REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal 46 of 2008

1. **GEETA BHARAT SHAH**
2. **VIPINKUMAR NATHALAL SHAH**
3. **MILAN NATHALAL SHAH Executors to the Estate of**
4. **BHARATKUMAR NATHALAL SHAH**
5. **VIPINKUMAR NATHALAL SHAH ……..... APPELLANTS**

AND

1. **OMAR SAID MWATAYARI**
2. **COASTLAND PROPERTIES LIMITED ….RESPONDENTS**

(An appeal from a ruling and order of the High Court of Kenya at ombasa

(Mr. Justice J.K. Sergon) dated 3rd May 2006

in

H.C.C.C. NO. 276 & 277 (CONSOLIDATED OF 2004)

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JUDGMENT OF THE COURT

The first respondent in this appeal ***Omar Said Mwatayari,*** through his advocates Stephen Oddiaga & Company, filed a suit by way of plaint dated 22nd December 2004 against Bharatkumar Nathalal Shah now represented by the executors of his estate Geeta Bharat Shah, Vipinkumar Nathalal Shah, and Milan Nathalal Shah, and Vipinkumar Nathalal Shah. He was seeking judgment against the two jointly and severally for:-

"***(a) An order cancelling and revoking the 1st and 2nd defendants title from the land Registry Kwale and reverting back the plot into plaintiff's name.***

(b) The plaintiff be registered as the owner of the plot number Kwale/Galu Kinondo/734 and Land

Registrar Kwale to rectify the title to reflect the change.

(c) General damages for fraud.

(d) Costs and interest of this suit."

The claim was based in the allegation that the appellants had by fraud acquired respondent's land which they subdivided and allocated to themselves. That plaint had a verifying affidavit annexed to it as is required by law. In that verifying affidavit, the respondent deponed that he had read the plaint and understood its contents, and that he swore the affidavit in verification of the facts in the plaint.

After the plaint was filed the court issued summons to enter appearance pursuant to the Civil Procedure Rules. In a sketchy, non convincing affidavit of service sworn by a process server on 11th January 2005, the process server stated he received the summons and copy of plaint in duplicate from the respondent's advocates on 23rd December, 2004 for service but after making several attempts on different occasions to serve the appellants, he was unable to serve them and so he returned the summons to the court unserved. There is no evidence of the alleged attempts, when they were made, where they were made, and how the same process server identified the residence and/or place of work of the appellants. That is why we say that affidavit was non-convincing. However, be that as it may, acting on the allegations in that affidavit, the respondent, in a chamber summons dated 11th January 2005, sought leave of the court to serve summons to enter appearance by substituted service by way of advertisement. We need to add here that the affidavit in support of that application for leave to serve the appellants by substituted service, referred to only one defendant. That application was placed before the superior court which readily granted the leave required and an advertisement was placed in the Kenya Times Issue of Monday 4th April, 2005.

That having been done, the respondent, on 17th May 2005 filed a Request for Judgment. It read:-

"***REQUEST FOR JUDGMENT***

Under Order 1XA Rule 3 (2) of the Civil Procedure Rules.

The plaintiff herein is requesting for judgment against Bharatkumar Nathalal Shah & Vipinkumar Nathalal Shah the defendants herein who has (sic) failed to enter appearance in due time. This request is for interlocutory claim, cost and interest as prayed for in the plaint.

Dated at Mombasa this 13th day of May 2005.

Stephen Oddiaga & Company

Advocates for the plaintiff."

Three days later, and to be precise, on 20th May 2005, the Deputy Registrar entered interlocutory judgment as was prayed for that letter, notwithstanding that the request for judgment was made under a wrong order. That is a matter for our further consideration later in this judgment. On 2nd June 2005, the matter was listed for formal proof on 25th August 2005. Hearing notice was to be issued for the same but on that day, 25th August, the formal proof did not proceed. It proceeded on 26th August 2005 when the record shows that it was consolidated with HCC 277 of 2004 on grounds that the original property the respondent sought to be restored to its original owner was plot No. 55 which was after the alleged transfer to the appellants, was subdivided into two plots namely Plot No. 733 and Plot No. 734. The suit No. 277 of 2004 was brought on claim of Plot No. 734 whereas HCC No. 276 of 2004 was in respect of Plot No. 733. After the evidence of the respondent, in a judgment delivered on 16th September, 2005, Mwera J. allowed the prayers of the respondent with costs and ordered that the appellant's title be revoked; the land registrar to accordingly rectify the register so that the original No. 55 is reflected as the property of the

respondent. As we have stated, that was the judgment on formal proof. There is nothing on record to show whether the hearing notice ordered to be issued by the Deputy Registrar when the formal proof date was taken, was actually served upon the appellants.

In May 2006, the appellants filed chamber summons dated 3rd May 2006. In that chamber summons the appellants sought orders that:-

"***(a) The judgment entered in default of appearance against Bharatkumar Nathalal Shah and Vipinkumar Nathalal Shah in High Court Civil Case No. 276 of 2004 be set aside.***

(b) Time be provided for filing of defence.

(c) Costs be provided for."

That application was premised on six grounds which were that:-

"***1. The summons herein were never served on the defendants;***

2. The defendants did not receive the notice of intention to sue nor any posted intimation of the suit;

3. Service was done through the Kenya Times Newspaper, a paper of limited circulation, without a specific order thereof being sought;

4. The 1st defendant died prior to the institution of this suit;

5. The 2nd defendant and executors of the 1st defendant have a good defence to the claim herein.

6. Other reasons to be adduced at the hearing of this application."

The affidavit in support of that application was sworn by Vipinkumar Nathalal Shah and he stated inter alia in that affidavit that Bharatkumar Nathalal Shah passed on, on the 20th October 2004 well before the suit was instituted. Copy of Grant of Letters of Administration and confirmation was annexed to the affidavit. He added at paragraph 7:-

"***That I verily believe that I have a good defence to this suit. I annex hereto a draft copy of the same and mark it as exhibit "VVS 2". I therefore pray that application be allowed with costs."***

The application was opposed and in an affidavit in reply to the appellants affidavit, the respondent maintained that he was the rightful owner of the suit properties and that he had, as by the time the application was made, transferred the property to a third party and that the death of one of the people sued before the suit was filed could not affect the outcome of the suit as both appellants were registered as owners jointly and therefore orders issued against the living party would automatically affect the deceased's rights over the subject property. Thereafter application to join the third party to whom the property had been transferred as stated by the respondent in his replying affidavit was made and that is how the second respondent Coastland properties Limited came into this matter. After some other non consequential applications were filed, the application by the appellants seeking to set aside the ex-parte judgment was set down for hearing before the superior court (Sergon J.) who, in a ruling dated and delivered on 30th March 2007 dismissed it stating:-

"***I find therefore that the defendants were properly served by substituted service by way of advertisement and that the duo neglected to enter appearance. Consequently, the ex-parte judgment was properly entered hence I see no reason to set aside the same. It has been argued that the suit against the 1st defendant is a nullity in view of the fact that at the time of giving (sic) suit the 1st defendant was dead. That may be so but the provision of Order 1XA rule 10 of the Civil Procedure Rules cannot be involved (sic) to make such a finding.***

Since the Court's jurisdiction was not properly involved I decline to make a decision on it."

That is the ruling that prompted this appeal. The appellants felt aggrieved by that decision and have come to us on a first and last appeal citing seven grounds of appeal which are that the learned Judge failed to appreciate that by reason of the demise of the first appellant prior to the institution of the suit, all proceedings flowing therefrom were void *ab initio* as there would be no lawful or proper service of summons so as to justify the preliminary and final decree in the matter; that on that ground alone, the learned Judge ought to have set aside the default judgment *ex-debito justitiae;* that the learned Judge misdirected himself by equating knowledge (per advertisement) of the existence of a suit with due and proper service of summons; that he failed to realize that there were no attempts to serve the summons according to the best service rule and no proper basis was available for substituted service; that the learned Judge failed to consider the defence set out by the appellants in the draft defence, and that the learned Judge failed to appreciate that there was no evidence whatsoever of ownership of the suit property viz- Kwale/Galu Kinondo/55 by the respondents.

In his submission before us, Mr. Shah, the learned counsel for the appellants, on the main, emphasized the grounds set out in the grounds of appeal and urged us to allow the appeal as in any case the request for judgment was unprocedural and made pursuant to a wrong rule. Mr. Oddiaga learned counsel for the respondent Omar Said Mwatayari conceded that the judgment as against the first appellant who was dead before the suit was instituted was not proper and should be set aside. However, as to the second respondent; he maintained that the interlocutory judgment was regular and should stand. He submitted further that the issue of the request being unprocedural was not in the memorandum appeal, and that the appellants had not submitted at any stage that they had an arguable defence and so he urged us not to consider that aspect. Mr. Kadima for the second respondent maintained that his client was an innocent purchaser for value without notice who bought the property subsequent to a court order from the first respondent.

We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned Judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted that he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead whereas paragraph 2 of the plaint he allegedly verified stated:-

"***The first Defendant is an adult (sic) of sound mind residing and working for gain at Nairobi. Service of summons in this suit shall be effected through the plaintiffs advocates office."***

That alone was, in our view, enough to cause the superior court Judge to act even *suo moto in* the matter. In fact, this was enough to cause him to set aside the *ex-parte* judgment for it was not sought with clean hands. It goes without saying that dead people cannot read advertisements and thus could not be said to have been served. As regards the first defendant, the interlocutory judgment could not be a regular judgment.

Secondly, *the* request for judgment was applied for pursuant to ***Order IX rule 3(2)*** of the Civil Procedure Rules. That rule states as follows: -

"***Where the plaint makes a liquidated demand together with several other claims, and the defendant fails, or all the defendants fail, to appear as aforesaid, the court shall, on request in Form No. 26 of Appendix c, enter judgment for the liquidated demand and interest thereon as provided by sub rule (1) but the award of costs shall await judgment upon such other claim."***

In the plaint that was before the superior court, there was no liquidated demand. Mr. Oddiaga submitted that the issue as to whether the request for judgment was procedurally proper was not raised in the memorandum of appeal. He is right to an extent as indeed it was not specifically raised in those terms. However, we feel as the irregularity of the interlocutory judgment has been raised and as the record that was before the Judge already showed that the request was not made pursuant to proper provisions of the Civil Procedure Rules, it was one of the matters the learned Judge should have considered. As it was indeed not raised in the grounds of appeal before us, we leave it at that.

Lastly, the appellant in his memorandum of appeal complains at paragraphs 6 and 7 as follows:-

"***6. The learned Judge failed to take into account the said solid defences set out by the appellants in the draft defence.***

7. The learned Judge failed to appreciate that there was no evidence whatsoever of ownership of the suit property Kwale/Galu /Kinondo/55 by the respondents."

When the chamber summons seeking the setting aside of the ex parte judgment was filed, a draft defence was annexed to it. When the application came up for hearing before the superior court, Mr. Shah for the applicants started his submissions by saying:

"***I rely on the facts deponed on the affidavit and the grounds set out in the supporting affidavit."***

And at the end of his submissions in-chief he submitted:

"***The suit involves RLA. property. I have a good defence."***

Mr. Oddiaga in reply relied on the replying affidavit which raised the merits of the first respondent's case and stated at paragraph 12 as follows:-

"***That I believe the defendants are only coming to court now to frustrate the otherwise legal process by myself and they have no claim at all furthermore the Draft Defence does not deny the issues raised in the plaint and I believe the said defence is not a good defence raising any triable issues."***

Thus whether Mr. Shah in his submissions before us did not touch on the proposed defence, is neither here nor there. It was a matter before the trial court. It was averred and left for the learned Judge to consider and further, before us, it was one of the grounds raised in the memorandum of appeal and was not abandoned when the appeal was heard. The principles to be considered by the court in determining whether or not to set aside a default judgment are well settled. Where it is established that there was no proper service, the court has no option but to set aside such judgment *ex debito justitiae* (see ***Kanyi Navan vs. Velji Ramji*** (1954) 21 EACA 20. In such a case the court has no jurisdiction other than to set aside the ex parte judgment. Where it is established that the defendant was served, the court has unfettered discretion to set aside the default judgment, provided that in so doing, no injustice is occasioned to the opposing party. Such discretion is intended to avoid injustice, or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice – see ***Shah vs. Mbogo*** (1967) EA 116. Of course the discretion given to the court, though unfettered, must, like all such discretions be exercised judiciously and not upon the whims of the court nor capriciously. However, in a case where the summons was properly served and therefore the ex-parte judgment is regular, the court, in the exercise of its discretion does not end there. It is enjoined, in a case where draft defence is annexed in the application, to consider that draft defence and if having considered it, it comes to a conclusion that the draft defence raises matters that require the court's investigation or put otherwise if the draft defence annexed to the application for setting aside raises arguable issues or triable issues, then the court is required to exercise its discretion in favour of setting aside the ex parte judgment even though it is regular. In the case of ***Tree shade Motors Limited vs. D.T. Dobie and Company (K) Limited and Joseph Rading Wasambo,*** Civil Appeal No. 38 of 1998, this Court stated:-

"***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. When 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 Automat Ltd vs. Rafiki Enterprises ltd (civil Appeal No. 220 of 1995 (unreported). "***

In the matter before us, though there was a draft defence annexed to the application as we have stated and the question of the arguability of the proposed defence was raised in the grounds before the court and in the replying affidavit and also in the submissions by the advocates before the court, the learned Judge never considered it necessary to consider it or even refer to it. That was an error on point of law. On our part, we have looked at the draft defence. We have considered paragraph 4 of that draft defence. Without saying more, we do not consider the proposed defence frivolous.

In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead. Judgment of Mwera J delivered on 16th September 2005 and ruling of Sergon J dated 30th March 2007 and subsequent orders are set aside. The ex-parte judgment against the second respondent is also set aside. The second respondent is to file defence to the suit within fifteen (15) days from the date hereof. The first respondent to pay to the second appellant costs of the application by way of chamber summons dated 3rd May, 2005 and of this appeal. Judgment accordingly.

Dated and delivered at ***MOMBASA*** this 16th day of October, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR