relied on by the Appellant while seeking for the above orders in his application was the fact that there was no proper service to the 1st Defendant who had been declared mentally incapacitated by the Ministry of Health as per the annexure marked MWK1 and therefore could not receive service of anything.

34. The said application was heard on the 10th March 2014 and the ruling was delivered on the 7th April 2014 wherein the trial Magistrate upon considering all the factors at hand, substituted that 1st deceased Defendant with the Appellant herein in terms of prayer (i) of the application. Thereafter, the trial magistrate in considering whether or not to set the ex-parte judgment aside, considered the defendant's failure to enter appearance or file a defence despite service being effected, that although it had been stated that the 1st Defendant was mentally incapacitated, no action had been taken to safe guard his estate up to the year 2008 when an application to appoint a guardian was filed, such delay and failure to enter appearance was not occasioned by an excusable mistake on the part of the applicant.

35. The court also found that after the interlocutory judgment had been entered on the 12th June 2001, the 1st Defendant had tried to save his property by bidding for the same. He therefore was unaware of the judgment against him yet filed no application to set aside the proceedings. The delay in bringing the application therefore after 12 years after the date of judgment could not be deemed excusable.

36. On the issue of whether parties could maintain the status quo, the court found that this prayer had been overtaken by events, the Plaintiff having acquired title to the parcel of land and therefore found it wise not to interfere with the status quo. She also considered the prayer on the application to transfer the matter to the Environment and Land Court in Nakuru and while placing reliance on the provisions of Section 18 of the Civil Procedure Code, found that she had no power to make such orders as this was the preserve of the High Court.

37. I have considered the record of appeal, both written and oral submissions and authorities cited. In my respectful view, this appeal herein turns on the following issues:-

> i. Whether the learned trial Magistrate erred in fact and law by failing to set aside the default judgment on terms that were just as is provided for in the law.
>
> ii. Whether the learned trial Magistrate **properly exercised her discretion in issuing the orders she did?**

38. The provisions of Order 12 Rule 7 of the Civil Procedure Rules are clear to the effect that:

> Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

39. Setting aside an *ex parte* judgment is a matter of the discretion of the court, as was held in the case of ***Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd*** **[2014] eKLR** where the court citing relevant cases on the issue held *inter alia:-*

> ‘‘The discretion is free and the main concern of the courts is to do justice to the parties before it (see ***Patel vs E.A. Cargo Handling Services Ltd****.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see* ***Shah vs. Mbogo***). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See ***Sebei District Administration vs Gasyali.*** *It also goes without saying that the reason for failure to attend should be considered."*

40. The Court of Appeal for Eastern Africa in the case of ***Mbogo v Shah*** **[1968] EA 93**, held that for the court to set aside an *ex parte* judgment, it must be satisfied on one of the two things namely:-

> a. either that the defendant was not properly served with summons; or
>
> b. that the defendant failed to appear in court at the hearing due to ***sufficient cause.***

41. As to what constitutes sufficient cause, to warrant the exercise of the court’s discretion, the Supreme Court of India in case of **Parimal vs Veena** ***2011 3 SCC 545*** *attempted to describe what* **sufficient cause** *was* when it observed that:-

> *"***Sufficient cause**" is an expression which has been used in large number of statutes. The meaning of the word **"sufficient"** is **"adequate"** or **"enough"**, in as much as may be necessary to answer the purpose intended. Therefore the word **"sufficient"** embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, **"sufficient cause"** means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been **"not acting diligently"** or **"remaining inactive."** However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

42. In the present case, it is clear that the main ground upon which the applicant seeks to set aside the judgment of the trial court is not for sufficient cause but for reasons that there was no proper service effected upon the 1st Defendant to the effect that he had neither entered his appearance nor filed his defence.

43. In ***Patel vs East Africa Cargo Handling Service*** **Ltd (1974) EA Duffus,V.P.** stated;

> *"***The main concern of the court is to do justice to the parties and the court will not impose conditions on 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"**

44. From the court record, it is clear that this case was filed in the year 2001 where an interlocutory judgment entered against the 1st Defendant (Appellant) on the 12th June 2001. No application was filed to set it aside until after its execution wherein the Appellant filed an application dated the 14th February 2014 to set it aside.

45. I have also considered the Medical reports from the Ministry of Health annexed as MWK 1 which were prepared on the 4th June 2007 and 23rd April 2013 respectively and which are to the effect that the 1st Defendant had been suffering mental illness since the year 1969, it then beats logic why the Appellant who was privy to this information filed the application to set aside judgment seven years later giving no explanation for the delay.

46. The Court of Appeal in its decision in the case of **Richard Nchapai Leiyangu vs. IEBC & 2 Others**, expressed itself as follows:-

> "we agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

47. In **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16EACA 63**, it was held that an appeal does lie to an Appellate Court against an order made in the exercise of judicial discretion, but the Appeal Court will interfere only if it be shown that the discretion was exercised unjudiciously. The principles that guide the appellate court in the exercise of this mandate were set by the predecessor of the Court in **Mbogo & Another (supra)** where it was held at page 96 that:-

> "An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice"

48. In the light of the above principles, the factors I am re enjoined to consider when deciding whether to interfere or otherwise with the order of refusal to set aside of the interlocutory judgment made by the trial court resulting in this appeal are not limited to the conduct of the parties in the actual litigation, but also to matters which triggered the litigation and I am satisfied that trial magistrate took into consideration all these factors and I find no sufficient justification to interfere with the trial court's order and proceed to dismiss this Appeal with costs to the Respondent.

49. It is so ordered.

Dated and delivered at Nyahururu this 15th day of October 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE