REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. 6 OF 2016

EVANS OMBONGI……….……..…………………...……….APPELLANT

VERSUS

JANE GESARE NYANCHOKA………………..…………..…1ST RESPONDENT

EMBAKASI RANCHING COMPANY LIMITED…...……..…2ND DEFENDANT

JUDGMENT

The 1st Respondent brought a suit against the Appellant and the 2nd Respondent at the Chief Magistrate's Court, Milimani Commercial Court namely, Civil Case No. 509 of 2010, Jane GesareNyanchoka vs. Evans Ombongi and Embakasi Ranching Co. Ltd.(hereinafter referred to as "the lower court case").In the lower court, the 1st Respondent sought judgment against the Appellant and the 2nd Respondent for; an order of eviction and demolition of the structures which were standing on Plot No. P6948 and Plot No. P6948B situated at Ruai, a permanent injunction restraining the Appellant from trespassing on the said parcels of land and a mandatory injunction directing the 2nd Respondent to show the Appellant his parcel of land. In her amended plaint dated 23rd February, 2011, the 1st Respondent averred that she was the owner of Plot No. P6948 and P6948B which she acquired from the 2nd Respondent. The 1st Respondent averred that she used the suit properties for over 10 years without any interruption until the year 2009 when she was informed by her neighbours that there was someone putting up a building on the suit properties. The 1st Respondent averred that through inquiries, she came to learn that the person who was putting up the said building was the Appellant. The 1st Respondent averred that the 2nd Respondent had erroneously and improperly showed and identified the suit properties to one, Evans Kimani Ndungu as Plot No. P4817 and P4817B and subsequently approved the sale by the said Evans Kimani Ndungu to the Appellant of Plot No. P4817B which plot was on the same position on the ground as one of the suit properties namely, Plot No. P6948B. The 1st Respondent averred that the Appellant had entered her Plot No. P6948B and erected thereon a stone house without her consent. The 1st Respondent averred that as a result of the said action by the Appellant, her quiet possession and enjoyment of the said parcel of land had been interfered with. The 1st Respondent averred further that she had been prevented from developing the said parcel of land by the Appellant.

Together with the plaint, the 1st Respondent filed an application in the lower court seeking a temporary injunction to restrain the Appellant from trespassing on, entering or encroaching on the suit properties pending the hearing and determination of the lower court suit. The Appellant was served with summons to enter appearance together with the said interlocutory application. The Appellant appointed the firm of S. G. Mbaabu& Co. Advocates to act for him in the matter. The said firm of advocates filed a notice of appointment of advocates on 16th November, 2010 and a replying affidavit to the 1st Respondents

interlocutory application. The 1st Respondents application for injunction was withdrawn on 9th November, 2010.

The Appellant's advocates then on record neither entered appearance nor filed a statement of defence. On application by the 1st Respondent, interlocutory judgment in default of appearance and defence was entered against the Appellant and the 2nd Respondent on 18th May, 2011. The suit was thereafter set down for formal proof when it was heard by Hon. R.A Oganyo (Mrs) P. M. on 15th September, 2011. In a judgment delivered on 17th February, 2012, the learned Magistrate held that the 1st Respondent had proved her case against the Appellant and the 2nd Respondent and entered Judgment in her favour as prayed in the amended plaint dated 23rd February, 2011. Following that judgment, a decree was extracted and application for execution filed on 22nd June, 2012 for the eviction and demolition of the Appellants structures on Plot No. P6948 and P6948B.

On 10th July, 2012 a warrant for the eviction of the Appellant from the suit properties was issued to James N. Mwangi t/a Elan Auctioneers for execution. On 1st August, 2012 the said auctioneers moved the court for police assistance while demolishing the Appellants illegal structures on the suit properties. The said auctioneers' application was heard and allowed by Hon. Andayi W. F (Mr.) S.P.M. on the same day. On 10th August 2012, the Appellant filed an application under certificate of urgency seeking orders to stay and set aside the orders which were given by Hon. Andayi W. R. (S.P.M) on 1st August, 2012. The Appellant's application was dismissed by Hon.Andayi W. F. (S.P.M) on 22nd November, 2012.

The Appellant did not give up. The Appellant changed advocates and on 26th November 2012 filed another application under certificate of urgency this time round seeking an order to stay the execution and to set aside the judgment that was entered against him by Hon. Oganyo R. A (Mrs.) P.M. on 17th February, 2012. The application was brought on the grounds that the 1st Respondent had obtained orders for the demolition of his residential house on Plot No. P4817B which he had occupied since the year 2008. The Appellant contended that the advocates he had instructed to defend him had failed to enter appearance and file a statement of defence and that it was not fair that he suffers for the mistake of the said advocates. The Appellant contended that he had a good defence to the 1st Respondent's claim a draft of which he attached to the affidavit in support of the application. In his affidavit, the Appellant stated that he duly instructed the firm of S. G. Mbaabu& Company Advocates to act for him in the suit and paid for their services. He stated that he trusted the said advocates to render professional services for which he had engaged them. He stated that his house now stood the risk of being demolished unless the judgment of the court was set aside.

The Appellant's application was opposed by the 1st Respondent through Notice of Preliminary Objection dated 4th December, 2012 and a replying affidavit sworn on the same date. In her Notice of Preliminary Objection, the 1st Respondent contended that the firm of Omao Omosa & Co. Advocates had come on record for the Appellant irregularly and as such the application filed by the firm on behalf of the Appellant was incompetent. In her replying affidavit the 1st Respondent termed the Appellant's application an abuse of the process of the court. The 1st Respondent took issue with the Appellants failure to include the prayers sought in the application in the earlier application dated 10th August 2012 which was dismissed by Hon. Andayi S.P.M on 22nd November, 2012. The 1st Respondent contended that she was not liable for the Appellant's misfortunes and that the blame lay with the Appellants advocates. The 1st Respondent averred that the Appellant did not have a good defence to the 1st Respondents claim since the 1st Respondent was not interested in Plot No. P4817B which the Appellant claimed to occupy.

The application was heard by Hon. R. A.Oganyo S.P.M who dismissed the same in a ruling delivered on 13th May, 2013. That is the ruling which is the subject of this appeal. In her ruling, the learned magistrate held that the judgment that had been entered against the Appellant was regular and that the Appellant had a duty to follow up his advocates after instructing them to find out the position of his case.

The learned magistrate also held that the application was res judicata and that the Appellant did not have a good defence to the 1st Respondent's claim. The learned magistrate held that since the Appellant had not given reasonable explanation for not filing his defence which in any event was not arguable, setting aside of the exparte judgment would prejudice the 1st Respondent in a manner that could not be compensated in costs.

In his appeal before this court, the Appellant has challenged the ruling and order of the learned magistrate on seven (7) grounds. In his memorandum of appeal dated 15th May, 2013 the Appellant faulted the learned magistrate for holding that his application was res judicata. The Appellant contended also that the learned magistrate erred in visiting his advocate's mistakes on him and for basing her decision on extraneous matters. The Appellant also faulted the learned magistrate for failing to consider the matters which were raised in the Appellant's affidavit in support of the application thereby exercising her discretion injudiciously.

The appeal was argued by way of written submissions. The Appellant filed his submissions on 22nd October, 2015 while the 1st Respondent filed her submissions on 8th July, 2016. I have carefully perused the records of appeal which contains the pleadings and the proceedings of the lower court. I have also considered the ruling the subject of the appeal and the grounds appeal put forward by the Appellant. Finally, I have considered the submissions of counsel together with the authorities cited in support thereof. The Appellant's application in the lower court was principally brought under Order 10 Rule 11 of the Civil Procedure Rules. That order gives the court power to set aside judgment entered exparte. The power is discretionary. Commenting on the exercise of that power the court inPatel Vs. E. A. Cargo Handling Services Ltd. (1974) E. A. 75 stated that:

> *"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 there is a judgment……The court will not usually set aside judgment unless it is satisfied that there is a defence on merits. In this respect, the defence on the merits does not mean in my view, a defence that must succeed…… It's an issue which raises a prima facie defence and which should go to trial for adjudication."*

In the case of Mbogo vs. Shah (1968) E. A. 93, it was held that an appellate court would not interfere with the exercise of the trial courts discretion unless it is satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and that as a result there has been a misjustice.

On the material before me, I am satisfied that the learned magistrate erred in the exercise of her discretion and caused injustice to the Appellant. There is no dispute that the Appellant was served with summons to enter appearance. There is also no dispute that the Appellant intended to defend the suit. Towards that end, the Appellant instructed an advocate whom he entrusted with the conduct of his defence. The advocate came on record and opposed the interlocutory application that had been brought by the 1st Respondent which sought injunctive reliefs against the Appellant. That application as I have stated earlier was withdrawn by the 1st Respondent. Having entrusted his defence with the said advocate, the Appellant took the back seat and thought that all was well. It was not until an auctioneer visited him with warrants of eviction that he realized that something was amiss. He went to his advocates who were then on record immediately and sought a stay of his eviction and the setting aside of the said warrant. That application did not see the light of the day because it ignored the fact that the warrants were issued pursuant to a judgment which had not been stayed or set aside. After the dismissal of that application, again, the Appellant moved the court immediately now through a new firm of advocates seeking the setting aside of the judgment pursuant to which the warrants for his eviction were issued. I have noted that the Appellant's previous advocates and his new advocates entered into a consent allowing the new advocates which are now on record to take over the conduct of the mater on behalf of the Appellant. In the circumstances the objection that had been raised by the 1st Respondent in the lower court regarding the manner in which the Appellant's current advocates came on record had no basis. I am also in agreement

with the Appellant that the learned magistrate erred in her finding that the Appellant's application dated 25th November 2012 was *res judicata*. Looking at the Notice of Motion dated 10th August, 2012 which was determined by Hon. Andayi W. R. (S.P.M) and the Notice of Motion dated 26th November, 2012 which was before the learned magistrate, it is apparent that the reliefs which were sought are different as they related to different orders. I am not in agreement with the findings by the learned magistrate that the Appellant did not give reasonable explanation why he did not file a defence. In my view, the reason was apparent on the face of the record. The Appellant had appointed an advocate who simply failed to perform his professional duties thereby exposing the Appellant to great los without a hearing. I do not also share the view of the learned magistrate that the Appellant did not show an arguable defence. The Appellant annexed to his affidavit in support of the application a draft defence which in my view raised triable issues which called for a trial. The dispute between the parties was over the physical location of Plot No. P4817B owned by the Appellant and Plot No. P6948 and Plot No. P6948B owned by the 1st Respondent. The Appellant contended that he was not occupying or claiming Plot No. P6948 and Plot No. P6948B in respect of which the 1st Respondent had obtained judgment and that the 1st Respondent was trying to evict him from Plot No. 4817B which was not in dispute in the suit. These are allegations which merited investigation at the trial. Finally, the learned magistrate failed to appreciate the fact that the Appellant was going to suffer serious prejudice and injustice if the exparte judgment was not set aside. The Appellant's home was threatened with demolition without him having been given an opportunity of being heard even after he had expressed an intention to defend the suit. I am not in agreement with the holding by the learned magistrate that the inconvenience to the 1st Respondent could not be compensated in costs. Applying the principle of proportionality, the learned magistrate should have exercised her discretion infavour of setting aside the exparte judgment and compensating the 1st Respondent in costs.In the case of, Phillip Chemwolo & Another vs. Augustine Kubede (1982-1988) KAR 1039 at page 1040 Apaloo J. A stated that:

> *"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."*

In the final analysis and for the foregoing reasons, it is my finding that the Appellants appeal has merit. I hereby allow the appeal on the following terms:-

1. The ruling and order made by Hon. R. A. Oganyo (Mrs) S.P.M on 13th May, 2013 is set aside and substituted with an order allowing the Appellant's Notice of Motion in the lower court dated 26th November, 2012 in terms of prayer 4 thereof.

2. The Appellant is granted leave to file a statement of defence within 14 days from the date hereof.

3. The Appellant shall pay to the 1st Respondent thrown away costs in the sum of Kshs. 15,000/= within 30 days from the date hereof in default of which the 1st Respondent shall be at liberty to execute for the recovery thereof.

4. Each party shall pay its own costs of the appeal and the application in the lower court.

Delivered and Signed at Nairobi this 28th day of April, 2017

S. OKONG'O

JUDGE

In the presence of

N/A	for the Appellant
Mr. Mongori	for the 1st Respondent
N/A	for the 2nd Respondent
Kajuju	Court Assistant