



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.426 OF 1999

MICERE KIBUTHIA & ANOTHER APPELLANTS

VERSUS

BENSON GATHIRWA NGUGI RESPONDENT

J U D G E M E N T

On 26th April, 1995 the respondent filed a suit No.1047 of 1995 in the court of the Senior Resident Magistrate at Kiambu to claim a sum of Kshs.62,400/= as special damage in terms of labour and materials expended in renovating the premises known as plot No.23 KANGANGI owned jointly by the appellants and which had been leased to the respondent for the purpose of carrying out butchery business therein.

The lease did not materialize because of disagreement by owners hence the suit in court.

On 25th September, 1997 when the case was fixed for hearing only the respondent and his advocates appeared and the case proceeded exparte.

Judgement was written on 4th December, 1997 and delivered by the learned Senior Resident Magistrate (Wachira (Mrs) on 8th January, 1998 in favour of the respondent.

An application to set aside this judgement was refused on 11th June, 1999. The matter did not end there and another application was made on 2nd September, 1999 for review of the expartes Judgement delivered on 8th January, 1998 and the ruling of 11th June, 1999.

In the same application was a prayer for stay of execution of the decree pending the determination of the application.

The grounds upon which the application was based were set out on the body thereof and it does not break above to repeat them here.

(a) That the 2nd and 3rd defendants were not agree that the suit was coming for hearing on 25th September, 1997.

(b) That a mix up of the date occurred due to the mistake of the former advocates of the 2nd and 3rd defendants.

(c) That the 2nd and 3rd defendants were notified by their former advocates that the hearing was to be on 25th November, 1999.

(d) That all the hearing the court erroneously proceeded with the matter on the mistaken premise that the

2nd and 3rd defendants were registered owners of plot number 23 Kanganji or that they were the administrators of the estate of the late Kibutha Gichobo, one of the owners of the plot.

(e) That the plaintiff was selective of the person to sue.

The supporting affidavit contained similar averments that as the grounds on the body of the application.

A preliminary objection was raised to this application by counsel for the respondent on 9th September, 1999 and a ruling made on it on 24th September, 1999 upheld the preliminary objection on the ground that the application was based on the same grounds as those relied on in the application to set the judgement aside.

The appellants were not satisfied with the ruling and they lodged this appeal in court on 13th October, 1999 in a memorandum of appeal which listed five (5) grounds of appeal; namely that the learned Magistrate erred in dismissing the application for review on a preliminary objection, that he erred in failing to give the appellants a chance to argue their application on merit; that he made a mistake in finding that the grounds supporting the application for review were the same as those which supporting the application for setting aside the ex parte judgement, that he erred in failing to realise and to recognize that the appellants had other grounds which if the application was heard on merit would have warranted a review as prayed for and that he erred in finding that the application for review was actually an appeal disguised as a review.

The appeal was placed before this court on 24th June, 2002 when counsel for both parties either urged or opposed the appeal.

Counsel for the appellants stated that the application was for review and not an appeal disguised as a review and that no appeal had been filed and that appellants could have raised grounds at the hearing of the hearing of the application for review which could have been used for appeal.

That there were sufficient grounds for review and the Magistrate should have allowed the application to be heard on merit.

According to the counsel, there was an error in the main suit in that the appellant were not registered owners of the suit premises or administrators of the estate.

Then counsel went into the reasons why the appellants failed to attend court during the hearing of the main suit and that they should have been given a chance to present the application for review.

Counsel stated there were sufficient reason for application for review to proceed on merit.

Counsel for the respondent opposed the appeal and submitted the appellants did not take any action after the ex parte Judgement had been entered until after execution proceedings had commenced, over one year, then they came to court with an application to set it aside.

He submitted that the preliminary objection was properly upheld or that the application for review was an abuse of the court process.

These are the submissions made before me for consideration and decision.

My view of this whole matter is that after the learned Magistrate declined to set aside the exparte judgement, the appellants should have appealed against that ruling but to lodge an application for review of that ruling or exparte judgement must have been based on a misguided advice.

In any event, even when the appellants chose to apply for review it was to be based on the grounds set out in order XLIV of the Civil Procedure Rules, namely, an error apparent on the face of the record; any

matter or evidence not within the knowledge of the applicant when the order was made or some other reasonable cause.

No such grounds were stated on the body of the application or in the supporting affidavit.

It is true to state that the respondent when testifying did not prove that the appellants were joint owners of the suit plot and that this would have constituted sufficient cause to satisfy the order quoted herein before but parties are bound by their pleadings and if the said appellants did not make any averments in this regards in their application, the court would have no basis for considering this ground in order not to uphold the preliminary objection and to allow the application to be heard on merit.

Moreover, since the appellants application was dismissed on a preliminary objection, it was incumbent upon their counsel to apply for leave to file the present appeal. My perusal of the lower court file does not disclose this was done in which this appeal was incompetently before this court.

I would, in the circumstances, strike out and/or dismiss this appeal with no order as to costs.

Delivered this 10th day of July, 2002.

D.K.S AGAYANYA

JUDGE