



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, NAMBUYE & MUSINGA, JJA)

CIVIL APPEAL NO. 291 OF 2017

BETWEEN

WILLIAM MUINDE KILUNDO

(Suing as the administrator of the Estate of

KILUNDO NZIVO.....APPELLANT

AND

PETER K. WAMBUA.....1ST RESPONDENT

JOSEPH MUTUA MUINDE.....2ND RESPONDENT

DOMINIC MUSEI IKOMBO.....3RD RESPONDENT

MITAMBO/KANTAI CO. LTD.....4TH RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya

at Machakos (Angote, J.) dated 31st March, 2017

in

Civil Appeal No. 177 of 2011)

JUDGMENT OF THE COURT

1. **Order 24** of the **Civil Procedure Rules** outlines the procedure to be adopted in the event of the death of any party in a suit. It sets out the steps to be taken by a legal representative of the estate of a deceased party so as to be substituted with the deceased. Of relevance to this appeal, is the implication of **Order 24 Rule 7**

(1) which stipulates that:

“Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.”

2. The salient facts which gave rise to the appeal are that the appellant instituted a suit against the respondents in the Chief Magistrate’s Court at Machakos being CMCC No. 975 of 2001 seeking *inter alia*:

a) That the names of Mwongeli Wambua Nzivo (deceased) be removed and/or cancelled out from the register of members as a co-owner of Plot Numbers 43, 188 in Mitaboni/Katani Company Limited and in the land register of the said plots at Machakos District Land Registry.

b) That an eviction order be issued against the 1st defendant (1st respondent herein) to be evicted from plots 43,188 Mitaboni/Katani Co. Ltd. and the District Commissioner Machakos District do ensure compliance of this order.

3. The suit was premised on the grounds that the appellant's father, Kilundo Nzivo (deceased) had purchased 300 shares in the 4th respondent's company and was issued with a share certificate number 48. Pursuant to his shares the deceased was allocated **Plot Nos. 43 & 188** (suit properties). Later on, the deceased came to learn that the 1st respondent's mother, Mwongeli Wambua Nzivo, had been fraudulently included as a member of the 4th respondent and registered as a co-owner of the suit properties.

4. The appellant believed that the 1st respondent had connived with the 2nd and 3rd respondents who were then officials of the 4th respondent to have his mother registered as a co-owner. Subsequently, the 1st respondent entered onto the suit properties, commenced construction and acts of waste thereon.

5. In his statement of defence, the 1st respondent's case was that the deceased and his father, who had also passed away, were step brothers. They both agreed to jointly purchase shares in the 4th respondent company for Kshs.8,500. By mutual trust his late father agreed for the deceased's name to appear on the share certificate since as per the company's regulations, a share certificate could only be in the name of one person.

6. Be that as it may, both his father and the deceased together with their families were allowed not only to move onto the suit properties but to erect temporary structures thereon pending subdivision and allotment of individual parcels. Both families co-existed until the demise of the 1st respondent's father. From then on the deceased began trying to evict his late brother's family from their rightful portion of the suit properties. The 1st respondent's mother's name was rightfully inserted in place of his late father as a joint co-owner with the deceased of the suit properties.

7. In addition, the 1st respondent averred that the appellant's suit was defective on account of an earlier similar suit filed by the deceased in the High Court being H.C.C.C No. 889 of 1991 which had since abated.

8. It seems that the 2nd, 3rd, and 4th respondents' statement of defence was struck out and judgment entered against them. Hearing of the suit proceeded as against the 1st respondent and in the end, the learned trial magistrate, S. M. Mungai, in a judgment dated 25th October, 2011 found in favour of the appellant.

9. The 1st respondent was not amused with that decision hence he lodged an appeal in the High Court. The learned Judge (**Angote, J.**) in a judgment dated 31st March, 2017 noted that the trial court had failed to address itself on the issue of the appropriateness of the suit in light of the abated suit which had been filed in the High Court. In his own words he observed:

“The analysis of the Plaints that were filed in the two (2) suits shows that the issues that were raised were the same.

Indeed, the orders that the 1st Respondent was seeking in Machakos CMCC No. 975 of 2001 were the same orders that his father had sought in Nairobi HCCC No. 889 of 1991, that is, eviction of the 1stAppellant from the suit land.

...

Having admitted in his Complaint that indeed the first suit had abated, and that the suit properties in the two (2) suits were the same, the learned magistrate erred by not holding that the subsequent suit was an abuse of the court process.

I say so because under Order 24 Rule 7 (1) of the Civil Procedure Rules provides that where a suit abates or is dismissed under the Order, no fresh suit can be filed on the same cause of action.”

Ultimately, the learned Judge allowed the appeal before him on that basis and set aside the trial court's judgment.

10. It is that decision that has instigated this second appeal which is predicated on the grounds that the learned Judge erred by -

“a) Failing to acknowledge and recognize there was only one appellant, Peter K. Wambua and that the other parties had neither defended the suit in the subordinate court nor lodged an appeal.

b) Holding that the cause of action in the abated High Court suit was similar to the cause of action in the subordinate court.

c) Relying on technicalities that do not go to the jurisdiction of the court and therefore, failed to consider the substantive dispute between the parties.”

11. Mr. Kariuki, learned counsel for the appellant, argued that in the impugned judgment the learned Judge kept on referring to the 2nd, 3rd and 4th respondents as appellants yet they had not lodged an appeal against the subordinate court's decision. This demonstrated that the learned Judge had not grasped and/or understood the background facts of the appeal before him. He believed that owing to the foregoing fundamental mistake the learned Judge arrived at the wrong decision which should be overturned.

12. The learned Judge was also faulted for failing to appreciate that the 2nd, 3rd, and 4th respondents did not defend the suit thus judgment was entered against them by the trial court. In particular, the prayer that was allowed against them was that the names of the 1st respondent's mother be removed and/or cancelled from the company's register as a member and co-owner of the suit properties. Therefore, the learned Judge should not have interfered with the said order.

13. Asserting that the cause of action in the High Court and subordinate court were different, counsel stated that in the High Court the appellant's father had sought the eviction of the 1st respondent from Plot Nos. 43 & 188, an injunction and general damages. Conversely, in the subordinate court the appellant had sought the eviction of the 1st respondent from Plot No. 188, and the removal of the 1st respondent's mother's name not only from the company's register but also on the title of the suit properties. To bolster that line of argument reference was made to the ***Black's Law Dictionary*** definition of a new cause of action as:

“... a claim not arising of, relating to, or involving the conduct, occurrence, or transaction contained in the original pleading. An amended pleading often relates back to the date on which the original pleading was filed. Thus, a plaintiff may add claims to a suit without facing a statute of limitations bar as long as the original pleading was timely filed. But if the amended pleading adds a claim that arises out of a different transaction or occurrence, or out of different alleged conduct, the amendment does not relate back to the date on which the original pleading was filed.”

14. As far as counsel was concerned, the provisions of ***Order 24 Rule 7 (1)*** of the ***Civil Procedure Rules*** do not oust a court's jurisdiction to consider substantive matters in dispute. Making reference to this Court's decision in ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR***, he urged that the foregoing provision was subservient to ***Article 159 (2) (d)*** of the Constitution and the Oxygen principle.

15. Last but not least, he contended that the learned Judge's finding that the suit in the subordinate court was an abuse of the court process was not substantiated. This is because the dispute between the parties had not been determined on merit prior to the subordinate suit. It is on these grounds that we were urged to allow the appeal.

16. Opposing the appeal, Mr. Mapesa, learned counsel for the 1st respondent, began by stating that some of the grounds raised by the appellant were on points of facts which are outside this Court's jurisdiction as a second appellate court. A case in point is the complaint touching on the title used by the learned Judge in the impugned judgment. According to him, the reference of the 2nd, 3rd and 4th respondents as appellants by the learned Judge could not be termed as substantial errors to warrant this Court's interference with the judgment.

17. Taking us through ***Order 24*** of the ***Civil Procedure Rules***, counsel submitted that ***Rule 7*** thereof outlines the effect of failure by a legal representative of a deceased party to comply with ***Rule 3*** which calls for substitution. The consequence being that once such a suit abates no fresh suit can be filed thereafter. In that regard, we were referred to this Court's decision in ***Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR***.

18. He went on to submit that the only way a suit which has abated could be saved is if the legal representative of the deceased litigant applies for extension of time for substitution and revival of the suit. In this case, the appellant did file an application seeking leave to be substituted with his deceased father in the abated suit however, the fate of that application was unknown.

19. Mr. Mapesa argued that the learned Judge was right in striking out the subordinate court suit since the cause of action therein was similar to the abated suit. Counsel also supported the learned Judge's finding to the effect that the said suit was an abuse of the court process. In doing so, he relied on the case of ***Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR*** where this Court in discussing the concept of abuse of the court process stated:

“The definition of abuse of court process was given in BEINOSI vs WYLEY 1973 (SA 721 [SCA] at page 734F-G) and adopted by this court in Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR, as follows:-

‘What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse of process.’ It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.’ (Emphasis added)

20. Taking into account that our jurisdiction as a second appellate court is limited to points of law, we have considered the grounds of appeal, submissions by counsel and the law.

21. First and foremost, it is not in dispute that the heading of the impugned judgment indicated the 2nd, 3rd and 4th respondents as appellants. Similarly, the learned Judge in the body of the judgment made reference to them in that capacity. Nevertheless, the learned Judge never made any orders against the said respondents and merely referred to them for purposes of placing the appeal before him in context. Consequently, we find that the appellant was not prejudiced by the reference of the said respondents as appellants in the High Court.

22. It is common ground from the pleadings on record that the suit in the subordinate court was anchored on the grounds that the suit properties belonged to the deceased; the 1st respondent's mother was fraudulently registered as a co-owner; and that the 1st respondent had trespassed on the same. Equally, as deciphered from the pleadings in the High Court suit the same was premised on more or less similar grounds, that is, that the suit properties belonged to the deceased and the 1st respondent had trespassed thereon. What was more, the 1st respondent's defence in both suits was similar. The suit properties belonged to both the deceased and his late father; he and his family were entitled to his late father's share.

23. Based on the foregoing, we, like the learned Judge, do find that the cause of action in the two suits were similar. Our position is guided by the case of **Drummond Jackson vs Britain Medical Association [1970] 2 WLR 688** at page 616 wherein **Pearson, J.** defined a cause of action in the following words:

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

Further Lord Diplock in **Letang vs Cooper [1964] 2 All ER 929** at 934 rendered the following definition:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

24. We also concur with the following sentiments of the learned Judge:

“The fact that the Respondent included the 2nd, 3rd and 4th Appellants in the subsequent suit does not make the subsequent suit any different from the first suit.

I say so because the cause of action in the two (2) suits is whether the 1st Appellant’s mother or father was entitled to the two (2) suit properties. The inclusion of the three Defendants in the subsequent suit does not change the cause of action, which is that the 1st Appellant is not entitled to the suit property.

Indeed, the 1st Respondent’s father filed Nairobi HCCC No. 889 of 1991 seeking for the eviction of the 1st Appellant from the two suit properties after the 2nd and 3rd Appellants had already made a decision that the two properties should be shared equally between him and the 1stAppellant’s father. The inclusion of the 2nd and 4th Appellants in the subsequent suit did not change the substance of the first suit.”

25. Having found that the cause of action in the two suits were similar, we cannot help but note that the High Court suit which was filed first in time abated following the deceased’s death on 13th August, 1994. This much is admitted by the appellant. As a result, the provisions of **Order 24 (7)** of the **Civil Procedure Rules** which we have set out in the opening paragraph of this judgment come into play. This Court while expressing itself on the said provision in **Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Ltd & 2 Others [2017] eKLR** held:

“Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented.” [Emphasis added]

26. We decline to accede to the appellant’s invitation to find that the provision in question is a mere technicality and should not defeat substantive determination of the suit. In doing so, we take guidance from the case of

Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR wherein this Court succinctly stated:

“The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure.”

27. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 12th day of October, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

R. NAMBUYE

.....

JUDGE OF APPEAL

D. MUSINGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR