



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 307 of 2006

FRANCIS DAWO KAWA APPELLANT

AND

TOBIAS OBILO ANDURU RESPONDENT

(Being an appeal from the decision, ruling of the Principal Magistrate's court at Migori, Hon.

Mr. Ezra Awino PM, dated on 28th November, 2006 in Migori PMCC NO.239 of 2004)

JUDGMENT

1. The appellant herein was the defendant in Migori PMCC NO.239 of 2004. The respondent sued the appellant in connection with a plot known as Plot No. 83 B situate at Migori Township alleging that he was the owner of the said plot, while the other half was transferred by one Jackton Ayado to the appellant. The respondent alleged that in or about the year 2003, the appellant without any reasonable and justifiable cause trespassed onto the respondent's portion of the plot and commenced construction thereon despite protestations and despite an order from the Migori Municipal Council to the appellant to stop the construction. The respondent therefore prayed for judgment against the appellant for:-

- a) *An order of eviction from the premises Plot No. 83 B Migori.*
- b) *General damages for trespass and loss of earnings.*
- c) *Costs and interest.*

2. The appellant filed a brief defence in which he denied all the allegations leveled against him by the respondent. The appellant urged the court below to dismiss the respondent's suit with costs.

3. The case was heard before the trial magistrate during which both parties testified. At the close of the hearing and after analyzing all the evidence that was placed before him, the trial court entered judgment for the respondent as against the appellant to the extent that the appellant be evicted from one portion of plot 83B measuring 12.5x50 feet. The trial court also awarded general damages for trespass and loss of earnings at ½ rate i.e. Shs.2000/= per month for loss of earnings from the date of the plaint to the date of judgment while general damages were assessed at Kshs.10,000/= with costs at 50%. The judgment was delivered on 24th May 2006.

4. After judgment was delivered, the firm of Otieno Yogo & Co. Advocates applied, vide their application dated 10th July 2006, to come on record and act for the appellant in place of the firm of

Odhiambo & Co. Advocates. That application was allowed by consent of the parties duly filed in court on 7th September 2006. On the 29th September 2006, the firm of Otieno Yogo & Co. Advocates filed a notice of motion dated 28th September 2006 under certificate of urgency asking the court to review its judgment/order dated 24th May 2006 and to set aside the same.

5. The application was based on the following 4 grounds:-

- a) *That there are new facts that has (sic) come for the [first time] that were not in the knowledge of the defendant at the time of the hearing of the suit;*
- b) *That Mr. Nyakeyo who held himself as an advocate for the plaintiff is not qualified person to represent the plaintiff;*
- c) *That the proceedings are tainted with criminality and the court cannot be party to criminal activities;*
- d) *That it is in the interest of justice that the application be allowed.*

6. The application was also supported by the appellant's affidavit sworn on 28th September 2006 in which he averred that during the hearing of the case in the court below, the respondent herein was represented by Mr. Patrick Nyakeyo, advocate who did not hold a current practicing certificate at the time and that the said advocate held the last practicing certificate in 2001. The appellant averred that on advice received from his advocates on record, the proceedings conducted by Mr. Nyakeyo advocate, were a nullity and that consequently the judgment delivered on 24th May 2006 was a nullity and should be set aside because it flowed from proceedings that were a nullity.

7. That application was heard by Hon. Ezra O. Awino and a ruling therein was rendered on 28th November 2007 dismissing the application with costs. The appellant was aggrieved by the said decision and has come to this court by way of appeal on the following 5 grounds:-

1. *That the trial magistrate erred in law and fact in ignoring the law and fact presented to him thus coming to the wrong ruling.*
2. *That the trial magistrate erred in disregarding the submissions of the appellants in support of the application.*
3. *The trial magistrate completely, misapprehended the law thus failing to fully appreciate and apply the same thus coming to the wrong ruling.*
4. *The trial magistrate considered irrelevant matters in coming to the decision which if he never considered he would have come to a different decision.*
5. *The decision/ruling of the trial magistrate is not supported by the law or fact submitted before him by the parties.*

8. The appellant prays that the appeal be allowed and that this court does reconsider the application dated 28th September 2006 and makes an order allowing the same with costs.

9. The appeal herein was canvassed by way of written submissions with the consent of both parties. I have seen and carefully read those submissions together with the supporting authorities. The appellant is represented by the firm of Otieno, Yogo & Co. Advocates while the respondent is represented by M/s Nyagesoa & Co. Advocates. Apart from reading the written submissions I have also carefully read through all the pleadings filed by the parties to this appeal and the proceedings, judgment and ruling of the trial magistrate. No doubt, this is a first appeal and on a first appeal, I am under a duty to reconsider and evaluate all the evidence afresh with a view to reaching my own conclusions in the matter, always

remembering, where a matter is based on oral evidence, that an appellate court does not have the privilege of seeing and hearing witnesses who testified during the proceedings in the lower court. In the instant case, the appeal concerns a ruling that was argued on the basis of affidavits. It therefore behoves me to read the proceedings carefully and to also carefully read the proceedings which gave rise to the judgment which is sought to be reviewed and/or set aside. See **Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123 p.126 (CA-Z)** and **Williamsons Diamonds Ltd. –vs- Brown [1970] EA 1 P.12, C.A-T.**

10. In the present appeal, the issue for determination is whether the appellant has made out a case for overturning the ruling of the learned trial magistrate dated 28th November 2006. It is not in dispute that the plaint in the lower court was filed by the firm of M/s Olago-Aluoch & Company Advocates. It is also not in dispute that the hearing of the case was conducted by Mr. Patrick Nyakeyo Advocate. When the appellant filed the application for review, he contended that the new fact that had arisen was that the person who appeared for the respondent, namely one Patrick Nyakeyo purported to be an advocate when he was not as shown by a letter dated 12th June 2006 from the Law Society of Kenya. Reliance also was placed on the provisions of **section 9** of the **Advocates Act** which reads:-

“Subject to this Act, no person shall be qualified to act as an advocate unless:-

- a) He(she) has been admitted as an advocate; and**
- b) His (her) name is for the time being on the roll; and**
- c) He (she) has in force a practicing certificate.**

11. It is thus clear from the above provisions that a person who is eligible to act as an advocate must have been admitted as such, must be having their name on the Roll and have in force a practicing certificate. It is argued that because Mr. Nyakeyo did not meet all the 3 conditions set out in **section 9** of the **Advocates Act**, the court which heard the case ought to have reviewed its judgment and set it aside. The appellant placed reliance on the case of **Geoffrey Orai Obura –vs- Martha K. Koome – Nairobi Civil Appeal NO.146 of 2000** and urged this court to find that Kenyan law is that once an advocate does not meet the conditions set out in **section 9** of the **Advocates Act**, such a person is an unqualified person and not eligible to practice on an advocate.

12. It was contended on behalf of the appellant that this appeal should be struck out on the following grounds:-

- a) The appeal is fatally defective, incompetent and bad in law and the same ought to be struck out;*
- b) The appeal is legally untenable and no amount of amendment shall ensure the same;*
- c) The appeal is otherwise an abuse of the due process of the court and the same ought to be dismissed with costs.*

13. For the preliminary objection, the respondent relied on the provisions of the CPR governing review applications and also on the provisions governing the preparation and filing of Record of Appeal. It was submitted that the Record of Appeal omitted some of the proceedings, both of the lower court and the High Court.

14. Counsel for the respondent contended concerning allegations that Mr. Nyakeyo who had no practicing certificate was not an advocate for purposes of appearing before court by saying that Mr. Nyakeyo only held brief for the firm of Olago-Aluoch Advocate and that the proceedings and judgment are therefore proper. Counsel urged the court not to visit the mistake of counsel on the respondent; and in any event, it was argued that the name of the said advocate was still on the Roll of Advocates.

15. It was also submitted that the appellant is being vexatious and in abuse of the process of the court in

that he had first filed Kisii HCCA No.160 of 2006 which appeal was then withdrawn (although there is no order on the Record of Appeal showing the withdrawal), then filed the application for review) and after the application was dismissed, he filed the present appeal. It was submitted that CA No.160 of 2006 was still subsisting and had been fixed for dismissal on 17th May 2011. Counsel for the respondent wants this court to hold and to find that the appellant is guilty of abuse of court process.

16. After carefully analyzing all the submissions made in this appeal, I have reached the conclusion that this appeal is not only incompetent but is also an abuse of the court process. The preparation of the record of appeal left a lot to be desired. Although the record was eventually paginated, a lot of the proceedings both in the court below and the High Court was omitted. The full proceedings of the lower court, including the proceedings during the hearing are not part of the record. This court had to literally forage through the lower court file to find some of the missing proceedings in order to fill in the gaps. The judgment complained of appears in the Record of Appeal, but without the proceedings that precipitated the said judgment.

17. It is also my considered view that the appellant is in abuse of the due process of the court. In the case of **Commercial Exchange Ltd. & another –vs- Barclays Bank of Kenya Ltd. [1996] LLR 2194 (CAK)**, it was held that it is an abuse of the court process to try to obtain orders similar to those sought in an earlier case. In the instant case, it is clear that Civil Appeal No.160 of 2006 was still alive and kicking when this appeal was filed, and even after this appeal was heard. The appellant did not exhibit an order withdrawing the said appeal; and in my view therefore, he is in abuse of the due process of the court. It is the duty of the court to protect itself against such abuse, and it is also incumbent upon counsel and litigants to take all necessary steps to safeguard the integrity of the courts by ensuring that they do not take actions that are likely to abuse court process. See **Caneland Ltd. & others –vs- Delphis Bank Ltd. – Civil application No. Nai 344 of 1999 – Court of Appeal at Nairobi.**

18. Having made the above findings, I do not find it necessary to address the issue of the incompetency of Patrick Nyakeyo as an advocate, for the horse is already dead, and there would be no gain in continuing to flog it.

19. In the premises, the appeal is hereby dismissed with costs to the respondent.

20. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

21. It is so ordered.

Dated and delivered at Kisii this 7th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

N/A for Appellant

----- for Respondent

----- Court Clerk

RUTH NEKOYE SITATI

JUDGE.