



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND OF KENYA AT KERICHO**

**CIVIL APPEAL NO. 3 OF 2018**

**WILLY KIPKOECH KIRUI (Suing as the**

**Legal representative of JOHN K. ARAP ROTICH).....APPELLANT**

**VERSUS**

**PETER KIPLANGAT RONO.....1<sup>ST</sup> RESPONDENT**

**MANINI AUCTIONEERS &**

**GENERAL AGENCIES LIMITED.....2<sup>ND</sup> RESPONDENT**

**RICHARD KIBII MUTAI.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. S.M.S Soita Ag CM delivered on 28<sup>th</sup> May 2014 in Kericho CMCC No. 106 of 2014)*

**JUDGMENT**

**INTRODUCTION**

1. The Respondent filed a plaint before the trial court claiming that by an agreement dated 10<sup>th</sup> May 2012, the Respondent and the Appellant entered into an agreement for the sale of Parcel No. Kericho/Kipchimchim/2196 (hereinafter referred to as 'suit property') measuring 1 acre for a consideration of Kshs 1,200,000/-. The Respondent paid a deposit of Kshs 500,000 and the balance was to be paid after the Appellant had obtained the requisite consent for the transfer. The Respondent bought building materials amounting to Kshs 420,600/- and delivered them on the suit property.

2. The Appellant was served with notice to enter appearance according to the affidavit of service dated 23<sup>rd</sup> April 2014 and when he failed to enter appearance and file his defence, the Respondent on 23<sup>rd</sup> April 2014 requested for default judgment to be entered against him. The trial court entered judgment against the Appellant for the liquidated sums claimed.

3. On 26<sup>th</sup> August 2014 the Respondent filed a Notice of Motion seeking stay of the intended public auction and setting aside the ex-parte proceedings leading to the default judgment. The Respondent also sought leave to defend the suit. The trial court struck out the application in its ruling dated 24<sup>th</sup> September 2014.

4. The Appellant now appeals against the default judgment on the following grounds;

*1. The Learned Magistrate erred in law and in fact by entering judgment against the defendant who until his death was both*

*mentally and physically unsound and not capable of following the proceedings and defending himself.*

*2. The Learned Magistrate erred in law and in fact by continuing with the proceedings against the defendant even after making a finding that the defendant was indeed mentally incapacitated.*

*3. The Learned Magistrate erred in law and in fact by entering summary judgment for special damages which had not been formally proved.*

*4. The Learned Magistrate erred in law and in fact by approving and ratifying the sale by the 2<sup>nd</sup> Respondent of the Defendant's portion of land known as Kericho/Kipchimchim/2192 measuring 4 acres to the 3<sup>rd</sup> Respondent yet the court had approved the sale of one (1) acre to satisfy the decretal amount.*

*5. The Learned Magistrate erred in law and in fact by approving and ratifying the sale by the 2<sup>nd</sup> Respondent of the Defendant's whole portion of four (4) acres land known as Kericho/Kipchimchim/2192 to be the 3<sup>rd</sup> Respondent without any valuation report.*

*6. The Learned Magistrate erred in law and in fact by approving and ratifying the sale by the 2<sup>nd</sup> Respondent of the Defendant's whole portion of four (4) acre land known as Kericho/Kipchimchim/2192 to be the 3<sup>rd</sup> Respondent for a paltry price of Kshs 2,000,000/- yet the market value for the land then was Kshs 12,000,000/-.*

*7. The Learned Magistrate erred in law and in fact by approving the sale by the 2<sup>nd</sup> Respondent of the Defendant's whole portion of four (4) acre land known as Kericho/Kipchimchim/2192 to the 3<sup>rd</sup> respondent without proof that the balance that remained after satisfying the decretal amount was ever paid to the Defendant.*

*8. The Learned Magistrate erred in law and in fact by approving the sale of the Defendant's land obvious conclusion and fraud by all the Respondents notwithstanding.*

#### **APPELLANT'S SUBMISSIONS**

5. Learned counsel for the Appellant submitted that according to the medical reports the Defendant did not have the capacity to be sued as he was mentally incapacitated. It was therefore not possible to serve the deceased and urged court to set aside the judgment. He submitted that the case was to proceed to formal proof in respect of special damages of Kshs 420,600/- pleaded in the plaint. It was his contention that the auctioneer sold the entire parcel of land as opposed to the trial court's notification of sale issued on 26<sup>th</sup> June 2014 giving direction for the sale of 1 acre out of the suit property. He further submitted that the suit property was sold at undervalue as the amount of Kshs 2,100,000/- is not reflective of the market value of land within the township area.

#### **RESPONDENT'S SUBMISSIONS.**

6. Learned counsel for the Respondents submitted that the Appellant's application before the trial court for setting aside the ex-parte judgment had an affidavit in support thereof sworn by George Kirui, who had not been appointed guardian ad litem to represent the deceased as per the dictates of **Order 32 (3) & (15) of the Civil Procedure Rules, 2010**. He further submitted that the collusion and fraud raised by the Appellant against the Respondents herein, Manini Auctioneers Limited and Richard Kibii Mutai are utterly misplaced as they were not parties to the primary suit. It was his contention that the question of setting the ex-parte could only be canvassed before the trial court and cited the case of **Kithu Mucamo v Edward Kagane [2019] eKLR**.

7. This being a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see **Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126**)

#### **ANALYSIS AND DETERMINATION**

8. The issue for determination is whether this court can entertain an appeal against a default judgment. The decree appealed against is at page 37 of the Record of Appeal. The Appellant was served with a Notice of entry of judgment as per the affidavit of service of

David Obara dated 30<sup>th</sup> May 2014. **Order 10 Rule 4(1) Civil Procedure Rules 2010** provides that;

*“(1) Where the plaintiff makes a liquidated demand only and the Defendant fails to appear on or before the day fixed in the summons or all the Defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the Defendant or Defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.”*

**Order 22 Rule 6 Civil Procedure Rules 2010** provides that;

*“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions herein before contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:*

*Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”*

9. The default judgment having been entered against the Appellant and notice of entry of judgment served, his only recourse was to make an application before the trial court to have the default judgment set aside.

10. The Appellant’s application before the trial court dated 26<sup>th</sup> August 2014 for setting aside of the default judgment was struck out. The Appellant did not appeal against the trial court’s ruling nor did it properly file an application for setting aside the ex-parte judgment, instead the Appellant has filed an appeal against the default judgment. In *Kithu Mucamo v Edward Kagane Kagoce case (supra)* the court observed as follows;

*“20. However, the Appellant has opted for a totally unorthodox method of obtaining relief against an ex parte judgment. As far as this court is concerned, it is the trial court which in the first instance has jurisdiction to set aside such a judgment. The appellate court can only handle an appeal against a refusal to set aside such an ex parte judgment by the trial court.*

*21. It is clear from the material on record that the Appellant has never applied for setting aside of the ex parte judgment before the trial court. The material on record indicates that the Appellant was made aware of such a remedy by the trial court. The Appellant has instead asked this court through his written submissions to set aside the ex parte judgment dated 21st December 2015. This court will not accede to such request for reasons already stated.”*

**Nanette K. Laughrey, Default Judgments in Missouri, 50 MO. L. REV.(1985)**, published in <https://scholarship.law.missouri.edu/mlr/vol50/iss4/7> engaged in the discussion on whether default judgments are appealable and stated as follows;

*“A default judgment cannot be directly appealed. In fact, no appeal is possible unless the defendant has first filed a motion to vacate the judgment with the trial court. The defendant can then appeal the trial court's ruling on the motion to vacate, but he cannot appeal the default judgment itself.”*

11. The application dated 26<sup>th</sup> August 2014 having been struck out by the subordinate court, I find that the appellant has not filed an appeal against the decision to strike out the said application. In the circumstances the appeal against the default judgment cannot be entertained.

12. In the end, I find that the appeal has no merit and it is dismissed with costs to the Respondents.

**Dated, signed and delivered via email this 30<sup>th</sup> day of July, 2020.**

**J.M ONYANGO**

**JUDGE**



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