IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 109 OF 2008

BETWEEN

LUCAS CHANGWONY…….....1ST APPELLANT

NICHOLAS KOMEN ……..…….2ND APPELLANT

JAMES CHANGWONY ……3RD APPELLANT

JOSEPH CHEPKOIYA ……..4TH APPELLANT

AND

STANLEY CHEBIATOR ……..……..... RESPONDENT

(An appeal from a ruling of the High Court of Kenya at Eldoret (Gacheche, J.) dated 13th June, 2006

in

HCCC. NO. 43 OF 1996

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JUDGMENT OF THE COURT

1. This is an appeal from the ruling and order of the High Court (Gacheche, J.) given on 13th June 2006 in Eldoret High Court Civil Appeal No. 43 of 1996. In that ruling, the High Court struck out the appellants' appeal from a decision of a Principal Magistrate refusing to review and set aside judgment granted by the Senior Principal Magistrate in favour of the respondent against the appellants on 10th April 1995.

Background

2. In November 1988, the respondent commenced suit in the Magistrate's Court at Eldoret (RMCC No. 803 of 1988) seeking an order to evict the appellants from the property known as Title Number Irong/Kapsoiyo/11 and general damages for loss of use of 7 acres of that land. The respondent averred

that he is the registered owner of that property comprising 58 acres and that the appellants had encroached upon it, occupied it and erected a building on it and started cultivating it without the consent of the respondent.

3. In their defence and counterclaim, the appellants denied that the respondent is the registered owner of the property. They contended that they had lived on the property for over 20 years; that the property is part of land set aside for the appellants' habitation and that the respondent had fraudulently obtained title over the same.

4. The hearing of that suit commenced before Mrs. Walekhwa, PM, as she then was, who heard the evidence of two of the respondent's witnesses. Upon R. M. Mutitu, SRM, taking over the conduct of the hearing there was objection by counsel for the appellants who wished to have the hearing start de novo. When the hearing resumed on 5th January, 1995, neither the appellants nor their counsel appeared whereupon the court ordered that *"the defence case deemed closed."* The result was that the hearing was concluded without the appellants tendering evidence.

5. When granting judgment in favour of the respondent, the learned trial magistrate in his judgment delivered on 10th April 1995 stated:

> ***"Taking everything into account I am satisfied that the plaintiff has established his case against the seven defendants on a balance of probabilities. I find that land parcel No. Irong/Kapsoiyo/11 belongs to the plaintiff and that he acquired it on first registration. I also find that each of the seven defendants are unlawfully encroaching it and I order that they should vacate the plaintiff's land above described. They should vacate it forthwith in favour of the plaintiff. I dismiss the defendant's claim with costs since the same has not been proved. I enter judgment for the plaintiff as prayed in the plaint together with costs of this suit and interest.."***

6. Though aggrieved by that decision, the appellants did not, for reasons that are not apparent, appeal against it. However, by an application dated 1st August 1995 the appellants applied to the subordinate court to review the order made on 5th January, 1995 deeming the defence case closed and for the setting aside of the judgment delivered on 10th April, 1995. The application was made under the then Order XLIV of the Civil Procedure Code. The respondent opposed that application. The Principal Magistrate who heard the application (K. Bett) was not impressed, taking the view that "*litigation must come to an end*" and proceeded to dismiss the application with costs in an undated ruling delivered on 9th April 1996.

7. Dissatisfied, the appellants lodged an appeal against that decision to the High Court. In their memorandum of appeal dated 16th April 1996, the appellants complained that the subordinate court had acted in excess of jurisdiction in entertaining a claim over land measuring 52 acres and that the appellants were denied an opportunity to be heard.

8. By an application dated 10th June 2005 presented to the High Court under section 3A of the Civil Procedure Act and Order XLI rule 27 of the Civil Procedure Rules, the respondent applied for an order to strike out the memorandum of appeal on the grounds that the appeal was against a non-existent ruling; that the appeal sought to have the judgment delivered by the subordinate court set aside when no appeal was preferred against that judgment; and that the appeal was clearly an abuse of the process of the court. The appellants opposed that application.

