



IN THE COURT OF APPEAL

AT NYERI

[CORAM: OKWENGU, KIAGE & SICHALE, J.J.A.]

CIVIL APPEAL NO. 151 OF 2017

BETWEEN

NTARANGWI M'IKIARA.....APPELLANT

AND

JACKSON MUNYUA MUTUERA.....RESPONDENT

(Being an appeal from the ruling and order of High Court of Kenya at Meru (Lady Justice Mbugua.) delivered on 12th July 2017 **In ELC Case No. 202 of 1995**)

JUDGMENT OF THE COURT

The appellant, **Ntarangwi M'ikiara** has filed an appeal against the ruling and orders made in **ELC Case No. 202 of 1995** on **12th July 2017**, wherein the court declined to grant his application to produce a document in the course of a witness' testimony which had not been included in the appellant's list of documents.

A brief background will provide context.

The appellant filed his list of documents on **24th February 2016** and the suit was eventually certified as ready for hearing after the parties affirmed that they had complied with **Order 11** of the **Civil Procedure Act** during the pre-trial conference. As the case proceeded for hearing on **8th May, 2017**, the appellant's witness attempted to produce the "**proper minutes of the**

Town Planning and Works Committee held on 17th January 1978".

The respondent raised an objection claiming that pre-trial directions had been taken and that the production of the document when the hearing had already started was an ambush. This objection was upheld. Being dissatisfied by the order, the appellant preferred this appeal, raising 6 grounds in their memorandum of appeal dated **18th October, 2017** that:

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1. The Learned Judge made considerable error of interpretation of the meaning and intent of “the overriding objective” of the Act and selectively emphasized out of context the portion of the law that suited her already biased view,
2. The Learned Judge further exhibited her poverty of understanding of the Constitution by misinterpretation and misapplication of Article 159(2)(b) of the Constitution,
3. The Learned Judge erred in law in misapplication of the clear procedural directions contained under Order 11 of the Civil Procedure Rules,
4. The Learned Judge failed to appreciate the whole conception of the procedural law and substantive law. She also failed to appreciate the rules of evidence with respect to admissibility and rejection of evidence in Civil Proceedings,
5. The Learned Judge preferred to quote the law and authorities without citation or reference so that nobody else could track the contextual meaning of ratio-decidenti or the principle of law declared under those authorities,

6. The appellant will pray this court to set aside the orders of the learned Judge and direct that the evidence rejected by the learned Judge be admitted and the suit to proceed before a different Judge”.

When the appeal came up for hearing on **28th July, 2020**, learned counsel **Miss Maore** who appeared for the appellant informed the court that the matter in the superior court had been determined in the respondents favour and that the appellant had filed an appeal against that decision, being **Civil Appeal No. 288A of 2019**. She urged the Court to allow the minutes of the town planning and works committee dated **17th January 1978** as additional evidence to be considered in the already filed appeal.

Opposing the appeal, **Mr. Kariuki** for the respondent submitted that the appeal had been overtaken by events given that a final determination had been delivered by the ELC court. Nevertheless, he submitted that the appellant had not given an explanation as to why the new document sought to be produced was not filed in their list of documents. Citing the case of **Topen Industries Limited v Afrolite Industries Limited [2000] eKLR** counsel contended that the appellant’s application to produce new evidence was unjust and amounted to an ambush. Counsel urged us to dismiss the appeal.

We have considered the record, the submissions of the parties and the law. The crisp issue for our determination is whether in the circumstances, this Court should interfere with the exercise of discretion by the trial court.

At the onset, it is true to say that it is common ground that final judgment in **ELC Case No. 202 of 1995** was delivered by the court on **22nd May, 2019** in favour of the respondent. We note that the appeal herein arose from an interlocutory ruling by the trial court and that the appellant has since appealed against the final judgment vide **Civil Appeal No. 288A of 2019**.

It is trite that once a court has made a final pronouncement on a matter, it cannot re-open the case save for clerical or arithmetical errors. Essentially, the orders sought in this appeal have the effect of attempting to re-open the case before the trial court. The appellant’s intention as stated in his memorandum of appeal is to set aside the orders of the learned Judge and for the Court to direct that the evidence rejected by the learned Judge be admitted and the suit to proceed before a different Judge. In light of the final determination by the trial court it is our view that the appeal before us is untenable as there is a finality to the proceedings before the ELC as pertains to this matter and consequently, the trial court has been rendered *functus officio*.

The appellant’s counsel’s proposition that this Court allows the document in question to be used as evidence in the filed appeal, similarly cannot hold as such orders can only be granted where this Court in the relevant appeal has been moved under **Rule 29 (1) (b)** of this Court’s Rules.

In the end we find that the appeal before us has been overtaken by events and has no legs to stand on.

Following our sentiments above, we find it unnecessary to determine the issue as to whether or not, the trial court exercised its discretion judiciously. In the circumstances, the appeal must fail. We therefore dismiss the appeal with costs to the respondent.

Dated and Delivered at Nairobi this 4th day of December, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR