



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE APPEAL NO. 13 OF 2021

ROSE JEMUTAI JOSEPH CHELALE.....-APPELLANT

VERSUS

HOYI ABDALA LATAMA.....RESPONDENT

[Being an Appeal from the judgment of the Senior Resident Magistrate (D.K. Mutai) in Kitale CMC Land Case No. 78 of 2019 delivered on 20/2/2020 (Sic)]

BETWEEN

HOYI ABDALLA LATAMA.....-PLAINTIFF/APPELLANT

VERSUS

ROSE CHEBIWIOTT NTULELE.....DEFENDANT/RESPONDENT

JUDGMENT

The Background

1. The Appellant being dissatisfied with the ruling of the trial court delivered on **06/08/2020** in **Kitale CM Land Case No. 78 of 2019**, preferred an appeal against the said ruling.
2. Before delving into the merits or otherwise of the Appeal, it is important to give a brief background of this suit. On **4/7/2019**, the Plaintiff in **Kitale CM Land Case No. 78 of 2019** filed a suit against the Defendant. He did so by a Plaint filed dated the same date. He sought eviction orders against the Defendant, her family members, agents, servants and/or any other persons claiming through her to remove themselves from plot No. **467** Kitalale Settlement (herein known as “the suit land”), in default of which the Defendant and any person claiming interest through her would be evicted by use of reasonable force.
3. A cursory perusal of the record shows that the Defendant was served with summons to enter appearance. She did not file any pleadings in response to those of the Plaintiff. The suit was heard by way of formal proof and judgment therein delivered in favour of the Plaintiff on **20/2/2020**.
4. The Plaintiff extracted a decree on **24/2/2020** in readiness for execution. However, on **29/5/2020**, the defendant filed an application dated **18/05/2021** seeking to set aside both the judgment and decree. She also prayed to be allowed to defend the suit. The trial magistrate delivered a ruling on **6/8/2020** in respect to the said application. He found the Application lacking in merit and thus dismissed it.

The Appeal

5. The defendant was dissatisfied with the ruling. She filed the instant appeal after the Court granted leave to file it after allowing an application for extension of time on **2/2/2021**. Something of importance to clarify at this stage is that the appellant filed her Memorandum of Appeal on **11/2/2021**. On it, the appellant indicated that the appeal was against the ruling of 6/8/2020. However, the Record of Appeal dated **01/03/2021** and filed on **17/3/2021**, the Certificate of the Record, the Statement of Address of Service and the Index all of the same date indicate that the appeal was against judgment which was delivered on **20/2/2020**. Having compared that with the Memorandum of Appeal, and wishing to do substantive justice rather than disposing of the matter on technicalities, this Court excuses that error. This court is of the view that the error is one that can be cured by **Article 159 (2) (d)** of the **Constitution of Kenya 2010**. For that reason the Court was of the view that the appeal as referred to in the memorandum of appeal against the ruling delivered on **6/8/2020** was the one to consider and not a non-existent appeal against the judgment dated **20/2/2020**. Worth noting is that the appeal was dismissed for non-attendance on **9/11/2021**. However, on **29/11/2021**, the appeal was reinstated by the consent of the parties dated **22/11/2021**.

The Memorandum of Appeal

6. The Memorandum of Appeal was filed on 11/2/2021. In it the Appellant raised seven (7) grounds. They were that:

1. *The learned trial Magistrate erred in law and in fact in failing to exercise his discretion in setting aside the exparte judgment.*
2. *The learned trial Magistrate erred in law and in fact in failing to consider that a wrong party had been sued and a judgment entered against the said party purporting the said party to be the appellant herein (sic).*
3. *The learned trial Magistrate erred in law and in fact in failing to consider relevant and pertinent issues in respect of setting aside the exparte judgment.*
4. *The learned trial Magistrate erred in law and in fact in failing to consider the averments in the appellant's further affidavit in which she pleaded the correct plot number as being 467*
5. *The learned trial Magistrate erred in law in disregarding issues raised in submissions filed by counsel for the appellant.*
6. *The learned trial Magistrate erred in acting in a biased manner without considering that the exparte judgment rendered the appellant remediless*
7. *The learned trial Magistrate arrived at an erroneous decision not supported by law or facts.*

7. The Appellant then prayed that the appeal be allowed by setting aside the ruling, setting aside the judgment of the trial Court and the setting down the suit to be heard by another Magistrate other than the trial Magistrate. She also prayed for costs of the appeal.

Submissions

8. On 7/10/2021, when this matter was before me for fixing a hearing date, I directed that the appeal be admitted for hearing. I also directed that the same was to be heard by way of written submissions. The parties filed their respective submissions which I summarize below.

Appellant's Submissions

9. The appellant filed her submissions on 29/11/2021. On the ground that the trial Magistrate failed to exercise discretion to set aside the *ex parte* judgment, she submitted that the Plaintiff sued one **Rose Chebiwott Ntulele** purporting to be the defendant whereas the right party/ name was **Rose Jemutai Joseph Chelale**. She affirmed the orders sought in the Plaintiff. She gave the history of the case which I have highlighted elsewhere in this judgment: I need not repeat it here. She stated that the trial court while deciding the Application for setting aside judgment, was alive to the principles set out in the case of **Patel v E.A. Cargo Handling Services Ltd (1974) E.A. 75**. Further, that the court narrowed down issues and considered whether there was a defence to the Claim and that it based its decision on the fact that the defendant had pleaded that she was in occupation of plot No. 473 and not 467 (sic). She stated that she resides on plot no. 467 but not 463 as she indicated in her affidavit in support of the application which was indicated that it was a typographical error.

10. Her submission was that the trial court omitted to mention the further Affidavit which contained the correction of the title. On the issue of setting aside regular judgments, she relied in the cases of **Elizabeth Kavere & Another vs Lilian Atho & Another [2020] eKLR** and **Grace Cherotich Kemboi V Simon Kipkoech Ngotwa & Another [2020] eKLR**. On the issue, she submitted that the court having found that the suit was undefended, ought to have considered the issues raised in the defence and the difference in the title numbers, and given an opportunity for the appellant to file her defence (sic). She stated that all the other issues would have been the subject of cross-examination. She summed up by stating that the trial court failed to accord the appellant a fair trial.

11. She submitted on the second ground which was that **whether a wrong party had been sued**. Her submission was that the issue of names was raised in the application before the lower court and the same was pleaded in the draft defence therefore, according to her, it raised a triable issue. She relied on the case of **UAP Insurance -vs- Lameck Bororio Mwene [2019] eKLR**.

12. The third ground, as submitted on it, was the trial Court having failed to consider relevant and pertinent issues. On this, the appellant indicated that the issue had been exhaustively addressed in grounds 1 and 2. Regarding the fourth ground, on failing to consider averments in the further affidavit, she submitted that the same had been addressed in ground 1.

13. On the fifth ground which the appellant framed as the trial Court failing to consider the issues raised in submissions filed, the appellant stated that trial Court failed to make reference to them even though she had filed them. She pointed out that the submissions contained legal authorities which were binding on the Court and that had it taken them seriously and considered the same, it would have established that, that was a proper case for setting aside the *ex parte* orders.

14. She summed up by submitting that the learned trial magistrate failed to exercise his discretion properly and that her rights were clogged by shutting her from the seat of justice.

The Respondent's Submissions

15. The respondent filed his submissions on 20/1/2022. He submitted that the appeal was baseless, lacked merit, an abuse of the court process and a waste of precious judicial time as there was nothing to fault the ruling of the lower Court on. He framed two issues for

determination as follows:-

1. Whether the defendant/appellant had a defence on the merits raising triable issues

2. Whether the defendant/appellant had an explanation why she did not enter appearance and defend the suit.

16. On the first issue, the respondent submitted by first giving the chronological events of the suit and how the suit was proved by the Plaintiff at the trial to its conclusion. He faulted the defendant for filing a draft defence which according to him was a mere denial. He then submitted that the appellant had not demonstrated how the draft defence raised triable issues to warrant the trial court to set aside the *ex parte* judgment. He indicated that the appellant did not provide any document to prove ownership of plot No. 467 or any other. For that reason, he submitted that the trial court found nothing to enable it exercise its discretion to set aside the *ex parte* judgment and that this court cannot have a basis to interfere with the decision of the lower court.

17. On the second issue, he submitted that the defendant was duly served and acknowledged it. However, she ignored to defend the suit and that she had filed the application to set aside judgment for the sole purpose of delaying her eviction. Further, that the defendant's draft defence did not raise any triable issues since it was in reference to parcel known as plot no. 473 which according to him was distinct and separate from the suit land which was plot No. 467. He relied on the case of **Board of Management St. Augustine Secondary School v Chambalili Trading Co. Ltd [2021] eKLR** to fortify his arguments.

18. He argued further that the record of appeal was incomplete because the appellant had omitted many exhibits especially the ones the Plaintiff relied on which were contained in his replying affidavit sworn on **2/10/2020**. His argument was that the Court could not fault the judgment of the lower court as there was no material provided on appeal to enable it to do so. He submitted further that this court could not answer whether or not the appellant had a defence on the merits raising any triable issues. He further argued that that there were no certified copies of the order appealed against in the record of Appeal. Thus according to him, the appeal was fatally defective in the absence of the proceedings of the trial court. He relied on the case of **Rael Wambui Nganga & Another v Rehab Wairimu Kamau [2020] eKLR** to support his argument.

Analysis, Issues and Determination

19. This court notes that parties' submissions did not help it much in determining the appeal. I say so because they were fairly misdirected. Be that as it may, this Court is under the duty to determine the appeal on its merits by considering the grounds raised in the Memorandum of Appeal. This being a first appeal, I would look at it from the perspectives of whether it is an appeal against a judgment or one against the exercise of discretion by the trial Court.

20. Where the Appeal would have been against a judgment my role at the appellate stage would have been as was given by the Court of Appeal in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, where it held that:-

"An appeal to this Court from a trial by the High 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 allowances in this respect."

21. Similarly in the case of **Peters v Sunday Post Ltd [1958] EA 424**, as quoted in the case of **Jackson Kaio Kivuva v Penina Wanjiru Muchene [2019] eKLR** the Court held:-

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."

22. Additionally, in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, the Court held that:

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

23. That said, as I consider this Appeal, which I hereby do, I have to bear in mind that it is not on the judgment delivered on **20/02/2020** otherwise I would have delved into an analysis of the sufficiency or want thereof of the evidence adduced during the trial. The Appeal is against the Ruling delivered on **06/08/2020**. The Ruling was on the Appellant's Application to set aside the judgment. The Application was declined. The Application required the Court to exercise its discretion in favour of the Applicant. That being so, consideration of the Appeal arising from an order made thereto takes a slightly different angle. My role as an appellate Court in such a situation is to consider whether or not the trial Court exercised its discretion properly or put in another way injudiciously or improperly in arriving at the conclusion it did. My role is not to substitute my discretion with that of the lower Court but to consider how the Court arrived at its decisions.

24. In **Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)** the Court stated inter alia, that:

“... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.

25. Also, in ***Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR*** the Court of Appeal held that “...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference.” Additionally, in ***Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63***, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.

26. This point was put forth clearly in the case of ***Mbogo and Another v Shah [1968] EA 93 at 96*** affirmed the as follows:

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”

27. This Court has now laid the foundation for its duty in determining this appeal. For that reason, the issues for determination before me are:

- a) ***Whether the trial Magistrate failed to exercise his discretion properly in refusing to set aside the judgment.***
- b) ***Whether the Record of Appeal is defective.***
- c) ***Whether the appeal is filed by a competent party.***
- d) ***What orders to issue and to meet costs of the Appeal.***

28. The issues are analyzed as hereafter, beginning with the Second issue that I have listed above. The issue was whether the Record of Appeal was or was not defective hence a candidate for striking out. In order to determine this issue, this Court is enjoined to consider the provisions of **Order 42 Rule 13** of the **Civil Procedure Rules**. The Rule provides for the documents which ought to be included in the record of appeal. The Rule provides that whereas the judge may dispense with some documents such as the notes by the trial magistrate or transcript of shorthand writings by the judicial officer, he shall not dispense with three of them, namely, the Memorandum of Appeal, the Pleadings and “*the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal*”. I have carefully perused the Record of Appeal herein filed on **17/03/2021**. I have noted that the Record has all the requisite documents that may be considered necessary except two important ones. These are the Order granting extension of time to file the Appeal out of time and the order of arising from the ruling appealed against. This makes the Record incurably defective. I note clearly, from a keen perusal of the Ruling by which extension of time to file the appeal was granted, that the Appeal was not filed within the time the Court granted. The Ruling forming part of the Record of Appeal between pages **11** and **18** of shows that the Court granted leave to file the Appeal within seven (7) days from **02/02/2021**. That date fell on a Tuesday. That means the Appeal should have been filed by **09/02/2021**. But the Court record shows that although the memorandum of appeal was dated **8/02/2021**, it was filed on **11/02/2021**. That was two days outside of the time limit granted by the Court. Thus, besides the Record falling short of the stipulations of the Civil Procedure Rules in terms of competency, the Appeal itself was filed out of time hence improperly before the Court.

29. The Second issue for this Court to consider but which happens to be the third one in the list above was whether the Appeal was filed by a competent party. First, this Court is alive to the rule that no suit can be defeated by misjoinder or non-joinder of parties. The Defendant in the parent suit, that is in the lower Court, raised an issue that the Plaintiff had sued her in the wrong name or that he had sued the wrong party. At no point in time did she apply to be enjoined as a proper or necessary party in order to bring all issues in the matter into controversy. She only purported to challenge the suit against her in her alleged proper name. This she expected the Court to consider even when she did not apply to amend the pleadings to have her alleged proper name included or substituted with that of the Defendant.

30. At the conclusion of the matter in the lower Court, the Defendant who was sued, and against whom the decree was issued did not appeal from the Ruling wherein the Court declined to set aside the decree. The Plaintiff and all the other documents filed show that the Defendant was one Rose Chebiwott Ntulele. In this Appeal, the person who brought it was Rose Jemutai Joseph Chalale. These are two different parties. The Appellant is a stranger to the proceedings in the lower Court. She neither applied to be enjoined as a party nor as an interested party. In the circumstances, this Court is of the view that the Appeal was filed by a stranger to the proceedings of the lower Court.

31. This Court is now left with the merits or otherwise of the Appeal before it. I would have taken my time to consider the merits or otherwise of the same but I am of the view that to do so would amount to engaging in an academic exercise. I am not supposed to do so since this is not a lecture room. I hold this view for the reasons given in the two preceding paragraphs, namely, first, that I have found that the Appeal was filed out of time hence improperly before the Court. Actually, I would put it clearly that in the circumstances, there is no appeal before me to determine. Second, even if I could have been wrong and it were to be found that there is an appeal before me, then that which would have been before me to determine is an appeal filed by a total stranger to the proceedings in the lower Court. These two are defects that neither Article **159(2) (d)** of the **2010 Constitution** nor inherent powers of this Court can cure. They are not mere technicalities for they go to the root of the Appeal herein. In those circumstances this Court could not and cannot entertain such appeal. The appeal must go the way those things that go into oblivion follow.

32. The upshot of the above observations is that I have no competent appeal before me. I therefore strike it out. Since costs follow the event, the ones incurred herein shall be to the Respondent, to be borne by the purported appellant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 7TH DAY OF MARCH, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.