REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, AKIWUMI & TUNOI, JJ.A.
CIVIL APPEAL NO. 297 OF 1997
BETWEEN

DICKSON NGIGI NGUGI .....APPELLANT

AND

COMMISSIONER OF LANDS .....RESPONDENT

(Appeal from a ruling and order of the High Court of Kenya at Nairobi (Bosire J) dated 31st July, 1996 in

H.C.MISC.A. NO. 181 OF 1993)

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JUDGMENT OF THE COURT

Dickson Ngigi Ngugi, the appellant herein, appeals to this Court from the ruling and order of the High Court (Bosire, J. as he then was) dated and delivered on the 31st day of July, 1996. By that order, the learned Judge had rebuffed the appellant's attempt to set aside an earlier order of the same Judge delivered on the 26th April, 1996. The matter arose in the following way.

Way back in 1974, the then Minister for Lands, one J.H. Angaine, directed the Commissioner of Lands, the respondent herein, to allocate to the appellant a piece of land measuring some 118 hectares in Njoro Township. The land was then unsurveyed, but following the Minister's instructions, the respondent had the land surveyed and was apparently given the number L.R. NO. 519/223 . By his letter dated the 7th June, 1977, the respondent allotted the land to the appellant on certain terms. In the first instance, the allocation to the appellant was for three years at an annual rent of KShs.2,354/= and during that period, the appellant was to carry out certain unspecified developments on the land to the satisfaction of the area's District Agricultural Officer. If at the end of the three years, that officer was satisfied with the developments carried out by the appellant, then the respondent would grant to the appellant a free-hold title to the land upon the appellant paying to the respondent the sum of KShs.235,400/=. From the material before us, it would seem the respondent was alleging that the appellant failed to carry out the agreed developments on the land and that at the end of the three years, the allocation to the appellant lapsed.

The respondent thereafter purported to sub-divide the land into numerous pieces and between 10th September, 1991, and 15th October, 1991, the respondent purported to allot to numerous persons from Egerton University, the various subdivisions carved out of the original piece which the appellant contends had been allotted to him in 1977. Aggrieved by these developments on the part of the respondent, the appellant went to the High Court on the 23rd February, 1993. By a notice of motion brought under Order

53 Rules 1, 2 and 3 of the Civil Procedure (Revised) Rules, the appellant asked the High Court for two basic orders, namely:-

> ***"1.A Judicial Review Orde r of Mandamus do issue directed to the Commissioner of Lands to issue a Lease in respect of L.R. 519/223 in the name of DICKSON NGIGI NGUGI.***
>
> ***2.A Judicial Review Order of Prohibition do issue to the said Commissioner of Lands to prohibit him his servants and/or agents and/or any other person on his behalf from further proceeding with the sub - division and alienation of the land known as L.R. NO. 519/223 or any part thereof."***

That motion was supported by an affidavit of twelve paragraphs sworn by the appellant. Contrary to the requirements of Order 53 Rule 2, there was no statement setting out the relief sought, the grounds upon which it was sought and an affidavit verifying the facts in the statement. There was only the affidavit to which we have already referred. That matter was, however, not raised before the learned Judge and it was also not raised before us.

On the 4th November, 1993, one Phoebe Amiani, on behalf of the respondent, swore what must have been a replying affidavit and she therein deponed that they had issued to the appellant a letter of allotment respecting the land in dispute, that the allotment was for a period of three years during which the appellant was to develop the land to the satisfaction of the district agricultural officer, that the appellant failed to develop the land, that the allocation was accordingly cancelled and that the land was then sub-divided and allotted to various public bodies for the benefit of the public. From the letters of allotment contained in the file we cannot see any single public body to which the land was allocated, but these are matters which were not argued before the superior court because the appellant did not, as it turned out, get a chance to put his case before the superior court. What happened is that on the 2nd October, 1995, the respondent filed in the superior court, a notice of preliminary objection citing four grounds, namely:-

> ***1.that the applicant had not complied with essential preliminary requirements set out under Order 53 Rules 1 (1) a nd 1 (2);***
>
> ***2.that documents annexed to the applicant's application were not certified as required by the provisions of sections 66 (a), 68 (2) (c), 79 and 80 of the Evidence Act;***
>
> ***3.that the application was t ime-barred by ..... of section 2 (1) of the Civil Procedure (Amendment) Rules, 1992; and***
>
> ***4.that the application was misconceived and bad in law.***

When the appellant's notice of motion eventually came up for hearing on the 16th October, 1995, the respondent's notice of preliminary objection was already on record and it was that objection which Mr. Oyalo, for the respondent, argued before Bosire, J. At the end of Mr. Oyalo's submissions, a Mr. Muriithi who appeared for the appellant asked for an adjournment to enable him consider the points raised in the preliminary objection. The learned Judge granted an adjournment to the 25th October, 1995. On the latter date, Mr. Kiraitu held Mr. Muriithi's brief; he asked for an adjournment and Mr. Oyalo did not object to the application.

The matter was adjourned to the 21st November, 1995. On the 25th October, 1995, Mr. Oyalo appeared but there was no appearance for the appellant. The Judge made an order standing over the matter generally. On the 2nd February, 1996, the matter was fixed in the registry to be heard on the 25th April, 1996, at 9.00 a.m., and a hearing notice was to issue to Mr. Oyalo who was not present at the registry. The record of proceedings for the 25th April, 1996, is as follows:- "25.4.9 6

> ***Coram: Mbito, J.***
>
> ***Oyalo for the Respondent.***

Nil for the Applicant.

Kahindu: Court clerk

Mr. Oyalo: Matter is part -heard before Bosire, J.

Order:As the matter is part -heard before Bosire, J. I hereby refer it to Bosire, J. for directions.

G.P. MBITO

JUDGE

25.4.96

Coram: Bosire, J.

No appearance for plaintiff/applicant.

Mr. Oyalo for the Respondent.

Order:Ruling on 9.5.96

S.E.O. BOSIRE

JUDGE" .

On the 9th May, 1996, the learned Judge delivered his ruling in which he upheld the respondent's preliminary objection and dismissed with costs the appellant's motion as being incompetent, and which then ought to have been struck out, not dismissed as the learned Judge said he was doing. By a chamber summons dated the 13th May, 1996, and taken out under Order IX B rules 4 and 8 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the appellant asked Mr. Justice Bosire for two orders, namely:-

"1.that the order made by the Judge on April 25, 1996 directing that the Respond ent's preliminary objection be determined without hearing the Applicant's reply thereto be set aside on the ground that the applicant had a good reason for failing to attend the court at the time the said order was made.

2.that a consequential order and in particular the ruling delivered on May 9, 1996 dismissing the application herein, be set aside."

The summons was supported by the affidavit of Mr. Kathurima M'Inoti, advocate, and as matters turned out before us, the following facts emerged:-

1.That on the 25th April, 1996, the matter was wrongly listed before Mbito, J.;

2.That the matter appeared as No. 4 in the Cause List before Mbito, J.;

3.That Mr. Oyalo went before the learned Judge and asked the Judge to refer the matter to Bosire, J. M r. Oyalo agreed he did so before Mbito, J. could start on the first three matters listed before him;

4.Mr. Oyalo then had the matter sent to Bosire, J.

Mr. Oyalo also agreed before us that he did not point out to Bosire, J. that he had not waited for the first three matters before Mbito, J. to be dealt with and to see if in the meantime, the appellant's advocates

would appear.

Mr. M'Inoti's affidavit evidence was that having disposed of two other matters in other chambers, he proceeded to the chambers of Mbito, J. at about 9.30 a.m. He found Mbito, J. still dealing with the matter listed as No. 3 on his Cause List and he (M'Inoti) assumed his matter would come up next.He accordingly waited until the end of the matter listed as No. 3 when he thought his turn had come and went into the Judge's chambers, only to be told that the matter had gone to Bosire, J. It is agreed Mr. M'Inoti then went before Bosire, J. and found that that Judge had closed the hearing of the motion. If we correctly understood Mr. Oyalo for the respondent, he did not seek to challenge those facts before us.It was proved that on the 25th April, 1996, the matter was wrongly listed before Mr. Justice Mbito; it was also proved by the Cause List which was annexed to Mr. M'Inoti's affidavit that the appellant's matter appeared as No. 4 on the Cause List before Mr. Justice Mbito. Again, Mr. Oyalo agreed before us that he entered Mr. Justice Mbito's chambers before the first three cases could be called. The file was then taken to Mr. Justice Bosire and Mr. Oyalo agreed before us that he did not tell Mr. Justice Bosire that he (Mr. Oyalo) had, as it was put in argument before us, jumped the queue to get into Mr. Justice Mbito's chambers. Had Mr. Oyalo told Bosire, J. that he did not wait until the first three cases before Mbito, J. had been called, Bosire, J. might well have been inclined to wait a little and see if Mr. M'Inoti might come, knowing that their case was listed as No. 4. It is to be noted as Mr. M'Inoti says in his affidavit, that on reaching Mbito, J.'s chambers and finding that case No. 3 was being dealt with, he had waited patiently until that case was over and then went in to start his case, only to be told it had been taken before Bosire, J. It was not suggested that it was unreasonable in the first place, for Mr. M'Inoti to go to Mbito, J.'s chambers; true the motion was part-heard before Bosire, J. but it had been listed before Mbito, J. and Mr. M'Inoti could not ignore that listing. Mr. Oyalo himself first went before Mbito, J. Mr. Oyalo's argument before us, which he supported with various authorities was that accepting all these matters as true, even if the appellant had been heard by Bosire, J. the appellant's notice of motion was so incompetent that it was bound to fail in any event. Mr. Oyalo stressed to us that in an application to set aside a judgment, for example, if there was no plausible defence on the merits, then no useful purpose would be served by setting aside the judgment and ordering a trial. With respect, we would broadly agree with Mr. Oyalo that where there cannot be any defence on the merits, then no useful purpose can be served by setting aside a regular judgment and ordering a trial. Put in a different way, where there are no triable issues, then a trial would serve no useful purpose. That, as we understand the matter, is the effect of cases of MBOGO V SHAH [1968] EA 93 AND PATEL V E.A. CARGO HANDLING SERVICES LTD [1974] EA 75 .Mr. Oyalo particularly relied on the statement of Lord Russell of Killowen in the case of EVANS V BARTLAM [1937] A.C. 437 which was one of the cases cited in PATEL'S case, to the effect that:-

> ***"... from the nature of the case, no judge could, in exercising the discretion conferred on him by the rule, fail to consi der both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action and (b) ..."***

We can find nothing to quarrel with in these broad principles of law or in the other cases relied on by Mr. Oyalo.

Those cases, however, do not answer the point in dispute and that point, as far as we are concerned is this. The right to a hearing before any decision is taken is a basic right and it cannot be taken away by the hopelessness of one's case. As we have pointed out, after Mr. Oyalo closed his arguments before Bosire, J. Mr. Oyalo heard the advocate for the appellant ask for an adjournment and the adjournment was specifically applied for to enable the appellant answer the points raised by Mr. Oyalo in the notice of preliminary objections. After that first adjournment, another adjournment was granted with Mr. Oyalo's concurrence. Mr. Oyalo did not then object to the applications for adjournment on the ground that even if the appellant had a chance to reply to his arguments, it would make no difference to what he had said.

The adjournments must have been granted on the basis that some answer, whatever, its worth, could be provided to Mr. Oyalo's arguments. In the end, the appellant was not allowed to put before the Judge his side of the case and in our view, Mr. Oyalo is not entirely blameless for what happened on the 25th April, 1996. Had he waited for his turn before Mbito, J., it might well be that Mr. M'Inoti would have found him

still waiting and they would have gone before Mr. Justice Bosire together. The appellant would then have put his case before the Judge and however weak that case might have been, we cannot imagine that the learned Judge would have failed to hear him. Mr. Oyalo, the advocate for the respondent, having in some way contributed to the situation arising in the appellant not being heard, we think it does not now lie in his mouth to say that even if the appellant had been heard, it would have made no difference.

Mr. Justice Bosire exercised a discretion in refusing to set aside his order of the 9th May, 1996, but we think that if he had been made aware of the fact that Mr. Oyalo had jumped the queue before Mr. Justice Mbito, he might well have exercised his discretion differently. This factor was not before him but it is now before us and it is clearly a relevant fact which he would have taken into account if it was placed before him. That factor entitles us to interfere with the learned Judge's exercise of discretion. Accordingly, we allow this appeal and set aside all the orders made by the Judge on the 31st July, 1996. We substitute those orders with an order allowing the appellant's chamber summons dated the 13th May, 1996. We, however, order that each party shall bear his costs of the summons in the High Court. We, however, award the costs of the appeal to the appellant.

Dated and delivered at Nairobi this 8th day of May, 1998.

R. S. C. OMOLO

JUDGE OF APPEAL

A. M. AKIWUMI

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR