REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CIVIL APPEAL NO. 3 OF 2017

HENRY KIPKEMBOI LAGAT……....APPELLANT

VERSUS

DR. FELIX KIPLIMO TARUS…….....RESPONDENT

JUDGMENT

On the 14.10.2015, before the Principal Magistrate's Court at Kapsabet, the respondent filed a suit against the appellant by way of plaint dated 29.9.2015 seeking a declaration for the refund of Kshs.620,000 being the purchase price paid as consideration of a portion of land measuring 2 acres with the parcel of land known as L.R. No. Nandi/Ntulele/33. Interest on the Kshs.620,000 at a rate of 20% per annum from 4.9.2014, amongst other prayers. On the 14.06.2016, summary judgment was entered for the plaintiff against the defendant in the sum of Kshs.620,000 and the respondent was at liberty to execute the same.

On the 23.06.2016, the appellant made an application to review it, findings and orders issued on 14.6.2016 with regard to the appellant making a refund of Kshs.620,000 to the respondent. Moreover, to consider the appellant's replying affidavit before making a ruling. The appellant appeared before the Lower Court on 23.06.2016 under certificate of urgency and was granted a temporary stay of execution of the orders pending inter-partes hearing on 12.7.2016. On 12.7.2016, however, the parties agreed to file a consent and the matter was mentioned on 26.7.2016 when a consent was recorded that the application dated 24.06.2016 be allowed and the matter was to proceed for hearing on the 15th and 16th August, 2016. On the 15th of August, 2016, the matter was adjourned to the 19th and 20th September, 2016 because Mr. Katwa Kigen was in Indonesia.

On the 19.09.2016, the matter was adjourned again because Mr. Katwa Kigen was not ready to proceed and had sent a letter. The matter was adjourned for hearing on 6th and 7th October, 2016. Costs of the adjournment were to be paid to the appellant. On the 6th October 2016, the appellant raised a preliminary objection that the court lacked jurisdiction but the same was dismissed and the matter proceeded for hearing. The plaintiff's case was heard and closed on the same date thus, 6.10.2016.

The matter was adjourned for defence hearing on 28.10.2016. On 28.10.2016, the appellant failed to attend court and therefore, the defence case was closed and matter was set for written submissions and highlighting. The matter was set for highlighting on 1.12.2016.

This necessitated the filing of the application dated 14.11.2016. The application sought an order that the Lower Court to set aside the ex-parte proceedings dated 28.10.2016 and the consequential orders. The grounds of the application are that the matter proceeded ex-parte and that the application was brought without undue delay. Moreover, that the appellant had a good defence and that it was in the interest of justice that the orders be set aside.

In the supporting affidavit of Mr. Silas Kibii, it was deponed that on 28.10.2016 when the matter came up for hearing, he had instructed Mr. Choge to hold brief and seek adjournment and that they had written to Mr. Katwa informing him that the defendant would not attend court because of the graduation ceremony of the daughter in Laikipia Campus scheduled on the same date. He came to know later that Mr. Choge did not attend court due to communication breakdown.

Katwa and Kemboy filed grounds of opposition whose import is that the application was made casually and presumptionally of the court, parties and participants and that there was no material upon which the court would exercise its discretion. The reason why the appellant and his advocate failed to come to court was not availed. The respondent argued that the writing to the adverse party's advocate and asking another advocate to hold brief are not enough to entitle a party to obtain adjournment.

After considering the application, supporting affidavit and the grounds being relied upon and rival submissions and having considered the law, the learned Magistrate found that the appellant could not claim that the matter proceeded exparte and yet they are the ones who took the date for hearing but did not attend court.

According to the learned Magistrate, the defendants were given the final chance when another application was allowed by setting aside proceedings and therefore, the appellant cannot be heard to say that they were not being given an opportunity to be heard. That there was no affidavit by Mr. Choge that he had been instructed to attend court. The letter by the appellant's counsel to the respondent's counsel seeking indulgence was an application outside court, considering that the date was taken by consent. Moreover, that the date of graduation must have been known well in advance before the hearing date was fixed. Litigation must come to an end.

The appellant has now come to court on appeal on the 11 grounds that can be summarized into one ground that the learned Magistrate did not exercise his discretion properly in disallowing the application. The appellant seeks orders that the appeal be allowed and the court to set aside the orders in Kapsabet PMCC No. 205 of 2015 delivered on 10.1.2017. That the defendant's case to be re-opened and be re-heard. Costs of the appeal to the appellant.

In submissions, the appellant submits that he demonstrated that he did not fail to attend court on 28.10.2016 willingly and or negligently as he was attending his daughter's graduation ceremony at Laikipia Campus on the scheduled date. Secondly, that Mr. Choge who had been instructed to attend court did not attend due to communication breakdown. The appellant further submits that the right to be heard is sacrosanct by virtue of Article 50 of the Constitution. Lastly, that the appellant has a prima facie case with a likelihood of success.

The respondent filed submissions and rightly submit that in sum, this is an appeal challenging exercise of discretionary powers. According to the respondent, an appellate court exercising of discretion is obliged to be restrained from interfering with the discretion of the court and can only interfere with the said discretion if satisfied that it was not properly exercised, or is containing the reason on the face of all relevant facts and circumstances. The respondent properly exercised his discretion by disallowing the application.

I have considered the rival submissions and do agree with Mr. Katwa that the sum total of this appeal is the challenge of the discretion of the Magistrate in dismissing the application dated 14.11.2016. The question is whether the learned Magistrate properly exercised his discretion in dismissing the application.

In the celebrated case of ***Pithon Waweru Maina Vs Thuka Mugiria (1983)*** ***eKLR***, it was held that there are no limitations or restrictions on a Judge's discretion except that if he does vary the judgment he does do on such terms as may be just. Legally speaking, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. 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 it by the rules.

This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. The appellate court should not interfere with the exercise of the discretion of a lower court unless it is satisfied that the latter in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the later has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have considered in the passing of the judgment.

The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court. A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically.

This court finds that the learned Magistrate erred in failing to observe that the respondent's counsel had previously caused the matter to be adjourned when by a letter which was read to court by Mr. Misoi for Katwa Advocates on 19.9.2016 he sought an adjournment and was indulged and therefore, to hold that a letter seeking for indulgence is an application outside court was an error as it is an acceptable practice for counsel to inform their colleagues of their intention to seek adjournment and that Mr. Katwa does not deny the fact that he received the letter seeking indulgence.

Though Mr. Choge did not swear affidavit, there was enough material before the Magistrate to enable him to exercise his discretion by allowing the application such as the fact that on the 15.08.2016, the defendant was present and ready but the respondent's counsel was not present and the matter was adjourned to the 19.9.2016. On the 19.9.2016, the respondent's counsel was not present and he was indulged and therefore the defendant had all along been eager to conclude this matter.

The learned Magistrate ought to have weighed the evidence on record that the appellant was always ready to proceed and there was evidence that his daughter was graduating on the date of the hearing and therefore, he opted to send a counsel to hold brief but due to communication problem, he did not attend. The respondent did not file a replying affidavit and therefore, all those facts are not controverted.

The learned Magistrate should have considered the fact that the right to be heard is cardinal and should be denied only with very good reasons. The appellant has filed a defence in the Lower Court. He has filed documents and witnesses' statements and therefore, considering all these facts, the learned Magistrate should have exercised his discretion in favour of the appellant.

The upshot of the above is that the appeal succeeds and therefore, the same is allowed. The order of the Lower Court in Kapsabet PMCC No. 205 of 2015 delivered on 10.1.2017 is set aside. The case is re-opened for defence hearing before a Magistrate other than Honourable E. A. Obina. Costs to the appellant.

Dated and delivered at Eldoret this 2nd day of March, 2018.

A. OMBWAYO

JUDGE