REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 181 of 1994

1. NJAGI KANYUNGUTI ALIAS KARINGI KANYUNGUTI

2. AJERICA WANJIRU KARINGI

3. SAVERIO MWANIKI KARINGI

4. SILVANO NJIRU KARINGI

5. JOHN MUNYI KARINGI…….……
APPELLANTS

AND

DAVID NJERU NJOGU…….....
……..RESPONDENT

(Appeal from the ruling of the Honourable Mr. Justice Shields delivered on 15th December, 1989.

IN

H.C.C.C. NO. 2101 OF 1996)

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JUDGMENT OF THE COURT

The appellants in this appeal challenge the exercise of discretionary jurisdiction by the superior court (Shields, J.) under O. IX A rule 10 Civil Procedure Rules, in which the court declined to set aside its judgment which had been entered in favour of the respondent, pursuant to an ex parte hearing of the suit.

The jurisdiction of this court to interfere with such exercise of discretionary jurisdiction by an inferior court was succinctly stated by Sir Clement De Lestang, V.P, in the often cited case of Mbogo v Shah [1968] EA 93, thus:

"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 which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

The onus was on the appellants to satisfy us that the superior court was wrong when it declined to vacate

its judgment. The grounds the appellants have advanced to attack the decision of the superior court are firstly, that the court failed to address its mind to the reasons which they advanced for their failure to attend the hearing of their case, that the court did not assign reasons for declining to vacate its judgment and that the court failed to examine the pleadings with the result that they were denied a hearing. To appreciate the issues raised by this appeal we consider it essential to set out, in resume form only, the background facts as can be gleaned from the record of appeal.

The first appellant is the father of all the other appellants and the paternal uncle of the respondent being his brother's son. The dispute between the respondent and the appellants concerns land known as Kagaari/Kigaa/384, measuring about 7.4 acres. It was originally registered in the name of the 1st appellant, but was later sub-divided into five sub-divisions with each appellant receiving a sub-division thereof. The respondent, as plaintiff in the court below, sued the appellants claiming half share of the land in dispute. His case and evidence there was that his father Njogu Kanyunguti, and the 1st appellant were the only sons of one Kanyunguti. The said Kanyunguti and Njogu Kanyunguti died before the land in dispute was demarcated for purposes of registration. The land in question was originally owned by Kanyunguti, but because he had died by the date of demarcation the 1st appellant became registered as first owner of the land in trust for himself and the respondent as the beneficiaries in equal shares. Further, that he has been living on the land since he was born, has a house standing on it, and has been cultivating it over the years hitherto.

The appellants were served with summons to enter appearance and the plaint, appeared and filed a written statement of defence through an advocate called L. Njagi, admitting that the respondent has been living on the land but denying he has any interest in it. Thereafter, the suit was set down for hearing and that advocate was duly notified of the date, the time and place the hearing would take place, but neither the appellants nor their said advocate attended the hearing. The matter, therefore, proceeded ex parte. Only the respondent testified. In the judgment that followed Shields, J. believed the respondent and acting on his evidence declared that there existed a customary trust of the suit land in favour of both the 1st appellant and the respondent as beneficiaries in equal shares. He therefore, proceeded to decree that the appellants execute all the necessary documents and instruments to vest 3.7 acres of the suit land in the respondent.

The Judgment was pronounced on 17th July, 1989.

This appeal was provoked when Shields, J. declined to set aside his judgment, above, and dismissed the appellants' application in that regard. The appellants' application which bore the date 5th December, 1989, was expressed to be brought under O. IX A rule 10 and O. XXI rule 25 of the Civil Procedure Rules. We however, wish to observe at the outset that neither provision empowers a court to set aside a judgment entered as above. The power to set aside a judgment entered pursuant to an ex parte hearing of a suit is donated by O. IX B rule 8 of the Civil Procedure Rules. It is therefore, obvious that the application was brought under an incorrect provision of the law. Although the principles upon which the court acts in an application under O. IX A rule 10 and O. IX B rule 8 of the Civil Procedure Rules, respectively, are the same we do not consider that the both provisions are inter-changeable. If the Rules Committee had so intended there would have been no necessity for having the both provisions; and, it would have expressly said so. We, therefore, are of the view and so hold that the application was incurably defective.

He foregoing notwithstanding we propose to consider the appeal on the merits considering that the issue above was neither raised by the parties before the superior court nor did the judge who heard the appellants' application consider it. In an application brought either under O. IX A rule 10 or O. IX B rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (See, Pithon Waweru Maina v. Thuku Mugiria, (Civil Appeal No. 27 of 1982) (unreported), Patel v. E.A Cargo Handling Services Ltd 1974 EA 75). The court is, also, enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.

The appellants' application in the superior court was supported by two affidavits. The first one was sworn by the 5th appellant, John Munyi Karingi, while the second one was sworn by the appellants' erstwhile advocate, L. Njagi. The deponents in the two affidavits admitted that a hearing notice for the hearing of the case had been duly and promptly served on the latter but neither him nor any of the appellants attended the court for the hearing of the case. The explanation given in the affidavits for their failure to attend was that, in the case of the appellants, they had no personal notice that the case was due for hearing; and, in the case of their advocate, that he had ceased private legal practice and that he had instructed Messrs Robert Njiru Mbogo & Co. advocates to hold his brief for purposes of seeking an adjournment of the case, but for some reason however, an advocate from that firm was unable to identify the case on the cause list for that day. Consequently he also did not attend the court as he had been requested to do.

L. Njagi ceased practice as an advocate sometime in 1987, according to what he deponed to in his affidavit, above. We have no evidence to show he made any application to the court below as required by the provisions of O. III rule 12 Civil Procedure Rules. That Order and rule requires an advocate who has ceased to act for a litigant to move the court by summons for an order that he has ceased so to act. We note from the notes of the judge in the court below that directions on a summons under O.51 of the Civil Procedure Rules, were given in 1988, ex parte, after due notice to the advocate then on record for the appellant and upon his failure to attend. The suit was, therefore, set down for a hearing on 20th and 21st February,1989, but could not proceed then because the trial judge was not satisfied that the appellants' advocate had been properly served. Fresh hearing dates were fixed and due notice was given to the appellants' advocate. The hearing proceeded on 5th July, 1989. Judgment was reserved and was delivered on 17th July, 1989.

The appellants' advocate Mr. L. Njagi did not explain in his affidavit, above, the steps he took between 1987, when he said he ceased practice as an advocate, and July, 1989, when the suit came up for a hearing when he said he instructed Messrs Robert Njiru Mbogo, advocate to hold his brief for purposes of applying for the adjournment of the case. He did not also explain the steps he took after July, 1989 to remove himself from the case. It is therefore our view that what he stated in his affidavit may be merely an afterthought. The appellants did not, also, explain their silence and inaction prior to December, 1989. Dr. John Khaminwa, for the appellants urged before us the view that oversights by the appellants' erstwhile advocate should not be visited on them, that the attitude of this court has all along been that each litigant should be given the full opportunity to put forward his case before a decision. However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, and will not assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.(See, Shah v. Mbogo & Another, 1967 EA 116 at p.123). The appellant's' conduct and that of their advocate when viewed objectively clearly shows that they were bent on delaying the course of justice.

As we have attempted to demonstrate, the respondent, who since January, 1988, has been acting in person, took all the essential steps in the suit. He even served upon the appellants' advocate then on record, Mr. L. Njagi, with an application dated 10th August, 1989, in which he sought an order from the court authorising the Deputy Registrar of the High Court to sign transfer forms in his favour on behalf of the appellants, in order to give effect to the decree in the suit. That application was heard and an order granted ex parte, on 6th October, 1989, in terms of the prayers in that application. The orders were made ex parte, because neither the appellants not their advocate appeared.

In the circumstances the judgment the respondent obtained and all subsequent and consequential orders were regular. The appellants were obliged to but failed to show sufficient cause for depriving the respondent of the fruits of the judgment. The respondent was entitled to justice as much as the appellants. The court was obliged to look at the both sides of the highway before a decision. Although we agree, that the learned judge in the court below did not assign full reasons for his decision, as he should have done, the material before us clearly show that the appellants were undeserving of the exercise of his discretion in favour of setting aside. The appellants and their counsel were not diligent enough in

this matter and we find no basis for interfering with the decision of the superior court. This appeal, therefore, fails and is dismissed with costs to the respondent which we assess at shs.10,000 to be paid by the appellants within 30 days and in default execution to issue.

Date and delivered at Nairobi this 7th day of March, 1997.

R. O. KWACH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL