



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 62 OF 2019

TRANS MARA SUGAR CO. LTD.....APPELLANT

versus

THOMAS ONDIEKI OSITU.....RESPONDENT

(Being an appeal from the ruling and order by Hon. M. M. Wachira, Senior Resident Magistrate, in Migori Chief Magistrate's Civil Suit No. 1493'B' of 2016 delivered on 08/03/2018)

JUDGMENT

1. The appeal subject of this judgment highlights the integrity and security of court records in the administration of justice.
2. On 31/10/2016 the Respondent herein, *Thomas Ondieki Ositu*, filed **Migori Chief Magistrate's Civil Suit No. 1493'B' of 2016** against *Trans Mara Sugar Co. Ltd*, the Appellant herein (hereinafter referred to as '**the suit**').
3. The suit was heard on 18/05/2017 in the absence of the Appellant. Judgment was delivered on 13/07/2017. On 13/11/2017 the Appellant filed an evenly dated Notice of Motion seeking to set-aside the *ex parte* judgement among many other prayers (hereinafter referred to as '**the application**').
4. The application was premised on several grounds including that the Respondent had filed a Notice to Act in Person, a Notice to withdraw the suit and a Statutory Declaration on 28/03/2017 and as such there was no suit to be heard on the said 18/05/2017. Copies of the documents were annexed as part of the application. It was also contended that the Appellant was not served for the hearing of the suit; which suit was in anyway heard prematurely.
5. The application was defended. In a Replying Affidavit sworn and evenly filed on 29/11/2017 the Respondent denied authoring and filing the documents in issue. He also denied ever appearing before a Commissioner for Oaths for purposes of swearing the Statutory Declaration.
6. The application was heard by way of written submissions. The court rendered its ruling on 08/03/2018. The application was allowed subject to payment of throw-away costs to the Respondent of Kshs. 20,000/= and settlement of the Auctioneer charges.
7. Dissatisfied by the conditional setting-aside of the *ex parte* judgment the Appellant filed the appeal subject of this decision upon grant of leave to appeal out of time *vide* **Migori HCC Misc. Application No. 256 of 2018**.
8. Directions were taken. The parties proposed and this Court concurred that the appeal be heard by way of written submissions. Both parties duly complied in supporting their rival positions. They also referred to several decisions.
9. I will first deal with the issue of the documents and the integrity of the court record.
10. The court dealt with the issue of the documents in the first instance at the hearing of the suit. The hand written record indicated that the court noted that the said documents were not in the court record. I have however realized that the typed proceedings indicated that the documents were in the court file. The word '*no*' was hence omitted. The hand written record therefore prevails.
11. Be that as it may, the issue resurfaced when the court dealt with the application. It was raised in the application by the Appellant and specifically denied in the replying affidavit by the Respondent. Nevertheless, the court proceeded with the hearing of the application.
12. The court then ruled on the issue on page 3 of the impugned ruling as follows: -

On the issue of notice to act in person and notice of withdrawal of the suit, I have looked at the court file and I did not see any such notices filed therein. The Court also confirmed during hearing on 18/5/2017 that no such notices were in the court file. Further, the plaintiff said on oath he never filed such documents in court. That leaves the question who filed the notices which the defendant counsel annexed as annexures JMO6 (a), JMO 6(b) and JMO 6 (c)? The court deals with record and in absence of such filed documents in the court file the court cannot rely on the same. There is a need to investigate the origin of the said documents. That is not the work of the court but the relevant authorities. Based on foregone I decline to grant prayer no 5 of the notice of motion.

13. The court was satisfied that what had happened in respect of the documents in issue was not right. It noted that such conduct called for an investigation. It however stated that such was the duty of the relevant authorities.

14. Whereas a court may not vest itself the duty to undertake investigations, a Court remains the sole custodian of all court files and is charged with the primary duty of preserving the security and integrity of such records. A Court cannot fold its legal hands and let it pass when the security and integrity of any of its records is questioned. So as to ensure fair play and to entrench public trust in the administration of justice, Courts (judicial officers and Judges) must not stand moot when the integrity and security of court records are impugned. This is a duty imposed upon every magistrate and judge and stretches to every other officer of the Court. The duty also transcends to all staff of the Judiciary and the stakeholders in the justice chain.

15. It must be always remembered that **Article 10** of the **Constitution** on *national values and principles of governance* binds everyone. **Sub-Article 2(c)** demands good governance, integrity, transparency and accountability in discharging public duties. In light of the **Constitution** the era of impugning court records and going scot-free was buried in the books of annals.

16. Having made up its legal mind of the impropriety of the record, the learned magistrate ought to have put a halt and instead engaged an administrative gear. He would have either referred the matter to the Head of Station for directions or taken steps to unravel the truth about the documents.

17. The approach taken by the court was unfair in two-fold. First, if it is true that the Respondent was the author and the genesis of the documents then the Appellant was entitled to prayer 5 of the application. That prayer was disallowed. Second, if the Respondent was not the author and genesis of the documents then he was also entitled to know who was behind that act. In the event it's revealed that the Appellant was the one behind such conduct then the Respondent ought to be appropriately remedied.

18. The application was hence prematurely determined. The impugned ruling and the resultant orders cannot stand.

19. As I come to the end of this judgment I direct that the orders herein shall apply *mutatis mutandis* in **Migori High Court Civil Appeal No. 61 of 2019 Trans-Mara Sugar Co. Limited vs. Zablon M. Okondo** since that appeal is also hinged on similar grounds as the appeal subject of this judgment.

20. In order to entrench the foregone responsibility in this matter, the following final orders hereby issue: -

(a) The appeal is hereby allowed and the ruling delivered on 08/03/2018 is set-aside and/or quashed together with all consequential orders;

(b) The issue surrounding the Notice to Act in Person, the Notice to withdraw the suit and the Statutory Declaration shall be investigated by the DCI – Migori and all those culpable be accordingly charged in a court of law;

(c) Pending the outcome of order (b) above, there be a stay of further hearing of the Notice of Motion dated 13/11/2017 as well as a stay of any execution proceedings in the suit;

(d) The costs of this appeal do abide the outcome of the Notice of Motion dated 13/11/2017 once heard and determined afresh.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May, 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically: -

1. oguttumboya@yahoo.com / oooadvocate@gmail.com for Oguttu Mboya & Company Advocates for the Appellant.
2. soodingoadvocates@gmail.com for Odingo & Company Advocates for the Respondent.
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE