Case Number:	Civil Appeal 15 of 2010
Date Delivered:	20 Dec 2013
Case Class:	Civil
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	John walter Onyango Otieno, Festus Azangalala, Sankale ole Kantai
Citation:	Amayi Okumu Kasiaka & 2 others v Moses Okware Opari & another [2013] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C. C.C. 11 OF 2008
Case Outcome:	Dismissed
History County:	Bungoma
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 15 OF 2010

BETWEEN

1. **AMAYI OKUMU KASIAKA**
2. **JAMES WANDERA**
3. **JOHN OMONGARI ……………………………………….. APPELLANTS**

AND

1. **MOSES OKWARE OPARI**
2. **PETER MANYURU IWUONI …………………………. RESPONDENTS**

(An appeal against the order of the High Court of Kenya at Bungoma (Muchemi J.)

dated 12th November, 2009

in

H.C. C.C. NO. 11 OF 2008

****

JUDGMENT OF THE COURT

This is an appeal against the ruling of the High Court ***(Muchemi J,)*** whereby the learned Judge declined to set aside an ex-parte judgment entered against the appellants, ***Amayi Okumu Kasiaka, James Wandera*** and ***John Omongari.***

The facts giving rise to this appeal are straightforward and are as follows:- By a plaint dated 18th February, 2008, the respondents, ***Moses Okware Opari*** and ***Peter Manyuru Iwuoni*** sought judgment against the appellants, primarily for eviction and mesne profits. They averred that they were registered as proprietors of land parcel numbers ***South Teso/Amukura/3176*** and ***3175*** respectively *(hereinafter " the suit land")* upon which the appellants had, about the month of August, 2006, without any colour of right and without the consent of the respondents, unlawfully encroached and illegally erected structures thereon. The respondents, in the premises, sought an order of eviction against the appellants and mesne profits from the time the appellants had encroached upon the suit land until determination of the suit.

The appellants did not enter appearance or deliver a defence. In the event, and on the application of the respondents, a formal proof was held before ***Mbogholi J*** who, on 10th February, 2009, entered judgment in favour of the respondents for the eviction of the appellants. The claim for mesne profits was declined. The respondents then executed the order of eviction.

On 22nd June, 2009 the appellants, in an application made substantially under ***Order IXA rule 10*** of the Civil Procedure Rules (then applicable), sought an order setting aside the said judgment. The affidavit in support of the application to set aside the judgment was sworn by ***Vincent Emayi Okasiaka*** alias ***Amayi Okumu Okasiaka,*** the first appellant, who was the 1st defendant before the High Court. He deponed *inter alia* as follows inter alia:

"7. That we were never served with summons to enter appearance, notice proceeding ***(sic)*** *execution and the bill of costs and the only return of service on the court file by* ***Caleb Sabatia*** *is totally false.*

8. …..

9. That the existence of this suit was reverted ***(sic)*** *to us on 19/5/2009 after the respondents had carried out demolition of our houses. Annexed as* ***VEO – 2*** *is a copy of the decree with remarks at the reverse page.*

10. That we were never served with any hearing notice despite this case being a land case. …...

14. That we have a defence to the respondents' claim on account that their father ***Joseph Manyuru*** *obtained the suit land through fraud and without consent of the Land Control Board pursuant to a purchase in 1971 but registered in his names on 7/8/2002. Annexed and marked* ***VEO – 4*** *is a copy of the letter to Land Registrar.*

15. That I have filed Busia ***HCCC No. 16 of 2009*** *seeking to revoke the respondents' and their father's title to suit land. Annexed as* ***VEO – 5*** *is a copy of the plaint.*

16. That the respondents have caused the applicant and his son to be charged vide Bungoma CM Criminal Case No. ***1236 of 2009*** *on a charge of forcible detainer. Annexed marked* ***VEO – 6*** *is a copy of the bond".*

Peter Manyuru Iwuoni, the 2nd respondent, swore an affidavit in opposition to the appellants' application and went in great detail regarding the manner in which the appellants were served with various Court processes after being pointed out by the 2nd respondent. He also deponed that the appellants had no defence to their claim.

The application was heard by ***F.N. Muchemi J*** as we have stated and the learned Judge found, with respect to service of summons to enter appearance, as follows:-

"Although service is disputed, the Applicants did not apply to call the process server for cross examination. This is the only way to test the genuiness ***(sic)*** *of the alleged service. In the absence of such examination, the Court will scrutinize the affidavit of the process server against the evidence of the parties contained in their affidavits. The dates of service of the orders of the Court do not reveal any concealment of the orders as alleged. The only issue worth consideration is that one Joseph Manyuru Iwuoni is alleged to have pointed out the appellants to the process server the first time they served.*

He is referred to as a neighbour by the process server. In the replying affidavit to this application, Peter Manyuru Iwuoni, the 2nd Respondent herein confirmed that he was the one who pointed out the Applicants to the process server. He also confirmed that the applicants are his neighbours.

…..

On close scrutiny of the affidavits of service, I find that they all contain vivid details. The date the time and place of service is shown. The mode of identification of the Applicants has been explained as required. The affidavits are therefore reliable and are satisfactory evidence of service."

With regard to whether the appellants had a bonafide defence to the respondents' claim, the Learned Judge said:-

"The Applicants failed to annexed (sic) a draft defence which is a requirement in order to show that they have triable issues which may be canvassed at the trial. The supporting affidavit only alleges that the 2nd Respondent obtained title to the land without the requisite Land Control Board consent. It is on this ground that the Applicants seek to challenge that title, It is important that the Defendants declare and demonstrate their legal interest in the suit premises which will give them a ground to stand on as they prepare to challenge the title of the Plaintiff. It is this kind of declaration and demonstration by the applicants which would raise triable issues. The court would then be persuaded to give the Applicants a chance to defend their interest. These elements are lacking in the pleadings of the Applicants in this application.

…..

It is my finding that the applicants have failed to satisfy the requirements needed in an application of this nature. They do not deserve the exercise of this Court's discretion to set aside the judgment."

The appellants have challenged the learned Judge's decision on seven grounds which were in effect reduced to three when ***Mr. Wanyama,*** learned counsel for the appellants, condensed them into three clusters at the hearing of the appeal. The first issue raised by Mr. Wanyama was that the learned Judge had improperly exercised her discretion in refusing to set aside the ex-parte judgment. In counsel's view the affidavit of service was defective and should not have been relied upon. The second issue raised by counsel was that the appellants had a bonafide defence which was disclosed in the affidavit in support of the application contrary to the finding made by the learned Judge in that regard. The last issue raised by counsel was that the learned Judge had erred in law and in fact in treating as incompetent the appellants' application to set aside the judgment on the basis that a general provision of the law had been invoked.

In his response to the appeal ***Mr. Kituyi,*** learned counsel for the respondents, submitted that the appellants had been properly served and the averments of the process server had not been challenged by cross-examination. Counsel also agreed with the learned Judge that the appellants did not demonstrate that they had a bonafide defence to the respondents' claim.

In our view, the substance of the appellants' complaints revolve around the exercise of the learned Judge's discretion which discretion is unfettered. See ***Shah -Vs- Mbogo [1967] EA 116.*** The parties did not agree on whether there was service of the summons to enter appearance upon the appellants. The learned Judge considered the affidavits of the parties and that of the process server and accepted the process server's averments in the affidavit of service, that the appellants had been served. The

learned Judge expressed the view that the affidavit of service could have been impeached if the process server was cross-examined, a course which the appellants failed to take.

The learned Judge was perfectly entitled to reach that conclusion and we detect no misdirection on her part nor can it be said with any colour of justification that she took into account irrelevant factors or did not take into account relevant ones in reaching her conclusion. We cannot also say that on the material before her, she arrived at the wrong conclusion on the issue of service.

So, the appellants sought to set aside, a regular judgment. It is trite law that once the Judgment is regular, before it is set aside, the applicant ought to show merits of the defence. The learned Judge herein seemed to have been of the view that a proposed defence should have been exhibited by the applicant as an annexture to the application to set aside the ex-parte judgment. We think that was a misdirection on the part of the learned Judge. In our view an applicant can still demonstrate his defence in an affidavit in support of the application. In the Supreme Court Practice, 1976, Vol 1, it is stated as follows:-

"Regular judgment. If the judgment is regular then it is an (almost) inflexible rule that there must be an affidavit of merits; i.e. an affidavit stating facts showing a defence as [to] the merits (Farden -Vs- Richter [1989] 23 QBD 124). 'At any rate whether such an application is not thus supported, it ought not to be granted except for some very sufficient reason' Per Huddleston, B. at 129 approving Hopton -Vs- Robertson [1984] WN – 77 , reprinted 23 QBD p. 126 (n) and see Richardson -Vs- Nowell BTLR 445"

The Court of Appeal in England considered the factors to be considered in an application such as the one which faced the learned Judge in ***Day -Vs- RAC Motoring Services Ltd [1990] 1 ALL ER 1007*** and held that the Court did not need to be satisfied that there was a real likelihood that the defendant would succeed, but merely that the defendant had bonafide triable issues.

Notwithstanding the misdirection alluded to above, the learned Judge considered the affidavit in support of the application and came to the conclusion that the averments therein did not raise any bonafide triable issue. The misdirection did not therefore result in failure of justice. It cannot be gainsaid that the learned Judge ought to have been satisfied that the appellants were not applying to set aside a regular judgment merely to delay the course of justice; on this aspect of the appellants' application the learned Judge said:-

"The supporting affidavit only alleges that, the 2nd Respondent obtained title to the land without the requisite Land Control Board consent. It is on this ground that the Applicants seek to challenge, that title. It is important that the Defendants declare and demonstrate their legal interest in the suit premises which will give them a ground to stand on as they prepare to challenge the title of the Plaintiff. It is this kind of declaration and demonstration by the applicants which would raise triable issues."

It is plain therefore that the learned Judge in declining to set aside the ex-parte judgment not only had the correct principles in mind, but also properly applied them. She appreciated that the applicants were not required to satisfy the court that their proposed defence would succeed. They had only to show that they had a bonafide triable issue. Having considered the material before her she found that the same fell short of demonstrating even one bonafide triable issue. She did not take account of a factor which she ought not to have, nor did she fail to take into account a factor which she ought to have taken into account. Her conclusion on this aspect of the appellants' case, in our view, cannot also be described as plainly wrong. She had an unfettered discretion and in our view exercised it properly.

The last issue raised by learned counsel for the appellants was that the learned Judge erred in law and in fact by treating the appellants' application as incompetent for having been brought under a general provision of the law. This issue, although initially raised by learned counsel at the commencement of his submissions, was not urged in the end. In our view, even if the same had been urged we would not have hesitated to dismiss it. We say so, because save for the statement of the learned Judge made at the end of her ruling that the application had been brought under a general provision of ***section 3 A of the Civil Procedure Rules,*** she nevertheless considered the application on the basis that the correct provisions of the Civil Procedure Rules had been invoked. The learned Judge made no finding that the application was incompetent. The last issue was therefore in our view not well taken and we are not surprised that it was not urged in the end.

For the above reasons, we have come to the conclusion that the learned Judge having exercised her unfettered discretion properly, we cannot interfere. We find no merit in this appeal and dismiss it with costs.

Dated and Delivered at Kisumu this 20th day of December, 2013

J.W. ONYANGO OTIENO

…..

JUDGE OF APPEAL

F. AZANGALALA

…..

JUDGE OF APPEAL

S. ole KANTAI

…...

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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