



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 408 OF 2010

JOYCE MUHAMBE KIGUMBA.....APPELLANT

VERSUS

JAMES KILONZO.....RESPONDENT

(Being an appeal from the Ruling by the Hon Ireri, Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani dated 27th September 2010 in Civil Case No 8520 of 2006)

JUDGMENT

INTRODUCTION

1. In her Ruling of 27th September 2010, the Learned Trial Magistrate Hon A. Ireri (Ms) Resident Magistrate, dismissed the Appellant's Chamber Summons application dated 5th November 2009 seeking a review of the court's orders of 2nd November 2009 in which she had upheld the Respondent's Preliminary Objection dated 18th October 2009 to the effect that the Appellant's suit was defective on the ground that her Verifying Affidavit had failed to indicate her postal address and place of abode.

2. Being dissatisfied with the said Ruling, the Appellant lodged her Memorandum of Appeal dated 4th October 2010 on 8th October 2010. She relied on thirteen (13) Grounds of Appeal. Her Written Submissions and List of Authorities were both dated 21st May 2018 and filed on 22nd May 2018. The Respondent's Written Submission were dated 14th May 2018 and filed on 15th May 2018.

3. When the matter came up in court on 7th June 2018, both parties requested this court to render its Judgment based on their respective Written Submissions that they were relying upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

4. Having looked at the parties' Written Submissions and case law that they each relied upon, it appeared to this court that the issues that had been placed before it for its determination were:-

a. Whether or not the Learned Trial Magistrate was justified in dismissing the Appellant's suit;

b. Whether or not the Learned Trial Magistrate misdirected herself when she declined to set aside her orders dismissing the Appellant's suit.

5. The said issues were dealt with under the separate and distinct heads shown herein below.

I. DISMISSAL OF THE APPELLANT'S SUIT

6. The Appellant submitted that she was condemned unheard, that the Learned Trial Magistrate exercised her jurisdiction improperly by relying on technicalities to strike out her suit and that mistakes of an advocate should never be visited on an innocent litigant.

7. She referred this court to Article 159 (2) (d) of the Constitution of Kenya, 2010 that stipulates that "**justice shall be administered without undue regard to technicalities**". She also placed reliance on the case of **Kodak Kenya Ltd vs Isaiah Ngotho Watheka t/a Global Colour Lab [2004] eKLR** where the court therein allowed the Plaintiffs therein to file fresh affidavits instead of striking out the suit. She further relied on the case of **CMC Holdings Ltd vs Nzioki [2004] 1 KLR 173** where it was held that discretion should be exercised judiciously.

8. On his part, the Respondent argued that the Learned Trial Magistrate exercised her discretion judiciously when she dismissed the Appellant's application as the same was *res judicata*. He relied on the case of **Mburu Kinyua vs Gachini Tuti [1978] KLR 69** where it was held that an applicant can only file a second application if it was based on facts not known to him otherwise, the same would be dismissed for being *res judicata*. He also referred this court to the case of **Michael Munene Njogu & 2 Others vs Bernard Githinji & 2 Others [2013] eKLR** where the Court of Appeal held that the principle of *res judicata* applied equally to application.

9. He contended that the Learned Trial Magistrate acted correctly when she upheld his Preliminary Objection because the Appellant and/or her advocate did not file any pleading to oppose the same. It was his averment that reinstating the Appellant's Chamber Summons application would have added no value as the suit was incurably defective because the said application had failed to address the issue of the defective Verifying Affidavit which had not complied with Order 18 Rule 4 (sic).

10. On 19th October 2009, the Respondent filed a Notice of Preliminary Objection dated 15th October 2009 in which he raised the following Grounds of opposition:-

1. THAT the suit herein was *ex-facie* incompetent, fatally defective and greatly misconceived.

2. THAT the suit herein was bad in Law and an abuse of the process of court.

3. THAT the purported Verifying Affidavit of one JOYCE MUHAMBE KIGUMBA in verifying contents of the plaint herein was in breach of the Mandatory Provisions (sic) of the law.

11. When the matter came up for the hearing of the main suit on 2nd November 2009, counsel for the Respondent informed the Learned Trial Magistrate that he was ready to proceed with the hearing of the aforesaid Preliminary Objection. The Learned Trial Magistrate then placed the file aside to 9.30 am. It appeared from the proceedings that counsel for the Appellant did not come to court and the Learned Trial Magistrate proceeded to hear the said Preliminary Objection and upheld the same in her absence.

12. The purport of the Ruling by the Learned Trial Magistrate was that the Applicant's Verifying Affidavit had failed to mention her postal address as was stipulated in Order XVIII Rule 4 of the Civil Procedure Rules (now repealed and replaced with Order 19 Rule 4 of the Civil Procedure Rules, 2010). The wording of the said provision remained unchanged.

13. Order XVIII Rule 4 of the Civil Procedure Rules provided as follows:-

“Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age”.

14. A careful perusal of the proceedings shows that the Appellant filed her Plaint dated 15th June 2006. The same was supported by a Verifying Affidavit that she swore on the same date. The said Affidavit showed her postal address as Post Office Box Number 14407 Nairobi.

15. It was abundantly clear to this court that the Learned Trial Magistrate misdirected herself because the omission by the Appellant to state her true place of abode could have been cured by Order XVIII Rule 7 of the Civil Procedure Rules (now repealed and replaced with Order 19 Rule 7 of the Civil Procedure Rules) that stipulated as follows:-

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality”.

16. In that respect, this court was persuaded to find and hold that the Appellant was justified in having filed her Chamber Summons application dated 5th November 2009 that sought the following orders:-

1. THAT there be stay of proceedings pending hearing and determination of this application.

2. THAT ruling order and/or decree entered on the 2nd November, 2009 exparte against the Plaintiff and all other consequential orders be set aside upon such terms as are just.

17. Notably, one of the grounds that she relied upon in her said affidavit was that the omission to indicate her true place of abode was curable under Order XVIII Rule 7 of the Civil Procedure Rules. In any event, denying a party his or her day in court due to a technicality was too draconian and was held to be so even before the promulgation of the Constitution of Kenya, 2010.

18. In the case of **Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another [2001] eKLR**, Ringera J (as he then was) struck out the verifying affidavits that had been filed by the plaintiff herein and granted them leave to file fresh and compliant verifying affidavits. This was a position that this court fully associated itself in the case of **Qad Software South Africa (Pty) Ltd vs Rift Valley Railways Investments (Pty) Ltd [2013] eKLR** where it considered a replying affidavit that the respondent therein had sought to have struck out for having been irregular. In that case, this court declined to strike out the said replying affidavit.

19. It was therefore this court's considered opinion that the Appellant's Chamber Summons application dated 5th September 2009 was not *res judicata* as the Learned Trial Magistrate had not given a determination of an application on similar facts. The Preliminary Objection was on the defectiveness of the suit while the said Chamber Summons application sought to have the Ruling of the Learned Trial Magistrate

issued on 2nd September 2009 set aside.

20. Accordingly, having considered the parties' Written Submissions and the case law that they each relied upon, this court came to the firm conclusion that the Learned Trial Magistrate completely misdirected herself in her Rulings of 27th September 2009 and 2nd November 2009.

21. Although the Appellant's counsel purported that the suit was part-heard, which was an incorrect position, that was no reason for the Learned Trial Magistrate to have arrived at the conclusion that she did and/or to have averred that the Appellant ought to have paid thrown away costs because no such order had been granted by the court, a position that the Appellant rightly pointed out.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 25th August 2011 was successful. The effect of this Judgment was that the Ruling of the Learned Trial Magistrate delivered on 8th November 2009 is hereby vacated and/or set aside.

23. This court hereby directs that this matter be mentioned before the Chief Magistrate Milimani Commercial Courts on 8th October 2018 for his or her further orders and/or direction.

24. As the error was on the part of the Learned Trial Magistrate, each party will bear its own costs of this Appeal.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of September 2018

J. KAMAU

JUDGE