Weru v Musyoki & 2 others (Suing as registered officials of Jesus Manifestation Church) (Environment and Land Appeal E004 of 2020) [2024] KEELC 1303 (KLR) (11 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1303 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E004 OF 2020

CA OCHIENG, J

MARCH 11, 2024

BETWEEN

PETER GITARI WERU ..... APPELLANT

AND

JOAN WAIRIMU MUSYOKI ..... 1ST RESPONDENT

WILLIAM MWANGANGI ..... 2ND RESPONDENT

ELIJAH MUTUA ..... 3RD RESPONDENT

SUING AS REGISTERED OFFICIALS OF JESUS MANIFESTATION CHURCH

(Being an Appeal from the Judgment of Kangundo Senior Principal Magistrate's Court in ELC No. 45 of 2019 (Formerly Civil Suit No. 150 of 2018) delivered on 1st August, 2019 by Hon. E. Agade, Ms. (SRM))

JUDGMENT

Introduction

1. By a Memorandum of Appeal filed on the 25th September, 2020 the Appellant appealed against the Judgment of Hon. E. Agade, Ms, Senior Resident Magistrate made on the 1st August, 2019 in Kangundo SPMC ELC No. 45 of 2019 between William Mwangangi, Joan Wairimu Musyoki & Elijah Mutua (Suing as registered official of Jesus Manifestation Church) v Peter Gitari Weru. The genesis of this Appeal is the Judgment by Hon. E. Agade Ms, Senior Resident Magistrate where she entered Judgment in favour of the Plaintiff (Respondent) but ordered them to refund the Defendant (Appellant) the purchase price with interest before evicting him from the suit land.

2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal on the 25th September, 2020 which contains the following grounds:-

1. That the learned Senior Resident Magistrate E. Agade erred in law and fact in hearing the Plaintiff's case exparte without proof of service ignoring the Defendant's defence, and subsequently granting an exparte Judgment against the Defendant/Appellant.

2. The learned Magistrate erred in law and fact by allowing exparte pre-trial without service upon the Defendant as the Plaintiff had not served and exchanged pre-trial documents under Order 11, *Civil Procedure Rules*, 2010.

   The learned Senior Resident trial Magistrate erred in law and fact by disregarding the fact that the Defendant had a defence which raised triable issues and in particular that the subject property was embroiled in a tussle in Succession Case No. 3 of 2019 (Formally No. P&A 193 of 1997).

4. The trial Magistrate erred in law and fact by assuming that all the mentions and hearings had been served when there was only one Affidavit of Service dated which could not be believed.

5. That the learned trial Magistrate erred in law and fact by hearing only one of the Plaintiffs in breach of the *Constitution* as against fair hearing and closed out of Defendant's defence.

6. The learned trial Magistrate erred in law and fact by granting exparte orders on 20th February, 2020 which orders were used by the police to attempt an eviction on the 28th February, 2020 unlawfully without compliance with the Judgment itself.

7. The trial Magistrate erred in law and fact by granting an exparte eviction order for enforcement without compliance of the Judgment itself and as a result of which properties and items belonging to the Appellant were destroyed.

8. The trial learned Magistrate Hon. Martha Opanga (SRM) erred in law and fact by dismissing the Application dated 30th April, 2020 seeking to set aside an exparte Judgment and in the process disregarded the evidence of the Appellant clearly contained in the proceedings thereby ignoring the interest, equity and the rights of the Defendant to defend his suit.

9. The trial learned Magistrate erred in law and fact to conclude that the Respondent Church through William Mwangangi Musyoki had proved its case contrary to the evidence in the proceedings.

   It is proposed to ask the court to order

   a. That the Appeal be allowed.

   b. That the Judgment dated 1st August, 2019 and Decree by the Hon. Court (Senior Resident Magistrate) be set aside and the Respondent's suit be dismissed.

   c. The cost of the Appeal be borne by the Respondent.

3. The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

4. The Appellant in his submissions has provided a background of this matter and confirms that during the hearing in the trial court, he was absent together with his Advocate D. K. Wanyoike. He insists that they were not served and not aware of the hearing date. He explains that after the Judgment, he immediately filed an Application dated the 30th April, 2020 seeking to set aside the *ex parte* Judgment

but the same was dismissed without undue regard to the constitutional obligation and discretion of the court. He contends that he filed a Defence that raises triable issues, yet he was condemned unheard and eviction orders issued against him. To buttress his averments, he relied on Articles 47(1), 50 (1) and 159 (2) (d) of the *Constitution* as well as the following decisions: Civil Suit No. 14 of 2020, *Doa Doa Doa Tented Camps & Lodges Limited v Jubilee Insurance Company of Kenya Limited and Republic v Speaker of Nairobi City County Assembly & Another* (2017) eKLR.

5. The Respondent did not file written submissions.

Analysis and Determination

6. I have considered the Memorandum of Appeal, Record of Appeal and the Appellant's submissions and the only issue for determination is whether the ex parte Judgment delivered on the 1st August, 2019, should be set aside and if the Appeal is merited.

7. This being a first appeal from the trial court and since I did not have a chance to see when the witnesses testified, I am guided by the principle established in the case of *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123 where it held that the duty of the first Appellate Court is to reconsider the evidence presented, evaluate it and arrive at its own conclusion. The Respondent as the Plaintiff in the Lower Court filed a Plaint dated the 29th June, 2018 where it sought for the following Orders:-

    a. An eviction order evicting the Defendant from the suit premises to grant the Plaintiffs' vacant possession.

    b. A permanent injunction stopping the Defendant either by himself, his agents, employees, personal administrators and/or representatives herein from trespassing, cultivating, planting any crops, utilizing, using, in any manner wasting, transferring possession, selling, dealing interfering with the suit land.

    c. General Damages as this Court may deem fit and just to grant.

    d. Costs of this suit.

    e. Any other or further remedies as the Court may deem fit and just to grant

8. The Appellant as the Defendant filed a Defence dated the 13th August, 2018 where he denied the averments in the Plaint. He insisted that the Sale Agreement dated the 2nd May, 2012 which formed the fulcrum of the dispute had not been frustrated. He confirmed that he was ready to pay the balance of the purchase price upon receipt of the completion documents. He denied that the Plaintiff ever offered him a refund of the purchase price.

9. The Appellant's erstwhile Counsel messrs D. K. Wanyoike & Co. Advocates', despite being served with the Pre Trial Notice on the 1st March, 2019 and 29th May, 2019 as well as a Hearing Notice on the 10th June, 2019 as evident in the Affidavits of Service for Mourice Okumu and Ambrose Onyancha, failed to attend court culminating in the trial court proceeding ex parte.

10. After considering the evidence tendered by the Respondent and analyzing the exhibits, the Learned Trial Magistrate proceeded to enter Judgment in favour of the Respondent on 1st August, 2019 whereby she granted prayers (a), (b) and (d) of the Plaint and dismissed prayers (c) and (e). The Respondent was directed to refund to the Appellant Kshs. 1,200,000 plus interest in accordance with Clause (e) of the Special Conditions contained in the aforementioned Sale Agreement before enforcing the orders granted in the Judgment against the Appellant. On 30th April, 2020, the erstwhile Advocates

filed an Application seeking to set aside the ex parte Judgment but the said Application was dismissed on 25th August, 2020.

11. The Appellant being aggrieved with the said Judgment and Ruling filed the instant Appeal.

12. From the Record of Appeal, I note the Decree in the Lower Court was executed on 28th February, 2020 wherein the Appellant was evicted from the suit land. I note in the Ruling dismissing the Application seeking to set aside the ex parte Judgment, the trial Court observed that:-

> From the said pleadings it is clear that Judgment was entered on the 1st August, 2019 and execution done on 28th February, 2020 six months after entry of Judgment... The Defendant/Applicant on his part filed this application in April 2020 two months after the said execution... He has not demonstrated that he has suffered substantial loss taking not of the fact that the judgement directed that the Plaintiff/Respondent refunds to him money deposited as part payment of the purchase price. The Defendant Applicant did not also offer security for the due performance of the Decree if the same was to be stayed."

13. The Court of Appeal in *Onjula Enterprises Ltd v. Sumaria* [1986] KLR 651, held that:-

> The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another v. Greenlands Limited* [1916] 2 AC 15 at 38."

14. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR the Court while dealing with the issue of setting aside of a Judgment observed that:-

> The well-established principles of setting aside interlocutory judgements were laid out in the case of *Patel v East Africa Cargo Handling Services* [12] where 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 judgement as is the case here the court will not usually set aside the judgement 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."

15. The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated "sufficient cause" to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase "sufficient cause" mean. The Supreme Court of India in the case of *Parimal v Veena* 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."

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it."

16. In this instance, and from the proceedings including Judgment by the trial court, I note the Decree emanating from the impugned Judgment had been executed and the Appellant offered the part purchase price of Kshs. 1,200,000 that he had paid. Further, from the Appellant's Defence, even though it raised triable issues, claiming he had developed the suit land, he never filed a Counter-claim to seek for damages. Even though the proceedings were ex parte, I note the trial court took into consideration the said Defence and directed that since the contract (Sale Agreement) dated the 2nd May, 2012 had been frustrated, the Appellant was entitled to a refund of the purchase price including interest in accordance with Clause (e) of the said Agreement. I note that the Respondent had confirmed refund of the purchase price to the Appellant. What the Appellant has not explained is whether he has been paid the interest on the purchase price as directed by the court. If not, I find that the Appellant should proceed to pursue the same as ordered in the said Judgment.

17. Based on the facts as presented while associating myself with the decisions cited, I find that no sufficient cause has been demonstrated to set aside the impugned Judgment since the Appellant's erstwhile Counsel was properly served before the hearing proceeded in the lower court. Further, the Appellant sought to set aside the lower court Judgment after the Decree therefrom had been executed.

18. It is against the foregoing that I decline to exercise my discretion to set aside the Judgment delivered by this Honourable Court on the 1st August, 2019 as it has been overtaken by events since the Decree was already executed.

19. I hence do not find any merit in the Appeal and will dismiss it but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11TH DAY OF MARCH, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Parties absent

Court Assistant – Simon/Ashley