



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & MARAGA, J.J.A)

CIVIL APPEAL NO. 276 OF 2011

BETWEEN

PETER IRUNGU WAINAINA APPELLANT

AND

CHEGE NJIHIA RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nyeri

(Sergon, J.) dated 23rd September, 2011

in

H.C.C.C No. 149 of 2008 (O.S)

JUDGMENT OF THE COURT

1. The appellant instituted a suit in the High Court by way of an Originating Summons seeking a declaration that he was entitled to the parcel of land known as **Title No. Loc 18/Kirere/210** (suit land) through adverse possession. The suit land is registered in the respondent's name. The respondent filed a replying affidavit in opposition but failed to enter appearance by filing a Memorandum of Appearance.
2. The appellant filed an application dated 4th December, 2008 seeking *inter alia* directions that the suit be heard *ex parte* by way of affidavit evidence and oral submissions. According to the appellant, the respondent's replying affidavit was not competently on record because he had not entered appearance. Vide a ruling dated 23rd March, 2009 the learned Judge (Makhandia, J, as he then was) allowed the application for directions as prayed.
3. M/s Mwangi Kamau & Co. advocates, who were representing the respondent at the time, filed an application on 16th April, 2009 seeking orders setting aside the High Court's ruling dated 23rd March, 2009. While considering the said application the learned Judge (Sergon, J.) vide a ruling dated 30th November, 2011 observed that the said firm of advocates had neither filed a Notice of Appointment nor a Memorandum of Appearance and therefore the firm was not properly on record. The learned Judge expunged the pleadings filed by the said firm.
4. Subsequently, the firm of Waiganjo Gichuki & Co. advocates entered appearance for the respondent by filing a Memorandum of Appearance dated 6th August, 2010. On even date the

respondent filed another affidavit in reply to the Originating Summons. According to the respondent's advocate, the respondent was entitled to enter appearance because judgment had not been entered in the said suit. The suit came up for hearing on 3rd March, 2011 before Sergon, J. and he observed that the order issued by Makhandia, J. on 23rd March, 2009 directing the matter to proceed *ex parte* was still in force. The learned Judge adjourned the matter to enable the respondent's advocate to make the necessary application.

5. Vide an application filed on 18th March, 2011 the respondent sought the following orders:-
 - ***The orders made on 23rd March, 2009 directing that this suit be heard exparte by way of affidavit evidence and oral submissions be reviewed and set aside.***
 - ***This suit be heard interpartes and parties be free to call witnesses and to be subject to the usual examination where necessary.***
6. The grounds upon which the respondent relied on in support of the application were that firstly, his former advocate failed to file a Memorandum of Appearance causing the first replying affidavit sworn by the respondent to be struck off and consequently, the court on 23rd March, 2009 directed that the matter do proceed *ex parte*. Secondly, that the mistakes of his former counsel ought not to be visited upon him. Thirdly, the respondent only became aware of the court's direction only on 3rd March, 2011 when the suit came up for hearing. Fourthly, that he had since entered appearance and filed another replying affidavit and it was in the interest of justice for the suit to be determined on merit. Fifthly, upon the aforementioned discovery, the respondent's advocate move expeditiously to extract the order dated 23rd March, 2009 and presented it to the Deputy Registrar for signature on 7th March, 2011; and that the order was issued by the court on 15th March, 2011 and the respondent filed the application on 18th March, 2011. Sixthly, that the appellant would not be prejudiced if the orders sought were granted.
7. In reply, the appellant filed grounds of opposition. It was the appellant's position that the respondent had not made a case for review under ***Order 45 Rule 1*** of the ***Civil Procedure Rules***; that the respondent was guilty of laches because the order sought to be reviewed was dated 23rd March, 2009 and the application seeking review was filed on 18th March, 2011, that is, 2 years afterwards; that the respondent's current advocate was not properly on record and therefore the application was incompetent; and that the orders sought by the respondent were tantamount to asking the court to sit on appeal of its own decision.
8. After considering the application, the learned Judge (Sergon, J.) vide a ruling dated 23rd September, 2011 allowed it with costs to the appellant. It is that decision that has provoked this appeal which is based on the following grounds that:-
 - ***The learned Judge erred in law in overlooking the fact that in all circumstances of this case failure to apply for enlargement of time within which to file an appearance to the Originating Summons and the failure of the advocate to bring himself on record by filing a Notice of Appointment was so fatal to render the application a nullity.***
 - ***The learned Judge erred in misinterpreting Article 22(3) of the Constitution to mean that lack of observance of law and laid down procedure on the part of a party is a technicality.***
9. Vide a consent order dated 23rd July, 2013 the appeal herein proceeded by way of written submissions. Mr. Kamonde appeared for the appellant while Mr. Gichuki appeared for the respondent.
10. It was submitted on behalf of the appellant that the respondent's advocate on record filed a Memorandum of Appearance and a replying affidavit under the mistaken belief that he was entitled to do so under ***Order IX Rule 1*** of the former Civil Procedure Rules; the said order was only applicable in instances of a suit commenced by way of a Plaint and not by an Originating Summons. Consequently, in holding that the respondent's advocate was properly on record, the learned Judge erroneously implied that failure by an advocate to follow the laid down procedure or

- law was sufficient cause to warrant review of a valid order.
11. It was argued that the learned Judge erred in not finding that the respondent's advocate had not filed a Notice of Change of advocate as required under **Order III Rule 6** of the **Civil Procedure Rules** yet the respondent's previous counsel was on record at the time. The appellant also argued that there was no provision allowing a party to file a Memorandum of Appearance out of time once directions had been issued by the court. The appellant urged us to allow the appeal.
 12. It was submitted on behalf of the respondent that the failure to enter appearance was solely due to his former advocate's mistake. The said advocate admitted the same in his affidavit sworn in support of the application filed on 16th April, 2009 seeking review of the directions given on 23rd March, 2009. Thereafter, the respondent instructed his current advocate. Placing reliance on **Order IX Rule 1** of the former Civil Procedure Rules, which allowed a party to enter appearance at any time before final judgment is entered, the respondent's advocate filed a Memorandum of Appearance on 9th August, 2010. The respondent's advocate on record did not file a Notice of Appointment because the respondent's former counsel, Mwangi & Kamau Co. Advocates, had not entered appearance.
 13. It was argued that the learned Judge did not err in allowing the application for review. This is because the learned Judge correctly chose not to rely on technicalities but to be guided by ensuring justice is delivered as provided under **Section 19** of the **Environment and Land Court Act**. It was in the interest of justice for the mistakes of the respondent's former counsel not to be visited upon the respondent. It was also submitted that justice dictated that the suit be heard and determined on its merits as it involved land dispute. The respondent urged us to dismiss the appeal.
 14. We have considered the record, the grounds of appeal, submissions by counsel and the law. The first issue is whether the respondent's advocate, Waiganjo Gichuki & Co advocates, was properly on record at the trial court. This is because the issue of appearance will have a bearing on the pleadings and in particular the application filed on 18th March, 2011 which is the subject of this appeal.
 15. It is not in dispute that the respondent's former counsel, Mwangi Kamau & Co advocates, did not enter appearance by filing a Memorandum of Appearance but only filed a replying affidavit sworn by the respondent in opposition to the appellant's Originating Summons. Consequently, the High Court (Makhandia, J.) on 23rd March, 2009 gave directions for the suit to proceed *ex parte* on account of non-appearance. Further, the court (Sergon, J.) vide a ruling dated 30th November, 2009 struck out all pleadings filed by the respondent's former advocate for being improperly on record.
 16. Thereafter, on 9th August, 2010, the respondent's advocate on record, M/s Waiganjo Gichuki & Co advocates, filed a Memorandum of Appearance and another replying affidavit. The appellant faulted the said appearance and argued it was irregular. The appellant argued that **Order IX** of the former Civil Procedure Rules was not applicable where a suit was instituted by way of an Originating Summons. We respectfully disagree with the appellant's contention and hold that **Order IX** which provided for appearance of parties was applicable even where suits are commenced by Originating Summons. **Order IX rule 1** provided:-

“A defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgment is entered against him, or, if no interlocutory judgment is so entered, at any time before final judgment.”

17. In this case, the respondent's former counsel had not filed a Memorandum of Appearance and at the time the respondent's advocate on record filed a Memorandum of Appearance no judgment had been entered against the respondent. We find that pursuant to **Order IX Rule 1** of the former Civil Procedure Rules, the respondent's counsel properly entered appearance by filing a Memorandum of Appearance. We further disagree with the appellant's submissions that the respondent's current advocate ought to have filed a Notice of Change of advocate under **Order IX Rule 6** of the former Civil Procedure Rules because as outlined above the respondent's former advocate had never entered appearance for the respondent.
18. We now turn to consider the issue of review. While considering an application for review a court exercises its discretionary power. In ***Mulembe Farm Ltd & Another –vs- John B. Masika & 3***

others- Civil Appeal No. 230 of 2004, this Court stated:-

“Whether or not a decision or order should be reviewed is a matter within a judge’s own discretion. For an applicant to succeed he must place material before the court to show any one or a combination of the three factors which we earlier set out. The appellants did not satisfy that condition. The power of review is not the same as the power exercisable on appeal. That is why the jurisdiction of the court in review is circumscribed. The court in a review is called upon to exercise a discretion in a situation where, if the power is not exercised injustice or hardship will result and is invoked to help a party who is shown to have taken all essential steps in a matter but because of factors beyond his control he was not able to avail all relevant material or evidence, or that an error or mistake occurred.”

19. Pursuant to **Order 45** of the **Civil Procedure Rules** the respondent sought review of the order dated 23rd March, 2009 directing for the suit at the High Court to proceed *ex parte*. **Order 45** sets out instances when an order of review can be granted. This Court in **Harold Kidem Mganga & another –vs- Constance Mwai Mtoto – Civil Appeal No. 244 of 2004** sets out the instances as follows:-

“Since the application was for review it was upon the appellants to show that there had been the discovery of new and important matter or evidence which was not within their knowledge or could not be produced by them at the time the decision was made. The appellants could succeed if they were able to show that there had been some mistake or error apparent on the record. They could also succeed if they could show any sufficient reason why the previous decision should be reviewed”

20. It was the respondent’s contention that he was always ready and willing to oppose the appellant’s Originating Summons. He instructed his former advocates and swore his first replying affidavit promptly; his affidavit was struck out due to the failure of his advocate to enter appearance. He maintained that he only discovered that his first affidavit had been struck out in the year 2010 and without undue delay he instructed his current advocate who filed a Memorandum of Appearance on 9th August, 2010. He maintained that he discovered on 3rd March, 2011 that the court had directed the matter to proceed *ex parte*, hence he filed the review application without delay on 18th March, 2011.

21. Based on the foregoing we find that the respondent has established that the directions which he sought to review were as a result of the mistake of his former advocate. In **Murai & Others –vs- Wainaina (1978) LLR 2782**, Madan, J.A expressed himself as follows:-

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it was committed by Senior Counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better.”

22. We are of the view that the respondent should not be penalized for his former advocate’s mistake. We further give the respondent the benefit of doubt that his current advocate only discovered of the said directions on 3rd March, 2011. Therefore, the application for review was made without unreasonable delay. We find that there was sufficient cause to warrant the review of the order dated 29th March, 2009.

23. Consequently, we see no reason to interfere with the learned Judge’s exercise of discretion in allowing the application for review. The appeal herein has therefore no merit and is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 13th day of May 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR