



REPUBLIC OF KENYA



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**Nyakweba v Kiage (Civil Appeal E016 of 2023)
[2024] KEHC 2509 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E016 OF 2023
HI ONG'UDI, J
MARCH 12, 2024**

BETWEEN

STEPHEN MOKAYO NYAKWEBA APPELLANT

AND

BENARD NYANGENA KIAGE RESPONDENT

(An appeal from the Ruling delivered by Hon D. K. Mikoyan (CM) on 1st October, 2021 in Ogembo Principal Magistrate's Court Civil Case No. No. E006 of 2020)

JUDGMENT

1. Stephen Mokaya Nyakweba the appellant is the plaintiff in the lower court case, while Benard Nyangena Kiage the respondent is the defendant.
2. The parties were to appear before the learned trial Magistrate on 15th February, 2021 for the court to confirm the filing of submissions in respect of a Notice of Motion dated 12th November, 2020 and filed by the appellant herein.
3. From the record when the matter came up on 15th February, 2021 both parties and counsel for the plaintiff were absent. There was counsel for the defendant called Ms Kiage present. Ms Kiage addressed the court saying:

“I was served with notice to withdraw suit”
4. Based on that request the learned trial Magistrate marked the suit as withdrawn with costs.
5. As a result of that order dated 15th February, 2021 the appellant filed a Notice of Motion dated 16th February, 2021 seeking to have the orders of 15th February, 2021 set aside and the suit reinstated. The same was responded to by the respondent herein. It was heard interparties and a Ruling delivered on 1st October, 2021 dismissing the said application.



6. It is the said ruling that is the subject of this Appeal, which has raised the following grounds:
 - i. That the learned trial Magistrate erred in law and fact, disallowing the appellant's application dated 16th day of February, 2021, without any justification.
 - ii. That the learned trial Magistrate erred in law and fact by holding that the appellant filed a notice to act in person and notice of withdrawing the entire suit, civil case No E006 of 2020 at Ogembo Law Courts and yet the plaintiff disowned the said notices on grounds that they were filed by a stranger without his knowledge.
 - iii. That the learned trial Magistrate erred in law and fact, by presuming that the notice to act in person and notice of withdrawal of the said suit, dated 16th day of December, 2020 and filed in court on the 12th day of February, 2021 respectively, were signed by the appellant and yet he/ appellant disowned the same as they were forged.
 - iv. That the learned trial Magistrate erred in law and fact by issuing orders dated 1st day of October, 2021 without sufficient reasons.
 - v. That the learned trial Magistrate erred in law and fact by dismissing the appellant's application by not taking into consideration the appellant's grounds stated in the supporting affidavit sworn on the 16th day of February, 2021 and his submissions.
 - vi. That the learned trial Magistrate's decision albeit a discretionary one was plainly wrong.
7. The Appeal was canvassed by way of written submissions

Analysis and Determination

8. I have carefully perused and considered the grounds of appeal, evidence on record, cited authorities and the law I have identified one issue for determination which is whether there was any merit in the Notice of Motion dated 16th February, 2021.
9. First of all, the appellant acted with speed after realizing that his suit had been marked as withdrawn. In the Notice of Motion dated 16th February, 2021 the appellant claimed to have no knowledge of the request for the withdrawal. He stated that the request was done by a stranger who only thumb printed the said Notices.
10. Upon perusal of the record I confirm that the Notice for withdrawal and Notice to act in person both dated 16th December, 2020 were filed in court on 12th February, 2021. The Notice to act in person ought to have been served upon Okemwa Elijah & Co advocates and O. M. Otieno & Co advocates. There is no evidence that the two law firms were ever served with the said Notices.
11. The said Notices are thumb printed, and having been disputed by the appellant, the court had a duty to satisfy itself as to the authenticity of the said documents. This was never done.
12. Furthermore, the practice is that besides filing such a Notice or even a consent the parties must appear in court to confirm that what is filed is actually from them and by them. In this case what the trial court ought to have done on 15th February, 2021 since both parties and the appellant's counsel were absent, was to issue a further mention and notify the parties to attend court to confirm the filing of those Notices.
13. There is still another issue which has cropped up in the submissions, in respect to a similar case having been filed before the Principal Magistrate's Court at Keroka being Civil Suit No. 109 of 2020. The parties therein are



Stephen Mokaya Plaintiff

Versus

Benard Nyangena Defendant

In this record I have found the plaint in the said case and its dated 15th August, 2020. Annexed to it is the supporting affidavit by Stephen Mokaya plus the plaintiff's lists of witnesses and documents. Also filed herein is the statement of defence by the defendant Benard Nyangewa, his list of witnesses and documents and a statement by Benard Nyangena Kiage, filed in the said case.

14. From the pleadings in the Keroka case its clear that the appellant who is the plaintiff therein is not represented by E. Okemwa Elijah & Co advocates in the said matter. This issue of the plaintiff having a similar matter at the Keroka court is the subject of the Notice of Motion dated 12th November, 2020 which is yet to be determined.
15. In view of the above analysis I find that the Appeal has merit and the following orders shall issue:
 - i. The Appeal succeeds and the Ruling delivered on 1st October, 2021 is hereby set aside.
 - ii. The appellant's suit Ogembo Principal Magistrate's Court Civil Case No. E006 of 2020 is hereby reinstated.
 - iii. Parties to appear before the trial court on 18th March 2024 for directions on the hearing and determination of the Notice of Motion dated 12th November, 2020 without any excuses.
 - iv. Costs shall be in the cause.
16. Orders accordingly.

DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

