



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 29 OF 2020

BETWEEN

JEMIMA OMONDI KOGA.....APPELLANT

AND

FRANCIS OTIENO.....RESPONDENT

(Being an Appeal from the ruling in Oyugis Chief Magistrate's CMCC No. 12 of 2020 by Hon. Celesa Okore – Senior Resident Magistrate).

JUDGMENT

1. Jemima Omondi Koga the appellant herein, had filed a suit against the respondent. The hearing of the suit had been adjourned severally at the instance of the appellant, mostly due to non-attendance. When the matter came up for hearing of the suit on 28th May, 2020 the plaintiff was absent. The respondent pleaded with the court to dismiss the suit for non-attendance. The suit was dismissed by the court in a ruling dated 29th May, 2020.

2. The appellant was aggrieved by the said ruling and filed this appeal through the firm of Migele & Company Advocates. She raised ten grounds of appeal as follows:

- a) That the learned trial magistrate erred in law and fact by dismissing the plaintiff's entire suit without any application mounted for the same.
- b) That the learned trial magistrate erred in law and fact in dismissing the plaintiff's suit without according her the right to be heard as enshrined in our Kenyan constitution 2010.
- c) That the learned trial magistrate erred in law and fact by failing to analyze her record and confirm that indeed the plaintiff/appellate was ready to proceed at some point when the respondent herein occasioned adjournments.
- d) That the learned trial magistrate erred in law and fact by directing the respondent herein to choose a site for burial when the same was the dispute before the trial court.
- e) That the Learned trail magistrate erred in law and fact by failing to analyze the pleadings before her that indeed the deceased who is alleged to be a stranger forced the appellant and her siblings who are total orphans to flee their homestead and seek refuge elsewhere.
- f) That the learned trial magistrate erred in law and fact by failing to interpret correctly at the provisions of Article 159 of the constitution of Kenya 2010 and thus arrived at a wrong interpretation and conclusion.
- g) That the learned trial magistrate erred in law and fact by misdirecting her mind to the provisions of section 1A, 1B and 3A of the Civil Procedure Act and thus arriving at a wrong conclusion.
- h) That the learned trial magistrate erred in law and fact by misdirecting her mind to the provisions of order 12 of the Civil Procedure Act.
- i) That the learned trial magistrate erred in law and fact by importing extraneous matters into the proceedings and rulings.
- j) That the learned trial magistrate erred in law and fact by failing to appreciate the challenges brought by Covid-19 and consequences upon hearing in court.

3. The appeal was opposed by the respondent through the firm of Agure Odera & Company Advocates.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. Order 12 Rule 3 (1) of the Civil Procedure Rules Provides:

(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

6. The plaintiff has a duty to ensure that the case is heard and finalised without erecting roadblocks. This duty was echoed by Gikonyo J in the case of **Utalii Transport Company Limited & 3 others vs. Nic Bank Limited & another [2014] eKLR**.

7. I have perused the submissions by both parties. I have also perused the ruling of the trial magistrate. It is very detailed and I find that she arrived at a correct conclusion; that the appellant was not keen to prosecute her case. She employed all known delaying tactics including changing advocates at the last minute. This trend of changing advocates persisted even up to when this judgment was pending. A notice of change of advocates dated 19th July 2021 was filed on 21st July, 2021. Whereas it is her right to instruct an advocate of her choice, it ought to be done in a manner that will not interfere with the hearing of a suit. If it does interfere, it may be seen as mischief.

8. The learned trial magistrate invoked the law correctly and exercised her discretion judiciously. This being a burial dispute, the learned trial magistrate made the correct decision in the circumstances. I will have no basis to interfere with her ruling. The appeal is therefore dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE