



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: P. WAKI, HANNAH OKWENGU & J. MOHAMMED, JJA.

CIVIL APPEAL NO. 55 OF 2017

BETWEEN

EZEKIEL KIPEL.....APPELLANT

AND

KIPSAINA ARAP MURSOI.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Eldoret, (George Kanyi Kimondo, J.) dated 27th day of April, 2017

in

H.C.C. NO. 201 OF 1997)

RULING OF THE COURT

Learned counsel for the appellant, **Mr. Nyachiro** had fully argued his appeal and **Mr. Bittock**, learned counsel for the respondent, had commenced his response thereto. In mid-course, however, Mr. Bittock sought an adjournment for several reasons. Firstly, he pointed out, the appeal is related to two other appeals, **Civil Appeal No. 59 of 2017** and **Civil Appeal No. 118 of 2018** which all arose from the same judgment. Secondly, he observed, there was a Court order in CA 118/18 that an application filed therein for validation of the appeal which was filed after abatement and for extension of time to file it, be placed before the same bench hearing the main appeals. That application was indeed placed before us this morning but Mr. Bittock was not present when it was called out and it turned out that there were several respondents who were not served with hearing notices and therefore the matter was adjourned to 2nd April, 2019 for hearing.

According to Mr. Bittock, unless the three matters are heard and determined at the same time, there may well be conflicting decisions of the Court. He further submitted that the appellant in this appeal will not suffer any prejudice as there is an order for stay of execution and in any event, it is in the interest of justice that the issues in the land matter be dealt with by the same bench.

In response, Mr. Nyachiro, opposed the application for adjournment which he considers an afterthought. That is because Mr. Bittock chose not to be in Court when his matter was called out when he should have made the application now being argued. He observed that the application in CA 118/18 was only filed in January this year when this appeal was still pending and there was no reason to adjourn the appeal. In his view, if this appeal succeeds, then it will not be necessary for the cross appeal in C. A. No. 118/2018 to be pursued and vice versa. He observed that this dispute is fairly old as it is in its 22nd year and it would be unjust to adjourn it further.

We have anxiously considered the application for adjournment. On the outset we must deprecate in the strongest terms, the conduct of **Mr. Bittock** who, despite his knowledge that the hearing on this matter was scheduled for 9.00 a.m, showed up in court long after it was disposed of. It was at that time that he would have drawn our attention to the matters now relied on to seek adjournment.

That said, it is not lost to us that the three appeals arise from the same decisions of the lower court. Whether the application for validation of C. A. NO. 118/2018 which is now set down for hearing on 2nd April, 2019 succeeds or not is not a matter for our decision. It may well be heard by a different bench. Suffice it to say, that in the event of success, there will be three appeals arising from the same judgment and it stands to reason that the appeals be considered at the same time, either separately or after consolidation as may be found appropriate. If they are heard separately by different benches, the possibility is not remote that conflicting views may well be expressed.

It is for that reason that we are inclined to adjourn this appeal for hearing before the same bench together with C.A. 59/2017 and C.A. 118/2018 subject to success of the application filed therein. It follows that the submissions made so far in this appeal shall be expunged

forthwith and the hearing shall commence de novo.

Mr. Bittock properly concedes that the respondent should bear the costs of the adjournment. We accordingly order that the respondent shall pay to the appellant the costs thrown away which are assessed at Shs.20,000/= (Twenty thousand).

The costs shall be paid before the appeal is next set down for hearing and in default execution shall issue without further application. We so order.

Made this 6th day of February, 2019.

P. WAKI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR