



IN THE COURT OF APPEAL
AT NYERI
(CORAM: BOSIRE, WAKI & AGANYANYA, J.J.A.)

CIVIL APPEAL NO. 176 OF 2006

BETWEEN

JOSPHAT NJOROGE THAARA APPELLANT
AND
PETER NJOGA RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nyeri (Khamoni, J.) dated 8th May, 1983

in
H.C.C.C. No. 12 of 1983)

JUDGMENT OF THE COURT

The dispute between the parties herein related to LR. No. Limuru/Ngecha/779 registered in the name of the appellant, **Josphat Njoroge Thaara**. It measured 1.71 acres. On 8th July, 1982, he entered into an agreement with the respondent **Peter Keffar Njogah**, to sell to him 0.85 of an acre from the land at a price of Kshs.42,500/=. Kshs.5,000/= of the purchase price was paid then and the balance of Kshs.37,500/= was to be paid to the appellant against the loan he had secured from the Standard Bank, Moi Avenue Branch.

It would appear from the supplementary agreement of the same date by the same parties that the respondent liquidated the loan plus interest directly to the bank on behalf of the appellant in the manner agreed in the loan agreement. However, the appellant did not transfer to the respondent 0.85 of an acre as agreed and this prompted the latter to file a suit in the High Court at Nyeri on 1st January, 1983 to claim from the appellant the 0.85 of an acre. Although the plaint was served on the appellant's wife on 24th February, 1983 he neither filed appearance nor defence and on 4th May, 1983 the case was heard by way of formal proof. The Court (*Patel, J.*) heard the evidence of the respondent and delivered a judgment on the same date awarding the respondent the suit portion of the land, stating *inter alia*:-

“I order that the defendant do transfer 0.85 acre of land from the land parcel number Limuru/Ngecha/799 to the plaintiff. In default the executive officer of this court to execute the necessary documents. Costs to the plaintiff.”

This Judgment was executed and the suit portion transferred to the respondent. After such transfer the respondent sold it to a third party. It was Limuru/Ngecha/1108. Before such division and transfer, one **Mary Mumbi Njoroge** the appellant's wife had attempted to caution the whole land but an application was made by the respondent to have it removed to facilitate the transfer of the portion No. Limuru/Ngecha/1108 to the respondent. This was done.

After such transfer had been effected and the parcel of land sold to the third party the appellant filed an application on 28th October, 2004 for an order setting aside the ex parte judgment. The application was dismissed on 8th May, 2006, and this gave rise to the appeal filed in Nyeri Court sub-registry on 7th July, 2006, now before this Court.

The grounds on the memorandum of appeal against the learned Judge's ruling were that he:-

- 1. Failed to observe that the appellant had not been properly served with summons to enter appearance and plaint in the case.**
- 2. Disregarded the appellant's evidence before him.**
- 3. Based his decision on irrelevant matters.**
- 4. Impeded the unfettered jurisdiction granted to him by the law and the rules.**
- 5. Failed to observe that the application before him had merit.**
- 6. Failed to allow the application before him.**

The appeal was heard by this Court on 26th October, 2011 when **Mr. Gachichio**, learned counsel for the appellant submitted that the ruling of the High Court over the ex parte judgment was the cause of this appeal. That the appellant had not been served with summons to enter appearance and only learned of the suit when he returned from Tanzania where he had been since 1983. Although the application to set aside the ex-parte judgment was made in 2004, the delay was sufficiently explained in the accompanying affidavit. According to his submissions, he received instruction at the execution stage and in spite of efforts to arrest the situation, the court file could not be found. And because of this the applicant filed afresh **Case No. 222 of 2002** at Nairobi and a stay order made but by this time the land had been sold to a third party. That although the appellant's wife was served with summons to enter appearance this was not accompanied by the plaint. In his submissions he stated that since the dispute was over land and there is no limitation to the Judge's exercise of discretion, he should have exercised it in favour of the appellant.

Mr. Kimani, learned counsel for the respondent opposed the appeal and submitted that the application to set aside was opposed because it was made 21 years after the judgment, which was an inordinate and unexplained delay. He gave the background of the case and said that though the appellant had sold part of the original land to a third party, the respondent sued and obtained judgment for part of the remaining portion which was still in the name of the appellant. The plaint was served on the appellant's wife – an adult member of the family but no appearance and defence were filed. According to him the appellant did not avail evidence that the file in the High Court had at one time gone missing to occasion the delay in filing the application to set aside. He stated further that though the appellant was claiming the portion given to the respondent by the Court it had been sold to a third party who was not a party to the case or this appeal.

When the High Court (*Khamoni, J.*) wrote and delivered his ruling on 8th May, 2006, he rendered himself thus:-

“Judgment was rendered in this suit 23 years ago. That judgment was executed when the suit parcel of land LIMURU/NGECHA/799 was sub-divided into 1107 and 1108. Portion 1107 was left with the applicant and portion 1108 taken by the respondent who subsequently transferred it to a third party said to be JOHN MBUGWA MUNGETHE who is not a party to those proceedings. The effect is that at the moment the respondent is not the registered owner of the portion of land the applicant wishes to recover.

It is admitted the court has unlimited discretion to set aside judgment. But the main concern of the court is to do justice to the parties. This seems to be an application which has come up because of an afterthought from a man who at an appropriate time had accepted the situation but is now trying to rebel from that situation. I think there has been too much delay on the part of the applicant and the granting of the application will not result into justice.”

As regards ground (1) we do not agree that the appellant was not served with summons to enter appearance. Under **Order - rule 12** of the Civil Procedure Rules service upon the wife – an adult member

of the family was good service. It was not disputed that such service was done. In respect to ground (2), the appellant's counsel submissions were considered in the ruling of the learned Judge and he did not base his ruling on irrelevant matters as alleged.

The learned Judge was aware he was supposed to exercise his discretion either in favour or against the appellant and in the circumstances of the application before him, he was unable to exercise it in the appellant's favour. And given that the piece of land the appellant was seeking to recover from the respondent was in possession of a third party who was not a party to the case/application, the application before the learned Judge had no merit and this is why it was dismissed. We are of the view that in view of all the circumstances of the case and the length of time it had taken for the application to be filed, what the learned Judge was really saying was that there was no triable issue to warrant setting aside the judgment.

In spite of the judgment having been delivered on 4th May, 1983 the appellant got engaged in making other applications or filing suits or appeals in other courts. We are of the view that this was not a good reason or explanation for the learned Judge to set aside the judgment. It is our view that the maxim "*equity does not aid the indolent*" applies perfectly well in the appellant's present situation.

This appeal fails and is hereby dismissed with costs.

Dated and delivered at Nyeri this 2nd day of December, 2011

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR