REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 107 OF 2017

FORMERLY MERU ELC. CIVIAL APPEAL CASE NO. 01 OF 2017

MICHENI KENYATTA.....1ST APPELLANT

MUSYOKA B. KITHINJI.....2ND APPELLANT

VERSUS

M'KEA M'MURITHI.....RESPONDENT

JUDGMENT

1. The Memorandum in this Appeal is dated **3rd April, 2003** and is in the following form:

MEMORANDUM OF APPEAL

(Being an appeal from the order dated **6.3.2003** in Meru CMCC No.183 of 1999 (M'KEA MURITHI VERSUS MICHENI KENYATTA & MUSYOKA B. KITHINJI)

The appellants being greatly aggrieved by the ruling and order of NJERU ITHIGA Senior Principal Magistrate dated and delivered on 6.3.2003 in Meru CMCC NO.183 of 1999 appeals against the entire order to this Hon. Court and sets herein below their grounds of appeal.

1. That the learned Senior Principal Magistrate erred in law and in fact in failing to find that there is grave error apparent on the face of the record of the decree/judgment dated 27.8.1999 requiring the 1st appellant to transfer to the respondent LR. NO. KARINGANI/NDAGANI/4696 when the 1st appellant was not the registered proprietor at the time of filing the suit up to the date of judgment or at all.

2. That the Learned Senior Principal Magistrate erred in law and in fact in failing to find that there was grave error apparent on the face of the record of the decree dated **27.8.1999** requiring the transfer to the respondent of LR. KARINGANI/NDAGANI/4695 & 4696 registered in the name of the said 2nd appellant and thus adversely affecting the rights of the 2nd appellant who was neither a party in the decree suit at the time of filing the suit or at the time of judgment or at all.

3. That the Learned Senior Principal Magistrate erred both in law and in fact in blaming the 2nd appellant for the delay in the period before he was made a party to the suit in dismissing the appellants application for having not been filed without unreasonable delay.

4. That the Learned Magistrate erred in law and in fact in relying on extraneous matters in dismissing the appellants' application.

5. That the Learned Magistrate erred in law and in fact in not properly or at all applying the decision/authority in **NYANDURO PRIMARY SCHOOL & ANOR V/S STEPHEN WAWERU (NBI Court of Appeal No. 179 of 1999 unreported)** over the application of section 159 of the Registered Land Act (Cap 300) L.O.K.

6. That the Learned Magistrate erred in law and in fact in failing to find that the summons to enter appearance were never served on the appellants and misapprehending the law in refusing the appellants leave to defend the primary suit.

7. That the Learned Principal Magistrate erred in law and in fact in failing to vacate the inhibition on LR. NO. KARINGANI/NDAGANI/4695 – 4697 which were registered on the basis of the errant decree as aforesaid and limits the rights of

the appellants' as the registered proprietors.

8. That the learned magistrate erred in law in failing to find that the decree dated 27.8.1999 is ***re-judicata*** Chuka RMCC NO. 1 of 1999.

9. That the whole ruling and order of the Senior Principal Magistrate is against the pleadings, submissions and the law;

It is proposed to seek from this honourable court orders;

(a) That this hon. Court review the interlocutory and final judgment entered in Meru CMCC No. 183/99 on 14.5.1999 and 27.8.1999 respectively and consequential decree and all orders thereto.

(b) That the entire suit in Meru CMCC No. 183/99 be dismissed / struck out for being a nullity ***ab initio***.

(c) That the orders of inhibition/caution entered on LR. NO. KARINGANI/NDAGANI/4695-4697 be vacated and recalled forthwith.

(d) That in the alternative and without prejudice to the foregoing the judgment in Meru CMCC No. 183 of 1999 be set aside and the appellants be given unconditional leave to defend as per the draft joint defence filed therein.

(e) That costs of the appeal and the court below be to the appellants.

Dated at Meru this 3rd day of April, 2003

FOR MICIIMI MBAKA & CO.

ADVOCATS FO RHTE APPELLANT.

2. The appellants' written submissions dated **26th September, 2016** take the following form:

APPELLANTS' WRITTEN SUBMISSIONS

Lordship, on behalf of the Appellants, we wish to submit as follows;

Appellants filed an amended application dated 4.11.202 to set aside an interlocutory judgment entered on 14.5.1999 and the final judgment dated 27.8.1999. That application was dismissed on 6.3.2003.

BACKGROUND

Vide a plaint dated **5.3.1999**, the respondent sought the following orders;

1. A declaration that the defendant do transfer parcel Number KARINGANI/NDAGANI/4695 & 4696 to the plaintiff.

2. Alternatively if he refuses the executive officer of this honourable court be empowered to sign all the necessary document to effect the transfer of the said parcel of land to the plaintiff.

3. Costs of the suit.

At page 9 & 9a of the Record of Appeal, there are two extracted decrees. The first decree (page 9) for transfer of parcel Nos. KARINGANI/NDAGANI/4695 & 4697.

The appellants application to set aside the judgment and which is dated 4.11.2002, the appellants explained that there was an apparent mistake on the face of record and that there was no service of summons effected upon the defendant and that the suit lands that the plaintiff sought transferred, being P/NOS. 4695 & 4696 were not registered in the name of the defendant in the plaint dated **5.3.1999**.

Your Lordship, we submit that the trial magistrate fell into error by failing to set aside the said judgment.

WAS SUMMONS SERVED UPON THE DEFENDANT?

The affidavit of service of summons to enter appearance is at page 6 of the record of Appeal. The process server, a clerk with Chuka Law Courts, deponed as follows at paragraph 3 & 4.

"3. That at 3.45 Pm I arrived at the Defendant's home situated at Iriani village, Karingani s/location, Meru South District.

4.That I was introduced to him whom I am and has instruction to accept my service."

Your Lordship, the law on service of summons is very clear on how service must be effected. S. 20of the Civil Procedure Act CAP 21, provides in mandatory terms, that summons must be served in the prescribed manner. The prescribed manner of service is to be found at Order 5 rule 6, 7, & 8 of the Civil Procedure Rules. Order 5 Rule 15 provides what must be contained in an affidavit of service.

We submit that the affidavit of service by Michael Mbogoh dated 8.3.1999 does not disclose proper service as per the law for the reasons that the said process server;

i) Did not explain how he knew that the defendant's home is at Iriani Village, Karingani S/Locatin.

ii) Did not explain whether he knew the defendant personally or not.

iii) Who identified the defendant to the process server.

We submit that there are doubts as to whether the defendant was served and we rely on the authority of ***KIPTARUS ARAP TUWEI –V- FEMINA SONGOK & ANOR [2016] eKLR*** whereby an interlocutory judgment was set aside on the grounds that the process server never disclosed who identified the defendant for service.

We further submit that the interlocutory judgment was irregular and the same ought to be set aside ***'ex debito justatiae.'***

INTENDED DEFENCE

Our Lordship, a look at the draft defence that was annexed to the application to set aside the judgment, it is apparent at paragraphs 8 and 15, defences of res-judicata and jurisdiction of the court were raised. We submit that the intended defence was not frivolous. It raised weighty issues that ought to have been considered.

CONCLUSION

Your lordship, the respondent extracted two decrees. The first decree affected land that did not belong to the defendant (see pages 9, 48 & 50 of the Record of Appeal). The second decree purported to add an extra parcel No. 4697.

We submit that the respondent' claim sought to affect land that did not belong to the defendant. That was an apparent error on record, which ought to have been cured by setting aside the judgment.

We so submit your Lordship.

Dated at Meru this 26th day of September, 2016

FOR: MWIRIGI KABURI & CO.

ADVOCATES FOR THE APPELLANTS

3. The respondent's submissions dated **1st February, 2017** take the following form:

RESPONDENT'S SUBMISSIONS

INTRODUCTION

Your Lordship, the Appellants herein lodged the appeal after their application to set aside interlocutory judgment was dismissed. It is trite law that setting aside a regular judgment amounts to a waste of courts time and therefore such jurisdiction has to be utilized sparingly.

Your Lordship, we hereby tender submissions for the Respondent in the following terms.

ANALYSIS

Your Lordship, the major issues that courts consider when setting aside interlocutory judgment are whether service of summons to enter appearance was properly served upon a defendant and whether there is any defence that raises triable issues. We proceed to address the two issues separately:-

(a) Whether summons to enter appearance were properly served

Your Lordship, the defendant was properly served with such summons and an affidavit of service was duly filed showing the time of such service and the location as being the defendant's home. At no point, your Lordship, did the defendant dispute that his home is not situate at the place indicated by the process server. Further, the defendant did not indicate anything to the effect that he was elsewhere on the material day and time which would have caused the process server not to locate him at his home. As such, the mere allegation that service was not effected is an afterthought which cannot be allowed to cause ignorance of court processes.

Your Lordship, we appreciate that judgment in the lower court was delivered many years ago and therefore matters relating to the Civil Procedure Rules have advanced considerably over time. Additionally, the law does not act retrospectively. For these reasons, Your Lordship, the appellants reliance on the Civil Procedure Rules 2010 in connection with the affidavit of service filed in the lower court is an attempt to apply the law retrospectively, which should be dismissed. The appellants, Your Lordship, also cited an authority that wholly relies on the current position and which is different from the position that was in place during the time of the lower court proceedings.

Your Lordship, we humbly submit that the defendant was properly served and thus the learned magistrate arrived at a regular judgment which should not be set aside. The defendant did not seek to have the process server cross examined at any point to establish the contents of the affidavit of service for the reason that the same contains what actually transpired. We thus urge the court not to waste time by setting aside the judgment.

(b) Whether the defendant's defence raises triable issues

Your Lordship, prior to setting aside interlocutory judgment, the court has to be satisfied that there is a defence on merits. The Court of Appeal in ***AMAYI OKUMU KASIAKA & 2 OTHERS V MOSES OKWARE OPARI & ANOTHER (2013) eKLR*** stated with approval that the merits of the intended defence must be shown. Further, it was emphasized that it is not about the likelihood of success of the defence, but that there is a bonafide triable issue.

The defendants in their annexed defence merely stated the doctrine of res judicata and further questioned the jurisdiction of the court of the court. It is our humble submission that these are issues that could have been expounded on if at all they are triable. For instance, the defendant would have stated which matter was res judicata the lower court matter and further why the question of jurisdiction would arise. That the defendant left it at that, shows that there is no prima facie defence that warrants to proceed to trial for proper adjudication.

Your Lordship, the issue of the mistake apparent on the face of the record raised by the appellants was not elaborated at all in either the affidavit in support of the application before the lower court or in the appellants' submissions. For this reason, it is our submission that the appellants have not disclosed any triable issue in their purported defence.

Your Lordship, we thus humbly submit that the intended defence is devoid of any triable issues and the interlocutory judgment was regular and therefore ought not to be set aside.

CONCLUSION

Your Lordship, it is our humble submission that the defendant was properly served with summons to enter appearance. Further, we submit that the defendant's annexed defence did not reveal any triable issue. The learned magistrate, therefore, properly considered these issues and arrived at a regular judgment which was not set aside despite the defendant's application to that end.

We pray that guided by the Court of Appeal in AMAYI OKUMU KASIAKA (supra), the Honourable Court do find that the Learned Magistrate exercised discretion properly and hence no need to have the judgment interfered with. Your Lordship, we humbly pray that the appeal herein be dismissed with costs.

DATED AT MERU THIS 1ST DAY OF FEBRUARY, 2017.

FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE RESPONDENT

4. I have considered the issues canvassed by the parties in their submissions. I noted that this appeal was filed in **April, 2003, over 15 years ago**. I deprecate this inordinate delay on the part of the appellants to prosecute their appeal.

5. I agree with the respondent that the appellants cannot rely on the version of the Civil Procedure Rules promulgated in 2010, retrospectively.

6. Having considered the submissions proffered by the parties in support of their diametrically opposed assertions and also having perused the proceedings in the lower court, I opine that the main issue in this appeal centres around whether the summons to enter appearance were properly served.

7. I find that the appellants have not, to my satisfaction, controverted the assertion by the respondent that the apposite summons were properly served. I am unable 15 years down the line to be persuaded that the judgment delivered in the lower court should be impeached. I also agree with the opinion of Muchemi, J, as quoted in ***Amayi Okumu Kasiaka & Others AND Moses Okware Opari and Another, Civil Appeal No. 15 of 2010, Court of Appeal at Kisumu*** that:

> ***"Although service is disputed, the Applicants did not apply to call the process server for cross examination. This is the only way to test the genuineness of the alleged service."***

8. I opine that the authority proffered by the appellants in support of their assertions, to wit, Eldoret ***HCCC No. 2 of 2012, KIPTAROS ARAP TUWI VERSUS FEMINA SONGOK AND ANOTHER***, is a good authority in its circumstances. The circumstances of this suit are different as the appellants have not, on a balance of probabilities, satisfied me that service of the apposite summons had not been effected.

9. Having had a careful look at the proceedings in the lower court and having considered apposite pleadings including the parties' written submissions in totality, I dismiss all grounds in the Memorandum of Appeal. I, therefore, decline to grant all the orders sought by the appellants.

10. In the circumstances, this appeal is dismissed. As a consequence, the orders sought in the appeal are denied.

11. Costs shall follow the event and are awarded to the respondent.

12. It is so ordered

Delivered in open Court at Chuka this **20th day of June, 2018** in the presence of:

CA: Ndegwa

I.C. Mugo h/b Mark Muriithi for the Respondent

Mutani h/b Mwirigi Kaburu for the Appellant

P.M. NJOROGE

JUDGE