



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

E.L.C.A NO 6 OF 2014

SILAS NDWIGA NAMAAN MUTABI.....APPELLANT/ORIGINAL PLAINTIFF

VERSUS

1. MOSES KAUMBUTHU SILAS

2. NDWIGA JOHN NYAGA.....RESPONDENT/ORIGINAL DEFENDANT

(Being an Appeal from the original judgement in Embu Chief Magistrate's Court

CC No.132 of 2013 by Hon S.P. Biwott – S.P.M of 2nd December, 2013)

JUDGEMENT

INTRODUCTION

Silas Ndwiga Naaman Mutabi, appeals to this court against the order directing him to pay shillings two hundred thousand (Kshs 200,000/=) shillings to the respondents, who are his sons. The order was made during the proceedings of the case on **11th November, 2013**. The two respondents have opposed the setting aside of this order. The order was made in an unusual circumstances which are set out below.

THE CHALLENGED ORDER:

The order which is challenged by the appellant was made immediately after the 2nd respondent (the original 2nd defendant) had been cross-examined by the appellant. The record indicates that after being shown an agreement allegedly signed by him, the appellant (the original plaintiff) confirmed signing it. Thereafter, the court stated as follows: ***“Judgement on 25.11.13, plaintiff to refund plaintiff (sic) Ksh 200,000/= before then or the judgement shall be deferred then.”***

According to the agreement which the Appellant signed between himself and the two respondents, the sum of Kshs 200,000/= was the contribution of the two respondents for the sub-division of the suit land since the appellant did not have any money. A perusal of the judgement shows that this order was never set aside by the court.

The appellant and the respondents understood that the order was to be obeyed by both parties. This explains why the appellant filed an appeal to have it set aside. In response to that appeal, the two respondents opposed its being set aside during arguments in this court.

The reference to that order in the magisterial court judgement is in the following terms:

“They only say that plaintiff owes them 200,000/= and that they fear plaintiff selling the land yet has their mother's grave. The reasons they give are social ones. They are free to sue plaintiff for their 200,000/= if they wish.”

This quoted reference did not have the effect of setting aside the order, hence this appeal.

SUMMARY OF THE JUDGEMENT

The proceedings that gave rise to this order were started by the appellant in **Embu CMC's Court Civil Case Number 132 of 2013**. In that case, the appellant had filed proceedings seeking an order to remove a caution that had been registered against his land parcel number **Gaturi/Nembure/12530** by the two respondents. According to the respondents, they had cautioned this piece of land because their late mother was buried there. They had information that their father now appellant was in the process of selling the land, wherein their mother was buried. Hence the entry of a caution against the suit land. The respondents also feared that if the land were to be sold by their elder brother (**Peter Silas Njeru**) on behalf of the appellant they would be left with no place to bury their father, now the appellant.

At the conclusion of the evidentiary hearing, the trial court in a well reasoned judgement rightly pointed out that the appellant was the absolute owner of the suit land. As a result, the trial court found that the two respondents had no right to lay claim to the suit land. Consequently, the trial court ordered for the removal of the caution that had been lodged by the respondents.

The trial court did not set aside the challenged order that directed the appellant to pay the respondents Kenya shillings two hundred thousand (Kshs 200,000/=) It is this failure to do so that gave rise to this appeal.

Additionally, the trial court also ordered each party to bear its own costs. It is the challenged order that gave rise to the following grounds of appeal:

GROUNDS OF APPEAL

The appellant lodged an appeal in this court seeking to set aside the challenged order. In his grounds of appeal, the appellant has urged this court to set aside the challenged order, which was delivered on 10th November, 2013. According to him, the trial court erred in law and fact by failing to consider the appellant's entire evidence. Instead the trial court unlawfully analyzed the evidence for the respondents in isolation and hence arrived at a wrong conclusion. In addition to seeking the challenged order to be set aside, he has also urged this court to award him the cost of this appeal.

I now turn to the applicable law before re-evaluating the entire evidence and consideration of the grounds of appeal

THE APPLICABLE LAW

The court has considered the following issues of law:

As first appeal court, the law requires that I re-evaluate the evidence produced by the appellant and the respondents. In doing so, I must defer to the findings of credibility found by the trial court, unless the findings are clearly wrong, when the entire evidence is considered. The principles of appellate review were set out in the case of **Selle & Another V. Associated Motor Boat Co. Ltd & others (1968) E.A 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 Hameed Saif V. Ali Mohamed Sholan (1995), 22 E.A.C.A.270).

The trial court erred in issuing the challenged order because the respondents had not counter claimed for that sum of money in the pleadings before the court. The record shows that the sole issue for decision was whether the caution should be removed or not. There was therefore no basis for making the order in favour of the respondents. A trial court should not make a finding of fact and proceed to issue an order unless there are pleadings upon which evidence has to be produced.

According to the record of appeal, the appellant had been allowed to plead through his elder son by the name **Peter Silas Njeru**. The reason given for this is that the appellant is an old man of poor health aged about 87 years. He is also said to be semi-senile. His elder son was allowed to argue the appeal as an authorized agent for that reason. He urged the court to allow the appeal and set aside the challenged order. Additionally, he supported the order for the removal of the caution. Finally, he urged the court to award his father the costs of the appeal. The respondents similarly urged the court to award them the costs of the appeal, if it was to be dismissed. In terms of **Section 27 of the Civil Procedure Act Cap 21 Laws of Kenya** the award of costs is in the discretion of the court. The trial court after taking into account that the appellant was the father of the two respondents ruled that each party was to bear its own costs. This is the finding of fact and I have also come to the same conclusion, that each party is to pay for its own costs.

APPEAL VERDICT

The appeal is hereby allowed. The challenged order is set aside. I make no order as to costs.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this..4th .. day of
....November, 2014

In the presence of

Mr. Peter Silas Njeru for Appellant

Mr Moses Kaumbuthu Silas – 1st Respondent

Mr Ndwiga John Nyaga – 2nd Respondent

Court clerk Kirong

Right of appeal under 72 Civil Procedure Act explained

J.M. BWONWONGA

JUDGE