



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 29 OF 2017

JULIUS KIAMBATI MBURA.....APPELLANT

VERSUS

BENARD KIRIMI THIRUNGA.....1ST RESPONDENT

THE LAND ADJUDICATION AND SETTLEMENT OFFICER,

TIGANIA WEST DISTRICT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal of the Ruling/Order of J.W. Gichimu (P.M.) delivered on 7th April 2015 in PMCC No. 197 of 2014)

JUDGMENT

1. The appellant herein was the 1st Defendant in the Subordinate Court, while the 1st Respondent was the plaintiff and the 2nd and 3rd Respondents were the 2nd and 3rd Defendants Respectively.
2. The Plaintiff instituted the suit PMCC NO.197 of 2014 vide a plaint dated 15th December 2014, where he sought the following Orders;
 - a. A declaration that parcel No. L.R. No. Uringu II Adjudication Section/5682 is the property of the plaintiff and that its transfer and consolidation with L.R. No. Uringu II Adjudication Section 5667 was wrongful, Illegal and should be reversed.**
3. The plaintiff had also filed an application contemporaneously with the aforementioned suit where he sought court orders to the effect that the 2nd Defendant should not forward the particulars of L.R NO. URINGU11/5667 to the Chief Land Registrar for registration, in the name of Julius KIAMBATI M'BURA, the then 1st Defendant or any other person, with an alternative prayer to have a restriction entered in respect of the aforementioned parcel of land . The prayer for a restriction to be registered was allowed at the ex-parte stage pending the hearing of the application inter-partes, and the matter was listed for inter-parties hearing on 31st December 2014, of which the 1st Respondent informed the court that he was only able to effect service upon the 2nd and 3rd Defendants. He sought a further hearing date and the same was given as 27.1.2015.
4. Come the date of 27.1.2015 and the counsel for the 1st defendant stated that he had just been appointed and therefore sought leave to file their response to the application within seven (7) days.
5. During the subsequent hearing of the application on 3.3.2015, Mr. Murango, advocate for the plaintiff raised a Preliminary Objection seeking orders that the Replying Affidavit filed in court and the statement of defence be expunged from the record because both documents were filed in court out of the prescribed period and without leave of the court. He submitted that the Replying Affidavit was filed after two weeks (14 days) which was outside the timelines issued by the court (7 days). The said counsel further submitted that under **Order 51 Rule 14 (2) of the Civil Procedure Rules**, a respondent intending to oppose an application must file his response in the nature of the replying affidavit or grounds of opposition at least three (3) days before the hearing date, that **Order 7 Rule 1 of the Civil Procedure Rules** also requires that a defendant shall file his defence within 14 days after entering appearance unless other or further Order is made by the Court and that the defence herein was filed after 20 clear days.
6. The Preliminary Objection was opposed by a Mr. Kimathi, for the 1st defendant who submitted that the court only granted leave for the 1st defendant to file its Replying Affidavit. He urged the Court to take into consideration that land matters are sensitive. He further averred that **Order 7 Rule 1 of the Civil Procedure Rules** does not provide a limitation as to the filing of the defence and he urged the court to be guided by the provisions of **Article 159 of the Constitution** and **Section 1A and 1B of the Civil Procedure Act**.

7. The Ruling to the Preliminary Objection was delivered on 7th April 2015, where the court found that the Replying Affidavit was properly on record. As for the Statement of defence, the court found that the 1st defendant did not seek the leave of the court nor was there any other or further orders of the court on filing of the defence. The trial Magistrate found that the defence having been filed in breach of Order 7 Rule 1, the same cannot stand, and the same was therefore struck out.

8. Aggrieved by the decision, the 1st defendant, now the appellant filed this appeal on the following grounds;

a. That the Learned Trial Magistrate erred in law and fact by striking out the defence on record and therefore occasioned the Appellant miscarriage of justice.

b. That the decision of the trial court was bad in law and in the eyes of a court of equity, and was therefore erroneous.

c. That the decision of the trial court went contrary to the Rules of natural justice and Section 159 of the Constitution of Kenya.

9. On 3rd May 2018, this court gave directions that the appeal be canvassed through written submissions. Both the appellant and the 1st respondent have filed their respective submissions which I have dully considered. The 2nd and 3rd respondents have associated themselves with the submissions of the 1st respondent.

10. It is now well settled that the role of the first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**).

11. The time for filing defence is prescribed in Order 7 Rule 1 of the Civil Procedure Rules which provides as follows:-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service”.

12. In this case the Appellant filed his memorandum of appearance on 09/01/2015. He ought to have filed his statement of Defence on or before 23/01/2015. He however proceeded to file the statement of defence on 12/02/2015. This is twenty days after the time lapsed for filing the statement of defence.

13. The appellant in his submissions has sought to rely on the provisions of Article 159 of the Constitution averring that the duty of the Court is to ensure that parties appearing before it have their disputes arbitrated upon fairly and in a manner that would ensure justice is delivered. He also relies on the cited authority of **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another [2001] eKLR** where the Court held;

“Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its higher calling to do justice by saving the proceedings in issue.”

14. The other cases cited by the appellant are:

(i) Harrison Wanjohi Wambugu vs Felista Wairimu Chege & Another (2013) eKLR.

(ii) Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 others (2013) eKLR.

(iii) Beldina Murai & 9 others vs Amos Wainaina (1979) eKLR.

(iv) Patriotic Guards Ltd vs James Kipchirchir Sambu (2018) eKLR.

15. The appellant further contends that their statement of defence was a valid document as it had been accepted by the registry, it had been paid for and was duly filed.

16. On his part the 1st Respondent submitted that the statement of defence was filed out of time and without leave of the court hence the same was a nullity. It was further submitted that the provisions on amendment and striking out pleadings are in existence in order to deal with such situations. Further, the 1st respondent submitted that the provisions of Article 159 of the Constitution and the Overriding objectives of the Civil Procedure Act could not help a party who circumvents the Rules of the court. He relied on the following cited authorities;

- **Boniface Mutinda Kabaka v David Mutua Kamonde & 51 Others [2018] eKLR,**

- **Nelius Wanjiru v Kenya Broadcasting Corporation & Another [2019] eKLR**

- **Ramji Devji Vekaria Vs Josphe Oyula, Eldoret Civil Appeal (Application) no. 154 of 2010.**

- Dishon Ochieng vs SDA church Kodiaga civil appeal (application) no. 333 of 2010.
- Mukenya Ndunda vs Crater Automobiles Limited (2015) eKLR.

Determination

17. I have considered all the arguments raised herein including the submissions of the parties.

18. Order 2 rule 15 of the Civil Procedure rules provide that:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that— (a) it discloses no reasonable cause of action or defence in law; or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

19. I do agree that the appellant was required to file his statement of defence within 14 days after entry of appearance, failure to which, he ought to have sought leave of the court. I am also in agreement with the submissions of the 1st respondent that documents are not validated by the payment and filing of the same at the registry.

20. I however find that that striking out a pleading is a draconian measure to be employed sparingly and that the court must heed to the overriding objective to do substantive justice to the parties.

21. I have looked at the statement of Defence and the same raises triable issues. The trial Magistrate never sought to analyse the prejudice that will be occasioned to the 1st Respondent (the plaintiff) if the defence was admitted. As rightly submitted by the appellant, the courts worldwide have embraced the Latin maxim **“audi alteram partem”** which means that “No person should be condemned unheard”.

22. I shall exercise my discretion in favour of the Appellant by allowing the appeal but subject to the Appellant paying consideration in terms of costs to the 1st Respondent.

23. I therefore make the following Orders;

(i) The Orders of the trial Magistrate dated 7th April 2015 be and are hereby set aside.

(ii) The defence dated 11th February 2015 and filed on 12th February 2015 is hereby reinstated and is deemed to be properly on record.

(iii) The Appellant is to pay the costs of this suit (the appeal).

(iv) A copy of this Judgment is to be placed in the lower court file and thereafter, the lower court file is to be severed from this file and is to be remitted back to the trial court for determination of the matter.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 7TH DAY OF NOVEMBER, 2019

IN THE PRESENCE OF:-

C/A: Kananu

Murithi holding brief for M. Kariuki for appellant

Wmanzia holding brief for Murango M. for respondent

1st respondent (Bernard Kirimi)

HON. LUCY. N. MBUGUA

ELC JUDGE