



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 85 OF 2015

SENACA EAST AFRICA LIMITED.....1ST APPELLANT

JOHN WAWERU 2ND APPELLANT

- V E R S U S -

DENNIS MATUNDURA CHOTI..... RESPONDENT

(Being an appeal from the ruling and orders of Hon. Chesang (Ms) Resident Magistrate delivered on 9th February 2015 in Milimani Civil Suit no. 5957 of 2013)

JUDGEMENT

1. On 9th February 2015 Hon. Chesang, learned Resident Magistrate, dismissed the appellant's motion for review dated 14.11.2014. Senaca E.A Ltd and John Waweru, the appellants herein felt aggrieved hence they were prompted to file this appeal and put forward the following grounds in their memorandum:

1. The learned trial magistrate erred in law and fact by holding that the trial proceeded in the presence of the defendants/appellants advocates and yet the same did not have audience before the court as the defendant's pleadings were not in the court file.

2. The learned trial magistrate erred in law and fact by holding that the defendants/applicants were the author of their own misfortune for not taking another date for the hearing of the application for setting aside and yet this application was allocated an earlier date on which it was not listed and came for hearing on the same day as formal proof.

3. The learned trial magistrate erred in law and fact by finding that the court had become functus officio after delivering judgment and yet the law is clear that application for review should be filed in the court that handled the matter.

4. The learned trial magistrate erred in law and fact by finding that prior to the matter coming up for formal proof, the only other proceeding on record was the entry for interlocutory judgment and yet it is clear that all the defendants pleadings that have been filed prior to the formal proof were not in the court file hence a review was merited once the court learned of the issue.

5. The learned trial magistrate erred in law and fact by not considering the defendants submissions.

6. The learned trial magistrate did not exercise her discretion judiciously.

2. When the appeal came up for hearing learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions.

3. I have re-evaluated the arguments made before the trial court in support and against the motion for review. I have also considered the rival written submissions. Though the appellant put forward a total of six (6) grounds of appeal, I think the question which commends itself for determination is whether or not the learned Resident Magistrate properly exercised her discretion in determining the application before her. It is the submission of the appellant that the learned Resident Magistrate failed to consider the material placed before her hence failing to properly exercise her discretion. The appellant pointed out that it moved the court by relying on the ground of sufficient reason to review its decision. The appellant stated in the affidavit filed in support of the application for review that at the time of formal proof an application to set aside interlocutory judgment had been filed which showed that the appellant had a weighty defence to the claim and that for reasons not within the knowledge of the appellant the application had not been placed in the court file by the court staff at the registry. The appellant argued that the trial magistrate should have inquired into the correctness of the facts on the issue touching on the missing court file and the absence of the application for setting aside in the court file on the hearing date.

4. The respondent vehemently opposed the appeal arguing that the trial magistrate properly considered the appellant's submissions and found that there was no sufficient reason shown to enable her review her decision. In other words, the respondent was of the view that the appellants failed to satisfy the requirements for review and therefore it was proper to dismiss the motion.

5. Having considered the rival submissions and having re-evaluated the arguments presented before the trial court, it is abundantly clear that the learned Senior Resident Magistrate appreciated the fact that the appellant had a pending application which was never prosecuted before the formal proof proceedings. The record shows that the file had a history of not being traced and when found some documents could go missing. In the circumstances it cannot be said that the appellants were the authors of their own misfortune. Had the learned Senior Resident Magistrate considered the history of the matter as submitted by the appellants, she could have found that the appellants had shown sufficient reason necessitating the review of the court's decision. With respect, I agree with the submissions of the appellants that it is strange to note that the defence (appellant's) counsel was present in court but failed to participate in cross-examining the respondent's witnesses who testified.

6. For the above reasons, I find the appeal to be meritorious. It is allowed as prayed. Consequently the order dismissing the appellant's motion dated 14.11.2014 is set aside and is substituted with an order allowing the motion with costs awaiting the outcome of the suit.

Dated, Signed and Delivered in open court this 8th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent