REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 41 OF 2018

DAUDI ABDULLAHI KUTU.....APPELLANT

VERSUS

LAWRENCE KOSKEI KOIBORKERA.....RESPONDENT

JUDGMENT

(Being an Appeal from the judgment of Hon. Samuel M. Mungai, Chief Magistrate in CMCC No. 31 of 2018 (Isiolo) delivered on 25th September 2018)

Introduction

This Appeal arises from the judgment of the Chief Magistrate Hon. Samuel Mungai delivered on 25th September 2018 in CMCC No. 31 of 2018 (Isiolo) the chronology of events leading to the decision by the learned Magistrate is that this suit was initially commenced before the ELC Court Meru and registered as ELC Case No. 131 of 2017. The matter proceeded Ex-parte on 1st November 2017 as the defendant did not Enter Appearance or file defence. While the matter was pending for submissions before the trial Judge Lady Justice Mbugua, the defendant through his advocate filed an application on 27th November 2017 seeking to set aside the interlocutory judgment and the Ex-parte proceedings. The defendant also sought leave to defend the suit. Though the application was strenuously opposed, the trial Judge exercised her discretion in the interest of justice and allowed the application on conditions that he files his defence and compliance documents under *Order II CPR* within 14 days from the date of that ruling on 7th March 2018. The trial Judge gave an order to the effect that failure to comply with the conditional leave aforesaid, the application will stand as dismissed and the orders vacated. The case was then transferred to Isiolo Chief Magistrate's Court by consent of the parties.

When the matter was transferred to the Chief Magistrate's Court Isiolo, it was re-named CMCC No. 31 of 2018 (Isiolo). The matter Thereafter came up for direction on 12th June 2018, and the counsels for both the plaintiff and the defendant were present. The counsel for the plaintiff/respondent drew the attention of the hon. magistrate to the ruling by the Meru Judge regarding the conditional leave to file defence and compliance documents within specified timelines. The learned counsel wanted an interpretation of the Judge's orders delivered on 7th March 2018. In a ruling delivered on 19th June 2018, the learned trial magistrate declared that the application by the defendant which had sought to set aside the proceedings of 1st November 2017 stood dismissed on 21st March 2018 after the defendant failed to comply with the conditions by the superior Court and directed that the plaintiff/respondent was at liberty to proceed with submissions. In a judgment delivered on 25th September 2018, the trial magistrate held that the evidence tendered by the plaintiff in the case stood unchallenged and entered judgment as prayed in the plaint with costs.

The appellant was aggrieved by the said decision and filed this appeal on the following nine (9) grounds:-

1. That the learned trial magistrate erred in law and fact in receiving evidence from the bar and accepting it to strike out the appellant's pleadings.

2. That the learned trial magistrate erred in law in declaring the application by the appellant dismissed without giving the appellant a chance to defend himself yet that order meant that the appellant was completely locked out of defending the suit.

3. That the learned trial magistrate erred in law and fact in effectively striking out the appellant's pleadings and in essence giving judgment in favour of the respondent without a formal application being filed and duly heard on merit.

4. That the learned trial magistrate's ruling was made on a date fixed for a mention but effectively dismissed the appellant's defence.

5. That the learned trial magistrate erred in law and fact in condemning the appellant unheard.

6. That the learned trial magistrate erred in law and fact in not applying the Oxygen Principle by failing to appreciate that the appellant had filed a defence and all other compliance documents which means he is ready to defend his land and this should not be locked out.

7. That the learned trial magistrate erred in law and fact in punishing the appellant for the mistakes of his previous advocates who might have been guilty of the little delay.

8. That the learned trial magistrate erred in law and fact in failing to uphold the rule of fair trial and appreciate that the right to defend has a value in our Judicial system and that it can only be taken away in very exceptional circumstances.

9. That the entire finding and judgment of the learned magistrate is bad and is against the law.

Appellant's Submissions

The appellant through the firm of G.M. Wanjohi & Co. Advocates submitted on the following items:-

a. Violation of Party's Right to be heard (Ground 2, 5 and 6).

On this limb, the appellant submitted that the learned magistrate was wrong in declaring the application by the appellant dismissed without giving the appellant a chance to defend himself as the dismissal order meant that the appellant was completely locked out of defending his suit. He argued that the learned magistrate failed to appreciate that the appellant had filed a defence and the compliance documents which means he was ready to defend the suit and by extension defend his land and thus should not be locked out. He cited Article 50 of the Constitution of Kenya, 2010 which protects a party's right to a fair hearing. He also cited the following cases:-

1. Ruth Wanjiku Njoroge Vs Henry Kalume Mutugwa (1995) e K.L.R

2. Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another Vs Francis Bahati Diwani & 2 Others (2014) e K.L.R.

3. Article 159 of the Constitution of Kenya, 2010.

b. Striking out pleadings without a formal application (Grounds 1, 3, 4 and 8)

The counsel for the appellant submitted that the learned trial magistrate erred in law and fact in receiving evidence from the bar and accepting to strike out the appellant's pleadings. He cited *Order 51 Rule 1 CPR 2010* and argued that the learned trial magistrate erred in law and fact in punishing the appellant for the mistakes of his previous advocate who might have been guilty of the little delay.

He cited the case of *Gold Lida Limited Vs NIC Bank Limited & 2 Others (2018) e K.L.R* where the trial Judge cited with approval the case of *Philiph Chemwolo & Another Vs Augustine Kubede (1982 – 88) K.A.R 103.*

Respondent's Submissions

The counsel for the respondent M/S Kitheka & Ouma Advocates submitted that the appellant was granted leave to file defence within given timelines but filed the same way after those timelines had lapsed. He submitted that any legal documents filed out of the given time limit without leave of the Court can only be taken as merely a draft without any legal force.

On the seven grounds of appeal, the learned counsel submitted on each as follows:-

Grounds No. 1

The counsel submitted that the appellant has not specified the evidence that was purportedly received from the bar by the trial magistrate. He argued that that ground remains an ambiguous allegation which is neither particularized nor proved.

Ground No. 2

The respondent's counsel submitted that the hands of the trial magistrate were tied since the appellant failed to satisfy the conditions under which the interlocutory judgment was set aside. The appellant was granted leave to file defence within specified timelines but failed to do so. Secondly, he submitted that the application by counsel for the Appellant to reinstate the interlocutory judgment was made orally on 12th June 2008 in the presence of counsel for the appellant who was given an opportunity to oppose and finally counsel argued that this ground of appeal arises out of the dissatisfaction by the appellant with the ruling of the trial Court delivered on 19th June 2018 which the appellant failed to appeal against the same despite the fact that the ruling was delivered in the presence of the appellant himself as well as his counsel. He further argued that the consequence is that the appellant is now appealing against the said ruling disguised as one against the final judgment.

Ground No. 3

The counsel submitted that there is no legal requirement that an application to strike out pleadings must be made formally. He argued that

such an order is discretionary and may be made even suo moto by the Court. He cited *Order 2 Rule 15 (1) of the Civil Procedure Rules 2010*. He submitted that *Order 51 Rule 1 of the Civil Procedure Rules, 2010* which is alluded to by the appellant in his submissions is a general provision of the law which do not mandatorily apply to striking out pleadings. He further submitted that the trial magistrate had inherent powers conferred upon him under *Section 3A CPA* and a duty to ensure timely disposal of proceedings at a cost that is affordable to respective parties provided under *Section 1 B (d) of the CPA.*

He also submitted that the appellant ought to have appealed against the ruling of the trial Court delivered on 19th June 2018 since this ground of appeal arises from his dissatisfaction with the said ruling, but he did not and he should therefore not be allowed to do so now.

Ground No. 4

On ground No. 4, the respondent's counsel submitted that this ground is factually wrong. He submitted that on 12th June 2018 when this matter came up for mention for directions, the counsel for the plaintiff (now respondent) raised the issue of the appellant's failure to file defence. The counsel for the respondent opposed and the counsel for the plaintiff made a rejoinder and thereafter the trial Court fixed the ruling for 19th June 2019 at 12.00 noon.

Ground No. 5

On this ground, counsel for the respondent submitted that the appellant was granted leave to file defence but failed to do so and having so failed, it was literally impossible to hear him since civil disputes are based on documentation.

Ground No. 6

The learned counsel submitted that the purported defence filed on 2nd November 2017 is a mere draft defence since the same was filed out of the stipulated time line.

Ground No. 7

In reference to ground No. 7, the counsel submitted that the trial Court could not proceed to full trial not because of "the mistakes of appellant's previous advocate who might have been guilty of a little delay" as the appellant puts it but because of the appellant's material, fatal and incurable omission of failing to file a proper defence when he was granted leave to do so. He argued that the mistake of the appellant's previous advocate was not "a little delay" as the appellant puts it but a total failure to file defence.

Ground No. 8

On ground No. 8, the counsel for the respondent submitted that the appellant totally failed to file defence even after being granted leave to do so by the Court and secondly, the appellant insisted on relying on a draft defence that was filed way out of time and without leave of the Court.

Ground No. 9

On ground No. 9, counsel submitted that this appeal is a fluff that does not disclose any factual or legal question capable of being canvassed.

Legal Analysis and Determination

Being the first appeal Court, I have a duty to analyze and re-evaluate the evidence before the trial Court and come to my own conclusion. The facts of this appeal are simple. First, the respondent instituted the original suit before the ELC Court in Meru where it was registered as ELC No. 131 of 2017 (Meru). In a plaint dated 25th April 2017, the respondent who was the plaintiff was seeking the following orders:-

a. A declaration that the plaintiff is the bona fide legal owner of plot No. 423 Kambi Garba within Isiolo Township and is entitled to vacant possession, occupation and use thereof to the exclusion of all others and as such the defendant be directed to surrender vacant possession of the said plot to the plaintiff or be evicted therefrom forthwith and to pay general damages for trespass and/or mesne profits assessed by the Court.

b. An order of permanent injunction to issue restraining the defendant by himself, his servants, agents and/or any one acting through him or for him from entering, trespassing, constructing or in any other way interfering with the plaintiff's quiet possession and ownership, occupation of plot No. 423 B at Kambi Garga within Isiolo Township.

c. Costs of the suit plus interest thereon.

d. Any other remedy and/r relief the Honourable Court may deem fit to grant.

From the Court record, a representative from the firm of Alfred Kithaka appeared in the ELC Registry on 13th June 2017 where a mention date was taken for 2nd August 2017. On the said 2nd August 2017, Mr. Kitheka, advocate for the plaintiff/respondent was in attendance. The learned counsel drew the attention of the Deputy Registrar to the fact that there was no defence filed by the defendant despite service of summons had been served and affidavit of service duly filed. The learned Deputy Registrar then fixed the matter for mention before the Resident Judge Hon. Lady Justice Mbugua on 11th October 2017. On the said date, the counsel for the plaintiff/respondent drew the Court's attention to the affidavit of service of summons to Enter Appearance. Upon being satisfied that the service was regular, the trial Court gave

the following directions:-

1. Pre-trial directions are taken.

2. Hearing on 1st November 2017.

3. Service of the hearing date to be effected.

On 1st November 2017, the case proceeded for hearing ex-parte. The plaintiff testified alone and produced documents contained in his list of documents as Plaintiff's Exhibits 1 – 5 respectively. The plaintiff then closed his case. The matter was fixed for mention for submissions on 29th November 2017. On 29th November 2017, the matter was listed before the Hon. Deputy Registrar Hon. Obara for mention where in attendance were Mr. Kitheka for the plaintiff and a Mr. Lekoona instructed by the defendant/appellant. The parties agreed to have a certificate of urgency which had been filed placed before the ELC Judge Lady Justice Mbugua on 4th December 2017.

On the 4th December 2017, the said application under certificate of urgency dated 2nd November 2017 was placed before the duty Judge Lady Justice Mbugua who did not certify the application as urgent. However, she directed that the said application be served and fixed for hearing in the ELC Registry on priority basis. The matter was fixed for mention for directions on 14th February 2018. When the matter was called out on 14th February 2014, the counsels appearing for the parties took directions to have the application dated 1st November 2017 canvassed by affidavit evidence and fixed a ruling for 7th March 2018. On the 7th March 2018, the trial Judge allowed the said application dated 1st November 2017 on the following terms:-

1. The proceedings of 1/11/2017 are hereby set aside.

2. Applicant is hereby granted leave to file his defence, documents and statements of witnesses within 14 days from the date of delivery of this ruling failure of which the application will stand as dismissed.

3. Applicant is condemned to pay costs of the present application.

After the ruling was delivered, the parties agreed by consent to have the suit transferred to the Magistrate's Court at Isiolo where the subject matter of the dispute was situated. When the matter was transferred to Isiolo Magistrate's Court, it was registered as CMCC No. 31 of 2018 (Isiolo). After the matter was transferred to the Chief Magistrate's Court at Isiolo, it was fixed for mention before the Chief Magistrate Hon. S.M. Mungai for directions where counsels for both the appellant and the respondent were present. The counsel for the respondent Mr. Kitheka drew the attention of the Court to the ruling by the initial trial Judge Hon. Lady Justice Mbugua on 7th March 2018 where the appellant had been granted leave to file his defence within 14 days from the date of the said ruling but failed and therefore sought directions of the Court that no defence had been filed and therefore the Court should give directions on the way forward. In a brief response, Mr. Lekoona for the appellant admitted that they had delayed in filing the defence and compliance documents as directed by the Court as the Court file could not be traced. The learned counsel for the appellant stated that they filed their defence on 2nd November 2017 long after the time lines given by the Court. In a brief ruling delivered on 19th June 2018, Hon. S.M. Mungai affirmed the orders given by the initial trial Judge Hon. Lady Justice Mbugua on 7th March 2018 and declared that the application by the defendant/appellant dated 1st November 2017 stood dismissed on 21st March 2018 and that the plaintiff/respondent was at liberty to proceed with his submissions. The appellant did not exercise his undoubted right of appeal against the said decision if he was not satisfied within 30 days from the date of delivery. On 25th September 2018, the trial magistrate gave judgment in favour of the plaintiff/respondent which is now the subject of this appeal. The chronology of events are the very essence of this appeal. I now re-evaluate and analyze the appeal in terms of the grounds of the Appeal as follows:-

Ground No. 1

The appellant is challenging the decision by the trial magistrate on grounds that the trial magistrate erred in law and fact in receiving evidence from the bar and accepting it to strike out the appellant's pleadings. This ground is indeed ambiguous and wanting in particular. The appellant has not given the particular piece of evidence which the trial magistrate received from the bar contrary to the law.It was incumbent upon the appellant to give the particular piece of evidence which the trial magistrate used in his judgment which was contrary to the rules of evidence.

Ground No. 2

The appellant is accusing the trial magistrate for declaring the application dated 1st November 2017 as dismissed and not giving the appellant a chance to defend himself. The order marking the said application dated 1st November 2017 as dismissed was not made by Hon. S.M. Mungai on 19th June 2018. The order declaring the said application as dismissed crystalized the moment the appellant failed to file his defence and compliance documents on 21st March 2018 (14 days from 7/3/2018), after the appellant failed to file defence and compliance documents under Order II Civil Procedure Rules. What the trial magistrate Hon. S.M. Mungai did on 19th June 2018 was to affirm the orders issued by the initial trial Court on 7th March 2018. What Hon. S.M. Mungai (C.M) did on 19th June 2018 was to give effect to the orders of Hon. Justice Lady Mbugua and no more.

Ground No. 3 & 4

As I have indicated in the chronology of events on record, the application by the appellant dated 27th November 2017 was to set aside the interlocutory judgment entered in favour of the respondent and to set aside the proceedings of 1st November 2017. What transpired on 1st November 2017 is that the hearing of the suit case proceeded Ex-parte and the plaintiff/respondent closed their case and a mention taken for filing submissions. When the trial Court granted the appellant conditional leave to file defence and other compliance documents within stipulated time lines which was not done, the position is that the status quo prior to the filing of the said application dated 27th November

2017 remained. The correct position is that there is no requirement in law that a formal application should be made to strike out the defence. The trial Court had already set out the conditions precipitating the dismissal of the defendant's pleadings which crystallized after 14 days. There was no need for any other formal application to declare the same as dismissed. It just needed an endorsement which was properly done by trial magistrate. That endorsement would be done on any given date for directions as was done on a mention date in this case.

Ground No. 5

The appellant who was the defendant in the trial Court sought to set aside interlocutory judgment and to set aside ex-parte proceedings conducted on 1st November 2017. The trial Court graciously allowed the application giving him time lines to do so which he failed. Instead of seeking extension of time to comply with the orders of the Court, the appellant is now crying fault that he was condemned unheard. Time lines given by the Court to a party(ies) to comply with filing of pleadings or other requirements are not a technical or procedural provisions but a substantive one occupying a pivotal position in the body of statute. The place of time lines was aptly put by the Supreme Court in the case of ***Raila Odinga Vs Independent Electoral and Boundaries Commission & Others (2013) e K.L.R*** where it was held:-

> "……. Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a Court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from Courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the Constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the time lines amounts to a procedural technicality; it is a Constitutionally mandated technicality".

Ground No. 6

The appellant on this ground is indicting the trial magistrate by failing to appreciate that he had filed a defence and compliance documents.

My view is that if the appellant filed defence and compliance documents, he did so outside the timelines given by the Court and without leave. The appellant did not seek leave to file the documents out of time . The purported defence and compliance documents filed outside the timelines given by the Court have no legal effect in the eyes of the law. The appellant cannot be said to be ready to defend when there is no regular pleadings on record.

Ground No. 7

The appellant is admitting that his previous advocate might have been guilty of a "*little delay*". The little delay which the appellant admits was committed by his previous advocate is really the crux of this Appeal.When the appellant and his previous advocate failed to comply with the conditional orders of filing defence and other compliance documents, the position prevailing previous to the application was set into motion. That position is that the application dated 27th November 2017 stood dismissed which the trial Court confirmed on 19th June 2018. The argument by the appellant that the trial magistrate punished him for the mistakes of his previous advocate cannot hold. Cases belong to litigants and not advocates. It has been held by this Court and it bears to repeat that the omissions and commissions by an agent are joined at the hip so that both are jointly and severally liable in law. That was the position taken by **Ringera J.** (as he then was) in the case of **Omwoyo Vs African Highlands & Produce Co. Ltd (2002) 1 K.L.R.** where he stated:-

> "Time has come for legal practitioners to shoulder the consequence of their negligent act or omissions like other professionals do in their fields of endeavor. The plaintiff should not be made to shoulder the consequences of the negligence of the defendant's advocates. This is a proper case where the defendant's remedy is against his erstwhile advocates for professional negligence and not setting aside the judgment".

I entirely agree with the reasoning by the learned Judge in that decision.

Ground No. 8 and 9

The appellant before the trial Court was given summons to Enter Appearance within the statutory period of 14 days but he failed to comply wherefore a request for interlocutory judgment was made by the respondent which after directions were taken, the trial Court allowed the suit to proceed ex-parte upon serving the appellant with the Hearing Notice. The suit proceeded to hearing Ex-parte but the appellant made an application to be given a chance to file defence and other compliance documents. The Court gave the appellant a conditional leave to file defence and compliance documents within another 14 days and the order was that the orders will be vacated and the position prior to the said application will be maintained. The appellant failed to comply with the conditional order whereby the inevitable happened. The appellant cannot be heard to say that he was not given a fair hearing. The appellant was given the statutory period to file his defence which he squandered. The trial Court went an extra mile by granting him leave to file the same together with all compliance document which he also failed to comply. The trial Court in my analysis directed her mind to the law and the facts in arriving at the impugned decision.

Disposition

For all the reasons I have stated herein above, I find this appeal lacking in merit and the same is hereby dismissed with costs to the respondent.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Appellant/Advocate- Absent

2. Respondent/Advocate- Absent

3. Fardowsa ; Court Assistant- Present