REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

Civil Appeal 147 of 2010

MOHAMMED ABDUL ADAN…..…….APPELLANTS

VERSUS

ARDO MOHAMMED ……..RESPONDENT

J U D G M E N T

The appellant was the plaintiff at the lower court. The appellant sued the respondent at the lower court seeking permanent injunction to restrain the respondent from interfering, entering or encroaching into the appellant's plot No.65 of the Jua Kali or from preventing the appellant from developing the said plot. The appellant also sought general damages and costs of the suit. The respondent filed defence denying liability. That pending hearing and determination of the suit the appellant obtained exparte injunction orders on 7th April, 2005. That when the application came up for interpartes hearing the same was stood over generally.

That by an application dated 21st February, 2006 the respondent sought the appellant's suit be dismissed for want of prosecution. That on 21st March, 2006 the appellant's suit was dismissed for want of prosecution with costs.

On 6th July, 2009 the appellant filed an application to set aside the dismissal orders and reinstate the suit for hearing on merits. The application was dismissed giving rise to the present appeal.

The appellant has in his appeal set out five (5) grounds of appeal as follows:-

1. That the Honourable Magistrate Mr. C. O. Owiye R.M Isiolo Law Courts erred in law and in fact in dismissing the plaintiff/appellant's application dated 6/07/2009 when there were no good grounds for the same.

2. That the learned Magistrate Mr. C. O. Owiye R.M. Isiolo Law Court considered extraneous and irrelevant matters in arriving at his conclusion.

3. That the Honourable learned Magistrate Mr. C. O. Owiye erred in law and in fact in not finding that Mr. Mbaabu Inoti and Co. Advocates were not properly on record and as such the appellant's application was no opposed.

4. That the ruling of the learned Magistrate Mr. C. O. Owiye was against the weight of the law and submissions by the appellants.

5. The learned Magistrate erred in law and in fact that the appellant was not properly served with the application dated 21/03/2006 as he was not within the jurisdiction of the court.

When the appeal came up for hearing the counsel consented that the appeal be determined by way of written submissions. Consequently both counsel filed their respective written submissions. I have carefully considered the written submissions and supportive authorities attached thereto. The court has also considered the pleadings, the proceedings and the trial court's ruling.

In the first ground of appeal the appellant faults the trial court for dismissing the appellant's application dated 6th July, 2009 when there were no good grounds for the same being dismissed. I have gone through the trial Magistrate's ruling and have found that he gave reasons for rejecting the appellant's application. He found amongst other reasons that the supporting affidavit had been sworn a year before filing of the application and the application was filed 3 years after dismissal of the suit.

The trial court also found the application was brought under omnibus provisions of law and held that was not proper when there exists express provisions under which the application ought to have been brought. That notwithstanding I find that the trial court should not have dismissed or rejected the appellant's for failure to quote the proper provisions of law. Order 51 Rule 10(1) of Civil Procedure Rules provides:-

"10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but

no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

In the case of **DANIEL MIGWI NJAI –VS-HIGHWAY VIEW FARM LIMITED AND GEORGE NDUNGU MWICIGI C.A. NO.139 OF 1989** Court of Appeal stated as follows:-

"The circumstances in which this court will disturb the exercise of a discretion of a trial Judge were stated by Court of Appeal for East Africa in the case of MBOGO-VS-SHAH(1968) E.A.93. In his judgment Sir Clement de Lestang V.P. said at Page 94:-

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Applying these principles to the present case, the discretion was, in our view, properly exercised and this court will not reverse the learned Judge's decision to grant an amendment notwithstanding the late stage at which the amendment was allowed."

In applying the above mentioned principles in the present case, I find that the discretion was, in my view, properly exercised and this court finds that there is no basis for interfering with the trial court's discretion.

In view of the foregoing ground one of the Memorandum of Appeal is found to be without merits and is dismissed.

Under ground No.2 of the Memorandum of Appeal the trial Magistrate is faulted on the ground that it relied on extraneous and irrelevant matters in arriving at its conclusion. I have gone through the trial Magistrate's proceedings and written submissions by both the appellant and the respondent's Counsel and I have been unable to find the extraneous and irrelevant matters the trial court is alleged to have relied

upon in arriving at its conclusion. The appellant has not pointed out the extraneous and irrelevant matters alluded to have been relied upon.

In view of the foregoing ground NO.2 is found to be without merits and is dismissed.

Under ground NO.3 the trial Magistrate is faulted in failing to find that the firm of M/s Mbaabu Inoti and Co. Advocates were not properly on record and as such the appellant's application was not opposed.

The appellant's suit was dismissed on 21st March, 2006. The Advocates on record were M/S Mukira Mbaya and Co. Advocates whereas the appellant was acting in person. The firm of M/S Mbaabu M'Inoti & Co.filed notice of change of advocate on 12th May, 2009, whereas the firm of M/S J. O. Ondieki & co. Advocates filed notice of appointment of Advocate on 22nd June, 2009 followed by filing of an application dated 6th July, 2009.

Under Order III Rule 9A of the old Civil Procedure Rules it was provided:-

"9A. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record."

The relevant order in the current Civil Procedure is Order 9 Rule 9 of Civil Procedure Rules 2010 which provides:-

"9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

In view of the foregoing the firm of M/S Mbaabu M'Inoti & Co. Advocates did not comply with Order III Rule 9A of Civil Procedure Rules. It did not seek and obtain leave of the court to come on record or consent of the outgoing advocates. The change of advocates was not effected for the reasons indicated herein above. I am in agreement with appellant's Counsel that the firm of M/S Mbaabu Inoti & Co. Advocates were not properly on record and they should not have had audience in the application before the trial court without complying with Order III Rule 9A in force by then(now Order 9 Rule 9 of Civil Procedure Rules. I therefore find ground No.3 of the appeal to be with merits and the same is allowed.

On ground No. 4 of the appeal the trial Magistrate's ruling is challenged on the ground that it is against the law and submissions by the appellant. I have gone through the proceedings before the trial court and I find that it considered submissions and law raised and it did not error in considering the submissions before it. I find no merits in this ground and the same is dismissed.

On ground No.5 of the appeal the trial Magistrate is faulted in failing to find that the appellant was not properly served with the application dated 21/3/2006 as he has not within the jurisdiction of the court. The appellant was said to have been served with the application by way of registered post. The best service in civil matters is personal service. Order 5 Rule 8 of Civil Procedure Rules provides that service be personal. Order 5 Rule 8(1) of Civil Procedure Rules provides;-

In a situation in which the respondent cannot be personally served, the applicant/appellant is required to apply for substituted service. Under Order 5 Rule 17(1) of Civil procedure Rules in such a situation provides as follows:-

17. (1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried

on business or personally worked for gain, or in such other manner as the court thinks fit.

In case where the respondent is known to be out of Kenya, as in this case, service out of Kenya is provided for under Order 5 Rule 21 and 22 of Civil Procedure Rules.

In view of the foregoing service of the application by registered post upon the appellant who was out of the country was contrary to the provisions of the Civil Procedure Rules. I find that the service by registered post was therefore not proper service. I therefore find ground No.5 of appeal to be merited and is allowed.

The upshot is that the appeal is allowed, and I proceed to make the following orders:-

i. The appeal be and is hereby allowed.

ii. The ruling dated 23rd April, 2010 be and is hereby set aside and the application dated 6th July, 2009 be and is hereby allowed.

iii. The appellant is awarded costs of this appeal but costs of the lower court shall be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF OCTOBER, 2012.

J. A. MAKAU
JUDGE
Delivered in open court in presence of:
1. Mr. Wamathe h/b Ondieki for the appellant
2. Mr. Mwirigi h/b Kiambi for the respondent

J. A. MAKAU
JUDGE