REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 8 OF 2019

Consolidated with Civil Appeal No. 9 and 10 of 2019

NATIONAL HOUSING CORPORATION.....APPELLANT

VERSUS

MARTIN NDAPATANA.....RESPONDENT

(Being an appeal from the entire Ruling/Order of the Chief Magistrate (Hon. Dr. Julie Oseko)

delivered on 23rd July 2019 at Malindi in the Magistrates Court, Land and Environment Suit

CMCC No. 230 of 2010 consolidated with CMCC No. 229 of 2010 and 231 of 2010)

JUDGMENT

This appeal arises from the lower court's ruling dated 23rd July 2019 delivered at Malindi in **CMCC Nos, 220, 230** and **231 of 2010** which were consolidated. The appellant herein being aggrieved by the said ruling lodged the present 3 appeals being Civil Appeal No. 8, 9 and 10 which were consolidated on 26th July 2021.

The appellant filed a Memorandum of Appeal dated 21st August 2019 and listed the following grounds:

1. That the Learned Magistrate misdirected herself in law and in fact in finding that the applicant sought more time to produce David N. Ngugi in court whereas what the applicant sought was to dispense with the attendance of the said David N. Ngugi.

2. That consequently the learned Magistrate failed to appreciate the fact that the appellant had been unable to trace the said David N Ngugi who swore the affidavit sought to be produced as evidence.

3. That the learned Magistrate erred in law and in fact when she identified the issue of admissibility of the affidavit sworn by David N. Ngugi but failed to make a determination on it.

4. That the Learned Magistrate erred in law and in fact when she failed to consider the appellant's submissions on the application or at all thus contravening the provisions of natural justice.

5. That further the Learned Magistrate misdirected herself in law and in fact in failing to outline in her ruling how the authorities cited by the Appellant were distinguishable.

6. That the Learned Magistrate misdirected herself in law and in fact in applying the provisions of section 33 of the Evidence Act which relates to statements by deceased persons, instead of section 35 of the said Act.

7. That the Learned Magistrate erred in law and in fact when she failed to address the issue of costs.

8. That the Learned Magistrate failed exercise her discretion properly as a result she reached a perverse finding.

9. That the Learned Magistrate gave a judgment against the law and weight of evidence.

A brief background to the appeal is that the Appellant filed before the lower court an application dated 20th May 2019 wherein it sought for orders to allow a witness PW1 to produce as evidence, an affidavit sworn by another person identified as David N. Ngugi on the grounds that the said David Ngugi could not be traced but the trial Magistrate dismissed the application giving rise to the current appeal.

Counsel agreed to canvass the consolidated appeals vide written submission which were duly filed.

APPELLANT'S SUBMISSIONS

Counsel for the appellant gave a brief background to the appeal and condensed the grounds of appeal to 4 namely: attendance of David N. Ngugi and admissibility of his sworn affidavit sought to be produced as evidence, provisions of natural justice, Section 35 of the Evidence Act and weight of evidence.

On the first ground, counsel submitted that the trial Magistrate misdirected herself in finding that the Applicant sought more time to produce the said David N. Ngugi in Court yet the Applicant sought to dispense with the attendance of the said person.

It was counsel's further submission that the said witness had already sworn an Affidavit with regards to the present matter and was untraceable during the hearing of the suit hence the application to recall PW1 to produce the affidavit to be admitted in evidence.

Counsel relied on section 35 of the Evidence Act and submitted that the section provides for the exceptions to statements in documents produced in civil proceedings if certain conditions are satisfied, which include;

> ***a. If the maker of the statement either: -***
>
> > ***i. Had personal knowledge of the matters dealt with by the statement; or***
> >
> > ***ii. Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and***
>
> ***b. If the maker of the statement is called as a witness in the proceedings***.
>
> ***Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is***
>
> ***Incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances (the case appears to the court unreasonable.).***
>
> ***2.*** In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case ***it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence-***
>
> ***a. Notwithstanding that the maker of the statement is available but is not called as a witness; _***
>
> ***b. Notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.***

Counsel therefore submitted that the section provides for instances when a court could admit as evidence, documents whose makers could not be traced without undue delay as it was in this case.

On the issue of natural justice counsel submitted that the Learned Magistrate failed to consider the Appellant's submissions as she did not outline how the authorities they cited were distinguishable. That that failure to present to the Appellant with much particularity the factors that the trial Magistrate took into consideration in dismissing their application was against the principles of natural justice.

Counsel cited the case of ***Onyango Oloo v Attorney General [1986-1989] EA 456*** where the court held that:

> ***"A. decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at... It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a law, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair....Denial of the right to be heard renders any decision made null and void ab initio."***

Counsel also cited the cases of ***R vs Vice Chancellor JKUAT Misc. Application No. 30 of 2007 and Ridge v Baldwin [1963] 2 ALL ER 66*** to buttress the point.

The Appellant further submitted that the trial Magistrate applied the provisions of section 33 of the Evidence Act yet that section relates to statements of deceased persons.

Mr. Ole Kina also submitted that the trial court failed to consider the issue of admissibility, credibility and relevance of the document in question as provided under section 35 (4) of the Evidence Act and urged the court to allow the appeal as prayed.

Finally citing the case of ***James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR,*** counsel urged this court to set aside the impugned ruling in order to afford the Appellants a chance to be heard.

RESPONDENT'S SUBMISSIONS

Counsel for the Respondents identified 3 issues for determination as follows:

> ***a) The appeal is filed out of time without leave of court.***
>
> ***b) The record of appeal is incomplete, therefore it is incompetent and invalid***
>
> ***c) On pretrial and pretrial directions***

On the first issue counsel submitted that the appeals ought to have been filed within 30 days from the date of the order/decree/ruling and that the impugned ruling was delivered on 23rd July 2019 and the record of appeal filed on 19th February 2020. That the appellant never sought for leave to file an appeal out of time hence the appeal is incompetent

Counsel relied on the case of ***South Nyanza Sugar Company Ltd v Simeon A. Opola [2020] eKLR*** where the court held that:

> ***"The appeal was to be lodged by 29/05/2015. Instead it was filed on 02/06/2015. From the record no leave to appeal out of time was sought and obtained The Record of Appeal is therefore incomplete for want of the order granting the leave to appeal out of time. In the words of the Supreme Court in Civil Application No. 20 of 2014 Bwa.na. Mohamed Bwana (supra) such an appeal would be incomplete and hence incompetent 7 The appeal is for rejection. Having said so there is no competent appeal for consideration. The appeal is therefore struck out with costs."***

On the issue as to whether the record of appeal is incomplete, counsel submitted that the contents of a record of appeal are outlined under Order 42 Rule 13 (4) of the Civil Procedure Rules and that the fact that the appellant did not attach the entire pleadings and proceedings before the lower court was fatal to the appeal. That the appellant ought to have attached all the proceedings in the lower court file.

Counsel relied on the case of ***Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR*** where the court held that:

> ***"The Record of Appeal is the complete bundle of documentation including the pleadings, submissions and judgment from the lower court, without which the appellate Court would not be able to determine the appeal before it"***

Counsel also relied on the case of ***Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR*** and urged the court to dismiss the appeal.

On the issue of pretrial, counsel submitted that Order 11 Rule 7 (1) of the Civil Procedure Rules makes provision for pre-trial conferences and directions which must be strictly complied with and as such in this case, the court gave directions that the matter proceeds by way of viva voce evidence whereby the Appellant did not at any point make an application before the hearing to produce evidence by way of affidavit.

Ms Aoko counsel for the respondent finally submitted that David Ngugi 's affidavit did not pass the test for admissibility of evidence for reasons that the affidavit was for purposes of an interlocutory application before the trial court and the same could not be equated to a statement within the ambit of section 35 of the Evidence Act and urged the court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

I have considered the grounds of appeal and the submissions by counsel and the issues for determination in this appeal are as to whether the appeal was filed out of time, whether the record of appeal is incomplete and whether the appeal has merit.

Section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows:

> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

From the record it is evident that the Memorandum of Appeal was filed on 21st August 2019, exactly 29 days after the impugned ruling was delivered which means that the appeal was filed within time. Further the record of appeal was filed on 19th February 2020.

In the case of ***Francis Likhabila v Barclays Bank of Kenya [2020] eKLR*** Githua J held as follows:

> ***"……..there is an observation I would like to make regarding the prayers sought in the motion. Looking at the application together with the averments in the supporting affidavit and the respondent's submissions, it is apparent that the respondent was under the impression that the 30 days period prescribed under Section 79 G of the Act applied to the filing of the memorandum of appeal and the record of appeal. This is not the legal position. The law is that appeals to the High Court are instituted by way of filing a memorandum of appeal and it is not mandatory for an appellant to file a memorandum of appeal together with the record of appeal. The record of appeal can always be filed later after the memorandum of appeal has been served on the respondent and before the appeal is listed for directions under Order 42 Rule 13 of the Civil Procedure Rules.***
>
> ***18. Unlike service of the memorandum of appeal which under Order 42 Rule 12 is required to be effected on the respondent within 7 days of notice by the Deputy Registrar that the appeal had been admitted for hearing, the Civil Procedure Rules do not provide a specific timeline within which the appellant should file a record of appeal. However, Order 42 Rule 13 of the Rules leaves no doubt that ideally, the record of appeal should be filed soon after service of the memorandum of appeal to pave way for fixing of a mention date for the purpose of giving directions on hearing of the appeal."***

On 26th July 2021 this matter came up for mention for directions whereby counsel for the appellant informed the court that he had already filed a record of appeal and sought for a hearing date. Counsel for the respondent informed the court that the appeal could be disposed of by way of written submissions of which counsel for the appellant agreed to.

Ms Aoko counsel for the respondent stated that they could file submissions and take a date for highlighting of the same. Counsel further submitted that the orders should apply to Appeal Nos. 9 & 10 of 2019. No issue arose as to the competence and suitability of the appeal.

On the issue of the contents of a record of appeal being incomplete, Order 42 Rule 13 (4) provides as follows:

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

> ***(a) the memorandum of appeal;***
>
> ***(b) the pleadings;***
>
> ***(c) the notes of the trial magistrate made at the hearing;***
>
> ***(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***
>
> ***(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
>
> ***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***

Provided that—

> ***(i) a translation into English shall be provided of any document not in that language;***
>
> ***(ii) <u>the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).</u>***

This appeal is an interlocutory appeal against the ruling of the trial Magistrate and not on the judgment and final decree of the court. Whether the appeal is allowed or not this matter has to go back to the trial court for hearing and determination. PW1 had not completed her evidence. It is therefore noteworthy as per sub rule(ii) above that the mandatory documents in an appeal as the present one are the memorandum of appeal, the pleadings and the order being appealed against. The necessary pleadings in this case will be the notice of motion and response thereto hence it would not be necessary to have all the pleadings and documents filed in the trial court for purposes of an appeal against a specific ruling. The court also has the benefit of perusing the lower court file hence I find that the record of appeal is complete as filed.

The appellant had sought in the Notice of Motion that the trial court dispense with the court attendance of the said David Ngugi as he could not be traced; the Plaintiff be allowed to recall PW1 to produce the affidavit sworn by David on 16th August 2010 as evidence; and the said affidavit be admitted as evidence. The application was very specific on what orders the appellant was seeking for.

Section 35 (1) of the Evidence Act provides as follows:

> ***Admissibility of documentary evidence as to facts in issue***
>
> ***(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of***

that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

In the impugned ruling the learned trial Magistrate wrote as follows:

"The Plaintiff in this instant suit seeks that more time be given to him so as he can be able to produce David N. Ngugi in court. However, it should be noted that this matter is a 2010 matter and has therefore lagged behind in this Honourable court thus causing various delays in the administration of justice. "Justice delayed is justice denied."

In the light of the foregoing considerations I find that the authorities cited by the defendant persuasive. These cited by the plaintiff are distinguishable. The Plaintiff has submitted and is not in any objection that they have tried to look for David N. Ngugi so as he can attend court but in various circumstances their efforts have not been futile.

The application also goes against the provisions of section 33 of the Evidence Act. It is clear that the deponent of the affidavit cannot be traced.

It is also clear that the defendant would wish to cross examine the witness and would therefore suffer prejudice of evidence of absent witness is allowed and the defendant does not have the chance to test its veracity.

In these reasons I reject the application by the Plaintiff and be that the case proceeds."

From the above ruling it is evident that the learned trial Magistrate misdirected herself from the onset, on what the Appellant's prayers were. The Appellant's prayers were basically leave to recall a witness to produce as evidence an affidavit sworn by another person and to admit that affidavit as evidence. The affidavit that was in issue formed part of the record as it had been filed in an interlocutory application. It is also one of the documents in the appellants list of documents dated 1st November 2018. The appellant had laid a basis why they were not able to procure the attendance of the said David Ngugi and that the documents formed part of the record. There was no evidence that the production would cause any prejudice to the respondents and further the respondents still had an opportunity to cross examine and shatter the veracity of the documents attached to the affidavit.

Section 34 (1) (a) of the Evidence Act provides that:

Admissibility of evidence given in previous proceedings

(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

Having said that, I find that the appeal has merit and that the supporting affidavit of the said Daniel Ngugi would be admissible. I have also had an opportunity to peruse the said affidavit and find that the contents of the said affidavit are a replica of the Plaint and the documents annexed thereto are the same documents produced by the Appellant's witness PW1.

The appeal is therefore allowed as prayed. The matter in the lower court to remitted for hearing and determination before another Magistrate with jurisdiction other than the trial Magistrate in the impugned ruling.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JANUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.