



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA NO. 21 OF 2017

DAVID KARIUKI NDIRANGU.....APPELLANT

VS

MAGDALENE WAMBUI NDIRANGU.....1ST RESPONDENT

K.D.T.A THROUGH UNIT MANAGER

GACHARAGE TEA FACTORY.....2ND RESPONDENT

(An appeal from the decree of the Hon D A Orimba, SRM ,Kangema issued on the 15/9/2011)

RULING

1. The Appellant, being aggrieved, with ruling and decree of A. Mwangi SRM delivered on 5/5/2016 in Civil Case No. 187 of 2007, Kigumo, preferred the present appeal vide a Memorandum of Appeal dated 2/6/2016 on the following grounds;

- a. The Learned Magistrate wrongly dismissed the suit for want of prosecution despite the plausible explanation that the previous counsel for the Appellant Muturi Njoroge and the counsel for the 1st Respondent had agreed to keep the Kigumo SRMCC NO.187 of 2007 in limbo pending the determination of Kigumo P&A Cause No. 63 of 2007, hence the failure to set the said case down for hearing. That explanation was never denied in that the 1st Respondent after obtaining leave to file a supplementary affidavit declined to do so.
- b. The 1st Respondent did not serve the application dated 28/7/2015 upon the 2nd Respondent thus rendering the proceedings in respect of the said application fatally defective.
- c. The Learned Magistrate erred in law in *suo moto* perusing the Kigumo P&A Cause No. 63 of 2007 without any request by either party so as to ascertain whether a consent order had been entered in that cause staying the cc no. 187 of 2007 yet there had been no suggestion or averment that such a consent was entered in that cause. The 1st Respondent should have brought up the issue in the supplementary affidavit.
- d. The Learned Magistrate was unduly adversely influenced against the Appellant for failure to file submissions, which was the work of counsel on record for the Appellant.
- e. The learned magistrate punished the Appellant for the mistakes of his Advocates by dismissing the suit whereas an order for costs in favour of the 1st Respondent would have sufficed.
- f. The Learned Magistrate in all the circumstances should have endeavored to save the suit which involved a serious family land dispute and which would have accorded well with the provisions of section 1A.1B mad 3A of the Civil Procedure Act as cited by the 1st Respondent.

2. Subsequently the Appellant then made the following prayers;

- a. That the order made on 5/5/2016 dismissing the suit for want of prosecution be set aside and the application dated 28/7/2015 be dismissed.

b. That the Court be pleased to give such further or other orders as for the expeditious hearing of the subject suit in Kigumo SRM's Court.

3. The impugned ruling was in respect to the Notice of Motion dated 28/7/2015 filed by the 1st Respondent's Advocates in which she sought the following orders;

a. That the honourable Court be pleased to dismiss the suit and claim for want of prosecution.

b. Alternatively, the Court be pleased to strike out the Plaintiffs claim and suit as the same is frivolous, incompetent and is an abuse of the due process of the law and the Court.

c. Costs of the application.

4. In an abridged fashion, the 1st Respondent premised the application aforestated on grounds that; the Plaintiff had not taken any steps to prosecute the suit for a period in excess of 7 years since the last Court attendance which was 21/8/08; the Plaintiff abandoned this current suit and filed another suit to wit SPMCC No 42 of 2013 , Kigumo which amounts to an abuse of the Court process; the Plaintiffs suit abinitio was incompetent, frivolous, mischievous and an abuse of the due process of the law and lastly that the pendency of the case did prejudice the 1st Respondent.

5. In her supporting affidavit the 1st Respondent deponed that the suit was filed in September 2007 and was opposed through a defence filed in the month of October 2007. On 21/8/2008, the Court struck out the amended plaint filed without leave of the Court. This arose from the non compliance with the Court orders directing the Appellant to file the amended plaint within 7 days. That the matter has not been prosecuted for over 7 years. The Respondent claimed that the Appellant filed a fresh suit being Kigumo Civil Suit No. 42 of 2013 on the same claim during the pendency of the instant suit. That the Appellant's suit was incompetent and frivolous *abinitio* and the continued pendency of the suit in Court was prejudicial to the Defendants. The 1st Respondent claimed that there was no proper suit before the Court because the Plaintiff's amended plaint dated 13/11/2007 was struck out with costs. That the Plaintiff's suit was lodged with the ill motive of excluding the Respondent who is the Plaintiff's stepmother and her family from harvesting the coffee produce belonging to her late husband. Maintaining that the suit was an abuse of the process of the Court, she urged the Court to strike it out.

6. In opposing the application, the Appellant through his Replying Affidavit dated the 2/2/16 deponed interalia and urged the Court to allow the suit to be heard to its logical end. He averred that he was advised by his Advocate Messrs. Muturi Njoroge that the Advocates of the parties had consented to stay of the suit in view of the pending succession cause to wit P & A cause No 63 of 2007 which subject matter was the suit land. That he only learnt of the application on the 28/1/16 as his former Advocate did not inform him of its existence. That since his former Advocates failed to advise him, he urged the Court that a litigant should not be punished for the mistakes of his counsel. Further he denied that his suit is incompetent. He claimed that the claim of trusteeship in the suit land does not arise as he became registered owner of the suit land in 1964 while the 1st Respondent got married to his late father in 1981.

7. The lower Court upon considering the Notice of Motion dismissed the Plaintiff's suit for want of prosecution and awarded costs to the Respondents vide a ruling dated 5/5/16. It is this ruling that is the subject of this appeal.

8. The Defendants in their amended defence dated 17/01/2008 challenged the Plaintiff's claim for being incompetent and frivolous and sought for it to be struck out. In addition, following the admission of trust over the suit land by the Plaintiff, the Defendants went ahead to list the particulars of the trust which defeats the Plaintiff's contention of having an exclusive right over the suit land.

9. Parties elected to canvass the appeal by way of written submissions.

10. With respect to ground No.s 1 and 3, the Appellant faulted the learned magistrate for perusing the file in P&A succession cause No 63 of 2007 to ascertain whether indeed there was a consent entered by the parties in respect to stay of proceedings in this suit pending the determination of the succession cause. He posited that the succession cause proceedings were not part of the pleadings in the matter and there was no reason for the Court to take such an action *suo moto* before being moved by any of the parties to peruse the said file. That the Court could have waited for the parties to introduce the material in the application for the consideration of the Court. He equated it to the Court descending to the arena of conflict.

11. With respect to ground 2 the Appellant stated that the 2nd Respondent was not served with the Notice of Motion and therefore faulted the Court for determining the Notice of Motion without satisfying itself that the 2nd Respondent was served. Relying on Order 51 Rule 5 of the Civil Procedure Rules, he posited that the Court should have adjourned the application to enable service to the 2nd Respondent. Failure to do so, he asserted, is fatal and that the orders issued must be set aside by the Court due to the procedural anomaly.

12. On ground 4, the Appellant faulted the Court in its ruling for concluding that the Appellant stopped attending Court and even failed to file written submissions as directed by the Court. That failure to file submissions is not insulting or demeaning the Court and that the Court in so holding was unduly harsh to the Appellant.

13. In respect to ground No 5, the Appellant submitted that his previous Advocates had on 21/8/08 misled him that there was a stay of the suit in view of the pending succession cause. He argued that mistake of counsel should not be visited upon him.

14. With respect to ground No 6 the Appellant submitted that the Court should have saved the suit as it involved a dispute on family land. That sections 1A, 1B and 3A clothe the Court with inherent powers to so save the suit. That the Court should have found the delay was unintentional and excusable. It opined that the Court erred in finding that there was substantial risk to fair trial. He maintained that it is

prejudicial to turn away the Appellant from the seat of justice by dismissing the case. The Appellant insisted that it was still possible to do justice to the parties by allowing the case to proceed.

15. In summary, it is the Appellant's Case that the Court descended on the arena by opting to peruse the Kigumo P&A case No. 63 of 2007 which was not part of the pleadings and material before the Court. That the 1st Respondent committed a fatal omission by failing to serve the application on the 2nd Respondent who was not a Co-Defendant to the 1st Defendant. That the Court un-proportionately reprimanded the Appellant for failing to file his submissions in respect to the motion. That the Appellant was misdirected by their Advocates who misadvised him that the parties had entered into an agreement to stay all other suits and never informed him of the dismissal application. The instructions of the apparent consent were passed on to the new Advocates. He opines that the mistakes would have been cured through payment of costs. That the Court ought to have exercised its jurisdiction to sustain the suit rather than dismiss it.

16. The 1st Respondent set out a chronology of events that happened since the filing of the suit by way of certificate of urgency in October 2007 and remained dormant until 28/7/2015 when the application for dismissal was filed. The Defendants immediately defended the suit and filed a notice of preliminary objection. The Plaintiff filed an application dated 13/11/2007 and another dated 11/01/2008 seeking to amend the plaint which was allowed and he was to do so in 7 days which he didn't but later sneaked into the file an amended plaint out of time which was later struck out. The Plaintiff was represented by three Advocates who kept adjourning the case several times. That when the Preliminary Objection came for hearing on 4/2/2016 parties were ordered to file written submissions, the Plaintiff did not file his even after extension of time, the Court then reserved the matter for ruling. In the ruling, the Court observed that the Plaintiff and his Advocates had stopped attending Court and were not complying with Court orders even those of filing submissions. The Court also perused the P&A file and found that the two files related to two different parcels of land and no stay orders had been entered into in the succession file. The Court also noted that the Appellant had acted in abuse of Court process for filing a fresh suit SPMCC 42 of 2013 also touching on parcel of land number Loc 18/Gachochi/1467 while this other one was still pending. The Court also noted that the indolence exhibited by the Appellant erased any prejudice that may have been occasioned to him by the dismissal. That no explanation was given for the delay. That the Court in considering the interests of justice properly found that the same required expeditious resolution of disputes. That the 2nd Respondent was duly served and no complaint of non-service was ever raised. That the trial magistrate applied the law to the letter in dismissing the suit and was not swayed in any way, the reason for dismissal was not only for non-attendance.

17. That the instant appeal falls within the meaning of Order 43 of the Civil Procedure Rules which require appeals emanating from applications under Order 17 Rule 2 (2) (3) to be lodged with leave of the Court. Leave in this instant appeal was not sought and not granted hence the appeal before the Court is improper.

18. The 2nd Respondent echoed the sentiments of the 1st Respondent and avers that the dismissal of the suit came to his aid and urges the Court to also decline the appeal herein.

19. The key issue for determination is whether there is a competent appeal before this Court.

20. The primary role as a first appellate Court is namely, to re-evaluate, re-assess and re-analyze the evidence before the trial Court and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In *Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212* this Court held that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

Is the appeal competently before this Court?

21. This is an appeal against a ruling in an application emanating from Order 17 rule 15 (2 and 3 of the Civil Procedure Rules). I have had a relook at the relevant order and it is Order 17 Rule 1(2). Guided by Order 50 Rule 10 the Court finds that quoting the wrong provisions of the Civil Procedure Rules is not fatal to the appeal. In particular Rule 2) states that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. It is the view of the Court that this one does not.

22. Having said that Order 43 sets out instances where a party to an appeal requires to seek and obtain leave of the Court to file an appeal. The opening preamble of Order 43 states as follows;

“ an appeal shall lie as of right from the following orders under the provisions of section 75(l (h) of the Civil Procedure Act.”

23. The specific orders which do not require leave have been listed deliberately thereunder.

24. The provision goes on to state under sub rule 2 that an appeal shall lie with the leave of the Court from any other order made under these rules.

25. Section 75 of the Civil Procedure Act states as follows;

“ An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the Court making such order or of the Court to which an appeal would lie if leave were granted;

a. ...

b.

h. any order made under rules from which an appeal is expressly allowed by rules”.

26. My reading of the above provisions of the law indicates that any appeal arising from Order 17 requires leave of the Court. The wording of the Civil Procedure Rules and Civil Procedure Act are mandatory. To the extent that the Appellant failed to seek and obtain leave of the Court renders the appeal incompetent. It deprives the Court the jurisdiction to hear the appeal.

27. Having found that there is no competent appeal before me, the sensible thing to do in the circumstance is to strike out the appeal which I do with costs to the Respondents.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANGA THIS 19TH DAY OF SEPTEMBER 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kinuthia HB for J M Mbuthia for the Appellant

Kirubi for the 1st Respondent

Mwaniki HB for Ms Njoroge for the 2nd Respondent

Irene and Njeri, Court Assistants