REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 56 of 2003
ISAAC KARURI NYONGO
PETER MIRINGU KIBUI……..……APPELLANTS
Versus
RUIRU SPORTS CLUB……..……RESPONDENTS
(Arising from P.M.'s court T0hika Civil Case No. 773 of 2002)
RULING

Ruiru Sports Club, the Respondent herein, took out the summons dated 26th February 2009 pursuant to the provisions of sections 3A & 78(2) of the Civil Procedure Act and order VI rule 13 and Order XLI rules 27 and 31 (2) of the Civil Procedure rules in which it sought for the appeal to be struck out for being an abuse of the court process or in the alternative the appeal be dismissed for want of prosecution. The summons is supported by the affidavit of James Ng'ang'a Gathingi. Peter Miringu Kibui, the 2nd appellant herein, filed a replying affidavit to oppose the summons.

The Respondent has beseeched this court to dismiss the appeal on the ground that it is now 6 yeas since directions were taken yet the appeal has not been fixed for hearing. It is said that the subject matter of the suit and the appeal was sold to a third party who was not a party to the suit and in this appeal hence the appeal remains an academic exercise. Mr. Wamae, learned advocate for the Respondent also argued to the effect that the 1st appellant having passed away in 2007, the appeal stands as having abated.

Mr. Njoroge on his part urged this court to dismiss the summons for the following reasons: First, that the summons did not specify the grounds it is based under order VI rule 13 hence the same is incurably defective. Mr. Njoroge's argument is that it is necessary to specify the grounds because order VI rule 13(1) (a) bars the reliance of evidence. When faced with this submission, Mr. Wamae, sought to abandon the reliance on the provisions of order VI rule 13 and said he was relying on section 3A of the Civil Procedure Act. Secondly, it is argued by Mr. Njoroge, that the application under order XLI rule 31, should have been by way of a motion as opposed to a summons like in this case, hence the application should be dismissed for being an abuse of the court process. Mr. Wamae conceded the fact that he should have filed a motion instead of a summons. He was of the view that the defect is not fatal but that the same curable under order L rule 11 of the Civil Procedure rules.

I have considered the rival submissions tendered by learned counsels on both sides. I have also perused the material placed before me. The facts leading to the filing of the application appear to be short and straightforward. Isaac Karuri Nganga and Peter Miringu Kibui sued Ruiru Sports Club vide the plaint dated 21st August 2002, filed before the Chief Magistrate's court, Thika whereupon they sought for inter alia a declaration that the Respondent herein, holds 30 acres comprised in the parcel of land known as Ruiru/Ruiru East Block 2/122/4 in trust for the plaintiffs (appellants). The suit was heard by Alex Anambo, the then learned Principal Magistrate, Thika, whereupon the learned Principal Magistrate gave the appellants judgment as prayed in the plaint on 13th November 2002. By his ruling of 30th April 2003, the learned Principal Magistrate set aside his judgment on the basis that the Principal Magistrate's court had no jurisdiction to hear and determine the suit. Being dissatisfied with the aforesaid decision, the appellants preferred this appeal. This is the appeal the Respondent now seeks to be struck out and or dismissed for the reasons I have earlier enumerated. The appellants have raised two preliminary issues against the summons. I am obliged to dispose of the two preliminary points of law before dealing with the merits of the application. The first ground argued is that the application should have been by way of a motion instead of a summons. I have carefully perused the provisions of order XLI rule 31 of the Civil Procedure rules and I am convinced that the rules clearly state that an application under order XLI rule 31 of the Civil Procedure rules must be by summons. I therefore do not uphold the preliminary objection on this grounds. In any case the court is given an unfettered discretion under order L rule 11 and under order VI rule 12 of the Civil Procedure rules to excuse the defect for want of form. The second preliminary point raised by the appellant is to the effect that the Respondent had failed to specify the ground he is relying under order VI rule 13 of the Civil Procedure rules. The Respondent's advocate purported to withdraw reliance on order VI rule 13 from the bar. I do not think I will accept the withdrawal, because the ground had already accrued to the appellants to rely on in opposing the summons. I agree with the submissions of Mr. Njoroge that it was necessary for the Respondent to state on which paragraphs he was relying under order VI rule 13(1)(a) – (d). However a cursory perusal of the summons shows that the Respondent had clearly stated that he was seeking for the appeal to be struck out and or dismissed for being an abuse of the court process. I can only infer that the Respondent meant to rely on the provisions of order VI rule 13(1)(d) of the Civil Procedure rules. In such a case the Respondent/Applicant was perfectly entitled to rely on affidavit evidence. Again I do not see any merit in the preliminary objection.

Having disposed of the preliminary points of law, let me now consider the merits of the summons. It is said that it is about 6 years since directions were taken yet the appeal has not been listed for hearing. The appellants admit that they have not caused the appeal to be listed for hearing. They have blamed the respondent for the delay because it instead filed a parallel suit in Nairobi. The appellants further allude to the fact that they are not aware whether or not directions have been taken in this appeal. There is no doubt that if an appeal is not listed for hearing within 3 months after the giving of directions, then the Respondent is entitled to apply for the appeal to be dismissed for want of prosecution. I have carefully perused the record and it is clear that directions in this appeal were given on 24th September 2003. It is therefore true that six years have passed since directions were taken yet the appellants have not deemed it fit to list the appeal for hearing. The appellants have blamed the Respondent as the cause for the delay. They have claimed that the Respondent has kept them busy with Nairobi H.C.C.C.No. 2127. of 2007. I am not convinced by that submission for two reasons. First, is that there was no order to stop the Appellants from fixing this appeal for hearing. Secondly, even if I was to buy the idea that the pending Nairobi H.C.C.C. No. 2127 of 2007 kept the Appellants busy, still there was no explanation as to what happened with the appeal from 24th September 2003 until 2007 when the Nairobi case came into being. By 2007, 3 years had passed before the appeal was listed for hearing.

In the end I am convinced that the appeal should be dismissed for want of prosecution under order XLI rule 31(2) of the Civil Procedure rules.

It has been alleged that the 1st appellant namely, Isaac Karuri Nyongo passed away on 8th November 2007 hence his appeal has abated. The appellants did not deem it fit to address me on this submission. I have no reason to doubt the allegation. Consequently, the appeal by the 1st appellant is marked as having abated.

The end result is that the summons dated 26th February 2009 is allowed in terms of prayer 4. Consequently the appeal is dismissed for want of prosecution. Costs of the appeal is given to the Respondent.

Dated and delivered this 11th day of November 2009.

J.K. SERGON

JUDGE