



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. APPEAL NO.7 OF 2018 (FORMERLY HCCA 48 OF 2016)

ZACHARIA KARANJA KINYANJUI.....APPELLANT

VERSUS

GEORGE NGALA AWINO.....1ST RESPONDENT

ELIZABETH KIASYO KYULU.....2ND RESPONDENT

RULING

1. Zacharia Karanja Kinyanjui, the Appellant, being aggrieved by the ruling of Hon. P. L. Shinyada, Senior Resident Magistrate of 8th July 2016 in Kisumu C.M.C.C. No. 606 of 2014 filed this appeal raising the following five grounds;

- a) **The learned Trial Magistrate erred in law and in fact in misapprehending the principles of setting aside an ex parte order.**
- b) **The learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellant needed to be heard on his case and he had not been given a chance to be heard.**
- c) **The ruling was in breach of the Constitutional principles of law on fair hearing and access to justice.**
- d) **The decision of the learned Trial Magistrate was biased.**
- e) **The ruling was totally against the law.**

2. The counsel for the parties appeared before the Deputy Registrar on the 26th September 2017 and agreed to have the appeal canvassed through written submissions. The learned Counsel for George Ngala Awino and Elizabeth Kiasyo Kyulu, the Respondents, filed their submission dated the 16th November 2017. The learned Counsel for the Appellant filed theirs dated 6th December 2017 on the 11th December 2017.

3. The appeal which had initially been filed as Kisumu High Court Civil Appeal No. 48 of 2016 was then fixed for judgment on the 29th January 2018 when it was transferred to this court on ground of jurisdiction and registered as Kisumu ELCA No. 7 of 2018.

4. That this being a first appeal on a ruling prosecuted through affidavit evidence and submission, the court will do its own re-evaluation of the evidence and pleading to see whether it would have come to a different conclusions, on the following three areas to which the five grounds are condensed into for the purposes of this judgment;

- a) Whether the Appellant has presented reasonable grounds upon which the learned Trial Magistrate decision should be faulted.
- b) Whether the Appellant was granted an opportunity to be heard.
- c) Whether the learned Trial Magistrate ruling was based on the available evidence and the law.

5. That the court has carefully considered the grounds of appeal, written submission, the record of appeal and come to the following findings;

- a) That the Respondents as the Plaintiffs commenced Kisumu CMCC No. 606 of 2014 vide their plaint dated 3rd December 2014 claiming for Kshs. 380,000/=, costs and interest against the Appellant, who was then the Defendant. The Respondents claim is that the Appellant failed to disclose the invisible underlying encumbrances to Kisumu Municipality/block 10/686, in the nature of

massive water and sewerage pipes belonging to Kisumu Water and Sewerage Company Limited, when they entered into the sale agreement over the plot on the 9th September 2014 under which they had made a deposit of Kshs. 380,000/=. That the discovery of the existence of the said pipes made the plot unsuitable for the purposes they had bought it for and upon notifying the Appellant, he agreed to refund the deposits. That the Appellant later declined to refund the deposit and hence the suit.

b) The Appellant opposed the Respondents claim through the statement of defence dated 19th December 2104. The Appellant's defence as understood by the court is that the Respondents were to blame for failing to conduct pre-contract inquiries through which they would have known of the plot's "**latent and patent**" defects if any. That he has never promised to refund the deposit as the Respondents are the ones in breach of the contract. That incase he is to refund the deposit, it should be less 18% for breach.

c) That trial court record shows that on the 19th March 2015, representatives of counsel on record for the parties fixed the suit for hearing on the 10th June 2015. That however, on that date the Defendant and his counsel did not attend court. The Plaintiffs case was heard and closed and the suit fixed for judgment on the 26th June 2015. Judgment was delivered as scheduled in the absence of both parties and that of counsel for the Defendant. The counsel for the Plaintiffs was represented. That by consent letter dated 17th July 2015 signed by both counsel for the parties and filed in court on the 30th July 2015, and entered as a court order on the 4th August 2015, the judgment entered on the 26th June 2015 was set aside and the case reopened for the Defendant to present his evidence. The defence hearing was then fixed for the 14th October 2015, but adjourned due to the absence of the Defendant and his counsel to 2nd December 2015 by consent. That on the 2nd December 2015, the Defendant and his counsel did not attend court and the trial court marked the defence case closed and judgment fixed for the 18th December 2015 and it was delivered as scheduled. The record shows that the counsel for the Defendant walked into the court room as the delivery of the judgment was coming to the finish. That the Counsel applied for 30 days stay of execution which was promptly granted.

d) That the Defendant then filed the notice of motion dated 21st December 2015 seeking to among others set aside the exparte proceedings. The application was heard and in its ruling of the 24th March 2016, the court observed that it was the second time the Defendant was seeking to set aside the exparte proceedings. The trial court allowed the application under the following terms; "**The Defendant will however pay to the Plaintiff throw away costs of Kshs 10,000/= (Ten thousand) within the next 15 days failure of which the orders granted will automatically lapse and the judgment remain in force. Plaintiff will have the costs of this application also**". The Plaintiff then filed their bill of costs for taxation on the 12th April 2016 which was fixed for hearing on the 4th May 2016. That on that date the court directed that the Defendants notice of motion dated 15th April 2016 for among others expunging the bill of costs and fixing the main suit for hearing be disposed of first. The application was heard on the 13th May 2016 and ruling dismissing it with costs delivered on the 8th July 2016. That is the ruling subject matter of this appeal.

e) That as can be observed from the summary of the lower court's proceedings set out above, the Appellant has not been denied opportunity to present his case before the trial court. That rather, the Appellant has been failing to attend court on the dates fixed for hearing. That **Article 159 (2) (b) of the Constitution of Kenya 2010** requires the court to deliver justice without undue delay. The provisions of **Section 1B (1) (d) of Civil Procedure Act Chapter 21 of Laws of Kenya** calls upon the court in furtherance of the overriding objective specified in **Section 1A** of the said Act of facilitating the just, expeditious proportionate and affordable resolutions of the Civil Disputes to handle such matters with the aim of among others ensuring "**the timely disposal of the proceedings, and all other proceedings in the court, at a costs affordable by the respective parties...**". That **Section 1A (3) of the Civil Procedure Act** places a duty to parties in Civil Proceedings or their advocates to assist the court to further the overriding objective and to effect, participate in the processes of the court and to comply with the directions and orders of the court. That in rejecting the Appellant's application subject matter of the impugned ruling dated 8th July 2016, the learned Trial Magistrate found that the condition given in the ruling of 24th March 2016 was not complied with in the time given and therefore the judgment delivered on the 18th December 2015 was automatically reinstated. That the cheque postdated to the 11th April 2016 could not be taken to have complied with the court order as payment could not have been processed until the 11th April 2016, which was outside the 15 days time given. That the court finds no basis of interfering with the learned trial magistrates finding on the failure by the Defendant to comply with the order of 24th March 2016. That further, the court has a duty to be impartial and do equal treatment to both parties before it and in the process ensure justice is delivered without undue delay and that the court's overriding objective is attained.

f) That the Appellant appear by his conduct of almost always absenting himself during hearing dates, not keen to be heard. That rather, the appellant appears to have been after delaying the matter for unknown reason. That the court proceedings have to come to an end one way or the other and where a party chooses not to take advantage of the opportunity afforded, then the court cannot be faulted for making a determination on the evidence presented before it.

6. That flowing from the foregoing the court finds no merit on the Appellant's appeal on the lower Court's ruling of 8th July 2016. That the appeal is therefore dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2018

In the presence of:

Appellant Absent

Respondents Absent

Counsel M/s Adwar for Appellant

Mr. Olel for Odongo for Respondents

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE