



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: AZANGALALA GATEMBU & KANTAI, JJ. A)

CIVIL APPEAL NO. 358 OF 2012

BETWEEN

SAMUEL OGODO WAGAAPPELLANT

AND

FISH PROCESSORS (2000) LTD.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisumu (Chemitei, J) dated 31st October, 2012

in

KISUMU HCCC No. 184 OF 2011

JUDGEMENT OF THE COURT

The action commenced by the Respondent, Fish Processors (2000) Limited, at the Senior Resident Magistrates Court' Winam, against the appellant, Samuel Ogodo Waga, looked simple and straight – forward. But it spiralled into litigation that it is doubtful the parties could have contemplated when that journey began. Simple and straight forward because there was no doubt that the respondent employed the appellant as a driver and in the course of that employment the respondent apparently advanced to the appellant a sum of Kshs. 30,000/= which the appellant received and acknowledged through signed vouchers. That sum having not been repaid the respondent prayed for it in the plaint dated 25th January, 2010. The appellant filed a statement of defence denying liability but this was met by the Motion filed on 9th February, 2010 where summary judgment was sought against the appellant.

That Motion was argued before the Senior Resident Magistrate, P. C. Biwott, who in the Ruling delivered on 23rd March, 2010 saw no defence to the claim and entered summary judgement for the respondent as prayed. That did not go down well with the appellant who sought refuge in the High Court at Kisumu through High Court Civil Appeal No. 38 of 2010 filed on 29th March, 2010. The appellant also sought stay of execution pending appeal. Ali-Aroni, J, in the Ruling delivered on 2nd July, 2010 granted unconditional stay pending appeal. The same Judge heard the substantive appeal and in what

she called a “Ruling” which is undated the appeal was allowed because the learned Judge found triable issues in the statement of defence filed by the appellant in the Magistrates' court. The effect of this finding was that the order on summary judgement was set aside and the so it was to go to full trial on the merits. The appellant was given the additional safety valve where the suit was to be heard by a different Magistrate, not the one who had found no merit in the statement of defence.

That apparent safety valve was not good enough for the appellant. This is because by an application in Kisumu High Court Miscellaneous Application No. 102 of 2011 which application is not on record but whose effect is captured in the Ruling delivered on 8th July, 2011 by R. N. Nambuye, J (as she then was) the appellant:

“...Four (4) reliefs are sought namely that the Honourable Judge in the Civil Appeal granted an order that PMCC No. 16 of 2011 at Winam be heard before another court of competent jurisdiction, that he feels her will get fair justice if the file is transferred from Winam Court to the Chief Magistrate's Court, that the applicant has two cases before Winam Court namely PMCC 164 OF 2006 and PMCC No. 16 of 2010 but he has not received any fair fairness (sic) and for this reason he seeks rerouting of the trial venue...”

The Learned Judge considered the application and granted it on the merits ordering that the file be transferred from the Winam Court to the Chief Magistrates Court at Kisumu for hearing and disposal. That order was effected and the new suit became Kisumu CMCC No. 257 of 2011. By Notice of Motion dated 4th August, 2011 the appellant moved the Magistrates court for leave to amend the defence and that the draft defence be deemed as duly filed.

In the draft defence the appellant sought to introduce a counter – claim for defamation and another for commissions allegedly owed to the appellant by the respondent. When that application came for hearing before the learned Resident Magistrate (R. B. N. Maloba) it was opposed principally on procedural grounds namely that the appellant had neither crossed nor underlined proposed amendments contrary to what the Civil Procedure Act required. The appellant was granted an adjournment presumably to have a second look at his application but when the matter came up the next time for hearing of the application no step had been taken by the appellant. The application was then heard on the merits and in a Ruling delivered on 23rd November, 2011 the learned Magistrate held inter alia:

“...All considered I allow the application as per pray (sic) (1) and (sic) decline to allow Prayer (2) because of the defects in the draft amended defence annexed to the application. Instead I direct the defendant to file afresh amended defence which duly complies with the Rules as set out under Order 8 r 7 (2) of Civil Procedure Act together with a verifying affidavit as is provided for under Order 7 Rule 5 verifying the pleadings in the counterclaim in terms of the defamation and commission earnings causes of actions. The defendant to file and serve the said amended defence within the next 14 days from the date hereof. Once served, the plaintiff to file their reply within 14 days as well under Order 7 r. 11....”

The appellant did not amend the proposed defence as ordered within the time given or at all. He instead filed an appeal being Kisumu HCCA No. 184 of 2011 challenging the said Ruling. That appeal was heard by Chemitei, J who in a judgement delivered on 26th July, 2012 found it unmeritorious and dismissed it.

The appellant was not done.

By a Notice of Motion dated 3rd September, 2012 the appellant asked the High Court to review, vary or set aside the said judgement for various grounds set out in the Motion and an affidavit in support. The learned Judge was unimpressed and dismissed the application in the Ruling delivered on 31st October, 2012. It is this Ruling that has provoked this appeal.

We have deliberately travelled that rather long route to show that although, as we stated at the beginning of this judgement that the claim appeared simple and straight forward at commencement, it ended up occupying a lot of judicial time going by the number of Judges and magistrates through whose hands the matter has passed before getting to us.

Our duty, on a second appeal such as this one, is to consider only issues of law and not matters of fact which have been considered by the two courts below and findings made – See Section 72 Civil Procedure Act and case law in **Mary Githanga Mbugua v Mary Waceke Gachuru Civil Appeal No. 294 of 2004 (ur)** or the Uganda Court of Appeal reported case **Mutazindwa v Agba & Others [2008] 2 EA 265**.

In the Memorandum of Appeal the appellant, who has been unrepresented all along, took six grounds of appeal against the said Ruling. In the first ground the appellant faults the learned Judge who he says disregarded the appellants arguments during the hearing on the application for review; in the second ground the Judge did not apply the correct principles when dealing with the matter before him; in the third ground the Judge failed to act within the jurisdiction donated by Article 167 of the Constitution; in the fourth ground the Judge erred in not finding that the plaint filed in the subordinate court was faulty; the fifth ground faults findings on costs while the final ground faults the learned judge for not finding that the respondents case was defective, fatal and incompetent accompanied by a false affidavit.

The appellant addressed us at length when the appeal came for hearing on 18th June, 2014. He reminded us that he raised a preliminary objection before the trial magistrate on competence of the suit. Summary judgment was still entered leading him to appeal which appeal succeeded. He then took us through the history of the matter which we have set out at length in this judgement.

Mr. I. N. Muma, the learned counsel for the respondent, in opposing the appeal submitted that the appellant had failed to comply with procedural steps in that leave to appeal had neither been sought nor obtained. Counsel further submitted that the Ruling appealed from was sound as the learned Judge acted within the confines donated in an applictaion for review like the one before him.

In the Notice of Appeal dated and filed at the High Court of Kenya at Kisumu on 31st October, 2012 but lodged the next day 1st November, 2012 the appellant gave notice that he was dissatisfied with the Ruling of 31st October, 2012 and intended to appeal against the whole of that decision. That decision or Ruling was on the application for review which we have referred to.

We have perused the said Ruling which captures issues that are raised in this appeal such as competence of the original plaint. The application was presented under Order 45 Civil Procedure Rules on review. The learned Judge expressed himself thus in the course of the Ruling appealed from:

“ The appeal in question dwelt on the application by the applicant to amend his defence and counterclaim. The same was allowed with some limited conditions. The applicant did not fulfill the same but instead filed the appeal which I disallowed.

Having carefully perused the application, I respectfully disagree with the application. There is no new issues which he has raised that the Judgment did not touch. The issue he is advancing regarding a plaint being defective or otherwise are issues which were within his knowledge during the prosecution of the appeal. In any case those are issues inclining limitation element which the appellant ought to raise at the trial in the lower court.

Further the applicant has not attached the impugne decree or order as required by Order 45 (1) of the Civil Procedure Rules. Attaching the Judgment as he has done is insufficient. It is fatal as it is always necessary to know which decision the court ought to review.

For the foregoing reasons I do not see any merit in the application. The best the

applicant would have done if he was not happy with the judgement was to file an appeal at the court of Appeal. The application is otherwise dismissed with costs to the respondent.”

We have considered the record of appeal, submissions made and the law.

It will be recalled that after the applicant successfully applied for the original suit to be transferred from the Resident Magistrates' Court Winam, to the Chief Magistrate's Court, Kisumu, he applied for leave to amend statement of defence to include counter-claims. He was given time by the learned Magistrate to comply with procedural steps so as to make the application competent but he did not do so. He chose to appeal but his appeal was not successful.

Looking at the whole record we would state that the appellant has been accorded a lot of discretion by the various judicial officers who have handled his various applications and appeal.

The learned Magistrate did not dismiss the application for leave to amend which on the face of it appeared incompetent but instead used his discretion to allow the appellant to comply with rules of procedure. The appellant for unexplained reasons was unhappy with this and chose the appeal route instead of complying with the orders made. We would on our part say that the purposes of rules of procedure is nothing more than to facilitate the realization of the values and objectives of the Judiciary as stipulated in the Constitution and through relevant legislation. The rules of procedure though not an end in themselves their value and importance cannot be gainsaid. For it is through observance of rules of procedure that both an appellant and a respondent in a dispute attain equality thus guaranteeing fairness between them as contending parties. It is through rules of procedure which prescribe the period within which a party should take specified action that expeditious disposal of disputes is assured and undue delay eliminated or minimized. It is through rules of procedure that a party knows the precise case it has to meet or answer, without being ambushed or taken by surprise by the opposite party.

The learned Magistrate could very well have dismissed the application for leave to amend the defence as, indeed, he was asked to do by the respondent but he chose instead to grant to the appellant an opportunity to comply with procedural steps.

Then there is the issue that was before the learned Judge subject of this appeal.

Order 45 Civil Procedure Rules deals with applications for review of decrees or orders. It sets conditions that an applicant must satisfy to fit within the Order. These conditions are such as that the aggrieved applicant against who the decree or order has been passed has not appealed; or where no appeal is allowed from the decree or order. Such an applicant, if he discovers new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason desires to obtain a review of the decree or order may apply for review of the judgement to the court that made the order and this must be done without unreasonable delay. There are other conditions set out in the said Order 45 which need not detain us today.

The only issue that was placed before Chemitei, J, in the application for review was the allegation that the original suit was incompetent and did not comply with the law. That issue had long been placed before the learned Magistrate who handled the application for summary judgment. That was through the notice of preliminary objection filed by the applicant dated 15th February, 2010.

We may well ask the question – what was difficult in the appellant complying with the order of the Resident Magistrate (R. B. N. Maloba) made on 23rd November, 2011 where the application for leave to amend defence was partially allowed but the appellant ordered to comply with procedural requirements set out in Civil Procedure Act? Compliance with that order would have saved a lot of judicial time and also save the parties time and expenses.

We have considered the whole appeal before us and can see no fault in the way the learned judge dealt with the application before him for review. No new matter or evidence had been discovered and there was no sufficient or any reason upon which the court would have exercised its discretion favourably for the appellants. The appeal is without merit and we dismiss it with costs to the respondent.

Dated and Delivered at Kisumu this 19th day of September, 2014

F. AZANGALALA

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JUDGE OF APPEAL

S. GATEMBU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR