IN THE COURT OF APPEAL

AT NYERI

(CORAM: KNELLER, NYARANGI JJA & GACHUHI Ag JA)

CIVIL APPEAL NO. 105 OF 1985

JAMES NDUHIU MACHARIA ……...……………….……APPELLANT

VERSUS

MWOTIA MACHARIA ……………………...……….RESPONDENT

(Appeal from a Ruling and Order at the High Court at Nyeri, Patel J)

JUDGMENT

James Nduhiu Macharia (Nduhiu), the appellant, began his battle with Mwotia Macharia (Mwotia), the respondent, with a plaint filed on January 11, 1974 in the High Court at Nyeri.

Nduhiu asked the High Court for orders that Mwotia should vacate Ruguru Kiamariga 328 in Ruguru location, Nyeri, pay him general damages for fifteen years unlawful occupation of it and the costs of the suit.

Nduhiu claimed he was the first registered proprietor of that parcel of agricultural land and that in 1958 he had granted Mwotia a licence to occupy part of it as a tenant at will from 1958 to 1973 (15 years) when Nduhiu asked Mwotia to leave it and Mwotia remained where he was and so became a trespasser. This led to Nduhiu suffering loss and damages. No particulars were supplied.

Mwotia, in his written statement of defence and counterclaim, filed on March 24, 1975, admitted he occupied half that parcel and denied every other averment of Nduhiu. He asked the High Court to dismiss Nduhiu’s claims with costs and counter-claimed for an order that half that parcel was held by Nduhiu on trust for him, it should be registered in Mwotia’s name as his own freehold or Nduhiu should compensate him with interest for the improvements he had made on that half he occupied for 18 years and, in any event, he should have his costs and interest on them.

Mwotia’s counterclaim was based on his allegation that he and Nduhiu were the sons of one Macharia Onaira the owner of the plot and (because Mwotia was in detention camp when land consolidation came to Ruguru Location) Nduhiu was registered as its proprietor but as to half of it he held it in trust for Mwotia under the customary law of the *Wa-kikuyu* an of the provisions of the Registered Land Act. Mwotia built 5 houses and planted 1,300 coffee trees and 6,000 cash crop plants on the half he occupied for those 15 years and compensation for those should be his if he had to quit that half and the amount should be based on a ‘proper’ valuation report.

In the last part of 1976 Nduhiu's advocate was Mr Macharia and Mwotia's was Mahan who both appeared before Mr Justice Todd in the High Court Nyeri on September 22 and asked if the Summons for Directions could be deferred to October 7 which it was. When that day arrived the learned judge recorded this –

> 'Order, by consent – plaintiff to reply to counterclaim within 14 days of today, in default judgment to be entered for the counterclaim. Today's costs to the plaintiff in any event. This matter be stood over generally.'

Nduhiu and Mwotia were still represented then by the same advocates and each consented to that order.

Neither Nduhiu or Mr Macharia for him filed a reply to the counter-claim within 14 days or at all. Mr Mahan's firm of advocates, Bail Sharma & Company, applied by letter on November 16, 1978 and on March 9, 1979 for the suit be set down for 'formal proof' so it was set down for hearing on May 8 and 23, 1979 but it was not reached until June 11, 1979.

Then it was that Mr Justice Cockar at Nyeri recorded evidence from Mwotia who added little to the details of his counterclaim save that the government gave him permission in 1960 to build on his portion and on January 17, 1973 their clan elders said Nduhiu and Mwotia both owned that parcel in equal shares.

The learned judge appears to have believed the testimony of Mwotia and he gave judgment for him on his counterclaim. He added an order that Nduhiu should transfer half the parcel and register it in favour of Mwotia and if he refused or failed to do so the executive officer of the High Court Nyeri should do so.

The order that reflected this judgment was issued on August 6, 1979 (about two months later).

Seventeen days after the judgment, however, Mr Macharia filed a summons in chambers expressed to be under Order IX B rule 8 Civil Procedure Rules asking for the judgment and order of June 11, 1979 to be set aside. Nduhiu's affidavit of August 20, 1979 in support set out the reasons for this. The cause list of the High Court in Nyeri indicated the action was for mention only. The names of the different advocates were put down as representing the wrong party. Directions were due to be given in the suit on August 24, 1979. The consequence was Mr Macharia who was for Nduhiu, did not attend the court for the mention. He should have done, if only to ask for an adjournment, if necessary, when it began to turn into a formal proof exercise.

The application was listed before Mr Justice Cockar on August 24 and on September 24, 1979 but stood over each time because it had not been served on Mr Mahan for Mwotia.

It was listed by the deputy registrar of the High Court Nyeri on February 22 for mention on March 10 but taken out on March 4, 1980.

It sank in 1981 and rose again on October 5, 1982 when, at the suggestion of Mr Mahan, Mr Justice O'Kubasu stood it over generally. At the end of that year there were unsuccessful attempts to get it on before the resident judge.

Mr Justice J S Patel heard it on March 14, 1984. Mr Waweru of Ole Kaparo & Waweru had replaced Mr Macharia by then as Nduhiu's advocate. The land had been sub-divided by then with the consent of the Land Control Board because the decree had been executed. Nduhiu complained he had lost all his land without being heard. His first advocate Mr Macharia, the only member of Macharia and company, the advocates, became a magistrate soon after the consent order was made so he did not draw and file Nduhiu's reply to the counter-claim and defence which Mr Waweru hinted was negligent of him.

Mr Justice J S Patel dismissed the application with costs on March 21, 1985 (about 5 1/2 years after it had been filed) because he found it was without merit. He held that 15 days after the consent order that in default of Nduhiu or his advocate filing a reply to Mwotia's defence and counterclaim no defence had been filed so notice to the other side of the formal proof was unnecessary.

Furthermore, Nduhiu had never occupied the half of the parcel of which Mwotia since May 7, 1981 was now the registered owner of the freehold. So it would have been unfair and unjust to allow the application after such a long period.

Nduhiu's appeal was instituted on September 13, 1985. He asked for orders that Mr Justice J S Patel's ruling and orders be set aside, the *ex-parte* judgment of June 11, 1979 and its decree be set aside, Nduhiu be given leave to file a reply to the counterclaim and the suit be set down for hearing by the High Court at Nyeri.

His grounds for asking for these remedies were–

1. The formal proof of the counter-claim should not have proceeded without notice to Nduhiu;

2. Directions under Order 51 Civil Procedure Rules having not been given or dispensed with the hearing should not have taken place;

3. Mr Justice J S Patel had failed to exercise his discretion judicially.

Mr Waweru in urging Nduhius's appeal had no more to add than the failure to draw and file the reply was not Nduhiu's fault.

Mr Mahan for Mwotia submitted that ordinarily Mwotia was in the position of a plaintiff if he filed a counter-claim (which he did) and Nduhiu had no right to appear in answer to it if he filed no reply and he had no right to be served with a notice of the hearing date of a formal proof of Mwotia's counter-claim.

Over and above that, in the special circumstances of this appeal, there was a consent order made in the presence of these parties and their advocates by Mr Justice Todd that in default of a reply being filed by Nduhiu within fourteen days of that consent order judgment was to be entered by the court for Mwotia on the counter-claim. Therefore, as Mr Justice J S Patel said, there was no need for proof of the counter-claim.

Furthermore, Mr Mahan asked, was the Court of Appeal going to set aside a judgment in default based on a consent order after twelve years? Even the application to set it aside had not been made for four years.

Order IXB rule 8 on August 2, 1979, which is the date when the application to set aside the judgment was filed, was this –

> "8. Where judgment has been entered under this order the court, on application by summons, may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

On March 14 and 21, 1985, which is when it was heard and determined respectively, it had become –

> "8. Where under this Order judgment has been entered or the suit has been dismissed, the court on application by summons, may set aside or vary the judgment or order upon such terms as are just."

According to rule 5(b) of the Civil Procedure (Amendment) Rules, 1984 (Legal Notice No.16 of 1984 made on 10th February 1984).

The difference did not affect the application (to set aside the judgment) with which Mr Justice J S Patel dealt on March 14, 1984.

There are three points to be made about the material before the learned judge in mid-March 1984. First, the consent order for judgment in default for Mwotia recorded by Mr Justice Todd led to Nduhiu's suit against Mwotia being dismissed with costs but it purported to enter judgment for Mwotia for an order that half that parcel was held on trust by Nduhiu for Mwotia and was to be registered in the name of Mwotia free from encumbrances or, in the alternative, Nduhiu should compensate Mwotia for all his

improvements to it according to a ‘proper’ valuation report put before the High Court. At once the question arises as to whether judgment in default was to be for the order or the compensation?

Secondly, the counter-claim was not for a liquidated amount but for an order either declaring a trust or for damages (compensation for improvements) to be based on a valuation report which was not set out in the counter-claim or attached to it. The matter should have been set down for hearing and listed as such for either of these because Nduhiu was entitled to attend, with or without his advocate, and question Mwotia and his witnesses (if any) when he asked for this order or for his compensation.

Thirdly, after February 10, 1984, according to rule 5 of the Civil Procedure (Amendment) Rules 1984, this suit could only be set down for hearing after the summons for directions had been dispensed with or in accordance with directions given upon that summons.

Now Mr Justice J S Patel had a very wide discretion to exercise under the relevant order and rule and there were no limits and restrictions on the discretion of the learned judge except that if the judgment was varied it had to be done on terms that were just; *Patel v E A Cargo Handling Services Ltd*, [1974] E A 75, 76 B, C (CA-K).

This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: *Shah v Mbogo*, [1967] E A 116, 123 B, C (K) Harris, J.

The matters which should be considered, when such an application is made, were set out by Harris, J in *Jesse Kimani v McConnell*, [1966] E A 547, 555 F (K) which included the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been *ex-parte* and whether or not it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in *Mbogo v Shah*, [1968] E A 93, 95, F. (CA-K) .

There is also a decision of the late Sheridan, J in the High Court of Uganda in *Sebei v District Administration Gasyali*, [1968] E A 300, 301, 302 (U) in which he adopted the words of Ainley, J as he then was, in the same court, in *Jamnadas v Sodha v Gordandas Hemraj* (1952), 7 U L R 11 (U), namely –

> “The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and, finally, I think, it should be always be remembered that to deny the subject a hearing should be the last resort of a court.”

And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainlie in *Smith v Middleton*, 1972 SC 30 -

> “……. In a selective and discriminatory manner, not arbitrarily or idiosyncratically ………”

for otherwise, as Lord Diplock said in his speech in *Cookson v Knowles*, [1978] 2 WLR 798, 981 C, (H L)–

> “……….. the parties would become dependant on judicial whim.”

Considering, however, that the failure to enter a reply to the counterclaim was not the error of Nduhiu but of his advocate, the consent judgment was for orders in the alternative, a summons for directions should have been dispensed with or dealt with before the hearing of the suit, the suit should have been listed for hearing on notice to Nduhiu or his advocate when it was for formal proof, the subject matter of the action was half this agricultural land and the dispute was one between brothers as to its ownership, the learned

judge in our view should have had no hesitation in setting aside the orders of Mr Justice Todd and making further orders relating to a reply to the defence and to the counter-claim, a summons for directions, a hearing date and so forth. He could not unfortunately have called upon Nduhiu's former advocate to show cause why he should not pay the costs of all this out of his own pocket.

We recall that Mr Mahan, for Mwotia, asked if this court would set aside a judgment in default based on a consent order made twelve years ago? He urged us not to do so unless we had good reason.

But in our view, there was good reason for Mr Justice JS Patel to have set aside the judgment of Mr Justice Cockar. We find that he exercised his discretion wrongly because, with respect, he did not take into account the law and the facts which he should have done and which we have just set out in this judgment.

So the appeal is allowed, the ruling and orders, of the High Court set aside, the judgment entered for Mwotia on June 11, 1979 and the decree that followed set aside, leave is granted to Nduhiu to file a reply to the defence and to the counter-claim within the next 15 days and in default or thereafter either Nduhiu or Mwotia may apply for a summons for directions to be dispensed with or heard and orders made upon it and a hearing date to be fixed and served unless these brothers can reach some agreement about the ownership of this parcel which will avoid further litigation. There will be no order for the costs of the appeal.

Orders accordingly.

Dated and Delivered at Nyeri this 28th day of October, 1986

A.A. KNELLER

……………………

JUDGE OF APPEAL

J.O. NYARANGI

………………..……

JUDGE

J.M. GACHUHI

…………………...

Ag JUDGE OF APPEAL