



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 39 OF 2020

ROBERT K. MUTHAMIA..... APPELLANT

VERSUS

CATHERINE KAJAU KIREMA.....RESPONDENT

(Being an appeal from the judgment of Hon. E.M Ayuka (S.R.M.) delivered on 2nd July 2020 in

NKUBU ELC No. 94B of 2015)

JUDGMENT

1. The litigants are siblings. The appellant was the defendant in the trial court where he was sued vide a plaint dated 9/10/2015. The respondent was seeking a declaration that the defendant/appellant holds 0.41 HA out of L.R NO. ABOGETA/L-KIUNGONE/1084 measuring 0.62 HA in trust for the plaintiff/respondent, an order directing the defendant to excise and transfer to the plaintiff 0.41 HA and in default the executive officer of the court be empowered to execute all transfer documents and costs of the suit.

2. It was the respondent's case that the appellant had approached her with the proposition of acquiring a piece of land in partnership where the owner of the land wanted to file a succession cause but lacked the funds. It was then agreed between the parties herein that the respondent would fund the succession cause to the tune of Kshs. 105,000. Once the succession was completed, the suit land would be transferred to the appellant who would hold 0.41 HA in trust for the respondent and transfer it to her. In September 2015, the respondent approached the appellant seeking the excision of her portion of the land but the latter refused to effect the transfer. Instead, the appellant claimed that he only owed her Kshs, 105,000.

3. The appellant entered appearance and filed his defence together with his statements and list of documents, whereby he denied all the allegations raised in the plaint.

4. The matter proceeded for hearing, but in absence of the appellant and his advocate. The appellant then filed an application dated 15/10/2019 seeking an order for the reopening of the case and recalling of the respondent for purposes of cross-examination. However, the application was dismissed vide a ruling dated 21/05/2020 and the trial court proceeded to deliver its judgment in the matter on 2/07/2020 in favour of the respondent.

5. The appellant being aggrieved by the decision filed his memorandum of appeal dated 24/7/2020 basing his appeal on four (4) grounds as follows:-

i. That the learned magistrate erred in law and fact in failing to conclusively deal with the appellant's application dated 15th October 2019, in which he sought the case to be re-opened to allow him cross-examine the respondent and her witnesses and further tender his evidence.

ii. That the learned magistrate erred in law and fact by failing to appreciate the difficulty and injustice that may arise by shutting out a party from actively participating in court proceedings.

iii. That the learned magistrate exhibited his limited comprehension of the court's discretion to set aside orders restricting the appellant's evidence and the need to determine the suit on merit.

iv. That the entire judgment is wholly unreasoned, not based on any sound legal principles, lacks merit and is of poor legal jurisprudence.

6. The appeal was canvassed by way of written submissions. The Appellant vide submissions dated 16/02/2021 stated that Section 146(4) of the Evidence Act allows the court to permit a witness to be recalled either for further examination in chief or further cross-examination. He

also relied on Order 18 Rule 10 of the Civil Procedure Rules and Articles 50 (1) and 159 (2) (d) of the Constitution of Kenya.

7. He also submitted that the court proceeded on hearing the suit without conducting proper pre-trial conference, that the trial court ought to have afforded the parties a level playing field to enable a fair and impartial determination of the suit. That the need for a party to adduce evidence is paramount and the technical oversight of non-attendance on the material day of the hearing ought not to prejudice a party's right to a fair hearing. In support of his arguments, the appellant has relied on the cases of; **Raindrops Limited V County Government of Kilifi [2020]eKLR**, and **Risoro V State Farm Mutual Automobile Insurance Co.[2009] 70 CPC Out Div CL**.

8. The respondent vide her submissions dated 03/03/2021 stated that an indolent litigant should not benefit from the courts discretionary power to set aside an ex-parte judgment or ruling as the appellant has not convincingly explained why he did not attend the hearing of the case despite being aware of the same. Further, it is submitted that the application of 15.10.2019 was heard and determined and no appeal was lodged hence the appellant is estopped from raising issues in that ruling. She urges the court to dismiss the appeal with costs. The respondent has relied on the following cases; **Ajit Surghviridi V J.F Mchoy (2014)eKLR**, **Amos Munyi Njue V Denis Murithi Mutegi & Another [2017]eKLR**, **Shah V Mbogo (1967) EA 166**, **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi HCCC NO. 834 of 2002**, **Karuru Munyororo V Joseph Ndumia Murage & Another Nyeri HCCC NO. 95 OF 1988**.

Analysis and determination

9. A perusal of the memorandum of appeal reveals that the appeal was lodged against the judgment delivered on 2.7.2020. The issues being raised in the appeal by the appellant however relate to the application dated 15.10.2019. I am therefore in agreement with the submissions of the respondent that the appellant is estopped from raising issues touching on the application dated 15.10.2019 as no appeal was lodged thereof in respect of the ruling dated 21.5.2020. If the appellant was dissatisfied with the aforementioned ruling, then the logical cause of action was to lodge an appeal and not to await the judgment then raise the issues all over again.

10. In the case of; **Waweru vs Ndiga (1983) KLR 236**, it was held that,

“a Court has unfettered discretion to do justice between the parties, it may be just and on the facts of a particular case to set aside an ex-parte judgment to avoid hardship or injustice arising from inadvertence or mistake even though negligent, but the discretion should not be exercised to assist anyone to delay the course of justice. Delay defaults equity.”

11. In **Edney Adaka Ismail v Equity Bank [2014] eKLR**, the court cited with approval the case of **CMC Holdings Limited v Nzioki [2004]eKLR** which stated as follows:-

“That discretion must be exercised upon reasons and must be exercised judiciously..... In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error”.

12. In **Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR**, the Court held that:

“It's an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the Civil Procedure Act obligates the parties to assist the Court in the expeditious disposal of cases.”

13. It is quite apparent that the firm of Kaumbi advocate had already come on record for the appellant via a notice of appointment way back on 7.11.2018. This was a period of almost one year up to the time the hearing took place on 24.9.2019.

14. In conclusion, I find that the circumstances of this case do not warrant the court to exercise its discretion in favour of the appellant. In the circumstances, this appeal is not merited and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 12.4.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

