



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 36 of 2006

GUIDO KANYANGI NABEA
APPELLANT/APPLICANT

VERSUS

CHAIRMAN, BOARD OF DIRECTORS

MIATHENE SUB-DISTRICT HOSPITAL
RESPONDENT

RULING OF THE COURT

This ruling relates to a preliminary objection on a point of law raised by counsel for the respondents herein and filed in court on 19.6.2006. The objection is to the appellant's appeal filed in court on 19.5.2006 and the applicant's amended Notice of Motion dated 19.5.06 on the grounds that:-

1. The appeal is premature and is not maintainable under the provisions of the Civil Procedure Act and the Civil Procedure Rules.
2. The Notice of Motion which is based on the said appeal and the sustainable (sic) under the said Act and the Civil Procedure Rules.
3. The court lacks jurisdiction to entertain the said appeal and the application and the same should be struck out with costs.

The Notice of Preliminary objection was filed and served after Mr. Kioga, counsel for the applicant had already submitted during the inter partes hearing.

The amended Notice of Motion to which the respondents have objected was filed in court on 19.5.06 and the applicant seeks the following orders:-

1. That the court be pleased to order Stay of Eviction of the appellant ordered by Nkubu Principal Magistrate in his judgment dated 10th May 2006 and in the decree dated 11th May 2006 together with a warrant dated 11th day of May 2006.
1. (a) That the court do grant permanent injunction and to (sic) order reinstatement of the applicant

back in his parcel of land where he has been illegally removed (sic)

(b) That damages occasioned by this illegal eviction be reserved to be determined by the court after the determination of the appeal.

2. That the court do order stay of any further proceedings of Nkubu Civil case No. 22 of 2006 until the final hearing of his appeal or until further orders of this court.
3. That the costs occasioned by this application be payable to the applicant/appellant by the respondent.

The application which is said to be brought under Order 41 Rule 4 of the Civil Procedure Rules and section 63 of the Civil Procedure Act is premised on 3 grounds on the face thereof, namely:-

- (i) The plaintiff filed a defective suit and they (sic) did not serve upon the defendant/appellant.
- (ii) That orders were obtained ex-parte and eviction was ordered by the court.
- (iii) That the applicant's houses and other properties were destroyed by the plaintiff's agents supervised by police on 16th May 2006 and in absence of defendant/applicant or any adult member of his household.
- (iv) That other grounds to be stated at the hearing of this application.

Simultaneously with the Notice of Motion, the applicant filed the Memorandum of Appeal in which he set out ten (10) grounds of appeal. The appellant's/applicant's complaints are that the trial court had no jurisdiction to entertain the suit that was before it. That the plaint was materially defective and therefore that the learned trial magistrate was in error when he admitted the plaint whose subject matter is land which lies in an area which is still under adjudication. The appellant has also complained that the learned trial magistrate was wrong in admitting a defective affidavit of service and further that the learned trial magistrate erred in failing to note that the plaintiff was not a legal person. The appellant/applicant has also complained against alleged bias by the learned trial magistrate against the defendant and further that the court orders were implemented against the wrong parcel of land No. 3508 instead of parcel No. 2945.

During the hearing of the Preliminary Objection, Mr. Rimita argued all the three grounds together and relied on Order 9A of the CPR which order deals with the consequences of non-appearance and default of defence. He contended that since the defendant failed to appear the ex-parte judgment was properly given. He contended that the best approach that the applicant should have taken would have been to apply to set aside and/or vary the judgment/order and not to file an appeal. That if attempts by the applicant to have the judgment/order set aside failed, then and only then could he come before this court.

It was further contended on behalf of the respondents that a party against whom ex-parte judgment is passed does not proceed to appeal as of right and therefore that applicant's counsel should go back to the trial court for the orders he now seeks from this honourable court.

Rules 10 and 11 of Order 9A of the CPR provide as follows:-

"10. Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

"11. Applications under this order shall be made by summons."

Though Mr. Kioga for the applicant/appellant intimated to the court that he did not wish to respond to the respondent's preliminary objection, he nonetheless did so and submitted that since he was already making his submissions in support of the applicant's amended Notice of Motion, it was not proper to admit the P.O. at that stage contrary to the provisions of Order 14 Rule 2 of the CPR. The said rule provides as follows:-

“14. If it appears to the court that there is in any suit a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried or before any reference is made to a referee or an arbitrator, the court may make an order accordingly, and may direct such question of law to be raised for the opinion of the court in such manner as the court thinks expedient and all such further proceedings as the decision on such question of law may render necessary may”

Mr. Kioga cited the case of MUIRURI –VRS – KIMEMIA (2002) 2 KLR 677 and urged the court to find that the P.O. as presented did not meet the requirements of a preliminary objection basically because there were still some facts to be ascertained. In the KIMENIA case (supra) the Court of Appeal held (3rd holding) that:-

“A preliminary objection is in the nature of a demurrer in that it raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Although the facts in that case were miles apart from the facts in the present case in which the respondent made a claim to land based on trust, the issue of a preliminary objection which was pleaded by the appellant did arise in the course of the hearing of the main suit. In dismissing the preliminary objection which sought to have the suit struck out on account of being time barred under the Limitation of Actions Act, the court (Tanui J) had this to say:-

“I think this preliminary objection cannot be decided without obtaining the necessary evidence relating to taking possession of the said parcel of land and the nature of the dispute between the defendant and one Jacob Mwaura. For these reasons I would reject the preliminary objection at this stage.”

Considering the circumstances of this case, I am of the considered view that this preliminary objection cannot stand. The respondent’s main contention is that the appellant’s/applicant’s appeal is premature and that the applicant has chosen the wrong procedure in filing both the appeal and the application before this honourable court. If the applicant chose not to apply to set aside or review the lower court judgment that does not necessarily take away his right of appeal if he so desires. Indeed, if the applicant had chosen to apply for review or setting aside of the exparte judgment he would have had to comply with Rule 11 of Order 9A.

In any event, this preliminary objection cannot be concluded without deciding the issues that have been raised by the applicant’s application, for example whether the alleged process server was so authorized to serve process and whether in fact he effected service upon the appellant.

In the result, I must reject the preliminary objection at this stage.

Orders accordingly.

Dated and delivered at Meru this 31st Day of July 2006.

RUTH N. SITATI

J U D G E