IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KARANJA & MWERA, JJ.A.

CIVIL APPEAL NO. 8 OF 2005

BETWEEN

NYOKABI KARANJA.....1ST APPELLANT

SAMMY MAKENZIE.....2ND APPELLANT

PENINA WANGARI….....3RD APPELLANT

SAMUEL KIRONGO.....4TH APPELLANT

AND

KAMUINGI HOUSING COMPANY LIMITED.....RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Nairobi

(Ransley, Commissioner of Assize) dated 12th February, 2002

in

HCCC NO. 1508 OF 1994)

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JUDGMENT OF THE COURT

The four appellants in this appeal were the plaintiffs in HCCC No. 1508 of 1994 while the Kamuingi Housing Company Limited (the respondent) was the defendant. By their plaint dated 20th April 1994, the appellants sued the respondent for orders *inter alia* to restrain the respondent, their agents, servants and/or employees from evicting the appellants from Plot No. 36/V/01 situate at Mathare.

The suit was fixed for hearing on several occasions but for one reason or another, it did not take off. One such time was on 16th October, 2001 when the matter came up for hearing before Ransley, Commissioner of Assize (C.A) (as he then was). On that date Mr. Ngatia who represented the appellants applied for an adjournment on the ground that his clients were not in court. Mr. Okeyo, learned counsel, still on record

for the respondent, opposed the application for adjournment an opposition that found favour with the learned C.A.

The C.A observed that the hearing date had been taken on 8th June 2001, which gave the appellants ample time to prepare their case and attend court. The C.A found no good cause shown as to why the appellants had failed to attend court. He therefore dismissed the plaint with costs to the respondent.

Following the dismissal, the appellants filed the chamber summons dated 30th November 2001 under the then Order IXB Rule 8 of the Civil Procedure Rules, seeking an order for reinstatement of the suit. The main reason given for the appellants' non-attendance on the date the matter was scheduled for hearing, was that they were unaware of the hearing date, having not received communication on the same from their advocate.

The CA heard the application for reinstatement of the suit but was not convinced by the reasons proffered for failing to attend court.

That, however, was not the only reason given by the learned C.A for disallowing the said application. He stated in his Ruling:-

> ***"It appears to me that the plaintiff had a good cause of action, I might be inclined to let the matter be heard on its merits (sic). However, it is clear from the plaint that the plaintiffs are shareholders on the defendant's company and there is a dispute between the plaintiffs and the company. The plaint is confused as it appears to the plaintiffs being the rightful owners of plot No. 36/V/01 by virtue of buying shares in the company…….***
>
> ***I would add that the shareholding in a company does not give a shareholder a proprietary right to the company's property (sic).***
>
> ***The plaintiffs remedy if they have a dispute with the company is to bring a petition to wind up the company if they are an appeared minority…. (sic)"***

He proceeded to dismiss the application with costs.

That ruling and the consequent dismissal is what drove the appellants to this Court. They have filed four grounds of appeal vide the memorandum of appeal dated 20th January 2005.The compacted grounds raise only one issue. Whether the learned C.A erred in determining the merits of the suit without the same being canvassed before him by way of adduction of evidence. In her brief submission before us, Miss Waweru, learned counsel for the appellants urged that the learned C.A had not exercised his discretion judicially as espoused in the *locus classica* case of **Shah vs Mbogo [1967] E.A.** She submitted that a party should not suffer the penalty of not having its case decided on merit unless there is fraud.

On his part, in opposing the appeal, Mr. Okeyo, learned counsel appearing for the respondent maintained that the C.A had exercised his discretion properly and considered the history of the matter and the conduct of the plaintiffs who he said were dragging the suit. Rehashing the old adage that litigation must come to an end, counsel urged the Court to find that the C.A was right in considering the pleadings and determining the issues raised based purely on the pleadings.

He urged us to dismiss the appeal.

In our view, this appeal turns on two issues only. The first issue is whether there was sufficient cause shown in the first place for the non-appearance of the appellants on the hearing date. In order to appreciate whether the C.A exercised his discretion judicially, it is necessary for us to consider the history of the appellants' attendances before the dismissal of their suit for non-attendance. We note that the list of documents was filed on 16th January 2001. This would mean that discovery had not been done prior to that date and the matter had not therefore been ripe for hearing.

On 24th January 2001, parties took a hearing date by consent and settled on 28th and 29th May 2001. The record shows that on the assigned date, the parties appeared in court but the case could not be reached. It was therefore, adjourned but not at the behest of the appellants. On 8th June 2001, an ex-parte hearing date was taken for 15th and 16th October 2001. Counsel for the appellants sent them the hearing notices using the defendant's postal address. That averment was not denied. They said they did not receive the notices and were therefore unaware of the hearing dates. It is clear from the record therefore that they had not failed to attend court on any previous occasions when the matter had been fixed for hearing. Their explanation for failure to attend court was, in our view, plausible in the absence of previous history of absenteeism.

According to the C.A, the appellants had '*not exhibited any great interest in having the matter heard'*. This was a tad harsh in our view as we have demonstrated elsewhere that this was the second time the matter was coming up for hearing and the appellants had been ready on the previous occasion but the matter was adjourned by the court.

Indeed, we note that the C.A himself seemed to harbour some doubt as to whether the cause shown for attendance was not good, when he stated in his ruling:-

> ***"It appears to me that the plaintiff had a good cause of action I might be inclined to let the matter be heard on the merits (sic).*** **However it is clear……..."**

He then went ahead to discuss the merits of the case. From this statement, it is clear that the non-attendance was not the reason why the case was dismissed. The same was dismissed because, according to the learned C.A, the plaintiffs' case was deficient in merit.

The question that arises then is whether, the C.A was right in considering the pleadings and determining the matter on merit without hearing the parties. We hold the view that this was wrong. If the C.A wanted to determine the merits of the matter, ex-parte, the least he could have done is invite the appellant's counsel, who was present in court on 16th October 2001, to address him on merits before the said dismissal.

From the record, counsel for the defendant said he had three witnesses. The C.A could still have allowed them to be called so that counsel for the appellants could have cross-examined them if he found it necessary to do so. The C.A could not determine the merits of the case, at ruling level without even asking the parties present to address him on the issues raised.

The suit involved immovable property, to which the appellants had staked a claim, and not just the shareholding in the defendant company as held by the C.A. The appellants were actually residing on the property in question and even had temporary restraining orders against the respondent. With respect to the C.A, there was no justification, in our view, for him to deal with such an important matter in such a perfunctory manner. We hold the view that he did not exercise his discretion judicially. The issues of merit were extraneous in the application seeking to set aside the order of dismissal which was purely based on non-attendance of the appellants on the hearing date.

We repeat here what the predecessor of this Court said in **Mbogo vs Shah [1968] E.A. 93 at pg 96,**

> ***"a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter, and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."*** Sir Charles Newbold P.

Clearly, going by our findings above, the C.A misdirected himself when he proceeded to determine the case on merit without having heard the parties, when the issue before him was solely to determine whether there was sufficient reason offered as to why the appellants had failed to show up in court on the

hearing date.

We are satisfied that his finding was manifestly prejudicial and oppressive to the appellants. It was, in our view, an aberration from the course of justice which demands that unless for very good cause, a party must not be prevented from accessing the seat of justice, or be evicted from the same unheard as happened in this case.

In all, we are satisfied that this appeal has merit. We allow the same and set aside the impugned Ruling of the High Court.

We order that the suit in the High Court being HCCC NO. 1508 of 1994 be and is hereby reinstated, and the same be heard on merit.

Costs of this appeal and those before the High Court are awarded to the appellants.

Dated and delivered at Nairobi this 22nd day of May, 2015.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

…….……

JUDGE OF APPEAL

J. W. MWERA

…….…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR