REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 62 OF 2010

WINSTONE MURIITHI NYAGA.....APPELLANT

VERSUS

STEPHEN KARURU NJAGI.....RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal is against the order and ruling of S.N. Riech Chief Magistrate Embu given in court on the 30th October, 2007 arising out of an application dated 6th September, 2006 in Embu Civil No. 275 of 2000 which the appellant seeks to set aside.

2. The appellant filed a memorandum of appeal dated the 7th July, 2010 which is grounded on the following points: -

1) The learned magistrate erred in law by awarding the costs of the suit to the Respondent.

2) The findings of the learned chief magistrate are clearly wrong.

3) The learned magistrate erred in dismissing the authority produced on behalf of the appellant without distinguishing it.

4) The learned magistrate erred in law by not noticing that some vital documents were missing in the file of the lower court.

5) The learned magistrate erred in law in ignoring the fact that the respondent had admitted owing the decretal amount.

6) *The appellant shall pray for leave to give further evidence*.

The parties herein agreed to dispose of the appeal by way of written submissions.

B. Appellant's Submissions

3. In his submissions, the appellant started by abandoning grounds 4 & 6 in his Memorandum of Appeal. The Appellant subsequently proceeded to address this court on matters leading up to the sale of land acquired by the Respondent's through public auction.

4. It is noteworthy that this sale through public auction is what the Respondent was aggrieved by and such made the application dated 6 th September 2006, the ruling to which, the Appellant now appeals.

5. The Appellant then proceeds to address this Hon. Court on issue of costs which in his view was wrongfully awarded to the Respondent herein yet "there was no such prayer". He further submits that costs do follow the event and as such costs should have been awarded to him since he "was the successful party in the suit as his judgement for the principal sum, costs and interest was never at any time set aside."

6. The appellant further submits on the lack of determination by the trial magistrate on the balance of the decretal sum owed by the Respondent. It is on these submissions that the Appellant moves this court.

C. Respondents Case

7. The Respondents submit that the appeal in itself is null and void as it was filed without a certified copy of the order appealed from contrary to order 42 rule 2 of the civil procedure rules.

8. The Respondent further addresses court on the issue of costs and posits that he has not taxed his costs as awarded by the trial magistrate in the application dated 6th September 2006 while insisting that the appellant should have sort clarification in court through an application under section 99 of the Civil Procedure Rules.

D. The Law

9. As a first appellate Court, it is this courts duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123*** in the following terms:

> *"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 principles 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 conclusions 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 demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif – vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**)."*

10. The appropriate standard of review established in these cases can be stated in three complementary principles:

> *a) First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*
>
> *b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and*
>
> *c) It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.*

11. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi Vs Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu Vs Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort Vs Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

12. Section 79G of the Civil Procedure Act provides as follows:

> *Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:*
>
> *Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.*

13. Order 42, rule 2 of the Civil Procedure Rules 2010 provides:

> *Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.*

14. Taking all this into consideration, it is noteworthy that this appeal is from a specific application, this is the application dated 6th September 2006, the ruling & order for which was given by S.N. Riech Chief Magistrate Embu given in open court on the 30th October 2007. With the above principles in mind, I will now proceed to deal with the appeal.

E. Issues for Determination

1) Whether the appeal was a nullity *ab initio*?

2) Whether the trial Magistrate erred in his final decision to set aside the sale by public auction?

3) Whether the trial Magistrate erred in awarding costs to the Respondent?

F. Analysis & Determination

i. Is the appeal competent

15. As to whether this appeal is a nullity as submitted by the Respondent in his submission, I am aware that the wording of Order 42, Rule 2 by stating," the appellant shall file such certified copy as soon as possible" imposes an obligation upon the appellant to include the aforementioned certified copy. The Appellant filed the record of appeal way back on the 23rd November 2015. The certified copy was filed on the 23rd August 2017, almost two years later.

16. The learned magistrate was dealing with an application seeking to review/set aside sale by public auction of LR. Ngandori/Nguvio/248. These orders were granted by the trial court.

17. The respondent submits that the appeal is void *ab initio* for failure to annex the order. Order 42 allows filing of the order later on with emphasis "as soon as possible". In this appeal, the appellant filed the order about two years later but before the appeal was heard.

18. I rely on the case of **IEBC VS NATIONAL SUPPER ALLIANCE (NASA) KENYA & 6 OTHERS [2017] eKLR** where the court held that failure to annex the order complained of in a Judicial Review application was not fatal to the proceedings. The court held: -

> *In the present appeal, the record shows that the 1st Respondent neither attached the decision to be quashed nor applied for leave to attach the same. The trial judges observed that it was not in dispute that a decision had been made by the Appellant to adopt direct procurement method. It is our considered view, that the learned judges did not err in observing that a decision had in fact been made by the Appellant and the court did not err in failing to strike out the Application as incompetent for failure to attach the decision to be quashed. The record shows that there was no dispute that a decision had been made and that the decision existed; there was no dispute as to the nature of the decision. In our view, depending on the peculiar circumstances of each case where it is clear, uncontested and definite that a decision has been made and the nature of the decision is not disputed, a court can either take judicial notice of the decision or the parties can by consent record the nature of the decision. In such cases, the need to attach or produce the decision to be quashed can be waived. We are of this view cognizant of the provisions of* ***Article 159 (2) (d)*** *of the Constitution which enjoins courts to administer justice without undue regard to technicalities.*

19. The ruling appealed against is the one dated 29th October, 2007 which is contained in the memorandum of appeal. The court and the respondent had a chance of looking at the ruling because it was available. There is no dispute that the ruling exists.

20. Article 159(2)(d) enjoins the court to decide matters without due regard to technicalities. Relying on this provision and on the **IEBC VS NASA** case, I am of the considered opinion that this appeal ought not to be declared void *ab initio* just because of the failure to annex the ruling which is available in the record of appeal.

21. The memorandum of appeal shows that the appellant has not appealed against the findings of the substantive issues in the application.

22. I have looked at the findings of the court as regards the setting aside of the sale and find no fault.

23. It is well settled law that t*he courts have discretion to award costs and to determine the amount payable. Indeed Mr. Justice (Retired) Kuloba in his book, Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi Law Africa) 2011,* page 94, stated: -

> "*Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise…"*

24. As much as courts have unfettered discretion to award costs, the court must be guided by the pleadings of the parties. Order 2 Rule 6 of the Civil Procedure Rules provides: -

> *6. (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.*
>
> *(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.*

25. It was held in the case of **SIT SERVICES AND TRAINING INTERNATIONAL VS WALFORD MEADOWS LTD** that: -

> *It is trite law that the issues that call for determination in a suit arise from the pleadings in that particular case and not from some general concept of law which parties have not pleaded and to which there is no reference.*

26. The appellant in ground No. 6 states that he will seek leave to give additional evidence. This ground was not argued in this appeal and therefore, the court has no material to make any determination.

27. In his application the respondent had not asked for costs of the suit. It was therefore wrong for the learned magistrate to grant costs of the suit in the application and furthermore, where there was no prayer.

28. Consequently, I find the appeal successful and make the following orders: -

> *i. That the orders for award of costs of the suit to the respondent in the ruling dated 29th October, 2007 are hereby set aside and substituted with an order granting the respondent the costs of the application dated 6/09/2006.*

ii. The matter CMCC No. 275 of 2000 is hereby is remitted to the chief magistrate's court for hearing and determination.

29. Each party to meet their own costs of this appeal.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -