THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ISIOLO

ENVIRONMENT AND LAND COURT

ELCA NO. 011 OF 2021

FATUMA BONAYA.....APPELLANT

VERSUS

LEONARD KIARIE KINUTHIA.....RESPONDENT

JUDGMENT

1. The Memorandum of Appeal in this suit states as follows:

MEMORANDUM OF APPEAL

(An appeal against the ruling/decree in Isiolo CMCC 40/2014 by Hon. E Ngigi (PM) dated 29th September, 2020)

The appellant being aggrieved;

1. The Learned magistrate erred in delivering a Ruling that was not only unconscionable but also an affront to the provisions of Article 159 (2) (d) of the Constitution which underlines substantial justice as opposed to procedural technicalities.

2. The learned magistrate erred in failing to consider that land is an emotive issue therefore he could have accorded both parties a fair hearing.

3. The Learned magistrate did not apply his judicial discretion in a fair manner.

4. The Learned magistrate further erred in law and fact by failing to consider the appellants defence and the evidence on record.

5. The learned magistrate erred in failing to direct his mind properly on the principles governing setting aside of judgments where a party has not tendered evidence and failing to grant relief when justice and equity so demanded.

6. The Learned magistrate erred in failing to be guided by the spirit of the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act.

7. The Learned Magistrate erred in considering extraneous matters which were not raised by parties and the appellant was not allowed to respond to.

REASONS WHEREFORE the appellant prays that the Ruling/decision be set aside and substitute it with a finding that it be remitted to the lower court for hearing of the case on a priority basis before another magistrate with competent jurisdiction save for Hon. Ngigi, and an order for costs.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2020

NJUI & CO. ADVOCATES

ADVOCATES FOR THE APPELLANT

2. The appeal was canvassed by way of written submissions. In her submissions, the appellant proffered that the lower court's ruling was an affront to the provisions of Article 159 (2) of the Constitution and eschewed substantial justice in favour of procedural technicalities. It was also argued that the learned Magistrate did not accord both parties a fair hearing and failed to take into account that land is an emotive issue. It is also claimed in ground 3 of the Memorandum of Appeal and in the submissions that the earned Magistrate did not exercise his discretion in a fair manner. It was also claimed that the learned Magistrate had failed to consider the Appellants defence and the evidence on record

3. The Appellant proffered that the learned magistrate failed to direct his mind properly regarding the principles governing setting aside of Judgments where a party has not tendered evidence and failed to grant relief when justice and equity so demanded. The Appellant also argued that the learned Magistrate had ignored the spirit enshrined in the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act. It was also claimed that the learned Magistrate had considered extraneous matters which the parties had not raised.

4. The Appellant has proffered the following cases to buttress her assertions:

a. Pithon Waweru Maina Versus Thuku Mugiria [1983] eKLR

b. Burhan Decorations versus Moving Foods Ltd & Another [2014] eKLR

c. Stephen Wanyoike Kinuthia [Suing on behalf of John Maraga (deceased)]Versus Kariuki Murege & Another [2018] eKLR

d. Patriotic Guards Ltd Versus James Kipchirchir Sambu [2018] eKLR.

e. China Road and Bridges Corporation Versus John Kimenya Muteti [2019] eKLR

f. Clemensia Nyanchoka Kinaro Versus Joyce Nyansiaboka Onchombo [2021] eKLR.

5. All the authorities proffered by the appellant are good authorities in their facts and circumstances. However, not all cases are congruent to a decree of mathematical exactitude in their facts and circumstances. In appeals, a court is entitled to examine all relevant proceedings and to come to its independent decisions having considered all the evidence tendered before the lower court and the general integrity of the apposite proceedings. This is what this court will do in this case

6. For the Respondent it was submitted that the suit had been adjourned many times as a result of which it had taken over 5 years before the trial court heard the Respondent in the absence of the Appellant in terms of the provisions of Order 12 Rule 2 of the Civil Procedure Rules, 2010. Thereafter a judgment was delivered in favour of the Respondent. The Respondent decried the fact that the Appellant filed an application to set aside the apposite judgement on 23rd June, 2020 whereas the Judgment had been delivered on 12th November 2019. This was over 7 moths later. In his submissions, the Respondent proffered that the Appellant did not satisfactorily explain why she and/or her advocate did not attend court when the hearing of the case had been scheduled.

7. Regarding ground 1 that the impugned decision was an affront to Article 159 (2) (d) of the Constitution, the respondent asked the court to consider the totality of the facts and circumstances of this case and find that the appellant had employed dishonest tactics to delay the hearing and determination of the suit.

8. The court finds that the provisions of Order 12 Rule 2 of the Civil Procedure Rules 2010 are a legal requirement buttressed by statutory law and, therefore, cannot constitute procedural technicalities.

9. Regarding ground 2, the Appellant argues that the Appellant does not explain how the trial magistrate failed to consider that land is an emotive issue. I find that, by itself, this ground is nebulous and has not been satisfactorily explained. I agree with the submissions proffered by the Respondent regarding this ground.

10. Regarding ground numbers 3, 5 and 6 of the appeal the Respondent proffers that they try to impeach the integrity of the judicial discretion of the trial magistrate. The Respondent at length contends that the trial magistrate properly and judicially employed his discretion. He was categorical that judicial discretion in the way the Appellant argues could not be exercised when the appellant and his advocate failed to come to court. He proffered the case of **John Ogei Mariama & 2 others Versus Paul Ntandura Civil Application** No. 307[204] 2 EA 163 which among other things opined that court business cannot be handled casually and that judicial discretion must be exercised upon reason not capriciously or on sympathy alone. It held that:

> ***"Justice must look both ways as the rules of procedure are meant to regulate administration of Justice and they are not meant to assist the indolent".***

11. The Respondent also raised the issue of the Oxygen Principles raised through section 3 A of the Civil Procedure Act and submitted that they were not applicable in this case because the Appellant had evinced casual conduct during the apposite proceedings. He proffered the case of ***Nicholas Kiptoo Arap Korir Salat Versus Independent Electoral And Boundaries Commission & 6 others [2013] EKLR*** where the court opined as follows:

> ***"The oxygen principles must never provide succor and cover to parties who exhibit scant respect for court rules and timeliness."***

12. Regarding ground 4 that the trial magistrate had failed to consider the Appellants defence and pleadings, the Respondent says that the impugned ruling had analyzed the pleadings and the issues in question and arrived at a sound decision. Having carefully looked at all the proceedings, I do find that the trial magistrate had carefully considered the pertinent issues and arrived at a very well reasoned decision. I

will dismiss this ground.

13. Regarding ground No. 7, the Respondent dismissed it offhand. I agree that the extraneous evidence and its extent was not satisfactorily explained by the Appellant. On the claim that reference to **Isiolo CMCC ELC 24 of 2019** by the Magistrate was extraneous being a parallel suit when the suit which spawned this appeal was still extant, I find that this was merely a restatement of an indubitable fact. This was not an extraneous matter.

14. Regarding the hackneyed statement that the mistake of counsel cannot be visited upon a litigant, the Respondent sought to debunk it by proffering the case of ***Charles Omwata Omwoyo versus African Highlands & Produce Co. Ltd [2002]*** where the court opined as follows;

> ***"Time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavor. The plaintiff should not be made to shoulder the consequences of the negligence of the defendant's advocate. This is a proper case where the defendant's remedy is against the erstwhile advocate for professional negligence and not setting aside the judgment."***

In this case the trial magistrate had properly, carefully and judiciously applied the existing law and borne obeisance to all the requirements of order 12 Rule 2 of the Civil Procedure Rules when he delivered the impugned Judgment and the consequent ruling which dismissed the appellants application to set aside the judgment. Indeed, I find that the trial magistrate gave an erudite exegesis regarding all pertinent issues.

15. I agree with the trial court that the opinion of Waki, J A, in the case of ***Kingori Kihumba versus Gladys wanjiru Migwi*** & Another cited in the case of ***Thomas K Sambu versus Paul Chepkwony [2014] eKLR*** is veritably appropriate to the circumstances of this case. The judge of the Court of Appeal opined as follows:

> ***"With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one else to blame if no further indulgence is accorded to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and diligence that entails such matter. Instead the applicant and his advocate exhibit undesirable non-charlance which I am not inclined to countenance."***

16. Do I need to state that in all situations the suit belongs to the litigant and not to his/her advocate? The simple answer is that the overarching responsibility regarding how a suit should be prosecuted always lies with the litigant with the professional input of his advocate. It is his duty to, at every stage, follow up the happenings in his case, the careless and casual shenanigans of his/her advocate notwithstanding. In this case, the litigant was not, with proper and overriding reasons, able to persuade the Hon. Magistrate in the lower court to exercise his Judicial discretion to set aside or not to set aside the apposite Judgment.

17. Having carefully considered all pertinent issues, I do dismiss all the 7 grounds proffered in this appeal.

18. The following orders are issued.

> ***a. This appeal is dismissed.***
>
> ***b. Costs are awarded to the respondent.***

Delivered in open Court at Isiolo this 25th day of April, 2022 in the presence of:

Court Assistant: Balozi

M/S Nyasani h/b Manasess Kariuki for the Respondent

M/S Wangechi h/b Mrs Kariuki for the Appellant

HON. JUSTICE P. M .NJOROGE

JUDGE