



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.41 OF 2012

BETWEEN

AMOS SALANO
.....APPELLANT

AND

**JOHN INYUMILI(SUED AS CHAIRMAN OF SENENDE FOCAL AREA DEVELOPMENT
COMMITTEE ...RESPONDENT**

**(Being an appeal from the ruling of Hon. E.W. Muleka, Resident Magistrate Hamisi in PM Civil
Case No.44 of 2010 delivered on 15th day of March 2012)**

J U D G M E N T

1. The appeal herein emanates from the ruling of E.W MULEKA delivered on the 15th of March 2012 in HAMISI PMCC No.44 of 2010.
2. In the said HAMISI PMCC No.44 of 2010 the Appellant was sued by the Respondent who claimed kshs.16,000/= from him. He filed a defence which was struck out by the trial Court. The appellant then filed an application dated 22.2.2012 seeking to review and set aside the orders of the trial Court striking out the defence. It is this application that was dismissed by the trial Court hence the present appeal.

The Appeal

3. The appellant was aggrieved and dissatisfied with the ruling of the trial Magistrate by which ruling the trial Magistrate found the application to have no merit and struck it out in its entirety. The appellant's appeal is premised on the following grounds as set out in the Memorandum of Appeal:-
 1. **THAT the Honourable Trial magistrate erred in Law and fact by failing to appreciate that the Appellants failure to attend Court was due to circumstances beyond his control.**
 2. **THAT the Honourable Trial Magistrate erred in law and fact by failing to appreciate and consider the medical evidence produced in Court.**
 3. **THAT the learned trial Magistrate failed and erred in law by failing to appreciate that the Applicant had an arguable Replying Affidavit which raised triable issues.**
 4. **THAT the learned trial Magistrate erred in law and fact by relying on an agreement that was not admissible in law by virtue of failing to comply with the provisions of Stamp Duty Act Cap 480 Laws of Kenya.**

The appellant wants this appeal allowed and the ruling delivered by the Honourable Resident Magistrate at Hamisi set aside.

Submissions

4. The appeal was canvassed by way of written submissions. It is on record that the Respondents are the only ones who filed their submissions. There are no submissions by the appellant.
5. In their submissions the Respondents are of the view that the appeal is based on three (3) broad grounds:-
 - a. That the trial Magistrate erred in failing to appreciate that the Appellant's failure to attend Court was due to circumstances beyond his control.
 - b. That the trial Court failed to appreciate that the appellant had an arguable replying affidavit.
 - c. That the trial Magistrate relied on an agreement not admissible in law.
6. The Respondents further submit that this Court should dismiss the appeal because the appellant's application does not meet the conditions of the law on review since the appellant was challenging the exercise of judicial discretion of another Magistrate and wanted a new Magistrate to sit on appeal from the decision of a Magistrate of concurrent jurisdiction. They opine that the matter raised by the appellant could only have been dealt with on appeal by an appellate Court and further that the application for review was brought after some undue delay. They also contend that this appeal was also brought after undue delay. They (Respondents) claim that the issue of inadmissible evidence was never pleaded by the appellant and therefore the appellant cannot rely on a new ground on appeal.

Issues for Determination

7. This Court having had the opportunity to carefully consider the pleadings and the submissions by the Respondent finds the following as the issues for determination:-
 - a. Whether the trial Magistrate failed to consider the reasons why the appellant failed to attend Court and/or the medical evidence.
 - b. Whether the trial Magistrate failed to appreciate that the appellant's replying affidavit raised triable issues.
 - c. Whether the trial Magistrate was wrong in relying on an agreement that was not admissible in law.
8. The first ground of appeal is not true. Appellant send his son to Court when the application dated 07/03/2011 was to be heard. The appellant's son did not produce any medical documents to the Court to support the allegation that the appellant was sick. The trial Court ruled that the appellants son did not tell Court why no documents had been filed in response and why he did not produce the medical documents and went ahead to deny the application for adjournment.
9. I find that the trial Court found no cogent reasons for the appellant's absence before allowing the respondent to continue with the application. It is also on record that the case was adjourned a number of times at the behest of the appellant. I therefore find that for the reasons set out above, the first ground of the appeal is not true and therefore must fail.
10. On the second issue by the appellant the trial Court found the appellants application defective and incompetent by reason of the fact that it sought different orders coming under different provisions of procedure that are in themselves in conflict. Having made that finding about the application, I also make a similar finding, it was not necessary to look at the replying affidavit attached. As clearly stated in the ruling, the appellant was given an opportunity to put his house in order after the Respondent was asked to serve the appellant afresh with the suit papers, but the appellant did not seize the said opportunity. This second ground of appeal also fails because the application that was to bring on board the Replying Affidavit was found to have no merit and was dismissed.
11. Lastly the trial Court dwelt on the issue of the agreement and found in its ruling that the appellant in his affidavit had not given any new facts that the Court was not aware of. In my view, parties are bound by their pleadings and it is not the duty of a Court to rewrite pleadings for any party.

For this reason, the appeal should fail.
12. For the reasons set out above this Court finds no merit in the appeal and the same is dismissed with costs to the Respondent.

Judgment delivered, dated and signed in open Court this 2nd day of December 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Didi h/b for Mr. Lugadiru for Appellant

Miss Mukolwe (absent) for Respondent

Mr. Solomon Lagat - Court Assistant