REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 33 OF 2019

(AS CONSOLIDATED WITH ELC APPEAL NO 1 OF 2019)

EUCABETH F O ODERA..APPELLANT

VERSUS

JEREMIAH O RAJWAYI.....................................RESPONDENT

JUDGMENT

Eucabeth O. Odera (***hereinafter referred to as the Appellant***) has come to this court in this consolidated appeal against the two decisions of honourable W. K. Onkunya Senior Resident Magistrate at Kisumu in ***CMCC ELC No. 113 of 2018, formerly Kisumu H.C.C.C ECL no. 260 of 2014 made on 23rd January 2019 and 7th August 2019 respectively.***

The genesis of this consolidated appeal is the plaint filed by the respondent on the 4th September 2014 where the respondent claimed to be the owner of land registration number Kisumu/Konya/5499 whereby the respondent claimed that the appellant was constructing a perimeter wall in his property and that was utilising his property. The appellant filed a memorandum of appearance on the 3rd of October 2014 and the statement of defence on the 2nd day of August 2018. The court found that the defence was not properly on record as it was filed 4 years after filing the memo of appearance and was therefore struck out.

This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded.

In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

The dispute herein revolves on land wherein the respond sought an order of permanent injunction to retrain the appellant from undertaking any works inside property title number Kisumu/Konya/5499, trespassing on the said parcel of land in any manner whatsoever.

The respondent claimed that the appellant trespassed on his land in the month of July 2014 and embarked on the construction of a perimeter wall inside the respondent’s property and has been wasting the property to the detriment of the respondent.

In her defence the appellant alleged that there was a dispute in the mapping of the various parcels of land the suit property included and that the provincial surveyor had visited the ground and resolved the issue in the presence of the owners of the neighbouring parcels and mutation forms were prepared and signed by all parties. The appellant alleged the existence of another case in respect of the suit properties thus WINAM PMCC NO 99 OF 2010.The appellant pleaded that the construction of the wall was within the appellant’s property.

The appellant filed her defence out of time and upon the respondent making an application for striking out, the same was struck out for having been filed out of time without the leave of the court.

In the first decision made by the honourable court on **23/1/2019** the lower court struck out the defence dated 1/8/2018 as it was filed out of time thus four years after the Defendant had entered appearance and without the leave of court.

The court relied on Order 7 rule 1 that provides that where a defendant has been served with a summons to appear he shall unless some other or further order of the court is made file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within 14 days from the date of filing the defence and file an affidavit of service. The Appellant argues that the court ought to have

been slow in striking out the defence.

The respondent on his part argues that the failure to file the defence in time was not a technical error and that the court cannot force a defendant to file a defence in time or at all. The defendant failed to file documents and defence for 4 years without a reason.

On this issue this court finds that the though the appellant filed the defence out of time, striking out of the same was so draconian as it led to the defendant not calling any witness and in essence the defendant was not heard by the court.

Though the defence was irregularly filed the court should have validated the same by ordering the defendant to pay the filing fees and allowing the defendant to defend the case as shutting her out when the defence was on record was draconian.

This court is guided by Article 159(2) of the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles—

> **(a) justice shall be done to all, irrespective of status;**
>
> **<u>(b) justice shall not be delayed;</u>**
>
> **(c) alternative forms of dispute resolution including reconciliation,**
>
> **Constitution of Kenya, 201096mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**
>
> **<u>(d) justice shall be administered without undue regard to procedural technicalities; and</u>**
>
> **(e) the purpose and principles of this Constitution shall be protected and promoted.**
>
> **(3) Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights;**
>
> **(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or**
>
> **(c) is inconsistent with this Constitution or any written law."**

It is true that the appellant's act of filing the defence out of time and by failing to seek leave to do so caused a delay of the hearing of the matter, however balancing the delay, and the right of the defendant to be heard, I do find that the honourable court erred in striking out the defence as the respondent did not demonstrate any injurious prejudice that he suffered by the late filing of the defence that could not be compensated with damages.

In **<u>Githere V. Kimungu</u>** [1976 – 1985] E.A. 101 The Court of Appeal stated that-

> **"……. the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case."**

In **<u>Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 others,</u>** Civil Application No. Nai. 173 of 2010 where a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court (Omolo, Bosire and Nyamu JJ.A) observed that:-

> **"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice…………**
>
> **In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."**

This court observes that the rules of procedure remain subservient to the Constitution and statutes.

Article 159 (2) (d) of the Constitution, **Sections 1A and 1B** of the Civil Procedure Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A consideration of recent judicial pronouncements from all the three levels of court

structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.

In the 2nd Appeal, the contention is that the dispute being a boundary dispute the best person to resolve the dispute ought to have been the Land Registrar and not a court of law.

Section 18 (2) of the Land Registration Act provides:

> **"(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section."**

I do find that courts of law have no jurisdiction to arbitrate on boundaries of registered land unless the boundaries have been determined in accordance with the section. There was no evidence in the lower court and now before me that the boundaries of the two parcels of land had not been determined. This section of law only applies where the boundaries had not been determined. Moreover, the court was not determining the boundary of the two parcels of land but the issue was whether the appellant had trespassed into the respondent's land. On the issue of jurisdiction under section 18 (2) of the Land Registration Act, courts have to be careful in interpretation so as not to throw back a dispute that revolves on trespass back to the land registrar. Where the boundaries are fixed and title deed issued, there is no boundary dispute for the land registrar to resolve but it is the duty of the surveyor to establish the beacons and the boundaries as fixed during adjudication. I do find the court has jurisdiction to her the matter.

The upshot of the above is that the consolidated appeal is allowed in terms that the ruling of the lower court made on 29th January 2019 is set aside and it follows that all resultant proceedings and judgment on 7th August 2019 and the decree dated 7th August 2019 and issued on 14th August 2019 are set aside and the matter is remitted back to the Resident Magistrates Court Kisumu to be heard by a Magistrate other than Honourable W.K.Onkunya.

DATED AT KISUMU THIS 17TH DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE