



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 27 OF 2013

DANIEL MUSAU MBITHI.....APPELLANT

VERSUS

RAEL KAVULI MUNYAO.....FIRST RESPONDENT

NZISA MUNYAO.....SECOND RESPONDENT

AND

TIMOTHY NGILA NZUKI.....3RD PARTY

PETER NZIOKI.....4TH PARTY

WILLIAM NYILU.....5TH PARTY

ANNA N.KIOKO.....6TH PARTY

ESTHER MUNYAKA.....7TH PARTY

TITUS KIVUVA MWILU.....8TH PARTY

BETH NZUKI.....9TH PARTY

(Being an appeal from the Ruling and subsequent Orders of the trial magistrate Resident Magistrate Hon. Ms. Kahuya LM (SRM) delivered on 7/9/2012 in Kangundo Civil Case No. 129 of 2006)

BETWEEN

DANIEL MUSAU MBITHI.....PLAINTIFF

VERSUS

RAEL KAVULI MUNYAO.....FIRST DEFENDANT

NZISA MUNYAO.....SECOND DEFENDANT

AND

TIMOTHY NGILA NZUKI.....3RD PARTY

PETER NZIOKI.....4TH PARTY

WILLIAM NYILU.....5TH PARTY
ANNA N. KIOKO.....6TH PARTY
ESTHER MUNYAKA.....7TH PARTY
TITUS KIVUVA MWILU.....8TH PARTY
BETH NZUKI.....9TH PARTY

JUDGEMENT

1. The appellant herein, vide a Complaint dated 9th August, 2010 claimed the sum of Kshs 100,000/- costs and interests from the Respondents herein. From the complaint, the cause of action was in respect of a compensation agreement dated 17th July, 2010 and 18th July, 2010 respectively which agreement, it was pleaded was presided by village elders and local administration.
2. In their defence, the Respondents averred that the Appellant together with the 3rd to 9th parties (sic) constituted a Kangaroo Court without jurisdiction guided by the practice of witchcraft, beat the Defendants senseless and under threat of death extracted a promise to pay the said sum of Kshs 100,000/- as compensation without any basis. It was the respondents' case that the suit was an attempt to pre-empt their claim. They also made a counterclaim against the Respondent for the sum of Kshs 21,000/- being a refund paid by them to the Respondent as well as general damages, for defamation and assault, destruction of their crops and forceful slaughter of their sheep.
3. By a Notice of Motion dated 5th December, 2012, the Respondents sought an order striking the complaint and dismissing the suit. They also sought that their claim be listed for hearing. The said application was based on the grounds that the Complaint disclosed no reasonable cause of action against the Defendants; that the Complaint was otherwise scandalous, frivolous and vexatious and clearly an abuse of the court process; that the Complaint disclosed no known nexus in law between the Defendants and the Plaintiff; and that it was in the interest of justice that the said application be granted.
4. In the affidavit sworn in support of the Motion, which was filed while the hearing of the main case was on course, it was deposed that from the evidence of the Plaintiff it was confirmed that the suit is an embarrassment of the court process and that the same was premised on an agreement based on witchcraft. According to the Respondents, from the pleadings and proceedings it came out clearly that the Appellant's suit is grounded on allegations of customary law which cannot form a basis for a claim in this court in as such reliance on customary practices is repugnant of justice and morality. In the Respondents' view, the alleged cause of action is in the circumstances only meant to abuse the process of the court for the reason that the purported compensation agreement was drawn by people who lacked judicial authority and extremely ignorant in themselves and of the workings of a modern society.
5. The Appellant reiterated that the claim was only calculated at pre-empting them after the Appellant received a demand letter from them. It was the Respondents' view that by entertaining the suit, the Court would appear to support the Appellant in his quest to subvert justice and promote wicked and backward social practices.
6. It was therefore their case that the suit was so hopeless that it plainly and obviously disclosed no reasonable cause of action and was so weak as to be beyond redemption.
7. In response the Appellant averred that the application was incompetent, frivolous, an abuse of the court process and only calculated to further delay the hearing of my suit herein. In his view, no evidence is admissible when a party alleges that a pleading discloses no reasonable cause of action or defence in law and yet the present application purported to adduce evidence by way of an affidavit.
8. According to the Appellant, his claim was based on lawfully executed agreements between the Respondents and himself which agreement which had never been challenged. He stated that as all witnesses in the matter had not been heard, the circumstances under which the agreement the basis of the suit was reached could not be determine. It was his contention that the Constitution of Kenya respects the freedom of conscience and that there is no law that requires that an agreement between parties be drawn by people with judicial authority. According to him, his claim herein was based on an agreement voluntarily executed and which had never been challenged in any court.
9. The Appellant averred that without adducing any evidence as to how the agreement was made, there wasn't enough material before the court to determine whether the agreement was binding or not.
10. In her ruling delivered on 7th September, 2012, the Learned Trial Magistrate found that the cause of action was not specifically pleaded and that the complaint did not disclose a reasonable cause of action as provided under Order 2 rule 15 of the Civil Procedure Rules. According to the Learned Trial Magistrate the Plaintiff ought to have specifically pleaded the relevant act and whether it arose from a tort or contract in order to enable the Defendants respond to the claim. However, based on the timing of the application which in her view was suspect having been raised two years after the filing of the suit and in the course of the hearing rather than before the matter was set down for hearing, she decided to lean towards sustaining the suit rather than terminate it prematurely in order to allow the underlying issues to be determined once and for all. Therefore, while dismissing the said application, she ordered that the complaint be amended to disclose the cause of action within 14 days of the ruling and in default, the suit would stand dismissed.
11. It was this ruling that provoked the present appeal in which the Appellant has raised the following grounds:-

1. The learned trial magistrate erred in law and in fact in holding that the Appellant's cause of action was not disclosed despite pleading an Agreement.
2. The learned trial magistrate erred in law and in fact by not appreciating that the Agreements in issue were arrived at after arbitration and that they had not been challenged nor the arbitration queried.
3. The learned trial magistrate failed to appreciate that no matter the genesis of the arbitration, once a binding agreement in writing was made, that agreement became the basis of any further claim against or by any of the parties to it.
4. The learned trial magistrate after having heard the Plaintiff's evidence in full, failed to analyse the same and incorporate in it in her ruling.
5. The learned trial magistrate's ruling and orders are yet to clear as to what exactly is to be incorporated in the amendments ordered.

12. It was therefore sought that the appeal be allowed, the Orders of 8th February, 2013 be set aside and the suit be allowed to proceed to its conclusion

13. On 2nd December, 2020, this Court directed that the appeal be canvassed by way of written submissions. However, only the Appellant complied and filed his submissions. Though in this appeal what is sought is for the setting aside the orders of 8th February, 2013 the submissions filed were directed to the ruling and orders of 7th September, 2012. Accordingly, those submissions are not of any use to this court in determining the instant appeal.

14. This being a first appellate court, it was held in **Selle –vs- Associated Motor Boat Co. [1968] EA 123** that:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

15. The Appellant has raised four grounds of appeal but I find that the only issue necessary for determination of this appeal is whether the Plaintiff disclosed a reasonable cause of action since that was the basis upon which the decision was made. Order 2 Rule 15 of the **Civil Procedure Rules** provides that:-

1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

16. The Respondents vide the Notice of Motion dated 5/12/2012 sought for orders that the Plaintiff dated 9/8/2010 be struck out and suit dismissed for not disclosing a reasonable cause of action against the Respondents. The learned trial magistrate found that paragraph 5 of the Plaintiff does not disclose a reasonable cause of action as required under Order 2 Rule 15. It is clear from the above provisions that in applications premised on rule 15(1)(a), no evidence is admissible and where a party swears an affidavit in support of an application grounded thereon, the court would not hesitate in striking out such an affidavit as I stated in **G.B.M Kariuki vs Nation Media Group Limited & 3 Others [2012] eKLR**. Though in this case the application was based on rule 15(1)(a) of the Rules and under which no evidence was admissible. In the premises, since this Court does not have the benefit of the Learned Trial Magistrate's findings on the other grounds, I cannot tell with certainty what her findings on the matter would have been had she dealt with the same.

17. In my view the learned Trial Magistrate's decision to disallow the application was correct though she should have struck it out on the ground of incompetency as opposed to dismissing the same.

18. As regards the order that the Plaintiff be amended failure to do which the suit would stand dismissed, In **Trade Bank Ltd. (In Liquidation) vs. L Z Engineering Construction Ltd. Civil Appeal No. 304 of 1998**, the Court of Appeal held that final preemptory or

unless orders are only made when the party has already failed to comply and that failure is inexcusable. In this case there is no reason why such a drastic order was issued.

19. In the premises, I allow the appeal, set aside the Learned Trial Magistrate's made on 8th February, 2013 and reinstate Kangundo PMCC No. 129 of 2010 to hearing in the usual manner.

20. As the order in question seems to have been issued by the Court without prompting, there will be no order as to the costs of this appeal. The Appellant will however have the costs of the application dated 5th December, 2012.

21. It so ordered.

Judgement read, signed and delivered virtually at Machakos 19th day of April, 2021

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Geoffrey