



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 30 OF 2016

KITHUNGURURU FARMERS

CO-OPERATIVE SOCIETY.....APPELLANT

VERSUS

HARRISON K. NJAGE T/A

H.K. ENTERPRISES (K).....RESPONDENT

J U D G M E N T

A. Introduction

1. The respondent filed suit against the appellants for recovery of damages arising out of a contractual relationship with the appellants in the year 2006 whereas the cause of action had arisen in the year 2000. In response to the suit, the appellants filed a preliminary objection dated 20/05/2015 on the grounds that the suit by the respondent was fraudulent and bad in law having been filed and served 12 years after the cause of action arose. The trial court proceeded to dismiss the appellant's preliminary objection.

2. Being aggrieved by the ruling of the trial court, the appellants filed a memorandum of appeal dated 19th May 2016 based on six grounds that can be summarised as follows;

a) *That the learned magistrate erred in both law and fact by failing to consider all the facts and issue raised in the appellant's preliminary objection as to the payment of filing fees as required by Order 3 Rule 2.*

b) *That the learned magistrate erred in both law and fact by failing to consider all the facts and issue raised in the appellant's preliminary objection and submissions regarding the failure of the respondent to extend summons to enter appearance since 2007 to 2013 as required by Order 5 Rule 1 and 2 of the Civil Procedure Rules 2010.*

3. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submission

4. The appellant submits that Order 3 rule 3(2) of the Civil Procedure Rules 2010 require the payment of filing fees before filing of the pleadings failure to which there would be no pleadings.

5. The appellant further submits that Order 5 rule 2 (1) provide envision a situation where summons to enter appearance are only valid for a year after which they will need to be renewed. It relies on the cases of **Udaykumar C Rajani & Others v Charles Thaithi CA NO. 85 of 1996** where the court held that service of expired summons upon a party was invalid. Reliance was also placed on the case of **Zakaria Somi Nganga v Kenya Commercial Bank Limited & 3 Others [2008] eKLR** where the court held that as the summons had expired 12 months from the date of issue, the plaintiffs suit had lapsed for non-compliance with Order 5 rule 1 of the civil procedure rules 2010.

C. Respondent's Submissions

6. It was submitted that the appellant had not included the entire proceedings in the lower court as the annexed proceedings started from the 8/1/2015 and as such this would be prejudicial to the respondent. It was further submitted that the appellant had conveniently avoided including relevant documents and proceedings from the lower court file such as affidavits of service and receipts.

7. The respondent further submits that the issue of expiry of summons does not arise as the initial summons had been served on the 15th June

2006 as per the affidavit of service dated 16th June 2006. As such, the respondent submits that the learned trial magistrate was justified in his findings especially as he confirmed the state of affairs from the court file.

D. Analysis & Determination

8. Section 78 (2) of the Civil Procedure Act gives the appellate court the same powers requires it to perform as nearly as may be the same duties as are conferred and imposed on the lower court. The section provides as follows:

“Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this act on courts of the original jurisdiction in respect of suits instituted therein”

9. It is now established that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof, as was restated in **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR**, the court restated the duty of an appellate court as follows:

“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....

.....From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court’s finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally”.

10. The issues for determination are as follows: -

a) *Whether the learned magistrate erred by dismissing the appellant’s preliminary objection as to the payment of filing fees as required by Order 3 Rule 3 (2).*

b) *Whether the learned magistrate erred in both law and fact by failing to consider the failure of the respondent to extend summons to enter appearance since 2007 to 2013 as required by Order 5 Rule 1 and 2 of the Civil Procedure Rules 2010.*

11. The preliminary objection dated 20/05/2015 called for dismissal of the respondent’s claim on grounds that the suit by the respondent was fraudulent and bad in law having been filed and served 12 years after the cause of action arose and further that the respondent had not paid the requisite court fees.

12. **Order 3 Rule 3 (2) of the Civil Procedure Rules 2010** provides:

Every plaint to be filed shall be presented to the registry during office hours together with any fee payable on its filing and each such plaint shall be date-stamped with the date on which it was so presented which shall be the date of filing the suit notwithstanding any dispute as to the amount of the fee payable.

13. The appellant submits that respondent must have underpaid the court fees. In rejoinder, the respondent submits that that the appellant has not included the entire proceedings in the lower court in his record of appeal as the annexed proceedings that started from the 8/01/2015 and as such this would be prejudicial to the respondent as the record of appeal as assembled by the appellant conveniently avoids including relevant documents and proceedings from the lower court file such as affidavits of service and receipts.

14. Indeed, I do note that the certified proceedings annexed by the appellant begin on the 8/01/2015 whereas the court record reveals that this matter goes way back. The plaint was filed on the 2/6/2006. I also note from the court record that the respondent paid Kshs. 1,625 as court fees. It is practice that a plaintiff who has not paid full court fees may be required to pay additional court fees before finalization of the suit.

15. On the issue of summons being taken out, the court record is clear that summons were issued some time in 2006 under the seal of the court after the suit was filed. The appellant states that the summons to enter appearance had expired 12 months from the date of issue and as such, the respondent’s suit had lapsed for non-compliance with Order 5 Rule 1 of the Civil Procedure Rules 2010. The respondent asserts that the issue of expiry of summons does not arise as the initial summons had been served on the 15th June 2006 as per the affidavit of service dated 16th June 2006 however the appellant refused to acknowledge receipt of the same.

16. The record reveals that there are copies of summons to enter appearance in the court file that were given under the hand and the seal of the court sometime in 2006. The court record also reveals that the affidavit of service for the summons to enter appearance dated 16th June 2006 was filed on the 13th May 2013. If at all the return of service was not filed that is a procedural technicality under the provisions of Article 159(2) (d) of the Constitution of Kenya, 2010. The appellants have not rebutted that they were served with summons to enter appearance and refused to acknowledge receipt as claimed by the respondent.

17. In the case of **Nicholas Kiptoo Arap Korir Salat v Independence Electoral and Boundaries Commission and 6 Others [2013] eKLR**, Ouko J.A, in the majority Court of Appeal decision stated as follows:-

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.... it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities.”

18. In line with the above decisions, it is my finding that in the circumstances surrounding this case, justice should not be sacrificed at the altar of procedural technicalities, more so as the appellant who filed the preliminary objection was very much aware of the existence of the suit herein. Having taken into consideration all the foregoing factors, I find that the preliminary objection would not have been sustained. The trial magistrate did not err in declining to uphold the said objection.

19. I find the appeal lacking merit and dismiss it with costs.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Kimanzi for Andande for Respondent

Mr. Okwro for Gitonga Muriuki for Appellant