



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 166 OF 2011

MOHAMMED CHAKWE CHIRINGA.....APPELLANT

VERSUS

SALIM OMA SALIM1ST RESPONDENT

CROWN PETROLEUM (K) LIMITED.....2ND RESPONDENT

(Being an appeal from the Ruling of Principal Magistrate's Court at Makindu delivered by Honourable N. M. NJAGI, (Principal Magistrate) 6TH October, 2011 in MAKINDU PMCC NO. 213 OF 2008)

JUDGEMENT

1. The Appeal arises from the ruling of Hon N.N. Njagi Principal Magistrate in **Makindu PMCC No. 213 of 2008** dated 6th October, 2011 in which he allowed an application for review and set aside an earlier judgement entered on the 24/03/2011 and ordered it to start afresh.

2. The Appellant being aggrieved by the said ruling has raised the following grounds of Appeal:-

(a) That the Learned Magistrate erred in fact and in law in issuing orders regarding Makindu PMCC No. 93 of 2009 Mwinga Benard Chula Vs Crown Petroleum (K) Ltd could apply to Makindu PMCC No. 213 of 2008 Mohamed Chakwe Chiringa = Vs = Salim Omar Salim and Crown Petroleum (K) ltd when there was no Application filed before the Honourable Court seeking such orders.

(b) That the learned Magistrate erred in fact and in law in issuing orders regarding Makindu PMCC No.213 of 2008 when the suit had not been listed before the Honourable Court on 8th February, 2011.

(c) That the learned Magistrate erred in law and in fact in finding that there was in finding that there was any agreement reached between Advocates for the parties when the file was indeed not before the court and when such the agreement had been recorded.

(d) The learned Magistrate erred in law and in fact in finding that there was an error on the fact of the record warranting the setting aside of the judgement.

(e) That the learned magistrate erred in law and in fact in setting aside the proceedings and the Judgement under the guise of a review when the Applicant had never sought the orders granted.

(f) That the learned Magistrate erred in law and in fact in purporting that an order alluded to by the Applicant been granted in the absence of any evidence to that effect.

(g) That the learned Magistrate erred in law and in fact in setting aside the entire judgment when a review is only meant to correct errors or mistakes apparent thereon.

(h) That the learned Magistrate erred in fact and in law in failing to exercise his discretion a fair and just manner.

3. Parties agreed to canvass the Appeal by way of written submissions. The Appellants counsel filed submissions while no submissions were received from the Respondents Counsel. The Appellants counsel submitted that the Judgement sought to be interfered with by the Respondent's Application dated 10/08/2011 did not contain any errors so as to warrant for review of the same and further that no agreement had been reached by both advocates and finally that the Respondents Application had no date and therefore there was no way the same could have been argued. Appellants Counsel sought reliance in the cases namely **BENJOH AMALGAMATED LTD =VS= KCB NBI HCCA NO. 16 of 2012 and J.M.K. =VS= M. W. M. – MSA HCCA NO. 15 of 2015** and urged this court to uphold this appeal with costs and set aside the ruling dated 6/10/2011 and the Respondent delivered on 24/03/2011.

4. I have considered the submissions by Appellant's counsel and the authorities cited. As this is the first Appellate court, its duty is to re-evaluate the evidence adduced before the trial court and come to its own independent decision (see **SELE =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA (28)**).

5. The Appeal herein is based on a ruling delivered on the 6/10/2011 by Hon N. N. Njagi in Makindu PMCC No. 213 of 2008. The Application dated 10/08/2011 had been filed by the Respondent seeking for the review and or setting aside of an Exparte judgment dated 24/03/2011. The lower court as per the record of appeal (pages 70 -72) shows that the Respondent's Application dated 10/08/2011 was canvassed by both learned counsels for the parties and further the issue that the said lower court vide a similar case with same cause of action against Defendants namely Makindu PMCC No. 93 of 2009 had issued orders on the 17/03/20109 to the effect that orders on **PMCC No. 93 of 2009** were to apply to **PMCC No. 213 of 2008**. Indeed a similar Application for review and setting aside of ex-parte judgment in **PMCC No. 93 of 2009** had been allowed by the same court.

6. The Respondent in the Application dated 10/08/2011 had pointed out to the court that there had been orders in **PMCC No. 93 of 2009** which were to apply in PMCC No. 213 of 2008. At the time of delivery of Judgment in **PMCC No. 213 of 2008** on 24/03/2011, the orders for setting aside had already been issued in **PMCC No. 93 of 2009** on the 17/03/2011 and that is why the Respondent's counsel had informed the trial Magistrate that the ex –parte judgment was arrived at in error since the orders of 17/03/2011 were already in force and were to affect **PMCC No. 213 of 2008** the counsel then managed to convince the trial Magistrate that the ex parte judgement had been entered in error and therefore it merited a review of the same.

7. The trial Magistrate in his ruling stated that he was satisfied that there was need to have the Defendants given an opportunity to have their day in court and put forth their defence and bring their witnesses. The court further agreed to set aside the ex-parte judgements in the two cases and awarded the Appellant thrown away costs. It must be noted that the trial court in determining the Respondent's Application for review and or setting aside was exercising its discretion. The trial court had heard the two cases namely **PMCC No. 93 of 2009** and **213 of 2008** and delivered judgements in favour of the appellant but then the same court had the discretion to set aside the same after being convinced by the Respondents. I find the trial Magistrate did not err in principle when he set aside the ex parte judgments as he received sufficient reasons and justification from the Respondent. The trial Magistrate in my view did not take into account an irrelevant factor. The trial court judgment dated 24/03/2011 was delivered while there existed an order issued on 17/03/2011 setting aside the two ex parte judgments. There was therefore an error on the face of the record warranting for a review by the trial court. In the premises I am unable to agree with the learned counsel for the Appellant that there had been no error in the judgment that had been set aside. The trial Magistrate indeed confirmed in his ruling of 6/10/2011 that the orders in **PMCC No. 93 of 2009**

were to apply in **PMCC No. 213 of 2008** and were to affect the judgment and he proceed to disallow the Appellant's objection to the Respondent's Application for review and setting aside. The trial court being a court of equity allowed the Respondent to participate in the proceedings in the interest of justice and duly awarded the Appellant thrown away costs. The Appellant suffered no prejudice in the circumstances since court would thereafter hear the parties and thrash out all the issues in controversy with finality. It would have been unfair for the court to shut out the Respondent from ventilating its case.

8. In view of the foregoing observations, I come to the finding that the Appellants appeal lacks merit. The same is ordered dismissed. As the parties are yet to litigate their case in the lower court, I order that each party bear their own costs.

Dated, signed and delivered at MACHAKOS this 29th day of September, 2017.

D. K. KEMEI

JUDGE

In the presence of:

Gicheru for Machama for Respondent

Marabi for Wahito for Appellant

C/A: Kituva