



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL NO. 7 OF 2016**

**BETWEEN**

**PAUL LAGAT.....FIRST APPELLANT**

**FREDRICK GICIMU KURIA.....SECOND APPELLANT**

**SIMON KAMAU NG'ANG'A.....THIRD APPELLANT**

**PETER JUMA MWANDA.....FOURTH APPELLANT**

**RICHARD WAFULA.....FIFTH APPELLANT**

**JACKSON KOSKEL.....SIXTH APPELLANT**

**FRANCIS MWARA.....SEVENTH APPELLANT**

**JOSEPH KIRWA CHUMO.....EIGHTH APPELLANT**

**DANIEL KIPLAGAT.....NINTH APPELLANT**

**AND**

**DAUGLAS NGUNCHIRI WAINCHUNGO.....RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya*

*at Kitale (Obaga, J.) dated 10<sup>th</sup> December, 2014*

**in**

**CIVIL CASE NO. 92 OF 2004)**

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**JUDGMENT OF THE COURT**

[1] The Respondent, **Douglas Ngunchiri Wainchungo**, sued the 1<sup>st</sup> to 7<sup>th</sup> appellants in the High Court at Kitale, seeking a declaration that Parcel of land No. LR 838/22, original no. 838/8/2 (herein the suit property) belongs to him and an order for the eviction of the 1<sup>st</sup> to 7<sup>th</sup> appellants, their agents or servants or anyone claiming from them. The respondent's suit was based on the fact that he was the owner of the suit property, having purchased it from its previous owner, Hasham Lalji Properties Limited.

[2] The 1<sup>st</sup> to 6<sup>th</sup> appellants filed a joint defence, in which they denied that the suit property belonged to the respondent, and denied having trespassed onto the suit property. They maintained that the property belonged to the estate of the late David Ngelechei Chumo and Leah Chepkoech Chumo to whom they have continued to pay rent. The 7<sup>th</sup> appellant never filed any defence and the respondent applied for judgment in default.

[3] By an application dated 1<sup>st</sup> March, 2010, the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> appellants applied and were enjoined in the suit as defendants. They then filed a defence and counterclaim in which they maintained that they were the lawful owners of the suit property, having purchased the same from Hasham Lalji Properties Limited. They sought a declaration that they were the sole legal owners of the suit property, and an order of permanent injunction restraining the respondent from trespassing or entering into or in any manner interfering with their ownership, use and possession.

[4] On the 5<sup>th</sup> June, 2014, the matter was listed for hearing. The respondent's counsel was present, and Mr. Wafula, the counsel for the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> appellants was also present. Mr. Buluma, counsel for the 1<sup>st</sup> to 7<sup>th</sup> appellants though served with the hearing notice, was absent. Hearing of the suit proceeded and the respondent testified and was cross examined.

[5] In his evidence, the respondent produced a Deed of Assignment dated 4<sup>th</sup> May, 2000, signed between him and Hasham Lalji Properties Limited through which Hasham Lalji Properties Limited assigned its interests in the suit property to him. He explained that he did not take physical possession of the suit property as there were tenants who were on the property. However, his lawyers wrote to the tenants to advise them on the change of ownership. Thereafter the tenants paid rent to him for a period of three (3) months then stopped. Despite demands from his lawyers the tenants did not pay any further rent, and the respondent therefore filed the suit seeking their eviction.

[6] Upon being examined, the respondent explained that the letter offering the suit property for sale, to the Chumo family who were tenants in the suit property was written after he had bought the suit property. The respondent maintained that his Deed of Assignment was signed by Ismail Lalji who was a Director in Hasham Lalji Properties Limited.

[7] The suit was adjourned to 17<sup>th</sup> September, 2014, for defence hearing at the request of the appellants' advocate. However, when the suit came up for defence hearing on 17<sup>th</sup> September, 2014, an application for adjournment was made on behalf of the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> appellants which application was rejected, whereupon the appellants having no witness had to close their case.

[8] The learned judge having considered the evidence before him found that the respondent had proved his case and issued a declaration that he was the sole owner of the suit property and further directed that the appellants be evicted from the suit property. The learned judge also dismissed the counterclaim lodged by the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> appellants for lack of evidence.

[9] The 1<sup>st</sup> to 9<sup>th</sup> appellants are now before us seeking to have the judgment of the trial judge set aside and the suit referred back to the High Court for rehearing. The appellants contend, that the learned judge shut them out of the seat of justice by denying them a hearing and failing to consider whether the firm of Buluma & Company Advocates had been served, and also making a finding whether the 8<sup>th</sup> to 10<sup>th</sup> respondents had been served with a hearing notice. They also contend that by refusing an adjournment, the learned judge shut out the evidence of a material witness Diamond Lalji, who had sold the suit property to the 8<sup>th</sup> to 10<sup>th</sup> respondents.

[10] The hearing of the appeal, proceeded by way of written submissions that were duly filed by the parties' counsel. For the appellant it was submitted that the oxygen rule requires that a party who is willing to be heard, be given opportunity by the court to be heard. In this regard the appellants relied on **Continental Butchery Limited vs Dhiwa [1978] KLR**, where the court held that a party to a civil litigation is not to be deprived of his right to have his case tried in a proper trial where if necessary, there has been discovery and oral evidence subjected to cross examination.

[11] The appellants urged that their defence and counterclaim raised triable issues, that it was therefore in the interest of justice that they be granted an opportunity to be heard. The appellants relied on **Fourty Aviation Limited vs Tradewinds Aviation Services**, Civil Appeal No. 52 of 2010, where it was held that only one triable issue was enough to allow the appellant to be heard on its defence.

[12] In his submissions, the respondent argued, that the appellants appeal was against the orders made by the court on the 17<sup>th</sup> September, 2014 rejecting their application for an adjournment; that no notice of appeal was filed against the orders made on 17<sup>th</sup> September, 2014; that it was only after the judgment was delivered on 10<sup>th</sup> December, 2014, that a notice of appeal was filed on 16<sup>th</sup> December, 2014, and a memorandum of appeal was lodged against the judgment on 21<sup>st</sup> December, 2015, challenging the orders of 17<sup>th</sup> September, 2014; and that the appeal was defective having been filed out of time.

[13] In regard to the judgment, the respondent maintained that he adduced evidence which was not controverted or shaken during cross examination. The respondent submitted that the appellants failed to attend court for defence hearing on 17<sup>th</sup> September, 2014, and no valid reason was given for their absence and that indolence and negligence could not be excused under **Article 159** of the **Constitution**. He therefore urged the Court to dismiss the appeal.

[14] Having considered this appeal and the submissions of both parties, we find that although the appeal is against the judgment of 10<sup>th</sup> December, 2014, the orders sought are actually against the ruling delivered on 17<sup>th</sup> September, 2014, rejecting the application for adjournment. To the extent that no notice of appeal was filed against this ruling, the appeal seeking to impeach the order made in the ruling is defective as having been filed out of time and without leave.

[15] This notwithstanding, we have perused the proceedings of the trial court and two things stand out. First, on 15<sup>th</sup> October, 2007, the hearing of the suit had proceeded ex-parte when the 1<sup>st</sup> to 6<sup>th</sup> appellants' counsel failed to attend court. Following an application made by the 1<sup>st</sup> to 6<sup>th</sup> appellants' counsel, these proceedings were set aside by consent and the appellants allowed to defend the suit.

[16] Secondly, on the 5<sup>th</sup> June, 2014, the 1<sup>st</sup> to 6<sup>th</sup> appellants' counsel though served failed to attend court. After the hearing of the respondent's case had been closed, the 8<sup>th</sup> to 10<sup>th</sup> appellants' advocates sought a date for the defence hearing indicating that he had not been able to contact the 8<sup>th</sup> to 10<sup>th</sup> appellants. The court obliged and fixed the matter for defence hearing on 17<sup>th</sup> September, 2014. Therefore, the

appellants had more than three (3) months within which to prepare for the defence hearing. However, on the scheduled date, Mr. Wafula, the 8<sup>th</sup> to 10<sup>th</sup> appellant's advocate applied for an adjournment stating as follows:

***“I am not ready to proceed. We intend to call the 10<sup>th</sup> defendant to testify but he is not available. He works with Madison Insurance. We informed him but he was not able to come. I also pray for witness summons to Diamond Lalji.”***

[17] The advocate for 1<sup>st</sup> to 6<sup>th</sup> appellants was absent and in rejecting the application for adjournment, the trial judge stated as follows:

***“I have considered the application for adjournment and the objection thereto by counsel for the plaintiff. This case has been in court for long. It was filed in 2004. The defendants have been the cause of delay. At some stage their advocate wanted to cease acting only to turn round and say that he had instructions. We are informed that one of the defendants was informed of today's date but he is not present. There is no reason given why he is not present. Another witness is also said to be away. He is Diamond Lalji. His whereabouts are not known. Today's date was taken on 5<sup>th</sup> June, 2014. There is no reason given why the witness could not be availed. The defendants are out to delay this matter. The application for adjournment is rejected.”***

[18] In our view, the trial judge cannot be faulted for having rejected the application for adjournment. The appellants having been given three (3) months within which to prepare for their defence, there was no good reason given as to why the defence witnesses were not available on the scheduled date. It is true that the appellants were entitled to a hearing. That opportunity was given to them but they squandered it. Moreover, justice cuts both ways. The court was entitled to also take the interests of the respondent into account. The suit had been pending for about ten (10) years, and there was need to bring the litigation to conclusion. In the circumstances, the appellant's contention that they were denied an opportunity to be heard has no merit. The 1<sup>st</sup> to 6<sup>th</sup> appellants did apply to have the judgment delivered on 10<sup>th</sup> December, 2014, set aside. That application was heard and was dismissed by the High Court on 10<sup>th</sup> February, 2015. That dismissal is not subject of the appeal before us.

[19] Finally, in regard to the substantive claim, in the absence of any evidence from the appellants, the respondent's evidence stood unchallenged. In addition, the respondent produced the deed of assignment that confirmed that he had indeed acquired an interest in the suit property. Thus, there was sufficient evidence before the trial court in support of the respondent's claim. The trial judge was right in giving judgment for the respondent and dismissing the counterclaim.

[20] In the circumstances, we find no merit in this appeal. It is dismissed with costs.

**DATED and delivered at Eldoret this 17<sup>th</sup> day of January, 2019**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**