



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 236B OF 2013

JUDITH KARWIRWA MIRITI - APPELLANT

VS

ERASTUS MARETE MWIRICHIA - 1ST RESPONDENT

PAUL MATUMA NDETHU - 2ND RESPONDENT

RULING

1. This is an appeal from the decision and ruling of the Chief Magistrate's Court in Meru by Hon. E.W Wambugu – RM delivered on 4th April 2013, in Meru CMCC No. 400 of 2010 on the following grounds;

- a. That the learned trial Magistrate erred in law and fact in arriving at a decision and ruling which if effected will amount to a miscarriage of justice in as far as the Appellant's claim is concerned.
- b. That the learned trial Magistrate erred in law in rejecting the Appellant's request to have her application dated 19.02.2013 (seeking for leave to further amend the plaint) heard before the 2nd Respondent's Application dated 12.02.2013 is heard.
- c. That the learned trial Magistrate erred in law and fact in not holding that the Appellant's Application dated 19.02.2013 ought to be heard first before the Application dated 12.02.2013.
- d. That the learned trial Magistrate erred in law and fact in directing that the 2nd Respondent's Application dated 12.02.2013 take precedence over the Appellant's Application dated 19.02.2013.
- e. The learned Trial Magistrate erred in law and fact in failing to take into account and/or consider the fact that if the 2nd Respondent's Application dated 12.02.2013 is determined first, then there is a possibility of having title to the suit property transferred into new names so as to defeat the cause of justice and the Appellant's claim the said suit.
- f. The learned trial Magistrate erred in determining issues raised in the Application dated 19.02.2013 yet the said Application had not been fixed for hearing.
- g. the learned trial Magistrate erred in law and in fact and /or misdirected herself into considering extraneous issues while making her decision and ruling on the Appellant's request.
- h. The Learned trial Magistrate misdirected herself into openly exercising a biased view and attitude against the Appellant in her decision and ruling made on the 4th April 2013.
- i. The learned Resident Magistrate erred in law and fact in failing to consider submissions by the Appellant's Counsel and or take into account the facts, the basis and implication of the Appellant's Application dated 19.02.2013 vis-à-vis the 2nd Respondent's Application dated 12.02.2013.
- j. The learned Resident Magistrate misdirected herself into using wrong principles and applying her personal views in arriving at her said decision and ruling.

2. The Appellant seeks the following orders;

a. That the decision and ruling of the Chief Magistrate Court made and delivered on 4th April 2013 in Meru CMCCNO. 400 of 2010 be set aside.

b. That this Honourable Court be pleased to direct that the Appellant's Application dated 19.02.2013 be heard first in preference to the Respondent's Application dated 12.02.2013 and that the same be heard before a different Magistrate of competent jurisdiction at the Chief Magistrate's Court at Meru.

c. That the 2nd Respondents be condemned to pay the costs for the Appeal and incidentals thereto.

3. The Appellant's case is that he sued the Respondents vide a plaint dated 20.09.2010 in MERU CMCC No. 400 of 2010 which was later amended several times. The further amended plaint filed on 07.02.2012 was filed on behalf of the Appellant by his new advocates on record MS MUIA MWANZIA & co. ADVOCATES and before that the Appellant's advocates had filed notice to withdraw suit against the 2nd Respondent/ Respondent. Thereafter the 2nd Respondent filed a notice of motion dated 12.02.2012 seeking orders to remove the caution placed by the Appellant against parcel number Ntirimiti/Settlement Scheme /1532 on 23.09.2010. The Appellant then filed a notice of motion dated 19.02.2013 seeking review of the consent orders which were made on 31.01.2012 in pursuance to the notice of discontinuance / withdraw of the suit against the 2nd Respondent, reinstatement of the 2nd Respondent to the suit and leave to further amend the plaint to include the 2nd Respondent's name. When the notice of motion dated 12.02.2012 came up for hearing on 21.03.2013 Counsel for the Appellant sought for directions from the Court to hear the notice of motion dated 19.02.2013 first before the notice of motion dated 12.02.2012 because if the application of 12.02.2012 was heard first the application dated 19.02.2013 would be overtaken by events. The trial Court after considering submissions by Counsel delivered its ruling on 26.03.2013 directing that the application dated 12.02.2012 should be heard first.

4. Brief facts of the case before the lower Court is that the Appellant entered into a sale agreement with the 1st Respondent for purchase of the suit land and paid the purchase price in full. The 1st Respondent then proceeded to obtain consent of the land control board to transfer the suit land to the Appellant from Timau. Thereafter the 1st Respondent declined and or failed to deliver the original title to the suit to the Appellant but instead he transferred it to the 2nd respondent precipitating the pending suit.

5. The appeal was canvassed by written submissions which I have read and considered.

6. The Appellant submits that the trial Court in disallowing the application to have the application dated 19.02.2013 heard, the Court occasioned injustice to the Appellant in violation of article 50 and 159 of the constitution. That in case the application by the 2nd Respondent is heard first and determined in his favour, the title to the suit land would be freed up and there will be the risk of the title to the suit land being transferred to other parties in order to defeat the cause of justice. That the withdrawal of the suit against the 2nd Respondent was done without authority of the Appellant to his former Advocates. That the Courts would be enjoined to set aside consent orders if the same were entered on basis of mistake, fraud, misapprehension of facts, collusion and agreement contrary of public policy absence of sufficient material acts, ignorance of material facts and any general reason which may enable the Court to set aside the agreement.

7. Further that the caution was placed to preserve the suit land pending the determination of the pending suit and if the same is removed vide orders that would arise after the determination of Notice of Motion dated 12.02.2013 the Appellant's case would be defeated. He faults the trial Magistrate for making findings in respect to the application dated 19.02.2013 whilst it is not the application that was before her for determination. That the ruling of the trial Magistrate was expressly biased against the Appellant. That the trial Magistrate failed to consider the submissions made by Counsel for the Appellant. That the costs alluded to by the trial Magistrate in her ruling had not yet been assessed for payment. That the Respondent's advocate had actually been served with the application dated 19.02.2013 on 26.02.2013 and the same was received while the Court observed that the application had not been served. The Appellant also sought the indulgence of the Court to consider his submissions which were filed out of time owing to an apparent failure to relay the Court orders to Counsel in good time by the Court clerk. He prays for the appeal to be allowed as prayed.

8. The 2nd Respondent submitted that the appeal ought to be dismissed because the Appellant failed to comply with Court orders in respect to the date of filing submissions and also service of the Court orders to the 1st Respondent. That the application by the Appellant sought to reinstate the withdrawn suit against the 2nd Respondent by amending the plaint which is against the rules of procedure under Order 25 rule 4 which require the filing of a fresh suit after the withdrawal of suit. That the Appellant was indolent for taking over a whole year to bring the application to reinstate the suit, the application was not filed under certificate of urgency and was not served on all the parties neither was it fixed for hearing. The Appellant's application is not the one that was listed for hearing on the 31.03.2013 but the Respondent's application dated 12.02.2013. The Appellant was therefore guilty of laches and that he application was filed as an afterthought; the delay was inexcusable. That the Courts are enjoined both under the rules of procedure and the constitution to ensure justice is not delayed under Order 45 rule 1 CPR, section 1A (1 and 3), 1B (1) d of the cap 21 and Article 159 (2) (b) of the constitution. The Appellant failed to pay the costs of the withdrawn suit to the 2nd Respondent. The Appellant did not adduce evidence to show that the withdrawn suit by consent was done without her instructions. That the Court should not act in aid of an indolent litigant who is deliberately attempting to delay the cause of justice.

9. I have read and considered the appeal and the parties' submissions and the key issue for determination is which application between that of the Appellant and that of the 2nd Respondents should be heard first. The determination of this question will successfully dispose of the appeal. The grounds of appeal are therefore collapsed under this issue.

10. It is commonly acknowledged by the parties that the issue that was before the learned Magistrate was that of directions which was intended to shape the course of the hearing of the two applications pending before the Court; the Appellant's dated the 19/2/13 and the 2nd Respondents application dated the 12/2/13.

11. On application by the Appellant, the claim against the 2nd Respondent was withdrawn according to the orders of the Court dated the 31/1/2013. Consequently, the plaint was amended to remove the name of the 2nd Respondent from the record. The parties to the suit thereafter remained the Appellant and the 1st Respondent. It would appear that the prosecution of the case remained dormant for a period of over one year.

12. Pursuant to the orders of the 31/1/12, the 2nd Respondent curiously filed an application dated the 12/2/13 seeking orders to remove a caution that had been lodged by the Appellant on the suit land. I will explain later in the ruling why this application is curious.

13. In a quick and swift rejoinder, the Appellant filed her own application of the 19/2/13 seeking to interalia set aside the orders of the Court of the 31/1/12 on grounds that she did not instruct her then Advocate to consent to such orders and that she was unaware that her claim against the 2nd Respondent had been withdrawn/discontinued. The Court being confronted by the two competing applications by the parties, after hearing the oral submissions of the parties rendered a ruling on the 4/4/13 that the application by the 2nd Respondent proceed for hearing. The learned Magistrate based her considered decision on the finding that the Appellant's delay in filing her application was inordinate and as such had not been explained. With respect to the learned Magistrate, I have relooked at the record and it is clear that the Counsels of both parties took a detour in arguing their application for directions and meandered into the substantive applications pending before the Court. No wonder the learned Magistrate ended up basing her decision on the merits or otherwise of applications that had not strictly been canvassed before her. I however lay the blame on the door of the learned Counsels.

14. The Appellant has alleged bias on the part of trial Magistrate. Where are the facts relied? I find none.

15. I have seen this misadventure repeated in the submissions of Counsels on record. For the purposes of this ruling the merits or otherwise of the applications are not before the Court on appeal. It is the ruling of the learned Magistrate and I have every intention to steer away from the applications for the simple reason that they are yet to be heard.

16. Going back to the background leading to the appeal before me, the application of the Appellant seeks to overturn the orders of the Magistrate issued on 31/1/12 on the ground that the said orders were recorded without her consent and instructions and wants the Court to reinstate the 2nd Respondent into the case. On the other hand, the 2nd Respondents application is for removal of caution being the registered owner of the suit land. If the 2nd Respondents application is heard first and succeeds, then the suit land will be unencumbered and the interest of the Appellant will be exposed to further disposal interalia. Likewise, if the Appellant's application succeeds then the 2nd Respondent will be reinstated and there might be no need to remove the caution pending the hearing and determination of the suit. In the event that the application of the Appellant is lost then the application by the 2nd Respondent may be determined and the Appellant is at liberty to proceed with her case against the 1st Respondent only.

17. Weighing one thing to another, I find that the 2nd Respondent has not demonstrated any prejudice that he can suffer if the application dated the 19/2/13 is heard first. That application should be heard and disposed affront. I will make the final orders later.

18. There is an issue that though not raised by the parties, I found it curious so much so that the Appellant's claim against the 2nd Respondent stands withdrawn and the plaint was amended to remove his name from the suit. Effectively he is not a party to the suit. If he is desirous to file an application, it can only be otherwise but not in this case. I say no more.

19. This Court issued orders as to the timelines that the parties were to file sub missions. According to the record all submissions were filed late. The Appellant has explained to the Court the reasons for late filing. The Court has been invited by the 2nd Respondents Counsel to strike out the submissions and dismiss the appeal.

20. Fortified by Art. 159 of the Constitution read together with section 1A and 3 of the Civil Procedure Act which enjoins this Court to do substantive justice, I exercise my discretion to admit all the submissions on record so that the matter may be determined on its merits.

21. The upshot is that the appeal succeeds to the extent stated below;

- a. The application dated the 19/2/13 should be heard first.
- b. The prayer that the application be heard before another Magistrate is declined.
- c. Costs of the appeal shall be in the cause.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MERU THIS 9TH DAY APRIL, 2019.

J G KEMEI

JUDGE

In presence of;

C/A Mutwiri

Nyamu Nyaga for Appellant

Muthamia for 1st Respondent

C.P Mbaabu for 2nd Respondent