



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: PLATT, GACHUHI & APALOO JJA)

CIVIL APPEAL NO. 95 OF 1985

MICHAEL A O MASHEREAPPELLANT

VERSUS

ROTAS MAKOKHA WALUSALA..... RESPONDENT

(Appeal from the High Court at Kakamega, Gicheru J)

JUDGEMENT

The appellant has taken two points in this appeal; the first is that the first appeal to the High Court ought not to have been dismissed summarily; and the second, that on the merits of the appeal, the judgment of the trial court should be reversed. The first ground is a matter of law, and on the second the disputes are all matters of fact, not suitable for this court to entertain under section 72 of the Civil Procedure Act. The substantial issue then is whether the first appellate court acted correctly in law in dismissing the first appeal.

The High Court has power under section 79B of the Civil Procedure Act, to peruse the record of an appeal presented to it before the appeal is heard, and if the judge ‘considers that there is no sufficient ground for interfering with the decree’, he may reject the appeal summarily. It was under this section that the High Court acted in this case. The appeal to the High

Court challenged on various grounds the findings of fact by the trial court, with a sense of grievance that the magistrate had been biased against the appellant. The crucial issue was whether a supposed friend of the respondent had credibly reported the respondent’s confession, that the respondent had admitted writing the libelous document, and had thus rebutted the respondent’s denial in court, of being the author of the document. There were two sides to this argument, and while the trial court accepted one and dismissed this suit, the appellant asked the High Court to review the whole matter. It is normally the duty of the High Court under section 79C of the Civil Procedure Act to hear the parties, allowing the appellant to exercise his constitutional right of appeal. In general, this court would wish first appeals to be carried out in accordance with sec 65 (i) (b) of the Act thus deciding all questions of law or fact. This process is well explained in *Cogland vs Cumberland* (1898) 1 CH 704 as approved by the Court of Appeal for East Africa in *Pandya vs R* [1957] EA 336 at p 337.

It was held that:-

“Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the court must reconsider the materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment

appealed from, but carefully weighing and reconsidering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

That was exactly the situation in which the appellant hoped to be heard. He hoped that the trial judge would listen to him, re-hear the case and give the appellant his own judgment upon the evidence. But the learned judge decided to dismiss the appeal summarily, and the appellant submitted that he was wrong.

The problem then is one of construing the words of section 79B of the Civil Procedure Act and especially the words ‘No sufficient ground.’ They must be construed in the context of appeals, where they may be a great variation in the quality of the grounds of appeal presented, from, let us say, very clearly successful grounds to very clearly unsuccessful grounds. It is in this latter part of the spectrum that section 79B operates. The philosophy of the section clearly is that when the grounds of an appeal cannot possibly succeed, then the appellant is not entitled to use his constitutional right of appeal and abuse the process of the courts, by wasting the time of the courts, more profitably spent on worthwhile matters. But the question remains how wide the spectrum should be. Can it embrace not only the clearest cases, but cases when there may be some argument, though the judge feels that they are not sufficient to go for hearing?

This court gave a lead in its approach to the problem in *Peter Nzioki & Another vs Aron Kitusa*, Civil Appeal 54 of 1982 when it held, perhaps *obiter*:-

“We are of the view that the learned judge should not have summarily dismissed the appeal. Section 79B of the Civil Procedure Act empowers the High Court summarily to dismiss an appeal where the judge considers that there is no sufficient ground for interfering with the decree appealed from. That power should be sparingly used, and only in the clearest cases, such as an appeal based entirely on points of fact, raising no questions of law, and not where, as in this case, the memorandum of appeal raised substantial grounds of law such as that the district magistrate was wrong in failing to hold that the appellants have acquired title by virtue of their long undisturbed possession of the suit land. It was all the more wrong to dismiss the appeal summarily as the appeal to the High Court was a final appeal.”

That appeal was not actually upon the question of summary dismissal. It was actually upon the process of review. But it has been followed in essence. There are several aspects which may be misleading. But the essence of the observations is that the power to summarily reject appeals must be sparingly used and only in the clearest cases. A sparing use can indeed only refer to rejection in the clearest cases of fact or law. So the spectrum is narrow. In this case, during an interlocutory ruling, this court said that the power to reject is a power which should be sparingly exercised. That then is the basis on which this court has already approached this problem, and it would be invidious now to depart from that standard.

The next step is to apply that standard to the situation in this appeal. While the learned judge decided that there were no sufficient grounds to allow the appeal to go to hearing, in our opinion it cannot be said that this is one of the clearest cases. The argument of the appellant is substantial and possibly the appeal might go either way. In those circumstances, it is our view that the power in section 79B was not to be exercised to oust the appellant’s constitutional right of appeal.

On that basis, then, the parties will return to the High Court to have the first appeal heard there. The respondent asked that the costs of the appeal should not be awarded today, but that the costs should be ordered to follow the event of the appeal in the High Court. The appellant asked for the deposit which he had paid into this court to be returned to him.

We agree with the appellant on his first ground that the High Court ought not to have summarily rejected the appeal, and we set aside the judgment of the High Court. We remit the record to the High Court to

hear and determine the first appeal. There will be no order on costs today, but the costs of this appeal will follow the event in the High Court. The deposit paid to the Court of Appeal by the appellant will be returned to him.

Dated and Delivered this 25th Day of March , 1987,

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL