



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL 100 OF 2008

KIRINYAGA COUNTY COUNCIL APPELLANT

VERSUS

KENYA NUT & CO. LTD 1ST RESPONDENT

ELIZABETH NJERI NGUGI 2ND RESPONDENT

(Appeal from entire ruling and/or Order of the Senior Resident Magistrate's Court at Kerugoya in Civil Case No. 230 of 1999 dated 1st December 2000 by P. K. Sultan– R.M.)

RULING

By an application dated 10th January 2002 and expressed to be brought under order VI rule 13(b) and (d) of the civil procedure rules, section 3A and 5 of the civil procedure Act and all other enabling provisions of the law, **Elizabeth Njeri Ngugi**, hereinafter referred to as “*the applicant*” prayed that this appeal be dismissed with costs. The application was anchored on the grounds that the Resident Magistrate’s Court at Kerugoya in Senior Resident Magistrate’s Court Civil Case No. 230 of 1999 from whence this appeal arose lacked jurisdiction to hear the dispute and that consequently there was in law nothing to be reversed or altered and there is a complete absence of any material from which an appeal can be heard. That as a direct consequence thereof the hearing of this appeal would be an exercise in futility.

The affidavit in support of the application was to the effect that the instant appeal arose from a ruling delivered by **Honourable P.K. Sultan**, Resident Magistrate on 1st December 2000 in Kerugoya Resident Magistrate’s Court Civil Case No. 230 of 1999 which sought interalia orders to reinstate the suit which had earlier on been dismissed on 17th November 2000 due to the absence of advocate for the appellant when the matter was called out for hearing. Prior to that the appellant had filed an application seeking to transfer the suit to the High Court on the grounds that the subordinate court lacked the requisite jurisdiction to hear and determine the suit. On 26th June 2000 **Githinji J** (as he then was) delivered a ruling and held that the case had been instituted in a court without jurisdiction. No appeal was preferred against the said ruling. Though the appellant later withdrew the claim for general damages for trespass, the prayer for injunction was never withdrawn. That all claims for the right to occupy or work land as the 2nd respondent was currently undertaking ought to be determined by the land disputes tribunal. Finally

she deponed that the suit premises exceeds Kshs.500,000/= in value and accordingly the resident magistrate's court had no jurisdiction to fully hear and determine the matter even if it was reinstated. It was for these reasons that the applicant was seeking the dismissal of the appeal.

In his oral submissions in support of the application, **Mr. Macharia**, learned advocate for the applicant merely reiterated and expounded on the grounds in support of the application as well as the supporting and supplementary affidavits. Suffice to add that the suit premises had been the subject of two valuation reports by the applicant as well as the respondent. The applicant's report put the value of the suit premises at Kshs.3,500,000/= whereas the appellant puts it at Kshs.14,300,000/=. That section 159 of the Registered Land Act specifically limits the pecuniary jurisdiction of the Magistrate's court to Kshs.500,000/=. The appellant was thus seeking to reinstate a suit in court with no jurisdiction. He relied on the following authorities on the question of jurisdiction.

1. **Halsbury's Laws of England 4th Edition Volume 10 page 132.**
2. **The Queen v/s The Commissioners for Special Purposes of the income Tax (1888) QB 313.**
3. **Desai v/s Warsama (1969) E.A. 351.**
4. **Owners of the Motor Vessel "Lilians" v/s Caltex Oil (Kenya) Ltd (1989) KLR 1.**

The application as expected was resisted. In a replying affidavit sworn by **Roselyne W. Miano**, a clerk to the appellant council, she deponed in pertinent paragraphs that it had filed suit against the respondents based on trespass and also challenged title of the applicant in respect of the suit premises. In appreciation of the lack of jurisdiction of the subordinate court to adjudicate over matters of trespass it applied for the transfer of the suit to the High Court which application was rejected by **Githinji J.** After the dismissal aforesaid the 1st respondent filed a formal preliminary objection on the ground that the subordinate court lacked the jurisdiction to determine the suit which preliminary objection was canvassed and a ruling thereon delivered on 8th August 2000. The preliminary objection was dismissed on the ground that the entire suit would not be defeated if the claim based on trespass was abandoned as there was still a claim to title to suit property which the subordinate court had jurisdiction to adjudicate over. There was no appeal against that ruling but subsequent thereto the parties fixed the main suit for hearing. However on 17th November 2000 the magistrate ordered the suit dismissed under Order IXB rule 4 of the civil procedure rules which order necessitated the filing of an application to set aside the same which application was again dismissed thereby provoking this appeal.

In her oral submissions in opposition to the application, **Ms Wambui**, learned advocate for the appellant argued that the application was brought in bad faith. Same issue had been raised by the 1st respondent in the lower court and was dismissed. The issue ought to be revisited only during the hearing of the appeal proper. That the application was brought under the wrong provisions of the law. The appeal was admitted for hearing on 6th May 2005. On 23rd October 2007 when the parties appeared before **Visram J** (as he then was), he ruled that the appeal should be set down for hearing where the twin issues; jurisdiction and the merits of the appeal will be canvassed. The issue of valuation was never raised in the trial. Accordingly the valuation reports filed herein were outside the pleadings. Finally the advocate submitted that under section 159 of the Registered Land Act, the subordinate court had jurisdiction to hear the matter in so far as cancellation of the title was concerned.

I have now carefully considered the application, respective affidavits, rival oral submissions, authorities cited and the law.

To begin with, I quite agree with the appellant that the application is bad in law for it has been brought under the wrong provisions of the law. Order VI rule 12(b) and (d) cited in the body of the application deals with striking out of pleadings for being either scandalous, frivolous or vexatious or it is otherwise an abuse of the process of the court. Before us is an appeal which has since been admitted. This provision of the law has no application at all to appeals. It matters not that the applicant has cited section

3A and 5 of the civil procedure Act and all other enabling provisions of the law. The applicant can only revert to those provisions in the event that there is no specific provision of the law under which such an application can be entertained. (See generally **Mediterranean Shipping Co. S.A v/s International Agriculture Enterprises Ltd & Anor. (1990) KLR 183**, **Alice Wangari Ndumo v/s Patrick Ngumi Githae & 2 Others NYR HCCA No. 28 of 2002 (UR)**, **Kenya Commercial Bank Ltd v/s Gichiru Kariuki & Washington Nderitu Karume NYR HCCC No. 64 of 1998 (UR)**, **Nyamogo & Nyamogo Advocates v/s Joseph Mboi Mwangi, NYR HC Misc. Appl. No. 201 of 2006 (UR)** and **Ndirangu Karaigua v/s Attorney General & Ano. NYR HCCC No. 3 of 1990 (UR)**). In the circumstances of this case there is a whole body of laws that deals specifically with appeals. This is order XLV. The applicant ought to have invoked those provisions of the law in advancement of this application. In any event I do not think that order XLI contemplates an application as the instant one. Under order XLI rule 14, an appeal may be dismissed where the appellant does not appear on the day fixed for the hearing of the appeal. Again under Order XLI rule 31 of the civil procedure rules, an appeal may be dismissed for want of prosecution. These are the only instances when an appeal can be dismissed. In my view the provisions of the law under which the application has been anchored has no application to the appeals. On that ground alone this application ought to fail.

The genesis of this appeal, is the decision of the learned magistrate not to set aside the order dismissing the suit made earlier on, on 17th November 2000. The suit was dismissed following the non-appearance of the appellant and its witnesses for the hearing of the suit. Following the dismissal the appellant filed the application seeking the setting aside of the order of dismissal as well as reinstatement of the suit for hearing on merits. That application too was denied hence this appeal. From the foregoing it is apparent that no evidence was tendered in support of or in opposition to the suit. Yet in this appeal, the applicant has gone out of its way to introduce evidence by way of valuation reports as to the value of the suit premises. This is introduction of evidence in appeal. Order XLI rule 22 of the civil procedure rules expressly allows only production of additional evidence in the appellate court but on certain conditions. It provides that “... **The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary, in court to which the appeal is preferred; but if**

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.” No such situation obtains in the circumstances of this appeal. The issue of valuation was never raised in the trial court. In any event it could not have been raised since the suit was dismissed for want of attendance by the appellant. The respondent cannot now raise it in this appeal by way of back door. If those documents are discounted as they should then I have nothing to go by in determining the value of the suit premises for purposes of jurisdiction. Accordingly, the authorities cited by the respondent on the question of jurisdiction are of no assistance to me.

The upshot of all the foregoing is that the application lacks merit and is accordingly dismissed with costs.

Dated and delivered at Nyeri this 21st day of May 2009

M. S. A. MAKHANDIA

JUDGE