



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC APPEAL NO. 97 OF 2016

CHRISTOPHER LEIYAN ROIMEN.....APPELLANT

VERSUS

JOHN TIPIS.....RESPONDENT

RULING

The respondent filed a suit against the appellant in the Chief Magistrate's Court at Milimani on 27th April, 2016 in Civil Case No. 2577 of 2016 seeking judgment for a sum of Kshs.3,100,000/= together with interest at commercial rates from 29th September, 2014 until payment in full being the balance of a refund of the purchase price which the respondent had paid to the appellant towards the purchase of a parcel of land known as Kajiado/Olchoro Onyore/22006 (hereinafter referred to as "the property"). The appellant was served with summons to enter appearance and a copy of the plaint. Instead of entering appearance and filing a defence to the claim, the appellant filed a notice of appointment of advocates and a notice of preliminary objection on 18th May, 2016 through the firm of Koki Mbulu and Company Advocates.

On or about 16th September, 2016, the respondent applied for ex parte judgment in default of appearance against the appellant which was entered by the court on the same date. On 8th November, 2016, the court issued warrants of attachment and sale of the appellant's movable properties in execution of the said default judgment. On 23rd November, 2016, the said warrants were executed by Muhatia Pala Auctioneers by attachment of several movable assets of the appellant.

Following the said attachment, the appellant did not go to the lower court but filed the appeal herein on 25th November, 2016 against the ex parte judgment that was entered by the lower court on 16th September, 2016 and subsequent decree that was issued on 7th October, 2016. The appellant challenged the said ex parte judgment on several grounds. The main grounds that have been put forward by the appellant in his Memorandum of Appeal are the following. The appellant has contended that the lower court erred in entering ex parte judgment in default of appearance while he had filed a notice of appointment of advocates and a notice of preliminary objection to the entire claim by the respondent. The appellant has also contended that the lower court erred in issuing warrants of attachment in execution of the said judgment while he had not been served with a notice of judgment as required under Order 22 Rule 6 of the Civil Procedure Rules. The appellant has also contended that the lower court had no jurisdiction to entertain the dispute that involved an agreement for sale of land.

Together with the Memorandum of Appeal, the appellant filed an application by way of Notice of Motion dated 24th November, 2016 seeking the following orders:

- (1) That pending the interpartes hearing and determination of this application there be an order of stay of execution of the decree claiming Kshs.3,816,174.67 issued on 7th October, 2016 and the warrants of attachment dated 8th November, 2016 in CMCC No. 2577 of 2016 pursuant to which the applicant's goods were proclaimed on the 23rd November, 2016.
- (2) That pending the interpartes hearing and determination of this application there be an order of stay of execution of the default judgment, orders and decree for Kshs.3,816,174.67/= pursuant to which warrants of attachment dated 8th November 2016 were issued to MUHATIA PALA AUCTIONEERS.
- (3) That pending the interpartes hearing and determination of this application there be an order prohibiting and a temporary injunction restraining the respondent's auctioneers, MUHATIA PALA AUCTIONEERS from attaching, interfering, or taking possession of the appellant's goods which are listed in the proclamation dated 23rd November, 2016.
- (4) An order invalidating the proceedings filed in CMCC No. 2577 of 2016 in the Chief Magistrates Court between the parties and the proclamation done on the 23rd November, 2016 by the respondent's auctioneers Muhatia Pala Auctioneers.
- (5) An order of the Court setting aside the judgment or order pursuant to which decree and warrants of attachment respectively dated 7th October, 2016 and 8th November, 2016 were issued.

The appellant's application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the appellant on 24th November, 2016. In summary, the appellant contended that the lower court erred in entering default judgment against him and putting in motion the execution process while he had filed a notice of appointment of advocates and a notice of preliminary objection challenging the jurisdiction of the court. The appellant contended that he was threatened with illegal attachment following the erroneous judgment aforesaid and that it would be just if the orders sought were granted.

The appellant's application was opposed by the respondent through a replying affidavit in which the respondent contended that the ex parte judgment and the entire execution process that were initiated in the lower court against the appellant were lawful. The respondent contended that the appellant did not enter appearance and as such the ex parte judgment in default that was entered against him was proper. The respondent contended further that the appellant was duly served with a notice of entry of judgment before warrants of attachment were issued against him.

The appellant's application was heard by way of written submissions. I have considered the application together with the affidavits that were filed in support thereof. I have also considered the replying affidavit that was filed by the respondent in opposition to the application and the submissions on record. The following is my view on the matter. Prayers 1, 2, 3 and 4 of the application are spent as the orders sought in these prayers were granted ex parte and were to last until the hearing and determination of the application. What is pending determination by the court are prayers 5 and 6 which are on the following terms:

(5) An order of the court invalidating the proceedings filed in CMCC No. 2577 of 2016 in the Chief Magistrate's Court between the parties and the proclamation done on 23rd November, 2016 by the Respondent's auctioneers Muhatia Pala Auctioneers.

(6) An order of the court setting aside the judgment and order pursuant to which the decree and warrants of attachment respectively dated 7th October, 2016 and 8th November, 2016 were issued.

There is no dispute that this court is seized of the dispute between the parties as an appellate court and that the appeal by the appellant is pending hearing and determination. In his Memorandum of Appeal, the appellant has sought the following prayers:

(i) An order of the court setting aside the default judgment in CMCC No. 2577 of 2016.

(ii) An order of the Court invalidating the decree for the payment of Kshs.3,816,174.67/= and warrants of attachment aforesaid.

(iii) A declaration that Section 9 of the Magistrates Courts Act, 2015 contravenes Article 162 (2) (b) of the constitution.

(iv) An order of the court invalidating the proceedings in CMCC No. 2577 of 2016.

It is clear from the foregoing that the reliefs sought in prayers 5 and 6 of the appellant's application have been sought in the appeal as final orders. It follows therefore that if this court was to grant the prayers, the court would have granted final orders without hearing the appeal. The appellant has not laid any basis to warrant the granting of such orders during the pendency of the appeal. Without expressing conclusive views on the matter, I am also of the opinion that this appeal was completely unnecessary. The lower court had jurisdiction under Order 10 rule 11 of the Civil Procedure Rules to set aside the ex parte default judgment that was entered against the appellant on 16th September, 2016 and the warrants that were issued consequent thereto. The appellant had a right of appeal to this court in the event that the application failed before the lower court. In the circumstances, it appears to me that the appeal was filed prematurely.

The upshot of the foregoing is that the Notice of Motion dated 24th November, 2016 has no merit and the same is dismissed with costs to the respondent. In the interest of justice, the status quo prevailing as of the date hereof shall be maintained for a period of thirty (30) days within which the appellant shall be at liberty if so advised to move the lower court for the setting aside of the default judgment that was entered ex parte by that court on 16th September, 2016 in which case he may consider terminating this appeal.

Delivered and Dated at Nairobi this 12th day of November 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

No appearance for the Appellant

Mr. Karanja h/b for Mr. Wabuyabo for the Respondent

Catherine - Court Assistant