REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CIVIL APPEAL NO. 7 OF 2015

SAMMY MANZI MALUKI ..... APPELLANT

V E R S U S

JOHNES MWASIA KAMUTI ..... RESPONDENT

(From the ruling of the Principal Magistrate's Court at Kyuso dated 30th April 2015 – E.M. Mutunga –RM)

JUDGMENT

1.BACKGROUND

On the 2nd of April 2015 which was 7 days after a ruling was delivered by the trial court at Kyuso on 26th March 2015 granting the respondent (Plaintiff in the trial Court) 7 days to rectify his plaint and file a (fresh or amended) plaint and granted leave to the appellant (defendant in the trial court) to file a defence, the appellants advocate Mr. Nzili made an oral application in the absence of the respondent, in the following terms:-

"The plaintiff was to amend his plaint by today and serve. We have not been served yet. The plaintiff is still destroying the land. We don't know as to which plaint he has amended. The verifying affidavit is amended and pray that it be struck off for being bad in law."

After hearing the above submissions from counsel, the court set a ruling date on the issues raised by counsel for 9th of April 2015. The said ruling was however delivered on 30th April 2015 in the absence of all the parties. The record does not show why the ruling was not delivered on 9th April 2015. In the said ruling, the learned magistrate relied on the case of National Bank of Kenya Ltd –vs- Tinage & 2 Others (2004) eKLR and concluded as follows:-

"Looking at the verifying affidavit sworn by the plaintiff on 25th February 2015 at Kyuso on the original plaint I find it proper. The finding of the court in the above case was that the plaintiff ought not to have filed another verifying affidavit. This court hereby declines to grant the prayers as sought by the defence."

2. THE APPEAL

Dissatisfied with the above ruling of 30th April 2015 by the learned magistrate at Kyuso, the present appeal was filed on 14th May 2015 by C. K. Nzili and Company advocates, on seven grounds as follows:-

1. ***That the learned trial magistrate erred in law and in facts in delivering the ruling on a date other than the one given in open court, and in the absence of the appellant.***
2. ***That the learned trial magistrate erred in law and in facts in postponing the ruling without any explanation so as to defeat the course of justice.***
3. ***That the learned trial magistrate erred in law and in fact in ignoring known legal principles and procedures of law.***
4. ***That the learned trial magistrate erred in law and in facts and misdirected himself in allowing two different plaints to exist and without striking out one of them.***
5. ***That the learned trial magistrate erred in law and in fact in openly assisting the plaintiff to defeat the course of justice.***
6. ***The learned trial magistrate erred in law and in fact in being biased against the defendants.***
7. ***The learned trial magistrate erred in law and in facts in behaving unethically before, during and after the ruling in company with the respondent, clerk and other third parties hence being compromised.***

At the hearing of the appeal Mr. Nzili for the appellant and the respondent in person made oral submissions.

3. SUBMISSIONS OF THE APPELLANT.

Mr. Nzili learned counsel for the appellant submitted that he would argue grounds 1 and 2 together, then 4 and 5 together, then 6 and 7 together and then 3 on its own.

Counsel submitted that the trial court ruling was scheduled to be delivered on 9th April 2015 but for reasons not recorded on the file, the ruling was delivered by the magistrate on 30th of April 2015 in the absence of both parties which was a mistake. Counsel submitted that the failure of the magistrate to inform them of the date of the delivery ruling amounted to an injustice of the highest order.

Counsel submitted further that the ruling was not based on any legal principles. According to counsel, though the court had previously indicated that the ruling was on matters of a serious nature, the court did not consider such matters of serious nature in the ruling. Counsel emphasized that two plaints had been filed in this matter and that though the plaintiff had objected to the same, they were served with a plaint which was not in the court file.

Counsel complained that in a ruling delivered on 26th March 2015, the respondent was given a chance to file a proper plaint and a mention date fixed by which, he had not served the new plaint. On the mention date, and when they raised the issue in the court, the court merely said that an amended plaint had been filed, while the order was specific that the plaint be amended and served. On that date which was 2nd April 2015, the appellant's counsel had not been served with the fresh plaint.

Counsel thus submitted that the court was wrong to have given a hearing date, as there was no proper plaint on the file.

Counsel lastly, submitted that it was obvious that the court was showing bias in favour of the respondent, and was openly assisting one of the parties to defeat justice for his clients. Counsel asked that the orders of 30th April 2015 be set aside, together with the orders in the ruling of 26th March 2015 as both were related.

4. RESPONDENT'S SUBMISSIONS.

In response to counsel's submissions, the respondent submitted that the matters raised by counsel for the appellant had been considered by the trial court. He submitted that the people who were alleged to have sold the land were not his clans men, and as such the transaction was irregular. He maintained that he wanted the appellant to bring to court the said people such as Phillip Mutemi Kimau, Moses Ngone, and Mwasia to be asked questions.

5. ANALYSIS AND FINDINGS.

This is a first appeal. I am thus as a first appellate court required to reevaluate the record and come to my own conclusions and inferences.

I have perused the whole record. The appeal is from a ruling in a request to strike out pleadings.

The appellant's counsel has complained about of bias of the trial court, and has cast doubts on whether the magistrate was behaving professionally in conducting the trial or court proceedings. I note that no hard facts or allegations have been made by counsel against the magistrate to support the allegations. The record does not show any signs of the Magistrate acting unprofessionally or unprocedurally or in a biased manner. In my view, the fact that the trial court changed the date of delivery of the ruling from 9th April to 30th April 2015, without informing any of the parties, and delivering the ruling in the absence of all the parties, though a mistake, was not proof of misconduct or impropriety or bias by the magistrate. In any event, no application has so far been made before the magistrate to disqualify himself from conducting the case on the above complaints. I thus dismiss the grounds of appeal that relate to alleged misconduct or bias by the trial court.

The ruling appealed against was from a verbal ex-parte request by counsel for the appellant that the verifying affidavit of the respondent be struck out for being bad in law. The learned magistrate relied on a case of ***National Bank of Kenya Ltd -vs- Tinage and two others 2004 eKLR,*** to dismiss the request of counsel for the appellant. The magistrate stated that Justice Kaburu Bauni had ruled on 26th October 2004 in the National Bank case (above), that an amended plaint needed not to be accompanied by any other verifying affidavit, if there was one already filed with the original plaint which was proper.

This court has not been told that the above reasoning by the trial court was wrong and in what respect. In my view, based on the counsels request to strike out the verifying affidavit of the respondent, the magistrate's finding was sound even if it might have been mistaken. The magistrate based the decision on a decided case. It cannot be said as contended by counsel for the appellant that the ruling was not based on legal principle. I will add that in the case of ***Saanun –vs- Commissioner of Lands and 5 others (2002)2 KLR 271,*** Onyancha J held, inter alia, as follows:-

1. ----
2. -----
3. -----
4. -----
5. ***If the legislature wanted an amended plaint to also be so accompanied it would have provided so. In the court's opinion therefore, an amended plaint need not be accompanied by a verifying affidavit since the suit already exists in a given form, and any ordered or taken amendments are specified inform and extent."***

I agree with the above reasoning that there is no legal requirement that an amended plaint be accompanied by a verifying affidavit, if there is already a valid verifying affidavit on record.

Was the postponement of the ruling date without informing the parties irregular and a denial of justice? Should the magistrate have left two plaints on record? These two questions were raised in submissions by counsel for the appellant.

I have already addressed the change of dates for delivery of the ruling, and in my view, even if the change of dates was a mistake it was not evidence of misconduct by the magistrate nor did it result in any injustice on the appellant. The appellant became aware of the ruling had and has taken the opportunity of appealing against the said ruling. I cannot thus presently say that he was prejudiced.

With regard to the two plaints being on the file, it is clear from the ruling of the trial court delivered on 26th March 2015 that the court allowed the respondent to file a (proper) plaint to the plaint dated 25th Ferbuary 2015, within 7 days. The respondent filed an amended plaint on 30th March 2015, which was

within the period of 7 days granted by the court. The fact that the amended plaint was not served on the appellant's advocate did not make it defective, as the court merely required that it be filed within 7 days, when it stated in the ruling as follows:-

"That he files a plaint in 7 days from today then serve the defendants who are granted leave to put in their defence."

From the above orders of the court, it is clear to me that the period of 7 days was fixed by the court merely for filing of the amended or new plaint. The court did not fix a time frame for the service of the said plaint. Therefore the appellant's counsel was not right in saying that the plaint was to be filed and served within 7 days from the date of the ruling.

For the record, I wish to state that the plaint filed on 30th of March 2015 was filed within the 7 days allowed by the court. It is thus the plaint which is alive on the file, and is the plaint to which the appellant was required to respond to. The earlier plaint was superceded by the filing of the later plaint as allowed by the court. The trial court which is seized of the case may however give any further directions that will serve the broader interests of justice in the progress of the case before it.

6. DETERMINATION.

Considering the totality of this matter, the grounds of appeal, arguments of the parties, and the law especially Article 159 (2) (d) and Section 1A and 3A of the Civil Procedure Act (Cap 21), I am of the view that this appeal has no merits. It merely seeks to deny the respondent his day in court on technicalities which cannot be allowed, as the trial court has a duty and obligation to administer substantive justice.

In my view the learned magistrate was correct in deciding that the matter proceeds further towards hearing of the main case. It is only by doing so that the trial court will be able to determine the dispute between the parties on merits.

I dismiss the appeal and order that costs be in the cause, as the main suit is still to be heard and determined. The trial court file will be taken back to Kyuso for further progress of the case.

Dated and delivered at Garissa this 22nd day of March 2016.

GEORGE DULU

JUDGE