



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MILIMANI

ELC. APPEAL NO. E031 OF 2021

LINDA WAGAH.....APPELLANT

-VERSUS-

JOHNSON MWANGI MARIU.....RESPONDENT

(Being an Appeal against the Ruling delivered by Hon. Lilian Lewa (Mrs.) PM on 29th March 2021 in the Milimani Commercial Magistrates Court in Civil Case No. 7273 of 2013)

-BETWEEN-

JOHNSON MWANGI MARIU.....PLAINTIFF

-VERSUS-

LINDA WAGAH.....DEFENDANT

JUDGMENT

INTRODUCTION

1. On the 11th of September 2020, the Appellant herein filed and/or lodged a Notice of Motion Application brought pursuant to Sections 1A, 1B, 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, and in respect of which, the Appellant sought the following Reliefs;

- i. This Application be certified urgent and the same be heard ex-parte in the first instance on account of the urgency involved*
- ii. The Honorable Court be pleased to set aside the proceedings of 9th of September 2020 and the consequential orders thereon including issuance of summons to enter appearance.*
- iii. This Honorable Court be pleased to grant stay of proceedings in this matter pending the hearing and determination of this Application*
- iv. Cost of this Application be provided for.*

2. The subject Application came up for hearing before the learned Magistrate on the 30th of November 2020, whereupon the learned Senior Resident Magistrate issued directions pertaining to and/or concerning the disposal of the Application dated the 11th of September 2020.

3. For clarity, the learned Magistrate ordered and/or directed that the Application be canvassed and/or disposed of by way of written submissions, and timelines were thereafter circumscribed, within which the parties were to file and exchange the written submissions.

4. On the 2nd of February 2021, the matter came up for mention to confirm and/or authenticate the filing and exchange of written submissions, and thereafter to fix the matter for Ruling. In this regard, the Honorable Court indeed confirmed that the parties had filed and exchanged their submissions, and thus a Ruling date was given and/or set.

5. On the 29th of March 2021, the learned Magistrate, who had by then been upgraded to a Principal Magistrate, rendered the Ruling whereupon same dismissed the Application dated the 11th of September 2020, and it is the dismissal of the said Application, which has provoked the instant Appeal.

GROUND OF APPEAL

6. The Appellant herein filed a Memorandum of Appeal dated the 28th of April 2021, but which Memorandum of Appeal was thereafter amended on the 22nd of July 2021, and the amended Memorandum of Appeal has itemized 8 grounds of Appeal as hereunder;

- a) *The learned Magistrate erred in law and fact in failing to appreciate the nature of the Application presented before her dated the 11th of September 2020.*
- b) *The learned Magistrate erred in law and in fact in failing to exercise her discretion judiciously in determining the Application dated 11th of September 2020, and in doing so:*
 - i. *Failed to appreciate the effect of the Ruling she delivered on the 9th of September 2020.*
 - ii. *Failed to appreciate that she condemned the Appellant unheard on the 9th of September 2020, despite her opposition to the Respondent's Application dated the 10th of May 2018.*
 - iii. *Acted in disregard of the Appellant's claim.*
 - iv. *Misapplied the provisions of Section 1A and 1B of the Civil Procedure Act.*
- c) *The learned Magistrate erred in law and in fact in approbating and reprobating at the same time and in doing so:*
 - i. *Purported to sanction the Respondent's delay in prosecuting the Application dated the 10th of May 2018 and condemning the Appellant by dismissing the Application.*
 - ii. *Misapplied the provisions of Section 1A and 1B of the Civil Procedure Act to favor the Respondent against the Appellant.*
- d) *The learned Magistrate erred in law and in fact in favoring the Respondent's evidence and submissions and ignoring the Appellant's evidence and submissions, thus arriving at a lopsided ruling, in that:*
 - i. *The Respondent's Affidavit and submissions did not address the Application under reference.*
 - ii. *The Respondent's Affidavit and submissions did not raise any compelling reason to oppose the Appellant's Application.*
 - iii. *The exercise of her discretion in dismissing the Application was not founded on any evidence or law.*
- e) *The learned Magistrate erred in law and in fact in purporting to elevate the provisions of Sections 1A and 1B of the Civil Procedure Act over and above the provisions of Article 50 of the Constitution of Kenya, 2010.*
- f) *The learned Magistrate erred in law and in fact in trivializing the factual and legal issues raised by the Appellant.*
- g) *The learned Magistrate erred both in law and in fact in finding that the Appellant did not oppose the Application dated the 10th of May 2018, despite the overwhelming evidence before her, namely:*
 - i. *Existence of filed Replying Affidavit sworn by the Appellant on the 13th of March 2020 and filed at the Court's registry on 25th June 2020.*
 - ii. *Existence of filed Replying Affidavit sworn by the Appellant on 13th March 2020, and a physical copy forwarded to Court on 11th August 2020.*
 - iii. *Existence of filed Replying Affidavit sworn by the Appellant on 13th March 2020 on judiciary e-filing.*
 - iv. *The Respondent had admitted receipt of the Replying Affidavit sworn by the Appellant on the 12th of August 2020.*
 - v. *The Respondent had not filed a further supplementary Affidavit to rebut the averments made in the Replying Affidavit sworn on 13th March 2020.*
- h) *As a result of the above, the learned Magistrate displayed bias in the manner in which she heard and determined the Application.*

SUBMISSIONS BY THE PARTIES

7. The Appeal herein came up for directions on the 29th of September 2021, whereupon the Court directed that the subject Appeal which touches on and/or concerns the Ruling of the Principal Magistrate on an Interlocutory Application, be canvassed by way of written

submissions.

8. On the other hand, the Court proceeded to and directed that the Appellant shall file and serve her written submissions within 14 days and thereafter, the Respondent was also to file and serve his written submissions within a similar timeline.

9. On the 17th of November 2021, the subject matter was listed for mention to confirm whether both parties had filed and exchanged written submissions and indeed, it transpired that both parties had filed and exchanged their respective written submissions.

10. For the avoidance of doubt, the two sets of written submissions filed and exchanged by the parties herein form part of the record of the Court and same have been duly considered and/or taken into account.

ISSUES FOR DETERMINATION

11. Having reviewed the entire Record of Appeal, the proceedings and the impugned Ruling by the learned Principal Magistrate and having also considered the written submissions filed by the respective parties, the following issues are germane for Determination;

i. Whether the instant Appeal filed by the Appellant is competent on the face of the provisions of Section 75 of the Civil Procedure Act, Chapter 21, Laws of Kenya, as read together with Order 43 of the Civil Procedure Rules, 2010.

ii. Whether the learned Trial Magistrate exercised her discretion judiciously or otherwise and whether this Court should upset the exercise of discretion by the learned Principal Magistrate.

iii. Whether the Appellant herein has shown any Sufficient cause or basis to impugn the Proceedings of the Court taken on the 9th of September 2020.

ANALYSIS AND DETERMINATION

Issue Number One

Whether the instant Appeal filed by the Appellant is competent on the face of the provisions of Section 75 of the Civil Procedure Act, Chapter 21, Laws of Kenya, as read together with Order 43 of the Civil Procedure Rules, 2010.

12. At the onset of this judgment, I pointed out the provisions of the law pursuant to and/or under which the Notice of Motion Application dated the 11th of September 2020 was brought. The said provisions were imperative and/or significant, to the extent that an Appeal arising from a Ruling rendered in respect of the Application premised on those sections, does not lie as of right.

13. Before venturing to deal with whether or not the Appeal herein is competent, it is important to take cognizance of the provisions of **Section 75 of the Civil Procedure Act, Chapter 21, Laws of Kenya**, which provides as hereunder;

“75. Orders from which appeal lies

(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.”

14. Other than the provisions alluded to in the preceding paragraph, it is also important to take note of the provisions of **Order 43 of the Civil Procedure Rules, 2010**, which provide as hereunder;

“Appeals from Orders [Order 43, rule 1.]

(1) *An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—*

- (a) *Order 1 (parties to suits);*
- (b) *Order 2 (pleadings generally);*
- (c) *Order 3 (frame and institution of suit);*
- (d) *Order 4, rule 9 (return of plaint);*
- (e) *Order 7, rule 12 (exclusion of counterclaim);*
- (f) *Order 8 (amendment of pleadings);*
- (g) *Order 10, rule 11 (setting aside judgment in default of appearance).*
- (h) *Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);*
- (i) *Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);*
- (j) *Order 19 (affidavits);*
- (k) *Order 22, rules 25, 57, 61(3) and 73 (orders in execution);*
- (l) *Order 23, rule 7 (trial of claim of third person in attachment of debts);*
- (m) *Order 24, rules 5, 6 and 7 (legal representatives);*
- (n) *Order 25, rule 5 (compromise of a suit);*
- (o) *Order 26, rules 1 and 5(2) (security for costs);*
- (p) *Order 27, rules 3 and 10 (payment into court and tender);*
- (q) *Order 28, rule 4 (orders in proceedings against the Government);*
- (r) *Order 34 (interpleader);*
- (s) *Order 36, rules 5, 7 and 10 (summary procedure);*
- (t) *Order 39, rules 2, 4 and 6 (furnishing security);*
- (u) *Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);*
- (v) *Order 41, rules 1 and 4 (receivers);*
- (w) *Order 42, rules 3, 14, 21, 23 and 35 (appeals);*
- (x) *Order 45, rule 3 (application for review);*
- (y) *Order 50, rule 6 (enlargement of time);*
- (z) *Order 52, rules 4, 5, 6 and 7 (advocates); (aa) Order 53 (judicial review orders).*

(2) An appeal shall lie with the leave of the court from any other order made under these Rules.

(3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

(4) *Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.*

2. Procedure [Order 43, rule 2.]

The rules of Order 42 shall apply, so far as may be, to appeals from orders.

3. Saving [Order 43, rule 3.]

Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.”

15. I have endeavored to reproduce the foregoing provisions of the law, purposefully and deliberately to show that an Appeal does not arise and/or accrue as of right against and/or in respect of a Ruling arising therefrom.

16. Owing to the foregoing, it was therefore incumbent upon the Appellant to seek for and/or obtain leave to Appeal before the learned Principal Magistrate, either informally at the time of the rendition of the Ruling or in any event, within 14 days from the date of delivery of the impugned Ruling.

17. On my part, I have perused the records and proceedings of the lower Court, and nowhere have I found any Application and/or request made before the learned Principal Magistrate for leave to Appeal against her Ruling or at all. For clarity, it is worthy to note that the Ruling under reference was indeed delivered in the presence of Counsel for the Appellant, and therefore same had the opportunity to seek for and obtain leave on even date.

18. To the extent that no leave to Appeal was ever sought for and obtained, no Appeal therefore lies before this Court for hearing and determination on merit.

19. It is imperative to note that a right to Appeal is expressly conferred and/or founded on a specific provision of the law and where the law is silent, an Appeal can only arise with leave of the Court and not otherwise.

20. In any event, where an Appeal is filed without leave, such an Appeal is a nullity *ab initio* and the Court does not have jurisdiction to entertain same.

21. In support of the foregoing observation, I adopt and reiterate the decision in the case of **Lucy Wanjiku Nyaga v James Mwaniki Munyi & another [2018] eKLR** where the Court of Appeal referred to the decision in **Peter Nyaga Murake vs Joseph Mutunga, C. A. 86 of 2015** where it stated;

“Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. The procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

22. It is also imperative to note that the Right of Appeal goes to the jurisdiction of the Court, and therefore where no right of Appeal is provided for under the law, no Appeal lies to the Court.

23. On the other hand, a party cannot argue that an Appeal which is filed without a right of Appeal, can still be ventilated and/or adjudicated upon before the Court. Neither can it also be said, that such a lapse is curable by invoking the provisions of **Article 159(2) of the Constitution, 2010**.

24. In support of the foregoing position, I adopt and reiterate the holding of the Court of Appeal in the case of **Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court observed:

“The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation”.

25. I am aware that the point herein was neither raised nor canvassed by the Respondent, but it is an issue of law that goes to the jurisdiction of the Court. Consequently, the Court is enjoined to observe and pay fidelity to the law and no other.

26. In any event, jurisdiction cannot be conferred by silence of the parties or on the basis of ignorance of the obtaining law. Either way, a question of jurisdiction is so paramount that where it does arise, the Court is called upon to deal with and/or dispose of same in the first instance, even when there is no prompting by the parties.

27. In view of the foregoing, I come to the conclusion that the Appeal herein, which was filed without leave of the Court, is a nullity *ab initio*.

Issue Number Two

Whether the learned Trial Magistrate exercised her discretion judiciously or otherwise and whether this Court should upset the exercise of discretion by the learned Principal Magistrate.

28. Other than the jurisdictional question which I have addressed herein before, it is also important to note that the Application dated the 11th of September 2020, which was dismissed by the learned Principal Magistrate vide the Ruling dated the 29th of March 2021, is one which sought for exercise of discretion.

29. Having been an Application that sought for exercise of discretion, the learned Principal Magistrate was therefore vested with unfettered discretion, which however was to be applied judiciously taking into account the circumstances both prior to and/or after the act which was sought to be reversed.

30. In this case, it was well within the mandate and/or discretion of the learned Principal Magistrate to consider the conduct of the Appellant and the Appellant's Advocate relating to the proceedings taken before the filing of the Notice of Motion Application dated the 11th of September 2020. For clarity, the antecedent conduct displayed during the proceedings of 12th August 2020 and 9th September 2020, were paramount and significant.

31. On the other hand, it was also within the discretion of the learned Principal Magistrate to consider the age of the file and the duration that the subject matter has taken in the corridors of justice. In this regard, the learned Magistrate duly and correctly observed that the matter was filed in the year 2013 and has thus graced the corridors of the Court for more than 8 years and counting.

32. Notwithstanding the foregoing, the learned Principal Magistrate was also enjoined to consider the provisions of **Sections 1A and 1B of the Civil Procedure Act, Chapter 21, Laws of Kenya**, and I need to add, the provisions of **Article 159(2)(b) of the Constitution, 2010**.

33. Having considered and taken into account the foregoing issues, the learned Principal Magistrate came to the conclusion that the Appellant and her Counsel were guilty of indulging in acts and/or omissions, which were deliberately calculated to delay, defeat and/or otherwise obstruct the course of justice.

34. On my own account, I have reviewed the proceedings before the learned Trial Magistrate as well as the Ruling appealed against and without hesitation, I share in the sentiments and observation of the learned Principal Magistrate.

35. It behooves all the parties and their legal Counsel, to take litigation seriously and to ensure that the requisite steps, that are meant to progress the matter to hearing are diligently taken and/or complied with. Indeed, the provisions of **Sections 1A and 1B of the Civil Procedure Act, Chapter 21, Laws of Kenya**, were meant to put a burden and/or obligation on the parties and their Advocates, to help the Court to FastTrack the hearing of matters and therefore to dispense justice, without undue delay.

36. Suffice it to say, that the learned Principal Magistrate exercised her discretion judiciously and took into account all the relevant facts and/or circumstances and there was no extraneous issue and/or bias that colored the mind of the learned Principal Magistrate, either as alleged by the Appellant or at all.

37. In view of the foregoing, I am not prepared to upset the exercise of discretion by the learned Principal Magistrate and in any event, no basis has been laid to warrant upsetting the discretion, which in my humble view, was correctly applied.

38. In support of the foregoing position, I rely on the decision in the case of **United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] eKLR** where the Honorable Court observed as hereunder;

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

39. In my humble view, the Ruling and decision of the learned Principal Magistrate was sensitive to the circumstances and/or facts surrounding the matter before her and was therefore well grounded and legally sound.

40. In the premises, I find no basis to interfere with same.

Issue Number Three

Whether the Appellant herein has shown any sufficient cause or basis to impugn the proceedings of the Court taken on the 9th of September 2020.

41. The Appellant herein had sought to set aside the proceedings which were taken before the learned Principal Magistrate on the 9th of September 2020. In this regard, it was incumbent upon the Appellant to show sufficient cause and/or basis as to why same was unable to

attend Court and/or participate in the said proceedings.

42. First and foremost, it is imperative to note that the Appellant's Counsel was duly served with a Hearing Notice in respect of the Application that was coming up for hearing on the 9th of September 2020. For clarity, that particular point is not contested.

43. Secondly, the Respondent further intimated to the Honorable Court that other than serving the Appellant's Advocate with the Hearing Notice, for which an Affidavit of Service was duly filed, same also called or telephoned the Appellant's Advocate and reminded same of the scheduled hearing date of the 9th of September 2020. Similarly, the said averment has also not been controverted.

44. Thirdly, the Appellant's Advocate himself is on record that same generated an email which was directed to the Honorable Court and which is contained at Page 95 of the Record of Appeal, whereby the said Advocate underscores that the Application dated 10th of May 2018 is actually scheduled for hearing on the 9th of September 2020.

45. With the foregoing information, how then can the Appellant's Advocate pretend that same inadvertently failed to diarize the matter in his diary, and could the failure to do so, be a deliberate act, to subvert the course of justice?

46. In my humble view, I am unable to appreciate why the Appellant's Advocate, who generated the email and confirmed that the subject matter was scheduled for Hearing on the 9th of September 2020, would thereafter fail to diarize. Consequently, the failure to diarize the matter, in the Counsel's Diary needed to carefully interrogated.

47. For me, the conduct exhibited by the Appellant and the Appellant's Advocate, is one that reeks of slovenliness and want of diligence. Such a conduct cannot attract exercise of equitable discretion in favor of the Appellant.

48. At any rate, judicial proceedings can no longer be conducted in such a leisurely manner and parties still to expect that same shall come back to the Court and crave for mercy and clemency. Parties must now wake up to the reality of the provisions of **Article 159(2)(b) of the Constitution, 2010** and the demand for justice to be expedited.

49. In support of the foregoing observation, I adopt and reiterate the holding of the Court of Appeal in the case of **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR** where the Court of Appeal observed that;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge’s conclusion that the suit in the High Court was not properly handled by the appellant’s advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise, it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.”

50. In my considered view, no sufficient cause and/or explanation has been proffered by the Appellant.

51. Conversely, what is evident and/or apparent is that the Appellant seems to be hellbent on obstructing the due process of the Court and to ensure that the proceedings are not concluded, in line with the provisions of **Section 1A and 1B of the Civil Procedure Act**, which are a restatement of the provisions of **Article 159(2)(b) of the Constitution, 2010**.

FINAL DISPOSITION

52. Having addressed all the issues that were synchronized herein before, I now come to the conclusion as hereunder;

i. The Appeal herein which was filed without Leave having been sought for and obtained beforehand, is a nullity ab initio.

ii. The Appeal be and is hereby struck out.

iii. Costs of the Appeal be and are hereby awarded to the Respondent.

53. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Ms Chepkemoi for the Appellant.

Mr. Johnson Mariu appearing in Person[Respondent]