



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 74 OF 2010

JOYCE M'KUURA.....1ST APPELLANT

MUKOMAU M'KUURA.....2ND APPELLANT

MOSES MUTHEE M'KUURA.....3RD APPELLANT

VERSUS

JUSTUS KABAYA.....RESPONDENT

J U D G E M E N T

The memorandum in this appeal dated 19th July, 2010 contains the following grounds and objections:-

1. **The Learned Magistrate erred in Law and in fact in finding that the Appellants' and/or each of them had been served to appear for hearing.**
2. **The Learned Magistrate erred in Law and in fact in blaming the appellants for not bringing the application in good time and not appreciating that the Appellants had no way of knowing of the ex-parte Judgment until execution took place.**
3. **The Learned Magistrate failed to appreciate and totally failed to understand what the Appellants' defence was as the Respondent had fraudulently acquired new numbers for their parcels of land since the area was under Adjudication and there were no permanent numbers to the parcels of land.**
4. **That Ruling of the Learned Magistrate is bad in Law and against the weight of the material paced before the Court.**

The appellant submitted as follows:

1. **The trial Court had a duty to consider the evidence of both sides to establish the truth. They disputed that they were served. They argued that the trial Court should not have been in a hurry to have the “case to proceed Ex-Parte as Defendants are absent and were properly served.”**
2. **The trial Court had wrongly blamed the appellants for bringing their application late even though they did not know that an exparte Judgment had been delivered against them. This, to them, explains why their applications dated 1st March, 2007 and 27th March, 2007 respectively were filed at that time as they only learnt about the judgment after warrants of**

arrest had been irregularly issued for contempt of court. The judgment was delivered on 9th August, 2006.

3. **The Learned Magistrate failed to appreciate and totally failed to understand what constituted the Appellant's defence as the Respondent had fraudulently acquired new numbers which were ascribed to the appellants parcels of land.**
4. **The ruling of the Learned Magistrate was bad in law and against the weight of the material placed before Court. It was further argued that the Learned Magistrate had failed to exercise her discretion properly and failed to be guided by the law applicable in cases of setting aside ex-parte Judgments/Rulings.**

The Appellant proffered the following authorities:

1. **Meru Civil Appeal No.111 of 2002 –**

Meme M'Ameru versus Fridah Karimi.

2. **Eldoret Civil Appeal No. 62 of 2003 –**

Peter Wekesa versus Peter Wangusi Wasike.

3. **Nairobi Civil Appeal No. 59 of 2006 –**

Ashwinchand Hirji Shah & Others versus Lucy Wairimu Mwaura.

4. **Evidence for Magistrates, pages 126 and 127**

The Respondent Submitted as follows:

1. **The appeal is a sham and an abuse of the court process. It brings in new evidence and more so the claim that there was an attempt to steal the appellants' land is a new matter which should be ignored.**
2. **The appeal concerns a ruling of the Learned Magistrate who was prayed upon to set aside an existing judgment of another magistrate and opined that the Learned magistrate could not proclaim superior jurisdiction over the other magistrate. The appellants should have appealed against the judgment and in case they were late they should have sought leave to appeal out of time. They further argue that the Appellant is conflating issues by bringing in issues which seem to be challenging the judgment and the ruling and by also alleging fraud when they know that the 3rd Party, the Adjudication Officer is not a party in these proceedings.**
3. **As the Appellants allege that their parcel of land is Number Upper Athiru/Gaiti/7746 then why should they get bothered with numbers Lower Athiru/Gaiti/1656 and 1657 which are occupied by the Respondent?**
4. **The respondents insist that service upon the appellants had been properly executed. They also took issue with, among other procedural issues, the delay of 7 months before the appellants filed an application to set aside the judgment.**
5. **The Trial Magistrate gave sufficient weight to all submissions before delivering her ruling.**
6. **The authorities proffered by the appellants were not helpful at all to their appeal as the circumstances were different and regarding handwriting, the authority was from an unknown source.**

The Respondent did not proffer any authorities.

The point for determination in this Appeal is one. It is whether or not I find it just and reasonable to set aside the ruling of the learned Senior Resident Magistrate in Maua dated 7th July, 2010.

I have considered the averments of the parties, their submissions and the authorities proffered. The Court of Appeal in the case of **Karatina Garments Ltd V Nganarua (1976) KLR 94**, opined that it was proper for a subordinate court to enquire into the reasons why in that case the Appellants' counsel was not present in Court when the hearing of the suit proceeded ex- parte. It expressed itself in the following manner:

“We have said time and again that in normal circumstances, the court should lean towards a policy of deciding cases on their merits rather than encourage ex-parte judgments based on procedural technicalities.”

I find that there are issues such as the dispute regarding the parcel numbers of the parcels of land in question. There is also the issue of whether the appellants had been properly served before the ex-parte proceedings took place. I, indeed, find that there are substantial matters which could only be determined on merits.

Although the court has unfettered discretion to set aside or vary exparte Judgments/Rulings, that discretion must be exercised reasonably, uncapriciously and judicially. I am persuaded that it has been demonstrated that the suit herein merits to be heard substantively. I am also persuaded that the trial magistrate should have considered reasons for the absence of the parties before the court proceeded to hear the suit ex-parte.

In the circumstances, I set aside the Subordinates Court Ruling dated 7th July, 2013. The suit in the Lower court is hereby reinstated for hearing.

I award costs to the appellant.

Delivered and dated at Meru this 30th day of September, 2013 in the presence of:

Cc Mwonjaru/Daniel

Rimita for Appellants

Ondieki h/b for respondent

P. M. NJOROGE

JUDGE