



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 3 OF 2017

(CORAM: J. A. MAKAU – J.)

ANJALINA NGESA OMOLO AND PAMELA

ACHIENG OMOLO (*suing as the legal*

representative in the Estate of

MORICE OMOLO ONYANDO (deceased).....APPELLANT

VS

OLALI TOM.....1ST RESPONDENT

IBRAHIM OTONDE.....2ND RESPONDENT

JUDGMENT

1. The Appellant **ANJILINA NGESA OMOLO** and **PAMELA ACHIENG OMOLO (*suing as the legal representative in the Estate of Morice Omolo Onyando (deceased)*)** sued the two defendants herein seeking judgment against the defendants jointly and severally for general damages, special damages of Kshs. 16,500/=, costs and interest.

2. The suit was filed before Principal Magistrate Court at Bondo Law Courts on 15th December 2014 and summons to enter appearance issued the same day. The summons to enter appearance were not served leading to further summons to enter appearance being issued on 9th March 2016.

3. By Notice under **Order 11 Rule 3(1)(f)** by the Trial Court wrote to the Advocates. The court stated: -

“(i) Upon perusal of this file, it has been found necessary that this suit be listed for directions.

(ii) This is to require you attend court on 21st day of September 2016 for directions”

4. On 21/9/2016, the date set for direction as per court’s notice none of the parties appeared leading to the Court issuing further notice for 12th October 2016, when the counsel for the Appellants appeared and requested to be allowed to file an application to serve the summons to enter appearance by way of substituted service, however, the Court dismissed the suit for want of prosecution provoking the filing of this appeal before this court setting out five (5) grounds of appeal being as follows: -

(a) The Learned Trial Magistrate erred in law and in fact in failing to appreciate the provision of Order 11 rule 3(i)(f) of the Civil Procedure rules, 2010 under which a notice was issued fixing BONDO PMCC NO. 81 OF 2014 for pre-trial direction on the 12/10/2016 and not a notice show cause why the suit should not be dismissed.

(b) The Learned Trial erred in law and fact in dismissing the application dated the 25/10/2016 against the weight of evidence and the law.

(c) The Learned Trial Magistrate erred in law and fact by failing to appreciate the grave injustice visited upon the appellants by so penalizing the litigant despite the attempts of service having been adduced during hearing of the application.

(d) The Learned Trial Magistrate erred in law and fact in failing to notice prayer 3 on the face of the application dated the 25/10/2016 in which the appellants sought leave of court to serve the respondents either in person or effect service by way of substituted service by advertisement in a national daily newspaper within a period of 3 months.

(e) The Learned Trial Magistrate erred in law and fact by sacrificing substantive justice at the altar of expediency.

5. M/s Mwalo, Learned Advocate, appearing for the Appellant urged all the grounds of appeal altogether and urged that the appeal be allowed.

6. M/s Mwalo contends that the case before the trial court was coming up for direction under **Order 11 Rule 3(1)(f) of Civil Procedure Rules** and not for Notice to show cause why the suit could not be dismissed. She urged the court ended in dismissing the suit. She further urged the time for service of summons to enter appearance had not lapsed as of the time of dismissal of the suit.

7. **The Civil Procedure** sets out the direction and renewal of summons to enter appearance under **Order 5 Rule 2(1)(2) of Civil Procedure Rules** which provides:-

“2. (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

(2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.”

8. In the instant case, summons to enter appearance having been renewed by the Lower Court on 9th March 2016, meant the summons to enter appearance were still valid as of the time the court issued its Notice under **Order 11 Rule 3(1)(f)** as of 11th August 2016.

The Appellant had upto 9th March 2017 to effect service of the summons to enter appearance upon the defendants, consequently there was no basis for the Court to set the matter down for direction under **Order 11 Rule 3(1)(f) of Civil Procedure**.

9. **Order 11 Rule 3(1)(f) of the Civil Procedure** under which the Notice leading to dismissal of the Appellant’s suit provides thus: -

“3. (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall:

-

(f) create a timetable for the proceedings;”

10. **Order 11 3(1)(f) of the Civil Procedure Rules** is only applicable in matters relating to case conferencing which takes place within 30 days after the close of the pleadings. In this case, the summons had not been served and the summons were still valid upto 9th March 2017. The Trial Court failed to appreciate and note that the suit was not ripe for case conferencing nor for dismissal for want of prosecution. The trial court ought to have considered the Appellant's application seeking to serve the summons by way of substituted service instead of dismissing the suit for want of prosecution.

11. The Trial Court in rejecting the Appellant's application for review of its order of 12th October 2016 and proceeding to issue consequential orders failed to in not noting that there were a mistakes or errors apparent on the face of the record or for that matter sufficient reason to warrant granting the review sought by the Appellants. That as the suit had erroneously been dismissed having been set for case conferencing erroneously, the Trial Court should not have declined the application for review and substituted service as the suit was dismissed prematurely and when summons for appearance were still valid for service.

12. **The Upshot is that the appeal is meritorious and is allowed. I proceed to make the following orders: -**

(a) The ruling of trial court dated 14th December 2016 in Bondo PMCC No. 81 of 2014 is set aside.

(b) The ruling of trial court in Bondo PMCC No. 81 of 2014 issued on 12th October 2016 is set aside and PMCC 81 of 2014 Anjilina Ngesa Omolo and Another (suing as the legal representative in the Estate of Morice Omolo Onyando (deceased) V Olali Tom and Another is hereby reinstated.

(c) The Appellants are given 3 months from the date of the judgment to either serve the Respondents with the summons to enter appearance in person or effect service by way of substituted service by an advertisement in a national daily newspaper with wide circulation.

(d) No Order as to costs.

DATED AND SIGNED AT SIAYA THIS 19TH DAY OF APRIL 2018.

HON. J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

M/s Mwalo: for the Appellant

N/A: for Respondent

Court Assistants:

1. Laban O. Odhiambo

2. Brenda Ochieng

HON. J.A. MAKAU

JUDGE