



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL NO. 23 OF 2017
(ORIGINALLY NAIVASHA HIGH COURT CIVIL APPEAL NO. 51 OF 2015)

MARULA ESTATES LIMITED APPELLANT

V

KIRUR ARAP MOSIRE RESPONDENT

(Being an appeal from the ruling of the Senior Resident Magistrate Naivasha, Esther Kimilu, in Naivasha Chief Magistrate's Civil Case No. 370 of 2014 delivered on the 9th June, 2015)

JUDGMENT

1. After an *ex-parte* hearing, the trial Court rendered judgment on 24 February 2015 in which judgment was entered for the Kirur arap Mosire (present Respondent) and he was awarded general damages of Kshs 200,000/- and special damages of Kshs 5,000/-.
2. The Respondent commenced execution proceedings and this prompted the Appellant to move Court through an application dated 15 April 2015.
3. The Appellant had sought in the application orders
 1. ...
 2. That Direct O. auctioneers be restrained to sell, or to offer for sale the defendants motor vehicle KBU 050L.
 3. The *ex-parte* judgment entered against the defendant and all the consequential orders be set aside and the defendant be granted leave to defend the suit.
 4. The defendant/applicant be granted leave to deposit a sum of Kshs. 300,000 in court as decretal sum. Costs and Auctioneers fees.
 5.
 6. ...
4. On 9 June 2015, the trial Court dismissed the application dated 15 April 2015. The dismissal of the application triggered the instant appeal.

5. The Appellant filed a Memorandum of Appeal listing some 7 grounds of appeal to wit:

1. THAT the Trial Magistrate was erroneous by making a finding that the defence annexed to the motion dated 15th April 2015 did not raise triable issues while as fraud and negligence had been pleaded as against the plaintiff's suit.

2. THAT the Trial Magistrate was erroneous in Law and fact by making a finding that there was proper service of the summons which had been denied.

3. THAT the Trial Magistrate failed to appreciate the fact that the plaintiff/respondent could be compensated by way of costs and set aside the ex-parte judgment.

4. THAT the Trial Magistrate failed to adhere to the Principles of Natural justice, the rule of Law as enshrined in the constitution in that every party has a right to be heard.

5. THAT the Trial Magistrate failed to appreciate there was no undue delay on the part of the Appellant to move the court once they were aware of the ex-parte judgment.

6. THAT the Trial Magistrate failed to appreciate the fact that a sum of Kshs. 300,000/= had been deposited on 21st April 2015 by the appellant as security for the ex-parte judgment and costs, which amount is still being held by the court.

7. THAT the dismissal of the motion dated 15th April 2015 was draconian and not proper in the circumstances as denying a citizen the right to be heard ought to be a last resort.

6. On 9 March 2017, the High Court in Naivasha directed that the appeal be transferred to this Court for hearing and determination, and this Court gave directions as to the manner of proceeding with the hearing on 21 June 2017.

7. Towards this end, the Appellant filed written submissions on 21 July 2017 while the Respondent filed his submissions on 23 August 2017.

8. The Court has keenly perused the record of appeal and the submissions.

The law

9. One of the most cited authorities on setting aside an *ex-parte* judgment in our jurisdiction is *Shah v Mbogo* (1967) EA 116 and the principles are that in setting aside, the Court has unlimited discretion, the main concern being to do justice to the parties.

10. Where the Court finds that there was no proper service of Summons, the Court has no discretion but has to set aside the judgment (see *Kanji Naran v Velji Ramji* (1954) 21 EACA 20).

11. The determination of this appeal should therefore primarily turn on the question whether the Respondent served the Summons and Pleadings upon the Appellant.

12. From the record, there is an affidavit of service sworn by Joseph Kalinde Manzi, a process server, and filed in Court on 7 October 2014, deposing that he served a Human Resource Manager called *Catherine* and that the said *Catherine* stamped and signed at the back of the summons (the original summons stamped and signed was annexed to the affidavit of service).

13. However, and according to a supporting affidavit sworn by Susanna Ureni, Administration and Public Relations Manager with the Appellant, it was deposed that a *Catherine* who was purportedly served had no authority to receive summons and that her signature (Susanna) was forged. It was also deposed that the said *Catherine's* whereabouts were not known after she left employment.

14. The Court has noted that the Appellant did not dispute or question the validity of its stamp embossed on the original of the Summons.

15. The Court also notes that the Appellant failed to deny categorically that it had a Human Resource Manager by the name *Catherine*. What the Appellant appears to question are the particulars of the person who identified the said *Catherine*.

16. Despite disowning the capacity of the said *Catherine* to receive service, it did not expressly disclose the designation of the Catherine Njeri Waweru or exactly when she separated with the Appellant, to explain why she did not swear any appropriate affidavit.

17. In the view of the Court, it was incumbent upon the Appellant to prove or demonstrate that the *Catherine* who accepted service did not fall within the categories of persons who are contemplated as competent to receive service on behalf of a corporate body. It failed to discharge that burden.

18. Considering the foregoing, the Court can conclude that the service on the Appellant was competent and proper and that it was afforded an opportunity to be heard, but squandered the opportunity by failing to enter appearance, file a Defence and attend Court to make its case.

19. The trial Court, in the view of this Court did not exercise its discretion arbitrarily or injudiciously in reaching the findings that it did.

20. Before concluding, the Court notes that the decretal amount which was deposited into Court was long ago released to the Respondent by the trial Court and the instant appeal may serve no more than an academic purpose as there was no suggestion that the monies would require to be refunded.

21. The Court in effect finds no merit in the Appeal and orders that it be dismissed with costs.

Delivered, dated and signed in Nakuru on this 1st day of December 2017.

Radido Stephen

Judge

Appearances

For Appellant Mr. Kagucia instructed by Kagucia & Co. Advocates

For Respondent Wanga Amboko & Co. Advocates

Court Assistants Nixon/Martin