



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Potter JJA & Hancox Ag JA)

CIVIL APPEAL 54 OF 1982

BETWEEN

NZIOKI.....APPELLANT

AND

KITUSARESPONDENT

(Appeal from the High Court at Nairobi, Muli J)

JUDGMENT

On April 9, 1980, a civil appeal to the High Court was summarily dismissed by Muli J. As it was a second appeal, no appeal lies from Muli J's decision to this court, by virtue of section 71A(2) of the Civil Procedure Act. 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 adverse possession was a prescriptive right, and that the District Magistrate was wrong in failing to hold that the appellants had 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.

The appellants then applied to the High Court for a review of the order dismissing their appeal, under section 80 of the Civil Procedure Act, and order XLIV rule 1 of the Civil Procedure (Revised) Rules. This application came for hearing before Muli J on February 16, 1982. Without hearing any argument on the merits of the application, the learned judge ordered as follows –

“This is not the case of review. The judgment is so clear. As Mr Patel wishes to consult his client I will stand over the matter generally. Today's costs to the respondent and to *amicus curiae*.”

By an addition to this order, obviously made subsequently and in the absence of the parties, the learned judge added that in his view the application had “virtually no chance of success”, and that it would be set down for mention on March 16, 1982, “parties to be informed”.

This addendum may well have resulted from the unilateral course taken by Mr Mervyn Morgan, the respondent's advocate, in writing to the learned judge a letter dated February 16, 1982, in which he referred to “this morning's order”, suggesting that the order be amended by fixing a time limit. Mr J B

Patel, the appellant's advocate, was not apparently consulted, nor was his acquiescence obtained, but he was informed of the new mention date, March 16, 1982, as directed by the learned judge in his addendum.

On the mention date, March 16, 1982, Mr J B Patel was unable to attend, being engaged elsewhere, and his brief was held by Mr Makecha. Mr Mervyn Morgan appeared for the respondents. Mr Makecha informed Muli J that he had no knowledge of the matter. Instead of fixing a date for the hearing of the application and again without hearing any argument on the merits, the learned judge proceeded to dismiss the application for review, with costs. From this order, the applicants have lodged the present appeal as of right, see order XLII rule 1(1) (aa). The principal ground of appeal, argued before us by Mr Patel, was that the learned judge erred in dismissing the application for review without hearing the parties. Mr Mervyn Morgan, for the respondent, conceded that there had never been a hearing.

We have no doubt that this appeal must succeed. March 16, 1982, was fixed as a date for mention of the application, and not as a hearing date. The application for review has never been heard, and it could not therefore lawfully have been dismissed. We set aside the order of Muli, J dismissing that application. We order that the application for review be remitted to the High Court for hearing according to law. We respectfully suggest for the Honourable Chief Justice's consideration, that he order that the application be heard by another judge (order XLIV rule 4). The appeal is allowed, with costs. The costs of the abortive proceedings on the application for review before Muli J will be in the discretion of the judge who hears and determines the application.

And it is so ordered.

Dated and Delivered at Nairobi this 23rd day of December 1982.

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

AG. A.R.W.HANCOX

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JUDGE OF APPEAL

I Certify that this is a true

copy of the original.

DEPUTY REGISTRAR