9. In the impugned ruling delivered on 13th June 2006, the High Court took the view that the grounds contained in the appellants' memorandum of appeal to the High Court "*touch on the judgment, which the appellants were not able to have reviewed*" and that "*having chosen to apply for review of that judgment, they had already exhausted their chances for lodging an appeal against the judgment*" and that the appellants could not "*seek the sympathy of* [the] *court by attempting to include in their appeal issues which arise from the said judgment against which they did not prefer an appeal*" and that to "*allow it would be tantamount to encouraging parties to abuse the due process*." With that, the learned judge struck out the memorandum of appeal with costs to the respondent in her ruling, the subject of the present

appeal.

The appeal and submissions by counsel

10. Referring to the memorandum of appeal, Mr. S. M. Mathai learned counsel for the appellants, argued that the High Court erred in striking out their appeal; that the court failed to appreciate that the appellants had an automatic right of appeal to the High Court; that the grounds of appeal raised in their appeal to the High Court, including the challenge to the jurisdiction of the subordinate court, were not frivolous; that by striking out their appeal the High Court denied the appellants a hearing on merits; that the judge took into account irrelevant factors; that the provisions under which the High Court was moved, namely Rule 27 of the then Order XLI, did not provide for striking out; that this was not in any case a clear case for granting the draconian relief of striking out.

11. According to Mr Mathai, the application to strike out the appeal was premature; the fact that the appeal had been admitted and had not been summarily rejected under section 79B of Civil Procedure Act is testimony that it raised sufficient grounds; that the only circumstances under which the appeal could be dismissed was under the provisions of Order 42 Rule 35(1) if the appellants failed to prosecute the appeal within the time periods stipulated under that Rule.

12. Counsel referred us to the decision of this Court in **Jane Muthoni Mungai and another vs. Texcal House Service Station Civil Appeal No. 118 of 1999** for the proposition that the drastic remedy of striking out should only be given when a pleading is incontestably bad.

13. Opposing the appeal, Ms. A. L. Khayo, learned counsel for the respondent, submitted that the High Court properly exercised its power to strike out the memorandum of appeal; that whilst the appeal was against a ruling of the subordinate court declining review, the appeal sought to attack the judgment of the subordinate court through the back door when indeed no appeal had been levied against the judgment; that the learned judge correctly held that the appellants had lost the opportunity to challenge the decree resulting from the judgment and that the issue of jurisdiction raised in the appeal was misleading because jurisdiction did not arise in the subordinate court.

Disposition

14. We have considered the appeal and the submissions by learned counsel. The question we have to determine is whether the conclusion reached by the learned judge that the appellants' memorandum of appeal was an abuse of the process of the court was well founded and whether the appellants were wrongfully denied an opportunity to be heard on merits on their appeal.

15. We have set out above, the background to this matter culminating with the appellants' appeal to the High Court seeking to challenge the decision of the subordinate court declining to review its decision and to set aside its judgment. As we have already noted, the grounds on which the respondent applied to have the memorandum of appeal struck out included complaints that the appeal was against a non-existent ruling; that the appeal was seeking orders to set aside a judgment of the subordinate court when there was no appeal against that judgment and that the appeal was clearly an abuse of the process of the court.

16. There is also the all-important matter of jurisdiction.In our view the assertion by the appellants in their appeal that the subordinate court acted without or in excess of its jurisdiction is one that required consideration. As stated by the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011**:

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…***
>
> ***… The issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter; for without***

jurisdiction, the Court cannot entertain any proceedings...

17. In the famous words of Nyarangi, J.A. in the often cited case of **The Owners Of Motor Vessel Lilian "S"vs. Caltex Oil (Kenya) Ltd [1989] KLR 1**at page 14:

> ***"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

18. In our view the complaints by the appellants in their memorandum of appeal that was struck out by the High Court, as well as the question whether the subordinate court had jurisdiction, are matters that should have been canvassed in the course of the appeal itself. We therefore consider that the learned judge erred in concluding that the appellants' appeal to the High Court was an abuse of the process of the court.

19. We accordingly allow the appeal. The ruling and order of the High Court given on 13th June 2006 is hereby set aside and substituted with an order dismissing, with costs, the respondent's application dated 10th June 2005. The appellants' appeal to the High Court is hereby restored for hearing on its merits.

Dated and delivered at Eldoret this 29th day of October, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR