



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL CASE NO.96 OF 2012

THADEUS ODAWA OYOMBE

APPELLANT

VERSUS

BOAZ OWINO

AJWA.....RESPONDENT

(An Appeal arising from, the Ruling of Hon. M.M. Nafula, Resident Magistrate in Bondo P.M.CC No.15 OF 2012 DELIVERED ON THE 6TH July 2012).

RULING

1. Thadeus Odawa Oyombe, the Appellant, commenced this appeal through the memorandum of appeal dated 2nd August 2012 on four grounds on its face. The grounds 1 to 3 are about jurisdiction of the learned trial magistrate to deal and determine the matter, while ground 4 is on whether the learned trial magistrate read, appreciated and correctly interpreted the authorities cited in support of the preliminary objection. The appellant prays for;

- a) The setting aside of the ruling and finding that the learned trial magistrate did not have jurisdiction to hear and determine the suit.
- b) Striking out of the suit filed in the lower court being Bondo PMCC 15 of 2012.
- c) Costs be awarded to the Appellant.

2. The Appellant was the Defendant in the Bondo SRM CC No.15 of 2012 commenced by **Boaz Owino Ajwa**, who is now the Respondent. The copy of the plaint, filed on 8th March 2012 that is in the record of appeal shows that the suit is based on alleged breach of contract for sale of land dated 18th March 2010 and trespass onto land parcel North **Sakwa/Nyawitta/3623**. The prayers in the plaint are for eviction of the Defendant and costs.

3. The appeal was admitted on 1st October 2012 and by consent letter dated 25th March 2015, the counsel for the parties agreed to have the appeal dealt with through written submissions. The Appellant's counsel filed their written submissions dated 18th April 2016 while counsel for the Respondent filed theirs dated 30th April 2016.

4. Upon being served with the suit summonses, the Appellant filed a memorandum of appearance dated

23rd March 2012 and a notice of preliminary objection on a point of laws dated 5th June 2012. The notice raised one issue in the following words;

“That this Honourable court lacks the jurisdiction to hear and/or entertain this matter by virtue of Act 162 (2) (b) of the Constitution of Kenya, 2010 as read with Section 13 (2) of the Environmental Land Court Act, 2011 and Gazette Notice number 1617 dated 9th February 2012.”

In response to the notice to raise a preliminary objection by the Appellant, the Respondent filed grounds of opposition dated 24th July 2012 raising the following issues;

- a) The application is an afterthought.
- b) The application is misconceived and meant to delay the just conclusion of this matter.
- c) The application is totally defective.”

5. The Appellant and Respondent counsel filed written submissions dated 19th June 2012 and 26th June 2012 respectively in the lower court. The learned trial magistrate considered the preliminary objection and the written submissions and rendered the ruling dated 6th July 2012 which is the subject of this appeal. The ruling shows that the learned trial magistrate agreed with the Respondent counsel’s submissions and held as follows:

“ It is true that the defendant’s counsel filed a memo of appearance but they did not put in their defence essentially that means that they have admitted to each and every fact on the plaint.

The court was guided by the authority that was supplied by the Plaintiff’s counsel in

Mukisa Biscuits Co. -v- West End Distributors

1969 E.A where it was held that a preliminary objection is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

In this instant case, the defendant should first (of) all make an application to set aside the interlocutory judgment before he gets any audience before court. The preliminary objection raised by the Defendant is premature and I therefore strike it out with costs to the Plaintiff.”

6. That in support of the preliminary objection, the counsel for the appellant had filed the Defendant’s list of Authorities dated 5th June 2012 consisting of the page 97 of the constitution of Kenya 2010 containing **Article 162**, pages 9 to 11 of the Environment and Land Court Act No.19 of 2011 with **Sections 13(2)** being highlighted and copy of the Hon. Chief Justice Practice Directions on proceedings relating to the Environment and the use and occupation of, and title to land under gazette notice **No.1617** dated 9th February 2012.

7. The counsel for the Respondent filed their list of authorities consisting of the case of **Mukisa Biscuits Manufacturing Co. Ltd –V- West End Distributors Ltd {1969} E.A 696** and made reference to Article 159 of the Constitution of Kenya 2010.

8. In support of this appeal the counsel for the Appellant filed their submissions and list of authorities dated 18th April 2016 while the Respondent’s counsel filed theirs dated 30th April 2016. The submissions filed by the counsel in this court are more or less an expanded mirror of those filed in the lower court.

9. The court having considered the grounds of appeal, submissions by both counsel, and the lower court record comes to the following determinations;

a) That the summons were served on the Appellant who entered appearance through his advocate on record vide the memo dated 23rd March 2012.

b) That upon the Appellant failing to file a defence within the time required, the Respondent requested for interlocutory judgment vide their letter dated 24th April 2012 and filed in court on 27th April 2012. The interlocutory judgment was entered on the 27th April 2012 with directions that the suit be fixed for formal proof.

c) That on the 11th May 2012 the case was fixed for formal proof by consent on the 8th June 2012, on which date the hearing was rescheduled to 22nd June 2012. By then the notice to raise the preliminary objection had been filed on 5th June 2012.

d) That the ruling by the learned trial magistrate merely states that the existence of the interlocutory judgment in favour of the Respondent dated 27th April 2012 meant the Appellant could not have audience before the court to prosecute the preliminary objection. The learned trial magistrate struck out the preliminary objection without making a merit finding on whether or not the court had jurisdiction to hear and determine the matter before it. The learned trial magistrate went ahead to propose that the Appellant should first move the court to have the interlocutory judgment set aside so as to get audience before the court. The court do not find any fault in the position taken by the learned trial magistrate for reasons that, the Appellant having failed to file defence, and the interlocutory judgment having been entered, his subsequent participation in the proceedings would be limited to cross-examining the witnesses called by the Respondent.

e) That the finding in (d) above clearly shows that the four grounds on the memorandum of appeal have no relevance to the learned trial magistrates ruling of 6th July 2012 and are therefore rejected. The Appellant should consider taking the route proposed by the learned trial magistrate to have the interlocutory judgment vacated first, and thereafter move the trial court for a determination on the issue of jurisdiction to hear and determine the suit before it.

10. That flowing from the findings above the Appellant's appeal fails and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18th DAY OF JANUARY 2017

In presence of;

Appellant **absent**

Respondent **absent**

Counsel Mr. Kwenga for Plaintiff/Applicant

Mr Oguso for the Defendant/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/1/2017

18/1/2017

S.M. Kibunja Judge

Oyugi court Assistant

Parties absent

Mr. Kwenga for he Plaintiff

Mr Oguso for the Defendant

Court: Ruling delivered and dated in open court in presence of Mr. Kwenga and Oguso for the Plaintiff and Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/1/2017