IN THE COURT OF APPEAL

AT NYERI

SITTING IN MERU

(CORAM: WAKI, VISRAM & G. B. M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 29 OF 2016

BETWEEN

WILLIAM NTOMAUTA M'ETHANGA

Sued as M'Mauta Nkari….……...….APPELLANT

AND

BAIKIAMBA KIRIMANIA…….……RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Meru

(P.M. Njoroge, J.) dated 30th March, 2016

in

H. C. E & L Case No. 164 of 2012)

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JUDGMENT OF THE COURT

1. This appeal relates to the decision of the High Court wherein the court declined to set aside a default judgment entered against the appellant and grant the appellant leave to defend the suit therein. We are fully aware that in an application before a court to set aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the appellate court would not interfere with the exercise of that discretion unless the exercise of the same was wrong in principle or that the court did act perversely on the facts. See ***Magunga General Stores -vs- Pepco Distributors [1987] 2 KAR 89.***

2. Bearing the foregoing in mind, the salient facts were that the respondent filed suit seeking *inter alia,* the eviction of the appellant from the parcel described as Ithima/Ntunene/40 (hereinafter referred to as "the suit property") and an injunction restraining the appellant from trespassing, constructing or otherwise interfering with his ownership and/or possession of the suit property. He claimed that he was the registered owner of the suit property; the appellant had without any colour of right trespassed and constructed structures thereon.

3. Pursuant to the affidavit of service sworn by Japhet M. Mukiira, a process server, summons to enter appearance and the plaint were served upon the appellant on 8th November, 2012. Nevertheless, the appellant failed to enter appearance which resulted in a default judgment being entered against him on 19th September, 2013.

4. Subsequently, the appellant filed an application dated 17th April, 2014 praying for the setting aside of the default judgment and leave to defend the suit. He urged that the failure to enter appearance and file defence was on account of misrepresentation by the process server. The process server allegedly misled him into believing that he had to do nothing until he was called for the hearing of the case. As such, the omission was not deliberate. It was only after auctioneers tried to evict him that he sought the advice of an advocate who recommended that he ought to obtain a copy of the green card to the suit property. He obtained a copy of the green card on 8th April, 2014 and learnt that the respondent, who is his step brother, had fraudulently transferred the suit property, a family land, in his own name. The suit property was first registered in favour of the parties' late father.

5. Upon weighing the arguments put forth on behalf of the parties, the trial Judge exercised his discretion in favour of the respondent by dismissing the appellant's application. In doing so he stated, in his own words, that

> ***"In the circumstances of this application, where the judgment was delivered on 19.09.2013 almost 7 months before this application was filed and where the decree arising out of the apposite judgment had been successfully executed, I refuse to exercise this Court's discretion to set aside the apposite judgment. I therefore dismiss the application dated 17th April, 2014."***

6. It is that decision that instigated the appeal herein which is predicated on the grounds that the learned Judge erred in law and fact by-

> ***a) Failing to direct his mind properly on the principles governing setting aside of exparte judgments.***
>
> ***b) Failing to consider the appellant's response with regard to the extent of execution of the default judgment.***
>
> ***c) Failing to be guided by the spirit of the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act.***

7. Mr. H. Gitonga, learned counsel for the appellant, submitted that the learned Judge failed to consider the reasons advanced by the appellant for the failure to enter appearance and file defence. In fact, the learned Judge said nothing about the explanation for delay, which, in his view, was excusable. He faulted the learned Judge for failing to appreciate the annexed draft defence which raised triable issues. He argued that the learned Judge erred in finding that execution had taken place when in reality the auctioneers had only demolished some structures on the suit property before members of public intervened and stopped the process. Thus, the decree arising from the default judgment had not been fully executed.

8. Mr. Gitonga submitted that the appellant stood to suffer hardship in the event the orders sought are not granted; that the suit property was family land; that he had lived there since birth; that he intended to file a counter claim based on fraud on the part of the respondent; that he had the right to be heard; and that he had not delayed in filing the application for setting aside. He prayed for the appeal to be allowed.

9. On his part, Mr. C. Mbaabu, learned counsel for the respondent, argued that the appellant had not placed sufficient material to warrant the learned Judge to exercise his discretion in his favour. He submitted that not only was the appellant served with summons to enter appearance but was also served with hearing notices, all of which he chose to ignore. The appellant's conduct amounted to an abuse of

the court process. Moreover, the appellant did not cross examine the process server on his allegations. According to him, the appellant's draft defence did not raise any arguable points and the counter claim was time barred. He also alluded that the appellant lacked *locus standi* to file the counter-claim simply because he had not obtained letters of administration in respect of their deceased father's estate.

10. We have considered the record, submissions by counsel and the law. It is imperative to first determine whether the decree which arose from the default judgment was executed. More so, because of the effect the same would have on the entire appeal. We cannot help but note that the appellant in his supplementary affidavit in support of his application, deposed that the auctioneers moved to evict him had been thwarted by villagers and that all they did was to demolish part of the structures he had erected. The respondent did not refute the same by way of an affidavit. All that there was were submissions from the bar that the execution had been carried out. We give the benefit of doubt to the appellant and find that the execution was not completed.

11. This Court while discussing the criteria for allowing an application for setting aside a default judgment, such as the one in this case, in ***James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another [2016] eKLR*** expressed thus,

> ***"In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other…"*** *Emphasis added.*

12. The appellant herein attributed the failure to enter appearance and file defence to the alleged misrepresentation by the process server coupled with his illiteracy and unfamiliarity with court procedures. However, we are puzzled by how the appellant after being served with pleadings would sit on them and not at the very least inquire as to what he needed to do. What prevented him from approaching an advocate like he did once auctioneers came onto the suit property? In our view the explanation advanced was rather lame.

13. All the same, the main plank of his defence is that the respondent had fraudulently transferred family land in his name; the suit property was first registered in their late father's name and prior to his demise he had divided the same equally between the parties; the appellant has been in occupation of his portion since birth. We find that the same raises triable issues which warrant meritorious consideration by the court. That much was aptly set out in ***Tree Shade Motors Limited -vs- D.T. Dobie and Company (K) Limited & Another [1998] eKLR*** in the following terms: -

> ***"The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend. That is what this Court decided in the case of Kingsway Tyres and Automart Ltd -vs- Rafiki Enterprises Ltd (Civil Appeal No. 220 of 1995) (Unreported). In the course of its judgment the Court said:-***
>
> ***"To our minds, the onus was on the respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that ex parte judgment was a regular judgment. It***

> ***would only, if at all, be properly, vacated on grounds other than non-service of summons.***
>
> ***There are ample authorities to the effect that, notwithstanding regularity of it, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits."***

14. As we can discern from the intended counterclaim, the appellant herein is not bringing it on behalf of his late father's Estate but on his own right. Hence, there is no need for him to have obtained letters of administration. In addition, the cause of action in the counterclaim is based on a declaration of trust and allegations of fraud which are not time barred as alleged.

15. In the circumstances did the trial Judge properly exercise his discretion? We think not. The main concern of the court is to do justice to the parties, and it ought not to impose conditions on itself to fetter the wide discretion given it. Unlike the learned Judge, we feel that it is in the interest of justice to allow the appellant to defend the suit and the matter to be determined on merit being a family dispute. In doing so, we invoke ***Article 159*** of the ***Constitution*** in order to render substantive justice. The Supreme Court in ***Law Society of Kenya -vs- The Centre for Human Rights & Democracy & 12 Others*** ***[2014] eKLR*** held,

> ***"Indeed this Court had occasion to remind litigants that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that 'justice shall be administered without undue regard to technicalities. It is plain to us that Article 159 (2) (d) is applicable on a case by case basis."***

16. The totality of the foregoing is that the appeal herein has merit and is hereby allowed. We hereby set aside the High Court's decision dated 30th March, 2016 and substitute the same with an order setting aside the default judgment. We direct the appellant to enter appearance and file his defence within ***14 days*** from date of this judgment. In addition, the appellant shall pay all thrown away costs to the respondent.

Dated and delivered at Meru this 23rd day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

…….…….

JUDGE OF APPEAL

G. B. M. KARIUKI

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR