Kamau v Miringu (Civil Appeal E046 of 2021)
[2024] KEHC 8373 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8373 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E046 OF 2021

JK NG'ARNG'AR, J

JUNE 26, 2024

BETWEEN

AMOS CHUMBI KAMAU ..... APPELLANT

AND

ALISON NJOROGE MIRINGU ..... RESPONDENT

(An appeal from the ruling and order of the Chief Magistrate's Court at Thika (E. Riany, SRM.) delivered on 25th March 2021 in CMCC No. 506 of 2014)

JUDGMENT

1. Vide a plaint dated 3rd July 2014 and filed on that day, the respondent sued the appellant contending that by sale agreement dated 17th December 1999, the respondent purchased plot no. 389 from the appellant at Witeithie Gwaka Investment Company for a sum of Kshs. 104,800,00. The respondent contended that he paid the full prices and by acknowledgment dated 8th May 2013, the appellant surrendered the plot to the company and was given a replacement plot being plot no. 1088. It was agreed that the respondent does take the plot on condition that the appellant pays the difference of the purchase price at the current market value. In spite of that agreement, the appellant failed to heed to his obligations hence the suit. He urged the trial court to compel the appellant to heed to his obligations. The respondent further sought costs of the suit.

2. Being satisfied that service upon the appellant was duly complied with the rules of the court, the court entered interlocutory judgment in favor of the respondent on 6th November 2018 for reasons that in spite of service of the summons, the appellant had failed to enter appearance and file his statement of defence.

3. The appellant got wind of the judgment. Consequently, he filed an application dated 26th March 2020 seeking to set aside the said judgment and resultant decree. The application was drawn and filed by Kiarie Njuguna & Company Advocates for the appellant. He further sought to be granted

unconditional leave to defend. In support of his application, the appellant contended that he was never served with the plaint or summons; that the return of service of Samuel Karuga Wandai sworn on 21st October 2015 was marred with falsehoods; that they only became aware of the judgment when they received a letter dated 23rd January 2019; that they later came acres an application for execution on 14th March 2020; that the decree is incapable of execution as it is not the owner of the suit property; that he had a good defence and that the respondent was guilty of material non-disclosure.

4. In its ruling dated 25th May 2021, the trial magistrate found that the application lacked merit and was dismissed with costs. It is those findings that have precipitated the present appeal. The appellant filed a memorandum of appeal dated 26th March 2021 that raised eleven ground disputing the findings of the learned magistrate. In summary, the appellant complained that the trial court misapprehended the principles constituent in consideration of an application of this nature; that the averments by the appellant had not been controverted as they were unopposed; that there were no issues regarding negligence of an advocate; that the trial magistrate was biased for arguing the matter on behalf of the respondent; that the learned magistrate failed to appreciate the facts and the appellant's submissions; that order 9 rule 9 of the Civil Procedure Rules did not apply and that the judgment was incapable of execution. For those reasons, the appellant urged this court to allow the appeal by setting aside the ruling of the trial court. The appellant further prayed that the judgment be set aside to pave way for a defended suit hearing. He finally prayed for costs of the suit.

5. The appeal was heard on the basis of the parties rival written submissions. The appellant's submissions dated 31st July 2023 argued that the trial court misapprehended the issues since she spoke at length on the negligence of an advocate; a fact that was not in dispute. He submitted that the trial court ought to have narrowed itself to establish whether service of summons had been properly done. He cited several decisions to contend that it was the duty of the trial court to sustain rather than discharge disputes at an interlocutory stage and consider the defence that raised triable issues. Secondly, the appellant submitted that the respondent never opposed the application since he never filed a replying affidavit. That they failed to furnish evidence that service was proper and as such, that issue was unopposed. That their queries to the respondent were never responded to and that the COVID-19 pandemic further frustrated their positive actions. On Order 9, rule 9 of the Civil Procedure Rules, the appellant submitted that it was not an issue for determination and should thus not have formulated a basis for the court's findings. He added that his submissions were not considered and as such, suffered a miscarriage of justice. Finally, he submitted that since the plot was not under his name, the decree was incapable of enforcement.

6. The respondent on his part filed his written submissions dated 29th August 2023 to submit that the arguments in support of the application were farfetched and lacked credibility as to allow the application. That it was based on falsehoods and wrong presumptions and could not be the basis for setting aside a judgment. He added that service of the summons was proper as could be discerned from the return of service dated 21st October 2015. He observed that the letter of 5th February 2019 annexed to the application and served upon the appellant contained the case number and the parties to the suit. As such they were well aware of the suit in 2019 and went into slumber to only file the application in 2021. He added that the judgment was proper and ought not to be set aside. That litigation must come to an end and the respondent ought to be allowed to enjoy the fruits of its judgment. He thus urged this court to dismiss the appeal with costs.

7. I have considered the impugned ruling, examined the memorandum of appeal and analyzed the law. This is an appeal against the trial court's exercise of its discretionary powers in setting aside an ex parte

judgment. In Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976, it was held that:

> " It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

8. The issue for determination is whether the trial court injudiciously exercised its discretion to deny the appellant leave to defend suit and in the process, failed to set aside its judgment. The principles enunciated in an application for setting aside have been well settled in our jurisdiction. In Patel vs. EA Cargo Handling Services Ltd (1974) EA 75, the court held that:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

9. In the case Mohamed & Another vs. Shoka (1990) KLR 463, the court set out the tenets a court should consider in entering interlocutory judgment to include:

   i. Whether there is a regular judgment;

   ii. Whether there is a defence on merit;

   iii. Whether there is a reasonable explanation for any delay;

   iv. Whether there would be any prejudice.

10. It is also critical to distinguish between a regular and irregular judgment. The same was prominently addressed by the court in Mwala vs. Kenya Bureau of Standards EA LR (2001) 1 EA 148 where it was distinguished as follows:

> " To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debit justitiae for a court should never countenance an irregular judgment on its record.

> ... Judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

11. Following the filing of the suit, the respondent herein served the appellant with summons to enter appearance. After lapse of the period to enter appearance, the respondent filed a return of service sworn on 5th February 2021. It disclosed how the process server effected service upon the appellant. The trial court was satisfied that service was proper and in the absence of a memorandum of appearance and a statement of defence, the suit proceeded undefended. These were also the findings of the court hearing the application. I have also looked at the record and arrive and the same conclusions. The appellant has also failed to demonstrate how the depositions set out in the return of service were false. Consequently, the circumstances herein demonstrate that the judgment was regular and as such setting aside, was not applicable ex debito justitiae.

12. The appellant attached a draft defence which raised several issues. In my view, those issues were triable as to amount to a proper defence. However, in ascertaining discretion as was established in Mohamed & Another vs. Shoka (supra), all tenets must be conjunctively established so that all conditions precedent must be met and not just one. In that vein, I noticed that though judgment was entered on 6th November 2018, the application was only lodged in 2021. The appellant stated that it was not aware of the suit as it was never informed of it.

13. I have already established that by virtue of the return of service, the appellant has failed to established how he was not properly served. What is more startling to me is the fact that in his own supporting affidavit to the application, the appellant conceded that he was served with a letter from the respondent's counsel sometime on 5th February 2019. The said letter disclosed the case number and parties; critical information regarding this matter. Instead of vigilantly taking steps to establish the position in the matter, the appellant sat duck, blamed the COVID 19 pandemic and only filed the application in 2021. In my view, the appellant was a sleeping dog and is the author of his own misfortune. Why didn't he act with haste if he was genuinely aggrieved by the trial court's conduct?

14. The appellant has thrown several excuses but none establish that he is a person of good faith. He entered into the arena of a blame game and could not really point out what exactly happened. The appellant was so desolate that he even misled the court alluding to the fact that the respondent had not filed a response to the application when in essence there is on record a replying affidavit dated 5th February 2021. I thus find that there is no reasonable explanation for the delay. Suffice to add that the respondent will suffer prejudice if the suit is allowed to proceed at this juncture. See execution is a lawful process and its delay is an affront to justice. No explanation has been preferred as to delay the respondent to enjoy the fruits of his judgment.

15. Finally, the appellant lamented that the aspect of order 9, rule 9 of the Civil Procedure Rules ought not to have formulated as an issue for determination because those issues were not contested. It provides as follows:

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

16. The above provisions portend that where judgment has been entered and a party has either appointed a new firm of advocates or a firm of advocates to act for it on a first time basis. Whatever the case, the provisions necessitate that a party must obtain leave of the court before seeking any other orders. In matters of practice, parties file an application with omnibus prayers, leave to come on record being part of those prayers.

17. The drafters of those rules had good intention and good reason in providing this rule. Couched in mandatory terms, it is not intended to be defeated simply because it was not raised by the party's adversary. Rules of procedure are not intended to succor a litigant that elected to draft poor pleadings and expected to benefit from that indolence. This court must uphold those rules and not be seen as a means to provide an escapist mechanism. It would open a floodgate of disputes and defeat the very essence of the draftsmanship of the rules.

18. The effect of not having leave is that the appellant could not seek for any orders as he had no audience. That application was incurably defective and hopelessly bad. In the end, I have said enough to conclude that the application is not only lacking in merit but also incomplete. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:-

Njugune for the Appellant

No appearance for the Respondent

Court Assistant- Peter Ong'idi