



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki & another v Njambi (Civil Appeal 9 of 2017)
[2023] KEHC 1831 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 9 OF 2017**

**FR OLEL, J
MARCH 2, 2023**

BETWEEN

GRACE WANJIRU KARIUKI 1ST APPELLANT

MWANGI WANJIRU 2ND APPELLANT

AND

LYDIAH NJAMBI RESPONDENT

*(Being an appeal against the Ruling Delivered On 28th February 2017 by the
Principal Magistrate Hon P.m. Kiama at Wanguru Law Courts in Civil Case No 91
Of 2015 Mwangi Wanjiru Alias Antony Mwangi Kariuki Lydia Njambi & 2 Others)*

JUDGMENT

1. This appeal arises out of a ruling dated February 28, 2017, wherein the trial magistrate ruled that the two parties added as defendants in the counter claim were strangers to the proceedings before court as they were un-procedurally added thereto and the trial court proceeded to strike out the said two defendants from the proceedings. The appellants being dissatisfied by the said ruling filed a memorandum of appeal dated March 28, 2017.
2. The memorandum of appeal was brief and only contained two grounds of appeal namely;
 - a. The learned trial magistrate erred in law and fact in interpretation and application of order 7 rule 8 of the *Civil Procedure Rules*.
 - b. The learned trial magistrate erred in law and in fact by holding that the defendants defence and counter claim dated December 3, 2015 was defective by virtue of including other parties not in the original cause of action.



3. The appellant prayed that the appeal be allowed and the ruling of the lower court be set aside and they be granted costs of this appeal.

Brief Facts

4. The respondent herein did file a suit on August 10, 2015 stating that she was the lawful licensee of rice holding No 2491C Thiba section measuring one acre. She claimed that the appellants herein had on diverse dates between July 25, 2015 and August 3, 2015 attempted to forcefully take possession and occupy the same thus grossly interfering with her farming activities thereon.
5. The appellant's herein did file their statement of defence and counter claim on December 3, 2015 and in the counter claim they did sue one Gabriel Mwangi & Joseph Wainaina as the 2nd and 3rd defendant in the counter claim. On the body of the counter claim they stated that the two defendants enjoined in the proceedings together with the plaintiff were children of the late Regina Wanjiru Mararo, who after concluded the succession to their mother's estate shared parcel No 2491. The appellants also pleaded that they did not know about the succession process undertaken and how sharing of the estate was effected but the net result was that the two defendants enjoined were allocated the portion they had leased and unlawfully harvested rice with security from Nguku Police Station.
6. On February 21, 2017 the parties counsels appeared before the trial magistrate and the respondent's counsel raised an objection that in the counter claimed filed, two persons/strangers had been introduced not initially sued in the suit and prayed that the defendants file a proper defence and counter claim without violating the initial suit.
7. The appellants counsel was given time to respond and stated that the defence and counter claim filed was proper in view of order 7 rule 8 of the [Civil Procedure Rules](#) and therefor the objection raised was baseless and ought to be dismissed.
8. The trial magistrate reserved ruling for February 28, 2017 and stated that the two defendants had been added un- procedurally as defendants in the counter claim. They were thus strangers in the suit. The court did further direct that the defendant should amend its defence within 14 days to strike out the two names. It is as against this ruling that this appeal has been filed.

Submissions

9. The appellants did file their submissions on September 8, 2019 and raised a single cogent issue that provisions of order 7 rule 8 of the [Civil Procedure Rules](#) provided that; where a defendant by his defence sets up any counter claim which raised questions between himself and the plaintiff together with any other person or persons, he shall add to the title of his defence, a further title similar to the title in the plaint, setting forth the name of all persons, who, if such counterclaim were to be enforced by cross action would be defendants to such cross action and shall deliver to the court, his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff with the period within which he is required to file his defence.
10. The appellant further stated that order 7 rule 9 and 10 of the [Civil Procedure Rules](#) directed that such a person, if enjoined would be served with summons and a copy of the defence to appear in accordance with the rules regulating service of summons
11. They thus summarized by stating that it is obvious that the magistrate fell into error to hold that the two person's enjoined in the counter claim were strangers to the proceedings and it was wrong to have their name struck out. They relied on the case of [Bilha Njeri Kabiru & another v Onesmus Karina & 3 others](#) (2017) Eklr.



12. The respondent too relied on their submissions filed in court on September 26, 2019. The jest of their submissions was that, the appellants were required by law to apply to join the intended defendants in the counter claim as parties by making a formal application exhibiting the pleadings intending to join parties in the amended pleadings. This was necessary to enable the opposite party/existing parties have a clear view of the pleadings and then the court would formally grant leave.
13. Further they stated that as at February 28, 2017, when the court reserved the ruling, there was no evidence that the new parties had been served with any documentation to make them formal parties in the said proceedings and supported the findings of the trial magistrate when he called the said persons strangers to the proceedings. The final issue raised was that the order issued on February 28, 2017 were directions and was not an order or decree. (no order or decree was extracted and or filed). Thus without the extract of an order being appealed against the entire appeal is fatally defective and could not be cured by section 159 of Constitution of Kenya 2010.
14. The respondent prayed that this appeal be dismissed with costs.

Determination

15. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
16. As held in *Selle & another v Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion 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. (*Abduk Hammed Saif v Ali Mohammed Sholan*(1955), 22 EACA 270”

17. The two issues which arise for determination is, what is the effect of not filing an order or decree in the record of appeal and whether the trial magistrate was right to summarily strike out the counter claim filed, which added two new parties as co-defendants in the counter claim and/or whether the appellants followed the right procedure in adding them as parties thereto.
18. Before I determine the main issue, the respondents have pointed out that the appellant did not extract an order or decree from the ruling dated February 28, 2017 and that this is a fatal failure to this appeal which cannot be cured by article 159 of the Constitution of Kenya 2010.
19. In the case of *Nyota Tissue Products v Charles Wanga Wanga & 4 others* (2020) the court held that;

“The rule applicable to the appeals to the High Court are under Order 42 rule 13(f) of the Civil Procedure Rules, which provides for the filing of a copy of the “judgment, order or decree appealed from” and does not make it mandatory to attach the judgment and the



decree. The record of appeal herein attaches the judgment of the trial court according to the requirements of order 42 rule (13)(4)(f) of the Civil Procedure Rules and in my respectful view, I would agree with the court in silver bullet bus case on the point that it would be too draconian to strike out the appeal in these circumstances.”

20. Further in *Paul Lawi Lokale v Auto Industries limited & another* (2020) Eklr Judge R. Nyakundi had this to say with regard to provisions of order 42 rule 13(4)(f) while appreciating the *Nyota Tissue Products citation*(supra)

“I share the sentiments with the learned judge in the forgoing authority..... To my mind, the use of the conjecture “or” suggests that litigants are not mandatorily obliged to attach both the judgment and the decree. Further, it is my view that a decree for purposes of an appeal being an extract of the decision appealed against, it would not be said to be an improper procedure when a litigant attaches the judgment appealed against and omits to do the same with a decree of the court.”

“ I consider the circumstances similar to this appeal courts have a right to construe the provision and be inclined to hold that the said requirement to be directory. Noncompliance causes no substantial prejudice or injustice..... it is however, evidently incorrect to assert as the respondent does in his submissions that in those circumstances the appeal should be struck out for being fatally defective.

The honourable judge then did make the final observation that ;

“ I take it that it would be contrary to the letter and spirit of the *Constitution* of Kenya 2020, to strike out the appeal in these circumstances. Article 159(2)(d) provides for the principle of substantive justice without prioritizing procedural technicalities. I therefor decline to grant the respondents prayer that the appeal be struck out for having omitted to include the decree and/or order in the record of appeal and hold that judgment appealed against alone as attached by the appellant fulfills the purpose of the decree in question.”

21. In this appeal, the appellant attached the ruling/directions appealed against. This obviously satisfies the provisions of order 42 rule 13(4)(f) of the *Civil Procedure Rules*. The respondent’s prayer to strike out the suit for failure to attach a decree and/or order thus fails.

22. As regards the main issue in contention order 7 rule 8 of the *Civil Procedure Rules* provide that ;

“ where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.”

23. Order 7 rule 9 further provides that ;

“ where such a person as is mentioned in rule 8 is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence, which shall be served with accordance with the rules regulating service of summons.”



24. The provision's above cited are self-explanatory. Any defendant is allowed in law to file a counter claim to include new parties not originally sued. In doing so they must appropriately further add a title similar to the plaint, setting forth the names of all persons, who, if such counterclaim were to be enforced by cross action would be defendants to such cross action. A glance at the counter claim filed by the appellant is exactly what the provisions of the law allowed them to do.
25. The trial magistrate thus fell in grave error to state that the added parties were strangers to the suit and strike out their names. There was no basis whatsoever for him to do so.
26. The respondent also alleged that the appellants ought to have proceeded first under order 1 rule 10 (2) of the Civil Procedure Rules by applying to enjoin the two (2) additional parties, then upon getting leave they would have then amended the counter claim to so include them. This proposition is not correct as order 7 rule 8 of the Civil Procedure Rules allows parties by way of counter claim to include new parties to the suit. The issue of seeking leave to enjoin new parties and amending pleading can only arise after close of pleadings by both parties.
27. Order 7 rule 17(2) of the Civil Procedure Rules provides that; "No pleadings subsequent to the reply (reply to defence) shall be pleaded without leave of court." In the instant suit, the pleadings had not closed as the appellants had not filed their defence. Further the respondent herein had not filed a reply to defence and defence to counter claim. If such rebuttal had been filed, then the appellants would have definitely needed leave of court to add parties to the suit and/or the counter claim.
28. The upshot is that this appeal has merit and is allowed.
 - a. The ruling/ direction delivered and dated February 28, 2017 in Wanguru PMCC Case No 91 of 2015 by Hon P.M Kiama (SPM) is hereby set aside in its entirety.
 - b. I award the appellant half costs of this appeal given that the error was made by the magistrate. The same is assessed at Kshs 75,000/= all inclusive.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF MARCH, 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;

- Court Assistant - Susan

