REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 17 OF 2015

MAGANJO JOSHUA KAGO.....APPELLANT

VERSUS

ROSE NJERI MBUIIMBWE (As the Legal Representative of the Estate

of the late NICHOLASGITHUKU WARURI……RESPONDENT

(BEING AN APPEAL FROM THE RULING OF HON. F.W. ANDAYI DELIVERED ON 2ND JULY 2015 IN CMCC NO. 14 OF 2012 (KERUGOYA)

JUDGMENT

BACKGROUND

The brief facts of this appeal is that the Appellant in this case, Maganjo Joshua Kago had sued the Respondent's husband one Nicholas Githuku Waruri (deceased) for the transfer of the suit land L.R. No. MUTIRA/KANYEI/165 which he allegedly bought but the said Nicholas Githuku Waruri reneged to perform his part of the bargain. He then sought to enforce that agreement before the Magistrate's Court aforesaid.

According to the Plaintiff/Appellant, they entered into a sale agreement with the Respondent for the sale of the suit land L.R. MUTIRA/KANYEI/165 at a price of Ksh. 325,000/=. He paid a deposit of Ksh. 175,000/=. However, the Respondent took no steps to have the suit land sub-divided so as to enable him get his rightful portion as agreed. In paragraph 6 of his plaint dated 3rd October 2011, the Plaintiff sought for a refund of his money and/or specific performance. On 8th February 2012, the parties entered into a consent judgment whereby the Respondent agreed to sign all statutory documents to facilitate the sub-division and subsequent transfer of the suit land measuring 0.369 Ha. to the Appellant. Immediately thereafter, the Respondent filed an application seeking a review of the consent judgment based on grounds that he neither signed the consent judgment nor the sale agreement. The matter was referred to Directorate of Criminal Investigations whereby investigations were conducted and the Forensic Document Examiner from the CID found that the signatures on the consent judgment and the sale agreement which were the subject of the dispute were fake as it was not made by the Respondent. The Appellant did not file any response or attend the hearing of the said application for review despite his lawyers M/S Ikahu Nganga & Co. Advocates having been duly served. The trial Court heard the said application which was not opposed and the same was allowed and the consent order was set aside. The Appellant proceeded and filed an application seeking review of the above orders and to be allowed to file his documents. The application was based on grounds that the Respondent served their lawyer but that he was not aware of the same. He argued that the mistake of his advocate should not be visited on him and that he should not be condemned unheard. The trial magistrate heard the said application and in a well

considered ruling delivered on 2nd July 2015 dismissed the same with costs to the Respondent.

The Appellant was dissatisfied with that order of dismissal and lodged this Appeal citing the following seven (7) grounds of Appeal:

That the learned trial magistrate erred in law and fact by holding that the Applicant was not diligent enough in ensuring that his case was progressing well when on actual fact the case had already been finalized. A miscarriage of justice was thereby occasioned.

That the learned magistrate erred in law and fact by heavily relying on the forensic report which had been prepared without the Court's authority or consent of the parties. A miscarriage of justice was thereby occasioned.

That the learned trial magistrate erred in law and fact by condemning the innocent parties without hearing on their part. A miscarriage of justice was thereby occasioned.

That the learned trial magistrate erred in law and fact by totally disregarding the sale agreement and consent orders. A miscarriage of justice was thereby occasioned.

That the learned trial magistrate erred in law and fact by failing to hear all the parties and determine the application dated 25th November 2014 on merits. A miscarriage of justice was thereby occasioned.

That the trial magistrate erred in law and fact by putting more weight on the evidence of the Respondent and dismissing the evidence of the Appellant without carefully evaluating it.

That the learned trial magistrate erred in law and fact by totally misunderstanding the legal principal which governs judicial discretion.

APPELLANT'S SUBMISSIONS

The Appellant submitted that he was not aware of the application dated 25th November 2014 and that when he discovered there was such an application and orders were given, he filed an application dated 16th December 2014 for review. He stated that he was not made aware of the said application by his advocate. He stated that if he had been made aware of the said application dated 25th November 2014, he would have instructed his lawyer to oppose the same. He stated that after the consent judgment was entered, he did not see the need to visit his advocate's office since the matter had been settled and finalized. The Appellant cited the following case in support:

Richard Nchapai Leiyangu Vs I.E.B.C & 2 others.

RESPONDENT'S SUBMSISIONS

The Respondent submitted that the Appellant was well aware of the Respondent's application dated 25th November 2015 as the process server one Francis Kunga Mugi filed an affidavit of service sworn stating that on the 28th November 2014, he served a copy of the application together with a Court order dated 26th November 2014 upon the Appellant personally and the firm of Ikahu Nganga & Co. Advocates. The Respondent cited the following cases:

Rajesh Rughani Vs Fifty Investment Limited & another (2005) e K.L.R.

Bains Construction Co. Ltd Vs John Mzuze Ogowe (2011) e K.L.R.

The Council, Jomo Kenyatta University of Agriculture and Technology Vs Joseph Muthura

Mbeera & 3 others (2015) e K.L.R.

LEGAL ANALYSIS AND DECISION

I have considered the seven grounds of Appeal and the legal arguments by the parties. I have also considered the authorities and the relevant law applicable. The Appellant who was represented by a counsel before the lower Court had entered into a consent judgment whereby the Respondent agreed to execute all the legal documents to facilitate the transfer of the suit land measuring 0.369 Ha. to the Appellant. The Respondent thereafter filed an application seeking to review the consent judgment. The said application dated 25/11/2014 was served upon the Appellant and the firm of Ikahu Nganga & Co. Advocates who appeared for him. An affidavit of service was filed by one Francis Kunga Mugi. The firm of Ikahu Nganga & Co. Advocates have not denied that they were not served with the said application dated 25/11/2014. The Appellant have not also sought to cross-examine the process server if indeed he is disputing service of the said application. Since the firm of Ikahu Nganga & Co. Advocates have not denied service of the said application, the Appellant cannot say that he was condemned unheard. The Appellant was given an opportunity to be heard when he was served with the application dated 25/11/2014 which was allowed as un-opposed after he failed to file their response or attend Court during the hearing. The lawyer who was on record and who was duly served has not sworn an affidavit giving explanation why he failed to attend Court. The Appellant cannot shelter behind his advocate who has failed to give any explanation for failing to respond and attend Court appropriately. The trial magistrate Hon. F.W. Andayi in his page 5 of his ruling observed as follows:

> ***"The Applicant has set out his main grounds in support of the application, supporting it with his deposition in the affidavit and his counsel has submitted that the reason is that the Plaintiff was not informed by his previous advocate on record that the application was coming up for hearing. Is that a good enough reason to set aside the order? Such an issue was dealt with by Kimaru J. in the case of Republic Vs Laikipia District Land Disputes Tribunal & 3 others (2006) e K.L.R where the learned Judge observed:***
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> ***"This Court and various Courts of record have stated that a suit, once filed is owned by a litigant and not his counsel. It beholves a litigant to diligently pursue his case and ensure that it has been prosecuted to its conclusion. A litigant cannot blame his counsel for failing to inform him of the progress of his case. It is such a litigant's duty to keep in contact his advocate so that he is aware of the progress that would have been made in his suit. In my view, that is an excuse that is raised by such a litigant to mislead this Court into granting him the orders sought. Furthermore, it is trite law that when an advocate diligently fails to give effect to the instructions of his client, he may be liable to be sued for professional negligence. It cannot in all circumstances be a ground for setting aside an adverse order made against such a litigant".***

I find the evaluation of the law by the learned magistrate correct. In the case ***of Republic Vs University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 others (2007) e K.L.R***, **G.V. Odunga J.** (as he then was) stated:

> ***"It is clear from the foregoing that the basis of the application is that the applicants were let down by their erstwhile advocates. The law is however now that it is not every case that a mistake committed by an advocate would be a ground for setting aside orders of the Court. In John Ongeri Mariaria & 2 others Vs Paul Madundura Civil Application No. 301 of 2003 (2004) 2 E.A. 163, it was held that:***
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> > ***"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders".***

In ***Savings and Loans Limited Vs Susan Wanjiru Muritu Nairobi (Milimani) HCC No. 397 of 2002***, **Kimaru J.** expressed himself as follows:

> "***Where it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case …….***"

I agree with the decision of the learned Judge save to add that unlike in the past when disputes were less and Court business was being done usually, the same approach is no longer affordable to the public now. There are those mistakes where no reasons and/or reasonable explanation is given for failure by the litigant or her advocate to take steps to expedite the Court process towards the prosecution of her case. In such a case, the consequence of such a mistake will definitely fall on the head(s) of such a litigant or her advocate. In the circumstance of this case, the firm of Ikahu Ngangu & Co. Advocates and the plaintiff in person were served with the application dated 25/11/2014. There is no affidavit by the advocate why he failed to attend Court during the hearing. The failure to attend Court could not be cured by taking a new counsel. A reasonable explanation for failure to attend Court by the advocate who was expected to attend Court must be given. The overriding objective of the Civil Procedure Act which is the frame work law binds litigants and their advocates to assist the Court to further the overriding objective of the Act by participating in the processes of the Court and to comply with the directions and orders of the Court.

For all the reasons given, hereinabove, I find this Appeal lacking merit and the same is hereby dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of November, 2019.

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E.C. CHERONO

ELC JUDGE

22ND NOVEMBER, 2019

In the presence of:

Mr. Chomba holding brief for Kimathi for Respondent

Mr. Abubakar holding brief for Kahiga for Applicant

Appellant - present

Mbogo – Court clerk – present