Nasoro & another (Suing on their own behalf and behalf of all the residents of Mpirani Area, Miritini Location Mombasa occupying CR 43800) v Golden Sparrow Trading Limited & another (Civil Appeal 62 of 2020) [2023] KECA 471 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KECA 471 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 62 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

APRIL 28, 2023

BETWEEN

ALI NASORO ..... 1ST APPELLANT

KHAMIS MOGUSU ..... 2ND APPELLANT

SUING ON THEIR OWN BEHALF AND BEHALF OF ALL THE RESIDENTS OF MPIRANI AREA, MIRITINI LOCATION MOMBASA OCCUPYING CR 43800

AND

GOLDEN SPARROW TRADING LIMITED ..... 1ST RESPONDENT

AFRICAN GAS & OIL CO LTD ..... 2ND RESPONDENT

(Being an appeal from the Ruling and order of the ELC Court of Kenya at Mombasa rendered by Hon Mr Justice C. K. Yano on 10th July 2020 in ELC Case 59 of 2009)

JUDGMENT

1. Before us is an appeal arising from the Ruling of Hon Mr Justice CK Yano dated July 10, 2020 in Mombasa Environment and Land Court (ELC) Case No 59 of 2009. The said ruling arose from the application dated October 14, 2019. By that application, the Appellants herein, who were the Plaintiffs before the ELC, sought that the firm of Messrs Masore Nyangáu & Co Advocates be allowed to come on record for the Appellants, and that the Court be pleased to recall and reopen the case and proceed to set aside or vary the decree entered by consent and issued on March 3, 2015 that marked the entire suit as fully settled. It was further sought that leave be granted to the Appellants to amend their plaint. The application, was supported by an affidavit sworn by the 1st Appellant, Ali Nasoro, on October 14, 2019.

2. The genesis of the matter, according to the deponent was that, through the firm of Maranga Maosa & Co Associates Advocates, the Appellants filed the suit against the Respondents for compensation as a result of unlawful eviction from Land Parcel Title No CR 43800, Mpirani Area, Miritini Location, Mombasa County (the suit property). That suit was a representative suit filed by the two Appellants on behalf of 223 Plaintiffs who were all residents of the suit property, save for the 1st Appellant who was merely nominated by the other plaintiffs to bring the suit on their behalf due to his knowledge of the surrounding area.

3. According to the deponent, in a ruling of May 14, 2010, the court directed a valuation be carried out to ascertain every Appellant's claim over the suit land. Though that valuation was carried out and a valuation report dated January 13, 2011 prepared by Messrs Value Consultant Limited, that Report was, however, not brought to the attention of the court. When the Appellants took up the issue with their said advocates, their relationship turned sour and due to lack of confidence, the parties represented by the 1st Appellant, save for the 2nd Appellant, sought alternative representation by instructing Messrs Kirui & Co Advocates to take over the matter on their behalf. Pursuant to the foregoing, the firm of Maranga Maosa & Co Associates Advocates released the physical file containing all the documents the Appellants intended to rely on to Kirui & Co Advocates.

4. Later the 1st Appellant who represented the interests of 222 Plaintiffs learned that the 2nd Appellant, having fallen out with the other parties, proceeded to compromise his individual claim against the Respondents in a consent executed between Messrs Maranga Maosa & Co Associates Advocates for the 2nd Appellant and Messrs Oloo & Chatur Advocates for the Respondents. However, from its wording, the consent marked the entire suit as settled upon payment to Messrs Maranga Maosa & Co Associates Advocates of Kshs 4,023,200/- (inclusive of costs). That consent was eventually adopted as the judgement of the court on January 29, 2015.

5. The 1st Appellant's decision to challenge the said consent was informed by the fact that it did not reflect the wishes of the Plaintiffs who were represented by the 1st Appellant as it only benefited the 2nd Appellant and the consent was not authorized by the other Plaintiffs. As a result of the said consent, the Plaintiffs were evicted from the suit property without either being relocated or being compensated by the Respondents. By the time of the filing of the application, it was disclosed that some of the plaintiffs were deceased. It was therefore sought that upon leave being granted to the said firm of Masore Nyangáu & Company Advocates to come on record, the said consent be set aside and that leave be granted to the Appellants to amend the plaint. Since all the parties would be given the opportunity to present their cases, it was averred that no prejudice would be occasioned to the Respondents by granting the application.

6. The application was opposed by way of grounds of opposition. These were that the omnibus manner in which the application was conceived and formulated rendered it fatally defective; that since the 1st Appellant had no demonstrable interest in the suit land and the 2nd Appellant was deceased, there was no representative suit capable of being revived and/or maintained thereafter; that the application was beset by unexplained laches, having been filed after an inordinate delay; and that the deponent of the supporting affidavit had not demonstrated that he had capacity to represent the alleged unnamed plaintiffs whose exact number had not been disclosed.

7. In his ruling, the learned judge declined to disallow the application on the ground that it was omnibus and proceeded to consider the substantive prayers. The Court however found that there was no notice of change of advocates from Messrs Maranga Maosa & Associates Advocates to Messrs Kirui & Co Advocates for any of the Plaintiffs and that from the record, the firm of Maranga Maosa & Associates Advocates remained on record until the time the suit was marked as settled. The Court also found that

from the manner in which the application was drawn, it appeared that the firm of Masore Nyangáu & Company Advocates intended to come on record for all the Plaintiffs, including the 2nd Appellant, though the 1st Appellant deposed that some of the Plaintiffs were deceased hence could not instruct the said firm to represent them. It was further noted that none of the persons listed as the plaintiffs signed the list as required under Order 1 rule 8(2) of the *Civil Procedure Rules*. According to the court, without a prayer for substitution of the deceased plaintiffs, the court could not grant leave to the said firm to come on record for the parties who were not specified some of whom were deceased.

8. Dealing with the requirements for representative suit under Order 1 Rule 8 of the Civil Procedure Rules, the Court found that there was no order sought directing service of the notice of the suit to those affected by the suit as required hence the suit was defective ab initio and there was no representative suit capable of being reinstated. It was further found that as the 1st Appellant had admitted that he had never resided on the suit property, he had no interest in the suit land. Further, as the 2nd Appellant who was interested in the suit was dead, it was not known who the 1st Appellant was representing and in what capacity since the substantive parties had not sought for the revival of the suit.

9. The learned judge found that the consent which was executed by the advocates for the parties was a product of prolonged negotiations between the parties and the conditions for setting aside a consent judgement had not been satisfied. It was also found that the application was beset with laches and was brought after unexplained inordinate delay. In addition, it was found that the consent was entered into on January 29, 2015 while the application was only filed on October 17, 2019, after a period of over 4 years, 10 months. Accordingly, the court rejected the application for reinstatement of the suit. It therefore did not consider the prayer for amendment. In the result, the entire application was dismissed with costs to the Respondents.

10. When this matter was called out for hearing on the court's virtual platform on November 10, 2022, Learned counsel Mr Masore appeared with Mr Muriithi for the Appellant while Mr Busieka appeared for the Respondents. Learned counsel relied on their respective written submissions which they highlighted.

11. On behalf of the Appellants, it was submitted that the learned judge by finding that the 1st Appellant had no capacity to bring the suit, did not consider the Respondents' defence which never questioned the 1st Appellant's capacity to bring the suit. According to the Appellants, the learned Judge's decision was contrary to the holding in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR* regarding the locus standi to bring a suit on behalf of other persons. It was further submitted that in his decision, the learned Judge did not consider the fact that the Respondents had undertaken to relocate the Appellants to another land and to compensate them for the disturbance and investments on the suit property. It was further submitted that though the learned Judge found that the suit was defective, that issue was not raised by the Respondents.

12. It was submitted that the learned judge failed to appreciate the object of issuing notice under Order 1 Rule 8 of the Civil Procedure Rules which is to afford an opportunity to the parties to object to the suit. According to the Appellants, the object of Order 1 Rule 8(2) was met since the persons being represented were specifically identified and a full list offered. Besides, the Respondents in their Statement of Defence never refuted the list of the affected class filed with the suit when they undertook to relocate and compensate the Appellants. Therefore, the absence of the notice needed not have preoccupied the learned Judge's mind the way it did.

13. While conceding that the 2nd Appellant was deceased, it was submitted, based on *Moon vs Atherton [1972] 3 All ER* 145 and *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu [2019] eKLR*, that the 1st and 2nd Appellants were the full parties to the action in the sense that they

are liable for the costs of the litigation. The other parties, who were not named, it was submitted, were still parties to the suit. Therefore, in this case, it was quite in order for the 1st Appellant to seek leave to amend the plaint to, inter alia, allow substitution of the 2nd Appellant with a living Appellant which remedy was available under Order 8 Rule 3 of the Civil Procedure Rules and not exclusively under Order 24 of the Civil Procedure Rules as tacitly suggested by the learned Judge. In any case, it was submitted that substitution could only be done after the suit was reopened and the consent decree set aside as it would make no sense for the legal representatives of the members of the class who had passed away to seek substitution in a suit where jurisdiction of the court was terminated by the consent decree.

14. According to the Appellants, it is clear from the record, that the replacement of the firm of M/S Maranga Maosa & Associates by M/S Kirui & Co Advocates was acknowledged by both the advocates then on record. However, the Deputy Registrar acknowledged that the issue of representation was unresolved. Accordingly, the fact that the consent was recorded without that issue being resolved was a sufficient reason to set the same aside since the consent was diametrically opposed to the interests of the other plaintiffs save for the 2nd Appellant and was contrary to public policy that the court ought to do justice.

15. The Appellants faulted the learned Judge for failing to consider the uncontroverted reasons for the delay in bringing the application which were set out in the supporting affidavit such as the documented hostility between the advocates over representation, pendency of disciplinary proceedings between the advocates at the Ombudsman and the Advocates' Disciplinary Tribunal, scattering of the plaintiffs after eviction from the suit property and M/S Kirui Advocates folding up operations in Mombasa without leaving a trace yet they had taken over material documents from M/S Maranga Maosa & Associates.

16. Based on *Standard Chartered Financial Services Limited and 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited a 2 others [2016) eKLR*, it was submitted that the learned Judge ought to have freed himself from the shackles of finality in litigation to obviate the manifest injustice and absurdity.

17. Based on the foregoing, we were urged to allow the appeal, reverse the order of the trial court of July 10, 2020 and substitute therefor an order allowing the Notice of Motion of October 14, 2019 as prayed together with the costs of this appeal and costs in the trial court.

18. The Respondents, in their submissins merely reiterated the findings made by the learned Judge and supported the same as being corrrrect. They sought for the dismissal of the appeal with costs.

Analysis and Determination

19. We have considered the written submissions by and on behalf of the parties herein as highlighted by learned counsel.

20. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions always bearing in mind that we have neither seen nor heard the witnesses and hence we should make due allowance in this respect. However, we are not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. See *Selle v Associated Motor Boat Co [1968] EA 123*, *Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 EACA 270* and *Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212*.

21. In this case, the learned Judge dismissed the Appellants' application on the grounds there was no evidence of change of advocates from M/S Maranga Maosa & Associates to M/s Kirui and Co Advocates hence the consent was entered into by the advocates who were properly on record; that in light of the death of some of the parties including the 2nd Appellant, the limb seeking leave to come on record for all the plaintiffs could not be granted without those parties being substituted; that there was no proper representative suit before the court that was capable of being reinstated or maintained; that the suit could not be reinstated as the 1st Appellant had no interest in the suit land and the 2nd Appellant was deceased; that the conditions for setting aside a consent judgement were not satisfied as the consent was signed by the advocates on record who had the authority to do so; and that the application was caught up by laches.

22. In determining this appeal, it is important to emphasize that what was coming up before the learned Judge was an application seeking leave by the advocates to come on record, reinstatement of the suit, setting aside a consent judgement and leave to amend the plaint. In our view the issue of the defect in the suit based on the failure to comply with Order 1 Rule 8 of the Civil Procedure Rules was not before the court at that time. It could not therefore be a basis for disallowing the application. That was an issue that went to the competency of the suit and could only be dealt with in an application seeking to have the suit struck out on that ground. In other words, the learned Judge was not properly seized of the issue of the competency of the suit. Similarly, as regards the locus of the 1st Appellant to bring the suit on behalf of the other Plaintiffs, that issue was not a matter that was properly before the learned Judge. In our view, in light of the findings in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR, that was a matter that could only be determined after affording the parties the opportunity to properly ventilate the issue and not as a response to an application for setting aside a consent judgement or order.

23. As regards substitution, where a sole party has passed away, it is only the legal representative who can apply for the same to be revived. In this case, there were two Appellants who were representing the other plaintiffs. One of the Appellants, the 2nd Appellant, admittedly passed away while the 1st Appellant was alive. The 1st Appellant's case was that the alleged compromise did not have his blessing and the blessings of the other Plaintiffs whose interests he represented and who were not parties to it and hence the consent was not beneficial to them. In our view, the matter before the court was not one where a party was dead and substitution was required, but where a party was seeking setting aside the judgement or order on the ground that he was not a party to the alleged consent. The question that then arises is whether such a consent which was undoubtedly favourable to the deceased 2nd Appellant could be set aside without the estate of the deceased 2nd Appellant being given an opportunity of being heard in the matter.

24. In this case, in attempt to go round this issue, the application sought leave to have the firm Masore Nyangáu & Company Advocates come on record for both the 1st and 2nd Appellants. That application, as was expected, met resistance since the 2nd Appellant was deceased and could not give instructions to the said firm to act for it. In our view, nothing barred the 2nd Appellant from being substituted even after the consent order since substitution may be done even after judgement where execution is pending. It is only after the successful substitution that a competent application could be made to set aside the consent order.

25. It is therefore our view that the application, in so far as it sought to have the consent order set aside before the estate of the 2nd Appellant was properly brought into the suit, was premature and if successful would have violated the rules of natural justice. Based on the foregoing we agree with the decision of the learned Jude in dismissing the application.

26. The Appellants took the view that the matter could be dealt with under Order 8 Rule 3 of the Civil Procedure Rules and not exclusively under Order 24 of the Civil Procedure Rules. Order 8 deals with amendments and not substitution of parties which is what the Appellants were seeking. Substitution of parties is dealt with in Order 1 Rule 10 of the Civil Procedure Rules. However, the law as we understand it is that where a party is deceased, he can only be replaced by way of substitution pursuant to Order 24 of the Civil Procedure Rules and not by merely amending the pleading. See *Auto Garage and Others v Motokov (No 3) [1971] EA 514*.

27. In light of our finding on that issue, it is our view that it is no longer necessary for us to deal with the other issues such as whether the application was brought after inordinate delay, whether there was a valid change of advocates or whether the application satisfied the conditions for the setting aside of a consent judgement.

28. In conclusion therefore, the appeal fails and is dismissed. Since the application was purportedly brought in the name of the appellants one of whom was deceased, we make no order as to the costs of this appeal.

29. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2023.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR