



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 42 OF 2019

MONICA KALEKYE KYULE.....APPELLANT

AND

JAMES JUMA1ST RESPONDENT

SAMUEL NJUGUNA GATU T/A GATU

PROPERTIES..... 2ND RESPONDENT

ALICE WAMUYU GATU T/A GATU

PROPERTIES.....3RD RESPONDENT

(Being an Appeal from the whole of the Ruling delivered by the Honourable A. M Maina. Senior

Principal Magistrate on the 14th May 2019)

JUDGMENT

By a Notice of Motion Application dated 9th December 2015, the Plaintiff (Appellant) sought for orders against the Defendants (Respondents) that;

- 1. That this Honourable Court be pleased to grant the Applicant leave to serve the 2nd & 3rd Respondents by way of registered mail vide post office Box Number 436 Ruiru.*
- 2. That this Honourable Court be pleased to grant the Applicant leave to include*

2015, when the matter came up for hearing, the Court ordered the Plaintiff (Appellant) to serve the 2nd & 3rd Respondents by way of substituted service. Further that John **Thuo Ndungu and Stephen Wainaina**, are witnesses and have sworn in their witness statements and as such already parties to the suit and are due to appear in Court and their witness statements have been filed and served upon the Plaintiff. That the Plaintiff (Appellant) has no claim or dispute against the intended Defendants, and it would be improper to join them as Defendants.

Further that the Plaintiff (Appellant) filed the suit on **21st July 2014** and has come to Court too late in the day with an Application to amend the Plaintiff. That the Application to enjoin the witnesses as Defendants is an attempt to cure what is evidently hopelessly and incurably defects that go to the root and substance of the purported claim. That he has been advised by his Advocates on record, which advice he believes to be true that the intended Defendants are witnesses and not necessary parties to the suit, since the Plaintiff's can address whatever issues they desire to when the parties appears before Court to give their evidence and the suit can effectively be adjudicated upon and settle questions involved in the suit without the need to enjoin the said parties. That if orders sought are granted, he would be greatly prejudiced as the Plaintiff's intentions are to preempt any Defence and water down his case. That the Application is meant to delay the suit and buy time, which is against the spirit of the Law.

The Application was canvassed by way of written submissions and on **14th May 2019**, the Court delivered its Ruling and dismissed the Application and stated that:-

“In summary I find that the present Application was filed too late in the day. The delay in filing the same was not explained. The Application is therefore an afterthought. Further the intended two defendants will be called as the 1st Defendants witnesses and the Court will be able to determine the real questions in controversy between the parties using their evidence and the parties evidence. In the Premise I find that the Application dated 9th December 2015 lacks merit and I proceed to dismiss the same with costs to the 1st defendant. Pre Trial Direction were taken way back on 24th April 2015 and the Plaintiff is directed to take steps to ensure that the case is fully heard by 12th June 2019 as per the Court orders given on 12th February 2019.

The Appellant was aggrieved by the above decision and by a Memorandum of Appeal dated **18th June 2019**, appealed against the said decision and sought for orders that

- 1. This appeal be allowed with costs***
- 2. The Ruling of the Honourable Senior Principal Magistrate be set aside and a proper finding be made***
- 3. The 120 days time limited for the hearing and determination of the Appellant's suit is set aside varied and or vacated.***

The grounds upon which the Memorandum of Appeal is grounded are;

- 1. The learned trial Magistrate erred in Law by failing to allow the amendment of the Applicant's pleadings in order to be able to determine matters in controversy with finality between or amongst the parties.***
- 2. The learned trial Magistrate erred in Law and in fact in not finding that the Plaintiff/ respondent had done all that was necessary to have this matter heard and determined by limiting the time for hearing of the main suit to 120 days from 12th February, 2019 to 12th June 2019 notwithstanding that there were other legal processes which was going on.***
- 3. The learned trial Magistrate erred in law and fact by failing to accord the Appellant humble time to litigate her case. Notwithstanding that it is indeed the Plaintiff who fixed the matter in the first instance for hearing on 12th February 2019***
- 4. The learned trial Magistrate erred in Law and in fact in basing her findings on irrelevant issues not supported by evidence adduced or the applicable law as clearly captured in her Ruling.***
- 5. The learned trial Magistrates decision is against the weight of evidence on a balance of probability.***
- 6. The Appellant shall upon receipt of the typed proceedings file a supplementary memorandum of Appeal to include other grounds and reasons that may become apparent.***
- 7. The learned trial Magistrate erred in Law and in fact in denying the Appellant his constitutional right to a fair hearing by unreasonable, unfairly and injudiciously in Ruling against the Plaintiff.***

The Court directed the Appeal be heard by way of written submissions and the Appellant through the **Law Firm of Nzaku & Nzaku Advocates** filed her written submissions dated **19th November 2020** and submitted that the trial Magistrate's decision not to allow the amendment of the pleadings violates her Constitutional rights to fair hearing as the decision is prejudicial to the Appellant's case, as it limits the ability of the Courts to determine pertinent matters in controversy. It was further submitted that failure to allow the amendment was unjust as it limits the Appellant from pleading her case.

That the Appellant was guided by **Order 8 Rule 3 and Order 1 Rule 10(2) of the Civil Procedure Rules 2010**, which did not stipulate a time limit as to when a party may seek leave to amend pleadings and enjoin parties. That the intended Defendants necessary in determining the real issues contrary to the assertions by the trial Court as in being the initial proprietors, there is need to establish whether dealings were

done fraudulently.

The 1st Respondent filed his written submissions through the Law Firm of **Kiarie Joshua & Company Advocates** and submitted that allowing the Appeal will be an exercise in futility and or an academic exercise as the Appellant has unfortunately engaged the Court on **12th June 2019**, when the Appellant filed the Memorandum of Appeal, the suit stood dismissed and there was no suit to appeal against and she ought to have sought for a reinstatement of the suit. That if the Court allows the Appeal and finds that the trial Court erred in dismissing the Appellant's Notice of Motion, then parties will be faced with a situation wherein they will be going to hear a matter that had ceased to exist upon lapse of **120 days**, and the same will be an exercise in futility. That the Appellant was indolent and failed to prosecute the suit since **12th February 2019**, when the trial Court delivered the Ruling. The Court was therefore urged to dismiss the instant Appeal.

As this is a first Appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123** where the Court 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 allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Mbogo vs Shah (1968) EA at Page 93**, where the Court held that:-

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the written submissions by the parties and the Ruling, the Court and finds that the issues for determination are;

1. Whether there was an existent suit when the Appeal was filed

2. Whether the Appeal is merited.

1. Whether there was an existent suit when the Appeal was filed

The 1st Respondent has submitted that the instant Appeal is an academic exercise as the Appellant filed the Appeal on **12th June 2019**, on the date that the Court had ordered that the same be heard and determined. It is not in doubt that the Memorandum of Appeal is dated **10th June 2019**, and the same was filed on **12th June 2019**. It is further not in doubt that unless stay is granted, an Appeal does not automatically operate as stay of execution of any Court orders .

On **12th February 2019**, the **Hon A.M Maina** stated:-

“Application dated 9th December 2015 to be served upon the Respondent's for hearing on 26th February 2019. The Plaintiff is directed to take steps to ensure that the case is heard and determined within 120 days of the date hereof failure to which it will stand dismissed for want of prosecution. This will be at the lapse of 120 days from today.”

Further when the matter came up on **9th April 2019**, to confirm the filing of submissions, **Mr. Kinyanjui** holding brief for **Mr. Nzaku** requested for time extension to which the Court confirmed that the Appellant had been given 120 days. Further when the Court delivered its Ruling on **14th May 2019**, it made a specific order that the Appellant do take steps to ensure that the suit was fully heard and determined by **12th June 2019**, which was the lapse of the **120 days**. As already noted above by the Court, the filing of the instant Appeal did not operate as an automatic stay. The extension sought by the Appellant was never granted neither was an Application for stay ever sought.

This Appeal was filed on **12th June 2019**. It is not in doubt that the Ruling having been delivered on **14th May 2019**, the Appellant had ample time within which to put their house in order which they failed to do. It is further not in doubt that as at **12th June 2019**, the suit had not been heard and determined and therefore as the orders of the Court had a rider, the suit stood dismissed when the instant Appeal was filed and therefore there was no suit in existence.

2. Whether the Appeal is merited

The Court having held that there was **no suit** in existence at the time of filing the Appeal, it therefore follows that the Appeal is not anchored on any suit and therefore it is not merited.

The Upshot of the foregoing is that this Court finds and holds that at the time the Appeal was filed, the suit had been dismissed for failure by the Appellant to set it down for hearing and determination and therefore the Appeal is **not** anchored on any suit and thus the said Appeal is **not** merited. Consequently, this Appeal is dismissed entirely with costs to the 1st Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy