



REPUBLIC OF KENYA
IN THE ENVEIROMENT AND LAND COURT
AT MILIMANI
ELC CIVIL APPEAL NO.8 OF 2014

SUGOW ADEN ABDI.....APPELLANT

=VERSUS=

KAMIL DAGANE ABDI.....1ST RESPONDENT

NAFISI MOHAMED MUHUMED.....2ND RESPONDENT

(AN APPEAL FROM THE JUDGEMENT OF HON. D.W MBURU RESIDENT MAGISTRATE dated 2.10.2009 and Ruling dated 22.2.2010 in Garissa Senior Principal Magistrates Court Civil Case No. 9 of 2009).

JUDGEMENT

INTRODUCTION.

1. The Respondents are the administrator and administratrix of the late Sheikh Dagane (Deceased) respectively. The deceased was the legal owner of a property known as Tana Farm No. 31 at Garrissa. The Respondents had initially brought a suit against four defendants including the Appellant herein but the Plaintiff was subsequently amended twice leaving the appellant as the only defendant.

2. The Appellant entered appearance but did not file defence in time. The Respondents applied and obtained entry of judgement on the ground that the Appellant had neither entered appearance nor filed defence. The Appellant thereafter filed defence before the case proceeded for formal proof. The formal proof hearing started on 1st July 2009 but one of the Respondents who had taken the witness stand was stood down to enable him avail a certificate of grant of letters of administration. The hearing was adjourned to 6th July 2009 at 3.00 pm but for reasons not indicated in the record, hearing resumed and was concluded on 7/7/2009.

3. The appellant filed a chamber summons dated 11th December 2009 in which he sought among other prayers setting aside the ex-parte judgement of 2nd October 2009. The appellant's application was fully heard and was dismissed in a ruling which was delivered on 22nd February 2010. This is what prompted the appellant to file this appeal.

The Appeal.

4. The appellant raised 18 grounds of appeal but which can be condensed into 5 as follows:-

a. That the trial Magistrate had no jurisdiction to try the case

b. That the case was resjudicata.

c. That the Respondents had no locus standi to file the suit.

d. That the trial Magistrate failed to appreciate the fact that the appellant had not been served with amended Plaintiff and hearing Notice during the formal proof hearing.

e. That the trial Magistrate failed to appreciate the fact that the appellant's proposed defence raised triable issues.

Submissions by the Appellant

5. The Court directed that the appeal be disposed of by way of written submissions. The appellant filed his submissions on 10th November 2016, in which he submitted that he was denied his right to be heard and that the suit was res-judicata.

Submissions by the Respondents

6. The Respondents filed their submissions 24th February 2017 in which they contend that the suit filed by them is not res judicata and that the appeal by the appellant does not raise any triable issues. That the Respondents are administrators of the estate of the deceased. That the appellant was aware of the existence of the suit as he had been served with the original Plaintiff and summons and entered appearance.

Analysis and issues for determination

7. I have gone through the record of appeal herein and the submissions by the parties to this appeal. The issues which emerge for determination are the following:-

i. Whether the Magistrate had jurisdiction to hear the case.

ii. Whether the case is resjudicata,

iii. Whether the Respondents had locus standi to file the suit.

iv. Whether the Appellant had been served with amended plaintiff and hearing Notice for formal proof.

v. Whether the Appellant's proposed defence raised triable issues.

8. This being a first appeal to this Court, my duty is to consider the evidence adduced before the trial court, evaluate it and reach my own conclusion. See **Selle Vs Associated Motor Boat Company (1963) EA 123.**

9. I will address the issues one by one in the order I have given them hereinabove. The appellant contended that the trial magistrate had no jurisdiction to her the matter as the subject matter of the suit was over 100,000,000/=(One hundred million). The Respondents contended that this is not possible and that even the entire Garissa town cannot be valued at kshs.100,000,000/=. That when the case was filed most of the suitland was bushy and could not be valued at that amount.

10. The suit property seems not to have been registered. This is because during the hearing, there was no title document produced. The Respondents produced various letters to confirm ownership of the land. There was no valuation carried out. The Court is therefore not in a position to ascertain the value of the subject matter. There is no basis upon which this court can find that the trial Magistrate had no jurisdiction to entertain the suit as the size and value of the land is not ascertainable at the moment. The

ground on jurisdiction therefore fails.

11. The appellant argued that the suit was resjudicata . The appellant's contention is that there was Garissa Senior Resident Magistrate's Court Civil case No. 15 of 1994 which had been decided and that therefore the filing of Garissa Senior Principal Magistrate Civil Suit No. 9 of 2009 was res- judicata. The Respondents argued that the latter suit was not res judicata as the parties were different from the previous suit. A look at the record of appeal shows that Garissa SRMCC No.15 of 1994 was filed by the deceased against the present appellant and others. This suit was dismissed for want of prosecution on 13th may 1999. It was not heard on merits and therefore the latter case cannot be res-judicata.If it had been heard and determined on merit, then the issue of res judicata would have come in. I therefore find that Garissa SRMCC No. 9 of 2009 is not res judicata.

12. The Appellant argued that the Respondents had no locus standi to file Garrissa SRMCC No. 9 of 2009. I have looked at the proceedings of the Lower Court. The Respondents produced a certificate of temporary grant dated 16th July 2002. The Respondents filed Garrissa SRMCC 9 of 2009 in 2009. The Respondents therefore had locus standi to bring this suit on behalf of the estate of the deceased.

13. The appellant brought an application seeking to set aside the ex-parte judgement on the ground that he had not been served with amended Plaintiff and had no Notice of the hearing which resulted in the ex-parte judgement. I have looked at the Ruling of the trial Magistrate delivered on 22nd February 2010. In dismissing the Appellant's application , the trial Magistrate stated this:-

“ I have looked at the averments in the supporting affidavit. The defendant avers at paragraph 2 thereof :-

“ That I was never served with copies of the amended Plaintiff (emphasis mine) yet the Plaintiff knew where to find me”.

This statement only talks of the emended Plaintiff. It does not talk about the original Plaintiff and or summons which were filed earlier. It appears that the defendant/applicant deliberately avoided mentioning these in his affidavit. I have looked at the court record and found that indeed the defendant filed a memorandum of appearance on 10th February 2009. He did not file any defence . The fact that the defendant entered appearance only shows that he had been served with Plaintiff and summons otherwise he would not have known that the suit existed”.

14. From what I have quoted hereinabove from the trial Magistrate's ruling, it is clear that the Magistrate appreciated that the Appellant had not been served with an amended Plaintiff. This notwithstanding, the Magistrate went ahead to decline to set aside the ex-parte judgement even after he confirmed that the appellant had entered appearance on 10th February 2009.

15. There is no evidence on record to show that the Appellant was served with a hearing notice for the formal proof. The law requires that a party who has entered appearance but not filed defence is entitled to be served to appear for formal proof. This was not done. The record shows that interlocutory judgement was entered against the appellant on 29th May 2009, on the ground that the Appellant had not entered appearance and filed defence. This was not entirely true as the Appellant had filed memorandum of appearance on 10th February 2009. The Appellant also filed a defence in person on 5th November 2009 albeit after interlocutory judgement had been entered. This defence though irregular on record had not been struck out and the trial magistrate was bound to consider the same when deciding on whether to set aside the ex-parte judgement or not.

16. The Plaintiff had been amended twice and on each occasion summons were issued. The Appellant was never served with the amended plaintiff and summons. The Respondent's Advocates have submitted that the amended Plaintiffs did not introduce any major issue in them other than removing names of defendants who had passed on .With respect to counsel for the Respondents, this is a wrong reasoning. An amended pleading though bringing in minor issues has to be served upon the other parties. The trial Magistrate was

therefore wrong in basing his rejection of the Appellant's application on the appellant's knowledge of the original Paint or earlier Plaint and summons.

17. It is clear that the Appellant was not served with a hearing Notice for the formal proof which had been fixed for 17th June 2009 but could not proceed. It was adjourned to 1st July 2009, when the first Plaintiff started testifying but was stood down to 6th July 2009. Again there is no evidence that the Appellant had been served. The hearing did not take place on 6th July 2009. It resumed on 7th July 2009 but again there is no evidence that the Appellant was served. In the case of **Mbeki & Others Vs Macharia & Another(2005) EA 206**, it was held as follows:-

“The right to be heard is a valued right . It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard”.

18. The appellant having entered appearance was entitled to be served, for formal proof. Had he been served, he would have brought it to the attention of the trial Magistrate that he had a defence on record and this would have led to the magistrate giving orders which would have taken the interest of all the parties into account. I therefore find that the trial magistrate was wrong to reject the appellant's application to set aside the ex-parte judgement.

19. The Appellant and others in the pleadings filed herein contend that they have been on the disputed land for decades. There was also an issue raised as to whether the plot is No. 31 or 88. From the evidence adduced by the first Plaintiff/Respondent during the formal proof hearing, it is clear that no title was produced. What was produced were letters from various agencies. There is therefore a need for the Appellant to be heard on whether the disputed land belongs to the group of 64 members or to the estate of the deceased. There are therefore triable issues raised. Even if the Magistrate had found that there was service which was wrong, he should have considered whether the proposed defence by the Appellant's counsel raised any triable issues.

CONCLUSION

20. It is clear that the trial magistrate was wrong in rejecting to set aside the ex-parte judgement. I allow the Appellant's appeal and set aside the trial magistrate's ruling of 22nd February 2010. In place thereof I allow the Appellants application with the result that the ex-parte judgment of 2nd October 2009 and all consequential orders are hereby set aside. The Appellant is granted leave to defend the suit by Respondents within 21 days from the date hereof. As the property the subject of this suit is based in Garissa, this file is hereby transferred to Garissa Environment and Land Court. For avoidance of any doubt, the period of 21 days shall start running after this file is received in Garissa and is assigned a Garissa ELC number. The Appellant shall have costs of this Appeal.

Dated, Signed and Delivered at **Nairobi** on this **31st** day of **July 2017**.

E. O.OBAGA

JUDGE

In the absence of parties who had been duly informed of the date and time of delivery of judgement

Court Assistant: Hilda

E. O .OBAGA

JUDGE