REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 104 OF 2019

PATRICK MUTUMA ARIMI .....APPELLANT

VERSUS

ELAIS MUTETHIA MURIRA .... RESPONDENT

(Being an appeal from the Judgment of Hon. M.K.N.N. Maroro (P.M.) delivered on 4th July, 2017, in Meru CMCC No. 209 of2014)

JUDGMENT

1. The appellant seeks to overturn the lower court decision on the grounds that the court failed to get the merits of the matter; acted without establishing the application dated 11.12.2018 was dismissed for non-attendance by the previous lawyer on record; condemned the party out of mistake of counsel; didn't observe rules of natural justice and held the application was an abuse of court process.

2. This being a first appeal the court is required to re-assess rehear and re-appraise itself on the lower court record, come up with its own findings and conclusions. ***See Selle & Another* v *Associated Motor Boat Co. Ltd & Another* (1968) EA 123.**

2. The appellant had sued the respondent in the lower court for beach of a sale agreement, damages thereof and a refund of **Kshs. 330,000/=** with interest of **19%** or in the alternative payment of the balance and transfer of **¼ acre** as per the sale agreement dated **6.2.2013**.

4. The respondent denied the claim and alleged the breach was on the part of the appellant. He sought the suit be dismissed.

5. By a reply to defence, the appellant denied the contents of the defence. Thereafter parties complied with **Order 11.**

6. On 3.12.2015 the defendant's lawyers applied to cease from acting for the defendant and M/s Igweta Murithi & Co. Advocates came on record for the defendant.

7. The matter proceeded for hearing on 6.6.2017 after numerous adjournments on the part of the defendant. He did not appear in court on that day despite service hence the plaintiff closed his case and by a judgment read on the claim was allowed.

8. On 24.7.2017 the plaintiff applied for the review of the judgment as regards costs and against damages of Kshs. 100,000/=.

9. On 22.8.2017, the applicant sought to withdraw the application and the court allowed withdrawal with no order as to costs.

10. Now a notice of motion dated 26.1.2018 was filed seeking the firm of G.G. Mugambi & Co. Advocates to come on record for the plaintiff. The same was allowed on 6.3.2018 leading to the filing of an application dated 11.12.2018 seeking for the review of the judgment in terms of costs and general damages. The firm of G.G. Mugambi & Co. Advocates on 30.1.2019 fixed the same for hearing on 26.2.2018 exparte. They did not attend hence the court dismissed it for want of prosecution and non-attendance.

11. The applicant did not take action until the firm of Charles Kariuki & Co. Advocates filed a notice of change of advocates in place of G.G. Mugambi& Co. Advocates to come on record for the plaintiff obviously without leave of court.

12. A notice of motion dated 24.6.2019 was filed seeking for the review of and or variation and stay of the orders made on 26.2.2019 and to allow the matter to proceed and be reinstated back for hearing.

13. The reasons given were the previous advocate had not informed the applicant of the hearing dates. The advocates also did not attend and the applicant stood to suffer irreparable damages if the application was not allowed.

14. The application was supported by the appellant's own affidavit sworn on 24.6.2019. At paragraph 5 he claims the suit was dismissed for non-attendance, that he enquired from the registry and was told as such, he was keen to persecute his suit, mistakes of his counsel should not be visited upon him and if the suit is not reinstated, he would loss, his birth right on the suit property.

15. The applicant appeared through Miss Aketch advocates in court on 23.7.2019, urged the court to allow the application though she conceded she had not filed an affidavit of service upon the respondent. The court dismissed the application with no orders as to costs.

16. In his submissions dated 17.8.2021 now represented by the fourth advocates in this file M/s Kaberia Arimba & Co. Advocates, the trial court is said to have erred in law and in fact, failed in its discretion yet the mistake was excusable, inadvertent and belonged to the previous advocates and hence it ought to have allowed the application to be heard on merit.

17. The applicant relies on **CMCC Holdings Ltd –vs- Nzioki [2004] IKLR 173 and Harrison Wanjohi Wambugu –vs- Felista Wairimu Chege & Another [2013] eKLR**.

ANALYSIS AND FINDINGS

18. To start with, it is trite law parties are bound by their pleadings and must always approach the court through known procedures in law. It is true the application dated 24.6.2019 was not heard on merits and that there was no explanation why the counsel then on record did not attend court or serve the application.

19. Similarly the said law firm is the same one which took a date exparte but did not attend court on time or at all. At the very least one would have expected the said lawyer to swear an affidavit and explain why he did not attend court. Court's discretion cannot just be exercised without context and material. There was none and the situation was even made worse in the application seeking reinstatement of the earlier application as I will demonstrate shortly.

20. The court therefore was in my humble view right to take the action of dismissing the application for both non-prosecution and non-attendance.

21. Coming to the application dated 24.6.2019 as indicated above the same sought for the reinstatement of a suit dismissed for non-attendance. The application is completely at variance with the record in the file as demonstrated above. There is no suit which was dismissed for non-atendance and non-prosecution. The appellant had testified, closed his case and judgment delivered on 4.7.2017. The affidavit by the appellant was not only misleading but also full of falsehoods yet the appellant is expected to have known the status of his file and given his lawyer the right information.

22. Equally, the lawyers as officers of court had the duty to peruse the file and appropriately guide not only their client but also the court in line with **Section 1A and 1B of the Civil Procedure Act** so as to attain the ends of justice.

23. In the circumstances obtaining, the trial court was perfectly in order to find the second application not only bad in law but also an abuse of the court process, given the foregoing court record.

24. A party coming to court has not only the duty but also the onus to make full disclosure so as the court is not mislead in the pursuit of his cause.

25. The above, and notwithstanding the missteps of both the appellant and his counsels on record, the trial court in my view made the correct ruling that the appellant had proved his case based on the evidence and entered judgment for Kshs. 320,000/=.

26. There is however lack of clarity on whether costs of the suit and interests were awarded and perhaps this is the reason the appellant was seeking for review of the judgment vide the application dated 24.7.2017.

27. Sections 27 and 28 of the **Civil Procedure Act** provides that as a general rule costs follow the event, unless there are reasons indicated by the court to deny a successful party costs.

28. The award of costs is therefore within the discretion of the court which has to be exercised in a judicial manner.

29. The law is that an appellate court will not interfere with the exercise of discretion by a trial court on costs except if the discretion is exercised on wrong principles or where the trial court gives no reasons for the decision or if the reasons are not good reasons as held in ***Joseph Oduor –vs- Kenya Red Cross society [2012] eKLR.***

30. The appellant pleaded he had sent a demand letter to the defendant. The same was also produced as an exhibit in court. Paragraph 10 of the defence denied receipt of the same and put the appellant to strict proof. He subsequently produced a demand letter dated 28.5.2014.

31. The trial court did not give any reason why the appellant deserved no costs so as to depart from the general rule on costs. Though the appellant had not cleared the balance of the purchase price on time, an addendum to the agreement was produced exhibit extending the completion date. It cannot therefore be said the appellant was careless or was the cause of the breach of the agreements.

32. In any event the defence did not specify if the appellant was the author of his own misfortune and hence should be denied costs. The suit was also defended. I therefore see no reason why the appellant should be denied costs. My finding is that the trial court erred in law for not giving reasons to deny the appellant costs. Secondly the court acted on the wrong principles of law in denying a successful costs guided by

the case of ***Supermarine Handling Services Ltd –vs- Kenya Revenue Authority [2010] eKLR.***

33. Turning to the issue of interests in ***Prem Lata v-s- Peter Musa Mbiyu [1965] E.A 592,*** the Court of Appeal held a party who had been deprived use of money by reason of wrongful act on the part of the defendant is entitled to be compensated by the award of interest.

34. In **Mukisa Biscuits Manufacturing Co. Ltd –vs-West End Distributors Ltd. [1970] E.A 469** the court held:

> **"The principle that emerges is that where a person is entitled to liquidated amount……. and who has been deprived of them through the wrongful act of another ……. he should be awarded interests from the date of filing the suit."**

35. In the instant case, the appellant was claiming a refund of **Kshs. 330,000/=** on account of a botched land sale agreement. He paid the deposit but found out the land had been allegedly subdivided by the respondent and resold to third parties. He was deprived both of the land and his money, w.e.f. 2013 to the time of filing this suit in 2014.

36. By the time the judgment was delivered on 4.7.2017 no attempts had been made to refund the same and or offer him an alternative land. He pleaded for the sum to attract interest at 19%. There was no justification given for that sale in the evidence tendered before the court.

37. Section 26 of the **Civil Procedure Act** provides that for a decree for payment of money, the court may order such interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the decree in addition to any interest adjudged on such principle for any period before the institution of the suit.

38. In my considered view the principles to apply were enunciated in ***New Tyres Enterprises Ltd –s- Kenya Alliance Insurance Co. Ltd [1988] KLR 380*** as the period from the date the suit is filed and secondly the period from the date of judgment and third the period before filing of the suit. The latter is only claimable if it was contractually agreed by the parties. It must therefore be pleaded and proved.

39. In my considered view the learned trial magistrate was right in declining the claim alleged for general damages of **Kshs, 1,000,000/=** since it was not pleaded in the plaint, nor was it proved given the sale agreement describes it as liquidated damages.

40. Similarly on the issue of interests at the rate of **19%,** the same is lacking in the two agreements. Additionally it was neither pleaded nor proved through evidence.

41. In my considered view the learned trial magistrate erred in law in not giving any reason for for denial of interest to the principal sum.

42. In exercise of my powers, I dismiss the appeal, but in the interest of substantive justice to the parties review the lower court judgment in so far as costs and interest are concerned. I re-affirm that the lower court suit be allowed but with costs and interests from the date of lower court judgment at court rates. The appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

Nelima for Omari for appellant

Mbae for respondent – absent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE