



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL NO. 38 OF 1980

BETWEEN

BANDALI.....APPELLANT

AND

MWALAGAYA.....RESPONDENT

JUDGMENT

Law JA On May 25, 1979, the Registrar of Titles at Mombasa wrote to the respondent under Section 57(6) of the Registration of Titles Act (“the Act”) giving him notice to remove a caveat lodged by him “within twenty eight days” failing to which it would be removed by the Registrar unless extended by an order of court. This letter was probably invalid and ineffective, as subsection (6) aforesaid was amended a fortnight before the Registrar of Titles’ letter was written, by the Statute Law (Miscellaneous Amendments) Act, 1979, whereby the period of twenty eight days was increased to forty five days as the period of notice to be given to a caveator. It is strange that the Registrar of Titles was not aware of this amendment to the Act which he administers; and it is even stranger that the draftman, when he amended subsection (6), overlooked the need to make a consequential amendment to subsection (8), which gives the caveator the right to apply by summons to the court for an order to “extend the time beyond the twenty-eight days mentioned in the notice.” The respondent received the Registrar of Titles’ letter on July 7. He consulted advocates, who on his behalf filed, on July 31, two applications by way of originating summons. They were given the numbers “Civil Case No 815 (OS) of 1979” and “Civil Case No 816 (OS) of 1979” and I shall refer to them as OS 815 and OS 816 respectively. By OS 815 the respondent lodged by him against the title of plot No 69 Section II Mombasa Mainland North should not be withdrawn, and that the respondent be declared the rightful purchaser of that plot, entitled to be registered as such. On December 17, 1979, Kneller J dismissed OS 815 on a preliminary objection taken by Mr AA Lakha for the appellant that the dispute between the parties was not suitable for originating summons procedure but should be the subject of a suit. The respondent immediately gave notice of appeal against the dismissal of OS 815, and that appeal (No 10 of 1980) was disposed of on October 30, 1980, when this court allowed the appeal. OS 815 was reinstated and remitted for hearing by the High Court and has not yet been disposed of. The second application, OS 816, is the subject of this appeal. By it the respondent prayed for the period of twenty eight days imposed by the Registrar of Titles to be extended pro-tempore pending the hearing of OS 816, and that upon the hearing of OS 816 the respondent’s caveat be extended pending disposal and determination of OS 815. Also on chamber summons, asking that the court be pleased to hear the first part of the application in OS 816 in vacation as a matter of urgency and to extend the period of twenty eight days laid down by the Registrar of Titles. That period was about to expire and the respondent’s caveat was in danger of being removed by the Registrar. This last application was made under Section 10 of the Judicature Act and under rule 3 of the High Court (Practice and Procedure) Rules.

The learned Judge, on August 2, granted the last application ex parte and ordered OS 816 to be served on the Registrar of Titles and the appellant. The appellant entered an appearance on August 24, 1979. On August 28, an appointment for the hearing of OS 816 was notified to the parties, but it has still not been heard because after a number of consent adjournments the appellant took out a chambers summons in OS 816 on February 26, 1980, asking that the ex parte order of August 2, 1979, be discharged and set aside on the grounds that it was now spent, and because —

- a) no exceptional circumstances or any good reason for making such an ex parte order had been disclosed;
- b) there had been no application to dispense with service;
- c) no undertaking as to damages had been given.

Kneller J heard this application on March 20, 1980, and on April 21, 1980, delivered his ruling, which takes up eighteen pages of the record, dismissing the application, and summarizing the grounds for its dismissal as follows —

“The offshot is that in my view, the interim order of August 2, 1979, is not spent and could in law have been made and was, in the exercise of the court’s discretion, rightly made in the circumstances of this case.”

From this decision the appellant has appealed. He was represented by Mr AA Lakha and Mr IT Inamdar appeared for the respondent. Mr AA Lakha objected to the extension of time asked for in OS 816 being granted ex parte on August 2, 1979 and described this as the whole subject of the appeal. More specifically, Mr Lakha submitted that OS 816, filed on July 31, 1979, could and should have been served on the appellant before August 4, when the time limit imposed by the Registrar of Titles expired. Service of an originating summons is a prerequisite to any action by the court, and action can only be taken on unserved originating summons in exceptional circumstances and for very good reason, none of which factors, in Mr Lakha’s submission, were present in this case. He pointed to the learned judge’s comment that there was no explanation for the delay of twenty four days between receipt by the respondent of the invalid notice issued by the Registrar of Titles and the filing of the originating summons. In my view there is an explanation and that is self-evident. The respondent, after receiving the notice from the Registrar of Titles, instructed new advocates, who had to familiarize themselves with the facts, refresh their memories as to the law and procedure applicable, draft two originating summonses and one chamber summons, and prepare the supporting affidavits. To have achieved all this by July 31, was no mean achievement. The learned judge did hold, and I agree with him, that there were exceptional circumstances which justified the court using its inherent powers to extend the period of the respondent’s caveat ex parte, and he instanced the great need to serve on the caveatee, the latter might have been unavailable through temporary absence or for some other reason, and there would have been a real risk of the caveat being removed by the Registrar of Titles. For these reasons, I would dismiss the first three grounds of appeal, which are directed against the making of the ex parte of the ex parte order extending time.

Ground 4 and 5 are to the effect that the ex parte order should have been discharged, because —

- a) the procedure relating to dispensation of service had not been followed, and
- b) no undertaking as to damages had been given.

In this connection, Mr Lakha referred us to the case of *Mohamed v Haidara* [1972] EA 166, in which Spry VP expressed the opinion that an application for the extension of a caveat should be treated in the same way as an application for an interlocutory injunction. Mustafa JA said that for his part he would prefer to reserve to a future occasion the question whether the same principles apply to the extension of a caveat as to the granting of an interlocutory injunction. The third member of the Court merely said “I agree”, presumably to the order that the appeal be allowed. On my reading of Spry VP’s judgment, it seems to me that in equating an application for the extension of a caveat with an application for an interlocutory injunction, the learned VP only had in mind the requirement for the applicant in each case to

show that the inconvenience he would suffer from the refusal of an injunction is greater than that which the respondent would suffer from the grant of one. I see no reason to apply any different principles as regards the extension of a caveat.”

Spry VP did not say that the other principles relating to interlocutory injunctions should be applied to extensions of caveats, and, to the extent to which he did go, I see no reason to differ from what he said. For instance, he did not suggest that an appellant for an extension of a caveat must give an undertaking as to damages. Such a person is already under a statutory liability to compensate any person who may have sustained damage by reason of the wrongful lodging or continuing of a caveat, by Section (12) of Section 57 of the Act, and no further undertaking as to damages is required from him. As regards the requirement of service of an originating summons, spry Ag P in *Mutual Benefits Ltd v Patel* [1972] EA 496 held that service was a prerequisite to the entertaining of an application to extend time, but that failure to effect service does not deprive a court of jurisdiction to entertain an ex parte application in the exercise of its inherent powers, but then only in exceptional circumstances and for very good reason. Order XXXIX rule 3 of the Civil Procedure Rules requires notice of an application for a temporary injunction to be given to the opposite party “in all cases before granting the injunction, but I agree with Mr. Inamdar that there is no need to import this provision into Section 57(2) of the Act, which provides its own procedure, and includes the necessity for service. But, as Kneller J pointed out in his ruling, although there was no formal application for dispensation of service, the extension was granted by him not under Section 57(2) but in the exercise of the court’s inherent powers for doing so. It was a matter for the court’s discretion which I see no reason to think was exercised otherwise than judicially and reasonably in this case. I would dismiss grounds 4 and 5.

Ground 6 is to the effect that the learned judge should have held that the ex parte order made by him was spent and ought to have been discharged. Mr Lakha submitted that as the caveat was extended “pending disposal and determination” of OS 815, and as OS 815 was disposed of when Kneller J ordered that it be dismissed on December 17, 1979, the ex parte order then became spent and should have been discharged by the learned judge in his ruling of April 21, 1980. Mr Inamdar submitted that “disposal and determination” meant final disposal. That is what the respondent asked for in the final paragraph of his affidavit in support of OS 816. There was an immediate appeal against the dismissal of OS 815, and that appeal was a rehearing and continuation of OS 815. The order dismissing OS 815 has been reversed on appeal, so that OS 815 has been reinstated and has not been finally disposed of or determined. The same applies to OS 816 which has not yet been heard. I agree with these submissions, and with the learned judge’s holding, that in the circumstances of this case, his ex parte order of August 2, 1979, was not spent when he delivered his ruling of April 21, 1980. For these reasons, I would dismiss this appeal, with costs.

As **Miller** and **Potter JJA** agree, it is so ordered.

Dated and Delivered at Nairobi this 27th day of November 1980.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR