REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 134 OF 2013

JOHN MATIRU NGANGA……..……APPELLANT

VERSUS

ROBERT MURIITHI NYAMU……...…..……RESPONDENT

(BEING AN APPEAL FROM THE RULING DELIVERED ON 16TH DECEMBER 2010 BY HON. H.N. NDUNGU – S.P.M AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 286 OF 2003)

JUDGMENT

This is in respect to the appellant's appeal against the ruling of **H.N. NDUNGU SENIOR PRINCIPAL MAGISTRATE KERUGOYA** dated 16th December 2010 in **SENIOR PRINCIPAL MAGISTRATE'S COURT KERUGOYA CIVIL CASE No. 286 of 2003** in which the trial magistrate ordered the eviction of the appellant, his servants and agents from plot No. 1A (A) HARAKA MARKET (the suit plot). It was further directed in that ruling that the eviction be carried out by Quickline Auctioneers and the Officer Commanding Wanguru Police Station (OCS) do provide security during the eviction.

Aggrieved by that order, the appellant filed this appeal seeking to set it aside on the following grounds:-

1. That the learned magistrate erred in law and fact in making a ruling against the weight of evidence.

2. That the learned magistrate erred in law and fact in failing to properly analyze the issues before making her decision.

3. That the learned magistrate erred in law and fact by hearing the application in the absence of the appellant's advocate despite the fact that he was genuinely away.

4. That the learned magistrate erred in failing to direct the appellant to either seek services of another counsel or appear in person and the hearing amounted to an ex-parte hearing.

5. That the learned magistrate erred in law in failing to appreciate the gravity of the matter.

6. That the learned magistrate erred by delivering ruling in absence of appellant's counsel in a language the appellant could not understand and by failing to explain to the appellant his right of appeal.

The genesis of this appeal is that the respondent herein **ROBERT MURIITHI NYAMU** had filed a suit

in the subordinate Court against the appellant **JOHN MATIRU NGANGA** seeking

orders that he (the respondent) be put in possession of the suit plot under the provisions of the then **Order XXI Rule 87 of the Civil Procedure Rules.** The appellant filed a defence denying the claim.

The suit was first heard by Mr. J**.N. ONYIENGO (SENIOR RESIDENT MAGISTRATE**) who delivered a judgment in favour of the respondent. That judgment was later set aside on the ground that the appellant did not attend although the hearing date had been taken by consent.

The suit was then set for hearing on 2nd October 2008 and again neither the appellant nor his advocate attended though duly served. Judgment was again entered for the respondent this time by **Mr. S.N. MBUNGI Ag. PRINCIPAL MAGISTRATE** who delivered a judgment on 16th October 2008 in favour of the respondent. This time, an application to set aside that judgment was dismissed by **H.N. NDUNGU (SENIOR PRINCIPAL MAGISTRATE**) on 11th November 2010. There is no evidence to suggest that any appeal was filed against that judgment or ruling.

Thereafter, the respondent filed an application dated 3rd July 2009 seeking to have the appellant evicted from the suit plot. When that application came up for hearing on 2nd December 2010, the appellant was present but his advocate **Mr. BWONWONGA** was not in Court and his brief was held by **Mr. MWAI** who sought an adjournment on the ground that **Mr. BWONWONGA** was before the High Court Nyeri in Civil Suit No. 123 of 2008. **Mr. GACHERU** advocate for the respondent objected to the adjournment reminding the Court that the application had been filed as far back as 2000 and hearing date had been taken by consent. The trial magistrate refused to grant a further adjournment and ordered that the hearing proceeds. It would appear that **Mr. MWAI** thereafter left the Court because the record shows that after **Mr. GACHERU** had argued his application, the appellant said as follows:-

> ***"They cannot evict me".***

In a reserved ruling dated 16th December 2010 and which is the subject of this appeal, the trial magistrate allowed the application and granted the orders sought.

It is clear that under ***Order XXI Rule 87*** ***(now Order 22 Rule 83 of the Civil Procedure Rules)*** such orders as were granted by the trial magistrate are not appealable as of right. Such an order as was made by the trial magistrate required leave to appeal under the provisions of ***Order XLII (now Order 43 of the Civil Procedure Rules***. As no such leave was sought nor granted, it follows that this appeal is incompetent and should be struck out.

I have nonetheless considered the appeal on its merit as it was admitted to hearing.

The main ground in his appeal is that the trial magistrate erred in law and fact by failing to appreciate that the appellant had an advocate who was away on genuine reasons and in failing to direct the appellant to either seek the services of another advocate or appear in person and therefore the hearing of the application amounted to an ex-parte hearing.

It is clear from the record that the appellant's advocate **Mr. BWONWONGA** had notice of the date the application was listed for hearing. He instructed **Mr. MWAI** to hold his brief and seek an adjournment which was rejected for reasons that are clear. The trial magistrate was particularly concerned that the matter had been pending since 2000 as indicated by **Mr. GACHERU** advocate for the respondent. In refusing to further adjourn the case, the trial magistrate was exercising her discretion. An appellate Court should be slow to reverse the trial Court's exercise of its discretion unless it was exercised on wrong principles, was un-reasonable or took into account irrelevant matters or failed to take into account matters that it ought to have considered and in the process arrived at a decision that was wrong. In the circumstances of this case, I see no reason to fault the trial magistrate's exercise of discretion in refusing to further adjourn the case. The record is clear that this was an old matter which had been adjourned severally at the request of the appellant. In exercising her discretion not to adjourn this case further, the trial magistrate acted on sound basis.

On the ground that the trial magistrate failed to direct the appellant to seek the services of another advocate, there is nothing on the record to show that the appellant made that request. When the application for adjournment was rejected, **Mr. MWAI** advocate who was holding brief for **Mr. BWONWONGA** advocate left the Court and the appellant himself addressed the Court saying:-

> ***"They cannot evict me"***

The trial magistrate considered that response in her ruling and found that the application was not "***seriously opposed".*** She was entitled to make that finding because that is what the appellant himself told the Court in response to the application seeking his eviction from the suit plot.

It cannot be true, as alleged by the appellant, that the application was heard Ex-parte. The ***BLACK'S LAW DICTIONARY*** defines ex-parte as follows:-

> ***"Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to Court action taken by one party without notice to the other".***

When an advocate is present in Court and leaves when his application for adjournment is refused and the party proceeds to address the Court as happened in this case, those proceedings do not amount to an ex-parte hearing of a case. An ex-parte hearing must connote a hearing that proceeds without notice to the other party. In this case both the appellant and his advocate had notice of the hearing and the appellant attended the Court and responded to the application.

On the ground that the trial Court erred in law and fact by failing to analyze the issues or to appreciate the gravity of the matter, nothing can be further from the truth. The ruling of the trial magistrate reads as follows at page 17:-

> ***"I have considered (sic). The application by its very nature is quite straight forward as the matter has been finalized. The defendant/respondent did not appeal from the judgment of the Court given way back on 16th October 2008. Under the circumstances, it is only fair and just that the orders sought herein be granted"***

There was really nothing placed before the trial magistrate to persuade her from not putting the respondent into possession of the suit plot in furtherance of a judgment that had been obtained two years earlier.

On the complaint that the trial magistrate erred by delivering a ruling in the absence of the appellant's advocate and in a language that the appellant could not understand, and that the trial magistrate did not explain to him the right of appeal, the appellant was himself in Court on 2nd December 2010 when the trial magistrate heard the application and reserved the ruling for 16th December 2010. It was his responsibility to inform his advocate to attend Court to take the ruling. If an advocate does not attend the Court for ruling or judgment, the Court is entitled to deliver the same to the parties themselves if they are in Court and in this case both parties were present.

There is nothing to suggest that the appellant did not understand the language of the Court. The record of 2nd December 2010 shows that he addressed the Court and so he must have understood what transpired.

On the ground that the trial Court did not explain to him his right of appeal, I have indicated above that any appeal from the orders issued on 16th December 2010 was by leave of the Court and not as of right.

The up-shot of the above is that this appeal is not only in-competent but also un-meritorious. It is accordingly dismissed with costs to the respondent.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Judgment dated, signed and delivered in open Court this 30th day of September 2016.

Mr. Mwangi for Mr. Gacheru for the Respondent present

Mr. Ombachi for the Appellant absent

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016