



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO. 12 OF 2018

1. MATIVO NZIOKA

2. SAMMY MATIVO

3. MULI MATIVO

4. MAKAU MATIVO.....APPELLANTS

VERSUS

GRISHON KANYINGI MUSAU.....RESPONDENT

J U D G M E N T

1. The appeal herein arises from the judgment of **Hon R.K Ondieki PM** delivered 29/8/2018 in Taveta PMCC 28 of 2010 wherein an interlocutory judgment was entered and the suit proceeded for formal proof where the Appellants were ordered to unblock the canal so that water can freely flow and the Respondent was awarded general damages worth Kshs. 50,000/=.

2. Being aggrieved by judgment, the Appellants filed a Memorandum of Appeal dated 18/09/2013 in which they raised the following grounds:

a) That the learned principal magistrate erred in law and in fact in holding that the plaintiff had proved his case based only on the fact that the appellants had not filed any defence.

b) That the learned principal magistrate erred in law and in fact in taking into account extraneous matters and factors in his judgment.

c) That the learned principal magistrate erred in law and in fact in failing to identify and set out issues for determination before the court and deciding on such issues from the totality of the evidence before the court.

d) That the learned principal magistrate erred in law and in fact in making findings of fact not supported by the evidence before the court.

e) That the learned principal magistrate erred in law and in fact in failing to appreciate that there was on record a defence filed by the appellants on 6th December 2010 and that the court record was incomplete and the court erred in ignoring the protests by the appellant that their defence was being ignored and overlooked and similarly their memorandum of Appearance.

f) That the learned principal magistrate erred in law and in fact in arriving at and making findings of fact not supported by the evidence before the court and in proceedings with the case on the basis that there was no defence when the appellants had filed their defence which was not considered .

g) That the learned principal magistrate erred in law and in fact in failing to appreciate that the evidence adduced on behalf of the respondent fell short of the standard required by law.

h) That the failure by the learned principal magistrate to appreciate that the Appellant had indeed filed a defence and failure to allow them to adduce evidence based on their defence occasioned a miscarriage of justice on the part of the appellants

i) That the learned magistrate erred in law and fact in making an arbitrary award of damages.

3. The Appeal was canvassed by way of written submissions. The Appellants' submissions were filed on 17/03/2021, while the Respondent's submissions were filed on 17/04/2021.

4. **Mr. Sammy Mativo** is the 2nd Appellant submitted that it was impossible for the Respondent to claim ownership of the water canal when in fact the appellants own the lands through which the canal passes through and that it is by fraudulent means that the Respondent assumed control of the water canal that passes through the appellants' land.

5. The 2nd Appellant also submitted that they were not given an opportunity at the trial Court to adduce evidence in their favour. Therefore, the Judgment by the trial magistrate was an injustice.

6. The Respondent on his part submitted that his case was for the unblocking of the water canals that had been blocked by the Appellant, and that the appellants have not furnished this Court with any evidence that indeed they filed a defence as alleged and that the allegations of fraud against him have not been proved.

The Determination

7. I have given due consideration to the appeal as well as the submissions and find the following issues necessary for determination:

1. Whether the Interlocutory Judgment entered was regular

2. Whether the Respondent proved his case to the required standard.

1. Whether the Interlocutory Judgment entered was regular

8. Having carefully gone through the proceedings of the lower Court, it is indeed noteworthy and I confirm that according to the trial Court proceedings, the Defendants/Appellants filed their Memorandum of Appearance and defence both dated 6/12/2010, and the same were filed in Court on the same day. Therefore, I find and hold that there was a regular Statement of defence by the Appellants. However, on the 29/08/2012 counsel for the Plaintiff, **Mr. Mwawasi** informed the trial Court that the Plaintiff needed to amend the Plaintiff since the 1st Defendant was deceased. Thereafter, an amended Plaintiff was filed on 5/03/2013 and after lapse of nearly a month, on the 5/04/2013 the Plaintiff filed a request for Judgment dated 5/04/2013. An Interlocutory Judgment was entered on 16/04/2013 against all the Defendants/Appellants.

9. It is a fact that an amended plaintiff was filed and no amended defence was filed. But does this mean that there is no defence on record? I do not think so. When an amended plaintiff is served upon a party who has already filed a defence, the defendant is not obliged to amend his defence. He can of course choose to amend his defence, but if he does not do so, it will be deemed that he is standing by his earlier defence. Order 8, which deals with amendments, is not explicit on this, where the amendment is made with leave; but it will be seen that Order 8 Rule 1, which deals with amendment of pleadings without leave, does give the other party discretion to amend defence. The provision is drawn as follows:-

Amendment of pleading without leave [Order 8, rule 1.]

(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.

(2) Where an amended plaintiff is served on a defendant—

(a) if he has already filed a defence, the defendant may amend his defence; and

(b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaintiff whichever is later.

10. It is noteworthy that from **Order 8 Rule 1(2) (a)**, where an amended plaintiff is served, the defendant **may** amend his defence. The word used is "may" which means that it is not mandatory for one to amend his defence. Order 8 Rule 1 of course deals with amendments that do not seek the leave of the court, but I believe that the same ought to apply even where the amendment is made with leave. The defendant must be given discretion to either amend his defence on record or abide by it. If he does not file an amended defence, it does not mean that he has no defence on record; it only means that he stands by the defence earlier filed, and has not seen the necessity of amending it. That is the import I will give in the circumstances of this case. Consequently, it is my considered view that the interlocutory judgment entered where there was a Memorandum of Appearance and Statement of defence were already filed on 6/12/2010, was irregular and should not have been entered.

11. In **Macfoy vs United Africa Co Ltd [1961] 3 All ER at Page 1172(1)** Lord Denning stated as follows: -

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is to sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"

12. In the end, I find and hold that all the steps undertaken after the entry of the irregular interlocutory Judgment are null and void. I would have proceeded to determine the dispute at the trial Court on merit. However, the defence filed by the Appellant's on 6/12/2010 is not on

record and the same would need to be furnished to the trial Court.

13. The upshot then is the following:

a) The interlocutory Judgment entered against the Appellants on 16/4/2013 is hereby set aside;

b) The suit in the lower Court to proceed from before the entry of the Interlocutory Judgment.

c) The Appellants are awarded costs of the Appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF JULY, 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:

Ogwel – Court Asst.

Appellant – No appearance

Respondent – No appearance

COURT

Notice of judgment to be served upon parties and counsel by High Court at Voi.

HON. LADY JUSTICE A. ONG'INJO

JUDGE