IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M KARIUKI & J. MOHAMMED, JA)

CIVIL APPEAL NO.11 OF 2005

KEZIA WAMBUI MWAURA.....1ST APPELLANT

ANN WOKI KARANJA.....2ND APPELLANT

VERSUS

CLEMENT J. M. KARIUKI.....1ST RESPONDENT

MARGARET WAMBUI.....2ND RESPONDENT

PETER G. W. NJIRU.....3RD RESPONDENT

JOHN W. LUKANDU.....4TH RESPONDENT

KENYA ASSEMBLIES OF GOD CHURCH.....5TH RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Ransley, J) dated and delivered on 15th day of October 2004

in

H.C.C.C. NO. 290 OF 1994)

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JUDGMENT OF THE COURT

1. This appeal was lodged on 24th January 2005 by Kezia Wambui Mwaura and Ann Woki Karanja who later died on 5th July 2013 and 5th May 2014 respectively. On 4th March 2016, this court (PCA in Chambers) heard an application by notice of motion dated 9th November 2014 for the substitution of the applicant, Grace Wanjiku Karanja, in place of the appellants whose estates the applicant had been authorised to administer by dint of a limited Grant ad litem issued in the estate of Kezia Wambui Mwaura and a Grant of Letters of Administration Intestate issued in the estate of Ann Waki Karanja by the High Court in Nairobi in Causes Numbers 2369 of 2015 and 886 of 2015 respectively. The appeal which had abated was on 4th March 2016 revived by an order of this court pursuant to rule 99(3) of the Court of Appeal Rules and was set down for hearing on 28th February 2017.

2. The background to this appeal as reflected in the Record of Appeal shows that the appellants' suit No.290 of 1994 in the High Court against the respondents was dismissed summarily on 15th October

2004. The claim in the suit was for recovery of land known as Dagoretti/Thogoto/T.32 measuring in area 0.24 of an acre (hereinafter referred to as "the suit land") which was transferred on 4th January 1994 to Kenya Assemblies of God Thogoto Church by the 2nd respondent, Margaret Wambui Kariuki, who allegedly had illegally obtained its title and purported to be its legitimate owner. It was pleaded in the plaint in the said suit that the suit land was owned and registered in the name of Clement John Mwaura Kariuki and that following his demise the suit land should have devolved to his wife, Keziah Wambui Mwaura, as the adminstratrix of the estate of the deceased. Indeed, following the determination of High Court Civil Appeal No. 81 of 1991 (Keziah Wambui Mwaura v. Mbatia Waiganjo and Clement John Mwaura Kariuki) Kezia Wambui Mwaura was declared the person entitled to the suit property and an order for her to be registered was issued. However, on 4th January 1994 the suit land was registered in the name of Margaret Wambui Kariuki, the 2nd respondent, allegedly under the guise of the latter being the widow of Clement John Mwaura Kariuki. Ann Woki Karanja, was a daughter of Keziah Wambui Mwaura. She was joined in the litigation as the latter's co-plaintiff. The 2nd respondent transferred the suit land to the 5th respondent, ostensibly in consideration of Shs.200,000/=. The parties had court running battles which culminated in the impugned judgment by the High Court (Ransley J) dated 15th October 2004.

3. The record of appeal shows that the learned trial judge summarily determined the appeal. The pertinent part of the impugned judgment stated –

> ***"The onus is on the plaintiff to show that this title is defective but having decided to withdraw from the suit this onus has not been discharged…***
>
> ***"… As the plaintiff has failed to prove her case, I have no alternative but to dismiss her suit with costs to the defendants. The restriction against the title dated 2nd February 1994 is ordered to be removed. Dated and delivered at Nairobi this 15th day October 2004."***

4. The record shows that on 27th September 2004 High Court suit No.290 of 1994 from which this appeal springs was fixed for mention before Ransley J on 6th October 2009. When it was mentioned before the learned judge on 6th October 2004, the 1st and 2nd respondents who were the 1st and 2nd defendants were absent. The learned judge stood over the suit to 15th October 2004 for the hearing of the application for contempt. But on 15th October 2004, the learned judge after dismissing the application for contempt ordered that "the case will continue" whereupon the 2nd plaintiff, Ann Woki, is recorded as having stated to the learned judge –

> ***"I do not feel we are getting a fair trial in the suit and do not wish to continue."***

5. The learned judge was not amused. The record shows that he proceeded to make the following order –

> ***"there is no reason why this matter should not continue before me and I am not prepared to disqualify myself from hearing the case. If the plaintiff leave (sic) the court I will have no alternative but to dismiss the claim."***

6. The plaintiffs were not mincing their words. The record shows that they left the court room. Counsel for the respondent proceeded to address the court after which the learned judge dismissed the suit summarily as he had said he would.

7. In the memorandum of appeal, the appellant impugns the learned judge's judgment and proffers 5 grounds of appeal as follows –

> ***1. The learned judge, erred in fact and law, in terminating the Plaintiffs suit at an interlocutory stage yet it was an application for contempt, which was slated for hearing on 15th October 2004.***
>
> ***2. The learned judge erred in fact and law in denying the Plaintiffs audience in contravention of the rules of natural justice.***

3. The learned judge erred in fact and law by delivering a premature judgment before the parties arguing their cases on merit.

4. The learned judge erred in fact and law in failing to disqualify himself from hearing this suit when the 2nd plaintiff made an informal application before him during the hearing of contempt application and assuming without facts or any basis there was no contempt and left his role of being an umpire and shifted to suit as an interested party thus necessitating delivery of his atrocious judgment.

5. The learned judge erred in law and fact by delivering a judgment which does not meet the standard of a judgment as no evidence of parties is incorporated in the same.

8. The appellant prays that the appeal be allowed and the impugned judgment set aside and the suit be heard de novo before a judge other than Ransley J and that the costs of the proceedings in the High Court and in this court be granted to the appellant.

9. When the appeal came up for hearing, learned counsel Mr. Nganga Mbugua of Mbugua Nganga & Company Advocates appeared for the appellant while learned counsel Mr. Jaoko of Nchoe, of Jaoko & Company advocates appeared for the respondents.

10. It was Mr. Mbugua's submission that the trial judge terminated the suit at an interlocutory stage and thus violated the appellant's right to be heard. Counsel pointed out that the suit was not scheduled to be heard on 15th October 2004 when it was dismissed. What was scheduled to be heard on that day was only the application for contempt. It was counsel's submission that the learned trial judge exercised his discretion wrongly. Referring to Order 17 rule 4 of the Civil Procedure Rules, counsel contended that the trial judge erred in dismissing the suit summarily on a day when it was not scheduled to be heard. Counsel urged that the dismissal Order was unlawful and ought to be overturned as the suit was not determined on merits. On case-law to buttress his submissions, counsel referred to **Jefferson Ltd vs Bhatcha** (1979) 2 All ER 1108; **Cooper & Another vs Williams & Another** (1963) 2 All ER 282; Halsbury's Laws of England, 4th Edition, Volume 37, page 325-336; Civil Procedure Act & Rules , Cap 21 Laws of Kenya.

11. On behalf of the respondents, learned counsel Mr. Jaoko submitted that no injustice was meted out to the appellant as the latter had ample time to prosecute the suit but failed to do so on account of delaying tactics he adopted to procrastinate the hearing. In his view, the appeal has no merit and should be dismissed.

12. We have perused the Record of Appeal and the memorandum of appeal.

We have also duly considered the rival submissions and the authorities cited by the appellant's counsel.

13. The issues that emerge for our consideration and determination are

(1) Whether the suit was set down for hearing on 15th October 2004;

(2) Whether the learned trial judge was entitled to hear and determine the suit on 15th October 2004.

(3) Whether the appellant's right to fair hearing was violated by the court on 15th October 2004;

(4) Whether the learned judge exercised his discretion properly and

(5) Whether the trial judge was entitled to summarily dismiss the suit as he did.

14. The answer to the first issue is dependent on the facts and the law. The record shows that the suit was

ripe for hearing as pleadings had been closed and an order was made on 20th July 2014 for the suit to be heard on 21st July 2004. On 21st July 2004, the hearing commenced and the appellant testified. As it could not be concluded, the hearing was stood over to 15th September 2004.

15. Before the hearing on 15th September 2004, the matter of contempt application came up. On 31st August 2004, Ojwang J, as he then was, had ordered the parties to appear before the trial judge (Ransley J who was seized of the case) for directions on the hearing and disposal of the contempt application.

16. On 15th September 2004, the suit which was part-heard before Ransley J was not placed before him for hearing. Instead it was placed before the duty Judge who ordered a mention on 24th September 2004 before Ransley J for the purpose of directions on the hearing and disposal of the contempt proceedings. On the 24th September 2004 the trial judge stood over the matter to 15th October 2004 at 10.30 a.m.

17. It is patently clear that what was before the trial judge on 24th September 2004 was the contempt application in which directions were anticipated. The hearing of the suit was not before him. When, therefore, the learned judge stood over the matter to 13th October 2004, the only matter that he could stand over to that date (or any other date) was the application for contempt. The record shows that before the date set for the hearing of the application (i.e. 15th October 2004) the appellant appeared before the duty judge on 27th September 2004 seeking clarification whether the application for contempt would be heard before the hearing of the suit. The duty judge ordered that as the suit was part heard before Ransley J, parties should appear before him as only he could review his orders. A mention date before Ransley J was fixed for 6th October 2004 when the learned Judge stood over the matter to 15th October 2004 and stated that *"application for contempt to be heard on that date."*

18. From the record, the matter before Ransley J, on 6th October related to the contempt application whose hearing the appellant wished to have prior to the suit being heard. That application was the only matter that the learned judge could fix for hearing on 15th October 2004 as he did. In effect, therefore, besides the application for contempt, there was no other matter before the trial judge as the hearing of the suit on 15th September 2004 had collapsed. This answers the first issue, namely that the suit was not fixed for hearing on 15th October 2004.

19. As regards the second issue, namely whether the learned judge was entitled to hear and determine the suit on 15th October 2004, the record shows that the learned judge dismissed the contempt application and ordered the hearing of the suit to continue. But it was not before him. At that point, the appellant protested, and perhaps rightly. She stated that she did not wish the hearing to continue. In effect, she sought adjournment. The learned judge declined to adjourn. He warned that if the appellant left the court-room, he would *"have no alternative but to dismiss the suit."*

20. The appellant left the court, whereupon the respondents applied for dismissal of the suit. The learned trial judge prepared a two page judgment in which he dismissed the suit summarily without hearing further evidence.

21. When the appellant stated that she did not wish the hearing of the suit to proceed, and that she was not getting a fair hearing, the learned judge did not consider or determine the appellant's request for adjournment but he stated, without giving reasons, that he would not disqualify himself. How did the learned judge deal with this twin application for adjournment and disqualification? He stated as follows –

> ***"there is no reason why this matter should not continue before me and I am not prepared to disqualify myself from hearing the case. If the plaintiff leave (sic) the court I will have no alternative but to dismiss the claim."***

22. The appellants were determined. They left the court. This is reflected in the record.

23. The suit was part-heard before Ransley J. Further hearing had been fixed for 15th September 2015. It did not take place. The trial judge did not fix the suit for further hearing on 15th October 2004. He heard

the contempt application on that day and decided to hear the suit as well. The appellant was not ready and did not want to proceed. Did the trial judge have powers to suddenly impose the hearing on the appellants? Order 12 of the Civil Procedure Rules shows that dismissal of suits for non-appearance of parties ensues where the suit has been fixed for hearing and service of hearing notices has been effected on the absent party against whom the dismissal order is ordered. In the instant appeal, the learned trial judge was not entitled to hear the suit on a date on which it was not fixed for hearing. He could not do so in absence of a consent of all the parties privy to the matter even if they be all present in court. He erred in hearing it. He also erred in dismissing it when it was not before him for hearing. A matter that is not fixed for hearing can neither be heard without consent of all the parties nor be dismissed. The effect of the trial judge's error was to violate the appellant's right to fair hearing under common law. That right is now embedded in the 2010 Constitution whose Article 50 vests in every person the right to fair hearing thus –

> ***"50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

24. Moreover, there was no power vested in the trial judge to dismiss the suit that had not been set down for hearing. Rule 1 (1) of Order 17 of the Civil Procedure Rules 1(1), 1(3) and 3 stipulates –

> ***"Rule 1(1); once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.***
>
> ***Rule 1(3); any party to the suit may apply for its dismissal as provided in subrule 1(supra)***
>
> ***Rule 3; where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit.***

25. The crux of the matter as regards dismissal of a suit on account of absence of a party on the day of the hearing is that the suit must have been set down for hearing and the party must have been served to appear. In this appeal, the suit was not set down for hearing on 15th October 2004. It could not therefore be heard, or dismissed on that day. The learned trial judge erred in entertaining the respondents' submissions for dismissal and in dismissing the suit. He had no discretionary power to dismiss the suit that was not before him. The purported hearing of the suit culminating in the order for dismissal was a misdirection on the part of the judge and was an error. It violated the appellant's right to fair hearing. This answers issues nos 2, 3 and 4.

26. The Civil Procedure Act and the Rules made thereunder which govern procedure in civil courts in the High Court and the subordinate courts are designed to mete out justice to parties. The overriding objective of the Civil Procedure Act and the Rules is, inter alia, to facilitate just resolution of civil disputes. The High Court is enjoined to give effect to this overriding objective. It was the duty of the court to seek to achieve a just determination of the dispute between the parties. The learned judge's wrong exercise of discretionary power to hear the suit when it was not before him for hearing was improper. Inherent power vested in the High Court by virtue of section 3A of the Civil Procedure Act is intended to safeguard justice and prevent abuse of the court process.

27. The principle in administration of justice which guides courts in discharging their mandate in resolving disputes is to ensure that justice is done to all, irrespective of status. To mete out justice, a court must, as far as possible, hear the merits of each case always bearing in mind that rules of procedure are intended to serve as the handmaidens of justice not to defeat it. (see **Iron & Steelwares Ltd v. C W Martyr Co.** [1956] 23 EACA 175 (CA-U) at page 177.

28. In **Wanjiku v. Esso Kenya Ltd** [1995-1988] 1 EA 332 (CAK) this court held that -

> ***"where a matter is fixed for mention, a judge is not entitled unilaterally to determine on that date substantive issues in the case before him. He can only do so if both parties consent to that course***

and only after giving the parties an opportunity to make submissions thereon".

"The inherent jurisdiction of the High Court is a residual jurisdiction which should only be exercised in special circumstances in order to put right that which would otherwise be a clear injustice."

29. This Court has further stated in **Trust Bank Ltd v. Amalo Company Limited** [C.A. No. 215 of 2000] that –

"the principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their merit. This was succinctly put a while ago by Georges, C.J. (Tanzania) in the case of Essanji and Another v. Solanki [1968] EA at page 224.

30. In **Dr. Samson Auma v. Jared Shikuku & Another** [Civil Appeal No.191 of 2002] (CA at KSU), where the learned judge dismissed the suit because the parties were absent although their counsel the (plaintiff's counsel) was present but the plaintiff was absent. Counsel for the plaintiff told the Court that he was not ready to proceed with the hearing. He gave the reasons for this. The advocate who held brief for the defendant's advocate informed the Court that the defendant's counsel did not object to the hearing of the suit being adjourned. The trial judge proceeded to dismiss the suit. On appeal by the plaintiff, this court impugned the trial judge's decision on the ground that he did not determine the application for adjournment on its merits before dismissing the suit and for assigning in the dismissal order the grounds that the plaintiff was absent when the hearing proper had not begun. This court held that that was an incorrect exercise of the learned judge's discretion which resulted in grave injustice as the appellant's case was terminated before the appellant could be heard on its merits.

31. In the instant appeal, the injustice to the appellant was equally as grave. By exercising his discretionary power improperly, the trial judge denied the appellant the right to be heard.

32. We find merit in the appeal. We allow it. We set aside the learned judge's orders dated 15th October 2004 on the dismissal of the suit and on costs. The suit is restored. We so order. We also order that the suit shall be heard de novo before another judge. Having regard to the nature of the matter and the conduct of the parties, we further order that costs shall follow the event and accordingly we award the costs in the suit in the High Court and in this appeal to the appellant to be borne by the 1st, 2nd and 5th respondents. It is so ordered.

Dated and delivered at Nairobi this 7th *day of April, 2017*.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR