REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 93 of 2005

MUKURU MUNGE …… APPELLANT

- Versus -

GILEAD MWANYASI ……..…… RESPONDENT

Coram: Before Hon. Justice L. Njagi

Mr. Nyabena for Appellant

Ms Lagat for Respondent

Court clerk – Kinyua

J U D G M E N T

This is an appeal from the judgment and orders of Ag. Senior Resident Magistrate, Taveta, delivered on 21st September, 2005, in District Magistrate Civil Case No. 30 of 1998. In that case, the plaintiff, who is now the respondent, prayed for judgment against the defendant, who is now the appellant, for Kshs. 57,600/= being the value of a structure belonging to the respondent which the appellant, without any colour of right, demolished on 24th April, 1997. The respondent also claimed the value of goods which were in that structure when it was demolished, interest, and costs of the suit.

In his amended defence, the appellant sought the dismissal of the suit with costs. His case was that the respondent had agreed to sell to him the structure and the plot on which it was built at an all inclusive price of Kshs. 110,000/= in respect of which he made a down payment of Kshs. 10,000/=. He also stated that he was ready to pay the balance of Kshs. 100,000/= once the respondent furnished him with the letter of allotment for the plot.

After hearing, considering and evaluating the evidence before him, the learned Senior Resident Magistrate found that the defendant had no lawful cause for demolishing the house that had been erected on the plot that he was purchasing, and the contention that he had permission from the plaintiff to demolish the house as being devoid of any substance since it had not been supported by any credible evidence. After taking into account that the house in issue was constructed in 1970, the learned magistrate found that its value was Kshs. 27,000/=. He accordingly settled for judgment for the plaintiff for the said sum of Kshs. 27,000/= with costs and interest. It is against this judgment that the appellant has appealed to this court.

The memorandum of appeal sets out eleven grounds that seek to impeach the judgment. At the

hearing of the appeal, Mr. Nyabena appeared for the appellant and Ms Lagat for the respondent. The main thrust of Mr. Nyabena's arguments was that in law, fixtures are part of the land, and therefore the house which is the subject matter of this appeal was part of the plot which the appellant was purchasing. If it was not going to be part of the plot, the argument should have said so; but it did not say so. He also submitted that even if the house had been excluded from the plot, there was no evidence or proof that the plaintiff was the owner. He further submitted that even if there was evidence of ownership, this was a claim for special damages which should be specifically pleaded and proved. As there was no such proof, he urged the court to allow the appeal.

In her response, Ms. Lagat referred to section 65 of the Civil Procedure Act and submitted that the High Court has jurisdiction to hear and determine appeals where the appeal is competent. She submitted that this appeal was incompetent since the decree was not incorporated in the record of appeal as required under order XLI rule 8B(4)(f) of the Civil Procedure Rules; and since no order had been extracted, she submitted that these omissions rendered the appeal incompetent as they went to the very root of the court's jurisdiction. She referred the court to **KADUDA** v. **DOUGLAS** [1981] KLR 260; **CHEGE** v. **SULEIMAN** [1988] KLR 194 and **ALEXANDER MORRISON** v. **MOHAMED RAZA SULEIMAN VERSI**, Civil Appeal No. 88 of 1952 and submitted that this court had no jurisdiction to hear the appeal and that the same should be dismissed with costs. Counsel did not argue any other point.

In reply, Mr. Nyabena argued that the documents enumerated in order XLI rule 8B(4)(f) rank pari passu and submitted that the inclusion of any one of them will satisfy the rule. He further submitted that all the decisions cited by Ms. Lagat are those of the Court of Appeal whose rules are different from those of this court, and that all those decisions related to preliminary objections before the matter went to hearing. He referred to order XLI rule 8B(4) and submitted that the court was satisfied that all the documents were on record. He referred the court to **SCHWEITZER** v. **CUNNINGHAM & ANOR**. (1955) 22 EACA 252 and asked the court to allow the appeal.

After considering the rival submissions of counsel, the first issue to be determined is whether the court has jurisdiction to entertain this appeal. Only then can it proceed to consider and determine the other issues. But if it comes to the conclusion that it has no jurisdiction, it will say as much and then down its tools.

Section 65 of the Civil Procedure Act, Cap 21, Laws of Kenya, is in the following words:-

"**(1) Except where otherwise expressly provided by this Act, and subject to such provision, as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court –**

(a) (deleted …)

(b) from any original decree or part of a decree of a subordinate court … on a question of law or fact;

(c) …

(d) (deleted …)"

On its part, section 66 of the same Act states as follows:-

"**Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal."**

To the extent that both these sections apply to appeals from decrees or part of decrees from subordinate courts to the High Court, and from the High Court to the Court of Appeal, the two sections are similar and an interpretation given by the Court of Appeal to section 66 ought to be applied by the High Court in the interpretation of section 65. In **KADUDA** v. **DOUGLAS** [1981] KLR 260, the Court of Appeal held

that the effect of a failure to include a copy of the decree or formal order in the record of appeal was to render the appeal incompetent with the consequence that such appeal must be struck out. That court took a similar view in **CHEGE** v. **SULEIMAN** [1988] KLR 194 in which it held that on the construction of the Civil Procedure Act (Cap.21), section 66 of which confers a right of appeal from the decrees and orders of the High Court to the Court of Appeal, no competent appeal can be brought unless such a decree or order is formally extracted as the basis of the appeal. It was further held that failure to extract the decree or order of a court before launching the record of appeal against the court's decision is a point which goes to the jurisdiction of the appellate court and it is not merely a point of procedure. Since the jurisdiction of the Court of Appeal is founded on statute, it cannot be properly invoked unless the intending appellant strictly complies with its provisions. This decision reiterated the position taken by the East African Court of Appeal in **ALEXANDER MORRISON** v. **MOHAN DRAZA SULEIMAN VERSI & ANOR**. (1952) EACA 26 while upholding a preliminary objection that no decree embodying the terms of the judgment had been drawn up and that accordingly that court had no jurisdiction to entertain the appeal.

The rules of the Court of Appeal on this point are similar to those obtaining in the High Court. Order XLI rule 8B of the Civil Procedure Rules is in the following words:-

"**(1) On notice to the parties delivered not less than twenty one days after the date of service of the memorandum of appeal the registrar shall list the appeal for the giving of directions by a judge in chambers.**

(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.

(3) The judge in chambers may give directions concerning the appeal generally …

(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) …

(b) …

(c) …

(d) …

(e) …

(f) The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal."

I do not agree with Mr. Nyabena that this paragraph is satisfied by the inclusion of any one of the documents stated therein. Instead, all the named documents should be on record, and it would be fatal not to include any of those named in paragraph (f).

However, it is also noteworthy that before an appeal is heard, the judge gives directions concerning the appeal generally and, before he does so, he should be satisfied that all the documents provided for in rule 8B subrule 4(f) are on the court record. By having allowed the appeal to go for hearing, this would mean, by the necessary implication, that the judge was satisfied that all the documents enumerated in paragraph (f) were on the court record. But even more important, as provided in subrule 2, any objection to the jurisdiction of the appellate court should have been raised before the judge gave directions under this rule. The respondent in this case should have complied with subrule 2 and raised his objection to the jurisdiction of this court before the directions were given.

Most important, the record shows that the parties herein appeared before in court on 14th July, 2006. The appellant appeared in person while Ms Lagat appeared for the respondent. The appellant told the court that he sought directions; that the documents were in order and had been served. Counsel for the respondent did not say anything. Directions were then given that the proceedings were in order and that the appeal may be fixed for hearing before the judge in Mombasa for ½ day. That was the forum at which the issue of the missing document should have been raised. But it was not raised. I don't think it would be in the interests of justice to allow the respondent to raise the matter after the appellant has already made his submissions as happened in this case. To do so would be not only highly prejudicial to the appellant, but would also encourage parties not to disclose all information which they thought would enable them to spring a surprise at the hearing of an appeal. By keeping silent when they should have brought the fact of the missing decree to the court, the respondent was guilty of non disclosure and constructively misled the court into believing that all the documentation was in order while it was not. He should not be allowed to benefit from such conduct. Further, by so doing only to raise the point at the hearing of the appeal amounts to stealing a march on the respondent, a practice which a court of equity will not countenance . By suffering the court to direct that all the documentation was in order, and directing that the matter do proceed to hearing, the respondent submitted himself to the jurisdiction of the court and should not be heard to contest it at this late stage. I therefore find that the court has jurisdiction in the circumstances of this case. Having so found, the next issue to be determined is whether the house was part of the plot which was being sold.

One of the issues raised by the appellant with regard to the suit premises was whether the sale of the plot, the subject matter of the suit, included the sale of the house thereon. It is a time honoured principle of real property law that land includes the fixtures thereon. That principle is adequately summarised in the latin maxim – **quicquid plantatur solo, solo cedit**, which means that whatever is affixed to the soil belongs to the soil. The sale agreement does not refer to anything else other than the plot. It is noteworthy that although the property in question belonged to the respondent's father, it was the respondent personally who wrote the agreement and signed it for his father. If the sale of the plot was never intended to include the house thereon, the agreement should have said so and as an interested owner, who actually drafted the agreement, the respondent would have been the first person to say so. As the agreement was silent, it would have to be construed in accordance with the principle stated above, and the house would be taken to have been part of the plot. In other words, barring an agreement to the contrary, fixtures are part of the land.

Mr. Nyabena argued that even if the house was expressly excluded from the sale agreement, there was no evidence that the plaintiff was the owner. The intricacy of this matter lies in the fact that there is no documentary evidence of the ownership of anything – the plot, or the house, and whereas the respondent's case is that the plot belonged to his father, he at the same says that the house thereon was his. If so, he needs to tender some proof. I agree with Mr. Nyabena that there was no evidence at all, documentary or otherwise, to demonstrate that the house in dispute belonged to the respondent. It was just the respondent's word, and that word is not proof of itself.

Even if the house had been shown to belong to the respondent, his claim is for special damages and these should not only be specifically pleaded, but should also be strictly proved. And here, once more, we land into the problem of proof. The respondent's general allegation is that he constructed the house in issue in 1970, at a cost of Kshs. 40,000/=. The construction involved expenditure in the purchase of material and payment for labour. The materials included pieces of timber of various sizes, lengths, and different cost per foot; nails of various lengths, iron sheets, cement, etc. The respondent did not produce a single receipt in proof of any part of the expenditure. Bearing in mind that the construction took place in 1970; that the suit was filed in 1998, and that he gave his oral evidence in 2005, how he is able to remember such intimate details as prices of 1970 without the benefit of a single receipt defies reason. He needs more than a photographic memory to do that.

But be that as it may. The bottom line is that there is no evidence to prove any of the expenses alleged, and once again, it is the respondent's word against itself. There is no proof, therefore, of the expenses incurred in the construction of the house, and the respondent did not, therefore, strictly prove his claim.

For the above reasons, the appeal succeeds and it is accordingly allowed with costs. The judgment of the lower court is hereby set aside and the orders made therein vacated. It is so ordered.

Dated and delivered at Mombasa this 29th day of September, 2006.

L. NJAGI

JUDGE