REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 350 OF 2017

(Formally Nakuru High Court Civil Appeal No. 190 of 2012)

DUNCAN IREGI KARUE.............APPEALLANT

VERSUS

MOSES WAMBUGU.......................RESPONDENT

Being an appeal against the Judgment/decree of Principal Magistrate at Nyahururu Principal Magistrate's Court (delivered on11th July 2012)

in

PMCC No. 183 of 2005

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard by VK KIPTOON Resident Magistrate *in the Principal Magistrate Court at Nyahururu in Civil Case No. 183 of 2005* where the learned trial Magistrate, upon considering the evidence of both parties, entered judgment in favour of the Plaintiff/Respondent on the 11th July 2012 for Ks 64,000/= and cost of the suit from the date of filling the same.

2. The Appellant, being dissatisfied with the judgment of the trial Magistrate filed the present Appeal before the high court sitting in Nakuru on the 1st November 2012.

3. The grounds which the Appellant has raised in his Memorandum of Appeal include:

> i. The learned trial Magistrate erred in law and fact by relying on the authority to sell which was not signed by the Plaintiff and which had not been witnessed by any person.
>
> ii. The learned trial Magistrate erred in law and fact by relying on documents which are not registered yet they are registerable documents at law.
>
> iii. The learned trial Magistrate erred in law and fact by relying on nonexistent contract between the Plaintiff and the Defendant.
>
> iv. The trial Magistrate erred in law and fact by entering Judgment against the Defendant where the(sic) was no contract between the Plaintiff and the Defendant to sell land on behalf of the later.(sic)
>
> v. The learned trial Magistrate erred in law and fact by failing to note that the Plaintiff was not a registered land agent and has not license to sell land on behalf of anybody.
>
> vi. The learned trial Magistrate erred in entering a judgment against the Defendant and condemning him unheard.
>
> vii. The learned trial Magistrate erred in law and fact by taxing the bill of costs when he had no jurisdiction to do so.

4. The Defendant/Appellant thus sought for an order that the judgment be set aside and the suit be dismissed.

5. From the proceedings in the high Court at Nakuru, I note that together with the memorandum of Appeal filed on the 1 st November 2012,

the appellant filed a series of other Applications all dated the 30th October 2012 being:

> i. An Application for leave to file the appeal out of time against a ruling made by the Hon Musyoki on the 11th July 2012 and that such leave do operate as stay of the proceedings.
>
> ii. The second Application was under certificate of urgency wherein the Appellant sought for stay of execution pending the hearing and determination of the Application and the Appeal against the judgment of Hon Musyoki of the 11th July 2012.

6. On the 1st November 2012, there were orders for the Application dated the 30th October 2012 to be served for inter-parties hearing.

7. On the 10th December 2013, there having not been a response for the Respondent in the application dated the 30th October 2012, the same was allowed with interim orders to remain in force until the hearing and determination of the appeal.

8. Thereafter, the parties went to slumber until the 11th July 2017 when the matter was transferred to this court and Counsel for the Respondent fixed the same for mention in the registry.

9. On two consecutive days thereafter when the matter came up for mention, none of the parties were present in court.

10. On the 8th March 2018, directions were taken with effect that the appeal be disposed of by way of written submissions unfortunately the original magistrate's trial Court file was not availed and hence the court made orders that the same be availed in the meantime.

11. The Appellant filed his written submissions dated the 6th April 2018 on the 10th April 2018 whereas the Respondents filed their own submissions dated the 11th July 2018 on the 12th July 2018.

12. I have considered the record, the judgment by the trial Magistrate, the written submissions by learned counsel for both parties as well as the applicable law. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).*** *I* also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. ***(See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

13. According to the proceedings herein, the Respondent/Plaintiff herein instituted suit against the Appellant/Defendant vide a plaint dated 1st July 2005 where he had sought for the following orders;-

> (a) That judgment be entered against the Defendant to pay a sum of Ksh 64,000/= being the principle sum thereof
>
> (b) Cost of the suit
>
> (c) Interest and (b) above court rates.

14. The Appellant/Defendant filed his defence dated the 22nd September 2005 on the same day wherein he generally denied that he owed the Respondent/Plaintiff a sum of ksh 64,000/= but admitted issues framed in paragraphs 2, 4, 7,and 8 therein.

15. Before the matter could proceed for hearing, the Respondent/Plaintiff filed an application dated 17th October 2005 that sought to strike out the defence and enter judgment in favour of the Appellant/Defendant. Vide a ruling delivered on the 21st March 2006 the said Application was dismissed with cost to the Appellant/Defendant.

16. Thereinafter, parties went to slumber to the effect that on the 18th February 2009, the matter came up for hearing of the notice to show cause as to why the same should not be dismissed for want of prosecution.

17. On the 24th October 2011 when the mater came up for hearing, there was no appearance by the Appellant although they had been served. The matter therefore proceeded ex-pate wherein the evidence of the Respondent and his witness was taken and the Respondent's case was closed and judgment was delivered on the 11th November 2011.

18. Pursuant to the delivery of the said judgment, the Appellant/ Defendant herein vide his application dated the 14th November 2011, moved the court to stay the execution of the decree passed on the 11th November 2011 pending the determination of the said application on the 28th November 2011.

19. On the said date, there having not been a replying affidavit filed by the Defendant/Appellant there were extension of the orders of stay upon which on the 20th December 2011 by consent, parties agreed to set aside the judgment of the 11th November 2011. The Defendant/Appellant was to pay Ksh 8,000/= as throw away costs and the case was thus fixed for fresh hearing for the 15th June 2012.

20. On the 15th June 2012, the Appellant having been served and there not being an appearance by either the Appellant or his counsel, the matter proceeded for hearing ex-parte before the trial Magistrate, wherein the Respondent/Plaintiff testified as Pw1 to the effect that on the

1st June 2004, the Appellant herein, being desirous of selling his piece of land, had asked him to look for a buyer for him upon which he would pay him a commission of 8% of the purchase price which was Ksh 800,000/=. His commission was therefore to be Ksh 64,000/=. Parties had reduced their agreement into writing which he produced the authority to sell as Pf exh 1.

21. That subsequently he had found a purchaser, one Samuel Macharia Kaguo who had gone ahead and bought the said parcel of land. The sale agreement between the Appellant and Samuel Macharia Kaguo dated the 11th September 2004 was produced as Pf exh 2. PW 1 testified that the said purchaser had paid a sum of Ksh 700,000/= on that date leaving a balance of Ksh 100,000/= which was later paid. He produced the acknowledgment of receipt as Pf exh 3. It was after parties had completed their transaction, that the Appellant refused to pay him his commission of ksh 64,000/=.

22. The Respondent/Plaintiff's second witness, Pw2, Samuel Macharia Nganga confirmed the testimony of Pw1 to the effect that indeed he had introduced him to the purchaser, the Appellant herein, wherein after he had bought the Appellant's piece of land at a consideration of Ksh 800,000/= land

23. Judgment in favour of the Respondent/Plaintiff for Ksh 64,000/= plus cost of the suit and interest thereon was delivered on the 11th July 2012. Subsequently the bill of cost was taxed at Ksh 77,630/= and notice issued to the Appellant following which the Appellant herein filed yet another application dated the 21st August 2012, seeking to stay the judgment that was delivered on the 11th July 2012 for reasons that the matter had proceeded ex-parte because he had not been served with the hearing Notice.

24. The application was hard inter parties wherein a ruling was subsequently delivered on the 17th October 2012 dismissing the appellant's application with costs. The dismissal thus gave rise to the present appeal.

25. Parties filed their respective submissions to the appeal to which I shall proceed and summarize as follows:

The Appellant's Submissions.

26. The Appellant's submission in seeking to set aside the judgment delivered by the trial Magistrate on the 11th July 2012 was for reasons that he was not given an opportunity to defend himself and cross examine the Respondent since he had not been served with the hearing notice

27. That indeed the Respondent herein had introduced himself as transporter and hence was not a registered land agent as per the provisions of Section 18(1) of the Estate Agent Act (sic) and therefore had no authority in law to practice as a land agent.

28. Further that there was no binding agreement between the Appellant and the Respondent because the said agreement did not meet the minimum requirements of a valid e agreement to the effect that there were no witnesses to the same and secondly, the same was not signed by the Respondent meaning that he was not a party to the agreement.

29. The Appellant also took issue with the taxation process submitting that there was no provision in the subordinate court to enable the Respondent tax his bill of costs in this cause. The Appellant prayed for the Judgment to be set aside and the matter to be heard on merit.

Respondent's Submission.

30. The Appeal was opposed by the Respondent who submitted that the Appeal was incompetent and ought to be dismissed for reasons that the same was lodged at the Nakuru Registry on the 11th July 2012, almost four months against a judgment that had been delivered on the 11th July 2012, without leave of the court which was in contravention of the provisions of Section 79(g) of the Civil Procedure Act.

31. To try and cure the defect, the Appellant had filed numerous applications with an Application dated the 30th October 2012 seeking for the said leave, which application was never prosecuted.

32. That the court's order of the 10th December 2012 did not specify which of the two applications dated the 30th October 2012 had been allowed, indeed what the court had stated was for the interim orders to stay in force until the Appeal had been heard and determined which orders did not apply to the application for leave to file the appeal out of time.

33. That even if the order granted was in relation to file the appeal out of time, the Appellant never sought to have the memorandum already filed out of time to be deemed to have been filed with leave of the court. The memorandum herein was thus filed four months after judgment was delivered and without leave of the court.

34. That that notwithstanding, the Appellant sought leave to file an appeal from a ruling delivered on the 11th July 2011. From the proceedings, no such ruling was delivered on the date in question.

35. That failure to obtain leave was not just a technicality, but went to the root cause of the Appeal and therefore there was no competent appeal before court.

36. That further on the merits of the Appeal, there was none, the Appeal having been predicted on two grounds that the Respondent was not a registered Estate agent and there was no valid contract.

37. It was the Respondent's submission that on the first ground, it had not been denied that the appellant was selling his parcel of land

wherein he had authorized the Respondent to look for a buyer and had even signed an authority committing himself to pay a commission of 8%. He had thus made an offer which was accepted and enforced. There was nothing illegal or unlawful in the said arrangement or contract.

38. On the second issue, the court record was to the effect that on the 24th October 2011, the matter proceeded ex-parte owing to non-appearance of the Appellant and his counsel although they had been duly served. Judgment had been delivered but which was set aside on an application by the Appellant. That even after fixing the matter for hearing a fresh, the Appellant failed yet again to appear in court for the hearing of the matter wherein the same proceeded ex-parte after the court having satisfied itself that service had been effected.

39. On the issue of taxation, it was the Respondent's submission that there were elaborate provisions in the Advocates Remuneration Act which govern issues on taxation of costs and where one was aggrieved by the said taxation the forum to address such issues would be to file a reference which the Appellant had not done.

Analyses and determination.

40. Considering the evidence adduced in the trial court I find the issues raised for determination as;

i. Whether the Appeal which was filed out of time could be deemed as being properly on record.

ii. Whether there was an agency relationship between the Appellant and the Respondent

iii. Whether the Appellant was condemned unheard.

iv. *Whether the trial magistrate had jurisdiction to tax the bill of costs.*

41. On the first issue as to whether the said Appeal which was filed out of time could be deemed as being properly on record, Section 79G of the *Civil Procedure Act* provides that:

> *Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:*
>
> *Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.*

42. An applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so It was held in the case of **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides,* is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

43. In the present case the Appellant's application to file an appeal out of time dated the 30th October 2012 was filed on the 1st November 2012 yet the judgment appealed from was delivered by the lower court on 11th July, 2012, which was 4 months after the judgment.

44. From the proceedings herein indeed there was no determination of the said application. What is on record was an order of 10th December 2012 allowing the Application dated 30th October 2012. Keeping in mind that there had been two applications filed on the said date that sought different orders as herein above stated, it cannot be said that the application to grant an extension of time to file the Appeal was the order granted.

45. I say so because, the principles to be considered in exercising the discretion whether or not to enlarge time were set out in the **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others [2002] 1 EA 65** where the Court set out the factors to be considered in deciding whether or not to grant such an application and these are

(i) the explanation if any for the delay;

(ii).the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

(iii).Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the applicant.

46. None of the above issues were considered in the present case, meaning that the Appellant herein was not granted leave to file his appeal out of time. The Appeal herein ought to have been struck out however, **this court is hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint.**

47. The court of Appeal in ***Kamlesh Mansukhalal Damji Pattni vs. Director Of Public Prosecutions & 3 others [2015] eKLR*** held that-

"It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice." (emphasis added.)

48. The court of appeal decision therein above is binding to me and having held as above, the issue that falls for consideration is whether this appeal, having been filed out of time could be deemed as being properly on record.

49. There is a plethora of authorities from the High Court which interpret the proviso to *Section 79G* of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule, J. in the ***Gerald M'limbine vs. Joseph Kangangi [2009] eKLR*** stated that-

"My understanding of the proviso to section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the court's process under Section 79B".

50. On the 10th December 2013, there was an order to the effect that:

'The application dated the 30th October 2012 is allowed. Costs in cause"

51. This was a blanket order keeping in mind that the appellant had filed two applications dated the 30th October 2012 each seeking different orders That notwithstanding and in the interest of justice I shall deem the already filed Appeal as having been duly filed.

52. On the second issue, vide the authority to sell dated the 1st June 2004, herein produced as Pf exh 1, the same is clear that the Appellant had asked the Respondent to look for a buyer for him wherein he would pay him a commission of 8% of the purchase price which was ksh 800,000/= The Respondent had acted as per the agreement and had found Pw2 as the buyer and who had subsequently bought the land at the price indicated on the agreement as per his testimony in court.

53. The definition of the agent-principal relationship in **Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001** is as follows:-

"... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."

54. In the case of **Garnac Grain Co. Inc. versus H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967] 2 All E.R. 353** where Lord Pearson with the concurrence of the House used the words-

"The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it… the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct ". (Emphasis by applicants)

55. It was thus based on the said agreement, that the Appellant had sold his land to PW2 one Samwel Macharia Gakuhi. It was upon execution of the sale agreement that the Appellant handed over the property to the purchaser. The agreement between the Appellant and the Defendant was produced as evidence wherein the Appellant has disputed the same as not being authentic. No evidence was adduced to support his allegation.

56. Based on the above definition as well as on the evidence adduced in court, I am satisfied that indeed there existed a relationship between the Appellant and the Respondent herein and that the contract between them, which was reduced into writing was binding.

57. I find that there was sufficient evidence pointing out that indeed Mr. Samwel Macharia Gakuhi, Pw2 herein entered into a sale agreement with the Appellant upon being referred to him by the Respondent. The Appellant cannot now turn around to state that he did not contract Respondent as his agent.

58. I wish to point out that on the onset of this matter which was filed way back in the year 2005, the same was heard ex-parte twice after the Appellant failed to appear in court to defend himself. Judgment was subsequently entered against him at the first instance, on the 11th November 2011 but by consent the same was set aside after the Appellant filed an application to set it aside.

59. Pursuant to the entry of the said consent, the matter was set down for hearing wherein again the appellant failed to appear in court and the

same was heard ex-parte once again. Upon perusing the court file I confirmed that the matter proceeded *ex-parte* after the court found that the Appellant had been duly served. There was no candid and/or frank explanation given as to why both the advocate and the Appellant did not attend court on the date set for hearing.

60. I am satisfied that on the evidence before the court, the Appellant was aware of the proceedings and simply sought to evade, if not ignore, the same. The court cannot be faulted for having condemned the Appellant unheard. In the circumstances of this case, the opportunity to be heard was afforded but not taken.

61. I find that by the Appellant arguing that he condemned unheard, he is abusing the integrity of the court. That the instant defence case was very casually prosecuted. In the same breath, I find that the Appellant herein is employing delaying tactics in trying to deny the Respondent the fruits of his judgment would be prejudicial to him.

62. The Appellant herein present to me **a serious case of negligence as the advocate not only ought to have advised the Appellant of the hearing date but parties ought to have been diligent enough in the prosecution of the matter. This is the kind of laissez faire attitude, this court cannot condone.** This limb of the ground of appeal has no merit and is dismissed.

63. On the last ground of appeal where the Appellant faulted the trial court for taxing the bill of costs without jurisdiction, my take on this would be that;

64. The Black's Law Dictionary defines "Taxation of Costs" as follows:

> "*The process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded."*

On the other hand the same dictionary defines assessment of costs as follows:

> "*Determination of the rate or amount of something (costs in this instance) – imposition of something (costs) e.g. fines……."*

The Oxford English Dictionary defines "taxation of costs" as follows:

> "*To examine and assess the costs of a case."*

The same dictionary (Oxford) defines 'assessment' as follows:

> "*To evaluate or estimate the nature, value or quality…….to set the value of a tax, fine etc for a person at a specified level."*

65. The provisions of *Section 27* of the **Civil Procedure Act** gives both the subordinate court and the High Court discretion and jurisdiction not only to award costs but also to determine the extent at which those costs are to be paid and by which party.

66. Paragraph 49 of the **Advocates Remuneration Order** clearly defines a "court" to mean both the High Court or any judge thereof or a Resident Magistrate's Court or a magistrate sitting in a magistrate's court.

67. *Part III* of the **Advocates Remuneration Order** gives the court the mandate to determine costs in contentious matters as between advocate and client and between party and party. It is therefore clear and indisputable that a Magistrate's court has jurisdiction to assess costs and as a matter of law**,** *paragraph 51* of the **Advocates Remuneration Order** clearly gives the applicable scale to be used in the subordinate courts as Schedule VII. I therefore find that the trial magistrate had jurisdiction to tax the bill of costs herein.

68. I have reconsidered and re-evaluated what transpired in the Lower Court and I have come up with my own conclusion to which that the Appeal herein lacks merit and is hereby dismissed with costs to Respondent.

Dated and delivered at Nyahururu this 21st day of May 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE