REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 132 of 2002

BETWEEN

CECILIA GATHONI ..... 1ST APPELLANT

HARUN J. M. THAIRU ..... 2ND APPELLANT

AND

GEORGE KARIUKI KABUGU ..... RESPONDENT

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

Nairobi (Keiwua, J) dated 7th June, 1995

in

H. C. C. C. No. 307 of 1995 (O.S)

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JUDGMENT OF THE COURT

(1) This is an appeal from the judgment of Keiwua, J (as he then was) dated the 7th June, 1995 at Nairobi in H. C. C. C. No. 307 of 1995**,** filed pursuant to leave granted Tunoi, JA (as he then was) on the 9th May, 2002 in Civil Application No. 360 of 2001.

(2) The procedural history of the appeal and its antecedents are as follows. In 1980, Mr. Thairu Waruihiu (now deceased) charged a parcel of land namely Title Number **KONYU/GACHUGU/576** (the suit property**)** to **Continental Credit Finance Ltd.** In default of repayment, the charger exercised its statutory power of sale by selling the suit property by public auction in Nyeri town on the 8th January, 1982 to Mr. George Kariuki Kabugu, the respondent in this case. In challenging the sale immediately thereafter, the chargor filed suit against the chargee, the auctioneer and the Land Registrar in the Eldoret registry vide Eldoret H.C.C.C. No. 60 of 1982**.** After seven years without any further developments, the respondent herein filed suit seeking the eviction of Mr. Waruhiu and vacant possession of the suit property at the Nyeri Registry in H. C. C. C. No. 2 of 1989. This suit was consolidated with Nairobi H. C. C. C. 85 of 1983. Unfortunately, before the suit was disposed of, Mr. Waruhiu died on the 3rd December, 1992.

(3) Following Mr. Waruhiu's death, the respondent made an application on the **23rd March, 1994**, seeking a declaration by the High Court that the suit had abated. In his ruling following hearing of the application on the 26th April, 1994, S. Amin, J directed that Mr. Waruhiu's heirs who are the appellants in this appeal, Ms. Cecilia Gathoni and Mr Harun J. Thairu, ought to have been served with notice of the application as the deceased's dependants, and ordered that they be notified through substituted service. Having noted that the appellants had not responded, Bosire, J (as he then was) made an order on the 24th July, 1994 declaring that the suit be marked as abated.

(4) The respondent then moved to file an application for an injunction against the appellants seeking their eviction from the suit property by way of an originating summons dated the 31st January, 1995. At the hearing of the application **before**Keiwua, J on the 7th June, 1995, the appellants told the Court that they required an interpreter to translate the proceedings into Kikuyu. The 2nd appellant, Mr. Thairu, however said that he was proficient in Kiswahili. The 1st appellant also told the court that the process of seeking agrant of Letters of Administration had began and requested to be allowed to clear the deceased's debt.

(5) In finding for the applicant, Keiwua, J ordered the appellants to vacate the suit property. The appellants being dissatisfied with the said ruling, filed a Notice of Appeal on the 8th June, 1995. In accordance with ***Rule 4*** of the Court of Appeal Rules, vide Civil Application No. Nai 66 of 1996**,** the appellants sought an extension of time to file the notice of appeal and memorandum of appeal. The application was allowed and order made allowing the applicants file their notice of appeal within seven (7) days from the date of the order and the record of appeal within twenty one (21) days thereof. A subsequent application for leave was also granted by Tunoi, JA on the 9th May, 2002, via Civil Application No. 360 of 2001.

(6) The memorandum of appeal filed on the 21st May, 2002, raised the following eleven grounds of appeal:

***"1. THAT the learned Judge erred in fact and in Law in e**ntertaining a suit and issuing orders for which he had no jurisdiction.*

2. THAT the learned Judge erred in fact and law by entertaining and hearing a suit which was brought unprocedurally and one which was therefore not a suit.

3. THAT the learned Judge erred in fact and law by not taking into consideration that the suit filed by the Respondent herein had already been barred by limitation of time.

4. THAT the learned Judge erred in Law in failing to take into consideration that the Appellants herein were already entitled to ownership and occupation by adverse possession.

5. THAT the learned Judge erred in fact and in law by holding that the Appellants herein had no defence to the Application for the Respondent herein while they had actually filed valid Grounds of Objection and Defence.

6. THAT the learned Judge erred in law in admitting for hearing matter that was filed in Nairobi whilst the proper place for filing would have been the High Court in Nyeri.

7. THAT the learned Judge erred in law in failing to hear the Appellants in respect to their grounds of objection as well as their replying affidavit.

8. THAT the learned Judge erred in law in allowing and/or permitting the proceedings or a substantial part thereof to held in a language which the Appellants did not understand.

9. THAT the learned Judge erred in fact by not allowing the parties to reconcile and have the

Appellants herein pay whatever amount of money was owed to the Respondent herein.

10. THAT the learned Judge erred in law and fact in admitting to hearing a matter filed while the same matter was before two other courts and had not yet been finally determined by the said other courts.

11. THAT the learned Judge erred in not taking into consideration that the Respondent herein had not proved his case on a balance of probabilities."

(7) The matter finally proceeded to hearing before this Court. In his submissions, the appellants' learned counsel Mr. Gacheche Wa Miano contended that the Civil Suit No. 307 of 1995 was brought by way of originating summons under Order XXXVI (now Order 37) of the Civil Procedure Rules, whereas the suit should have been instituted by way of a plaint. In respect of the reliefs, he submitted that Order XXXIX (now Order 40) of the Civil Procedure Rules provides for temporary and not permanent injunctions.

(8) In relation to the place of suing, the appellants' learned counsel submitted that the suit ought to have been filed in Nyeri, where the cause of action alleged arose, and not in Nairobi. He further submitted the 12 year limitation period had lapsed between the time the respondent acquired title to the suit property on the 7th April, 1982 and the time he claimed it by filing the suit in 1995. Finally, the learned counsel averred that the omission of the court to hear the appellants, consider their replying affidavits and accord a court interpreter as requested by the appellants supported the grant of the prayers and orders sought in the memorandum of appeal.

(9) In reply, learned counsel for the respondent Mr. L. E. Sane submitted that the records and in particular the supplementary record in Civil Suit No. 60 of 1982 at page 23, indicated that the suit was transferred from Nyeri to Nairobi by consent. He stated that following the death of Mr. Waruhiu, the suit abated. He argued that the appellants were not party to the suit which was commenced by way of originating summons. In submitting that procedural problems do not invalidate proceedings, learned counsel cited ***Boyes vs Gathure Civil Appeal 44 of 1969 EA 369*** wherein the predecessor of this Court namely the Court of Appeal for Eastern Africa held inter alia that the use of the wrong procedure did not invalidate the proceedings, because: (a) it did not go to jurisdiction and (b) no prejudice was caused to the appellant. He also cited ***Article 159*** of the Constitution of Kenya, which requires that the administration of justice to be donewithout undue recourse to technicalities. In urging the court to dismiss the appeal, Mr. Sane maintained that the appellants had not asserted any right to adverse possession, neither had any such aright arisen as the appellants had not filed suit to assert their claim.

(10) This being a first appeal, we are reminded of our primary role as the first appellate court namely to re-evaluate, reassess and reanalyze the facts as they were before the learned trial judge and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of ***Sumaria & Another vs Allied Industries Ltd [2007] KLR 1*** where this Court held inter alia that being a first appeal the court was obligated to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that the Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the judge has shown dominatably to have acted on wrong principles reaching the finding he did. See also the case of ***Musera vs Mwechelesi and Another [2007] KLR 159*** wherein this Court also held inter alia that "as an appellate court the court had to be very fair to interfere with the trial judge's finding unless it was satisfied either that there was absolutely no evidence to support the findings or that the trial judge had misunderstood the weight and bearing of the evidence before him and thus arrived at unsupportable conclusion".

(11) Following these principles**,** we have carefully considered the impugned judgment that gave rise to this appeal, the grounds set out in the memorandum of appeal, the oral submissions by learned counsel for both parties, the material on record, and the applicable law and we have come to the conclusion that the appeal revolves around the two questions regarding the Court's failure to address the omission on the part of the respondent herein to file the suit in accordance with the Civil Procedure Rules and the failure to

afford the appellants a hearing after the death of their benefactor.

(12) In relation to the procedure, we note that the record before us indicates that on the 1st January, 1995, the respondent herein brought an application by way of originating summons under ***Order XXXVI Rule 3*** of the Civil Procedure Rules as read with ***section 3A*** and ***63*** of the Civil Procedure Act, seeking the following orders:-

"1. THAT an injunction to issue against the Defendants/ Respondents jointly and severally or their agents and/or servants or otherwise howsoever remaining, entering or trespassing or doing any acts and/or continue occupying a piece of land known as KONYU/GACHUKU/576, which the Plaintiff/Applicant is the registered proprietor;

2. THAT the defendants/respondents to be evicted from the said parcel of land;

3. THAT this Honourable Court to make such further reliefs which it may deem fit and just to grant in the circumstances."

(13) ***Order XXXVI Rule 3*** of the repealed Civil Procedure Rules states as follows:-

"A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract."

(14) It is the view of this Court that this suit should have been filed byway of a Plaint. We wish to associate ourselves with this Court's holding in the past that, *"An application must be brought within the correct provision of the law. (i.e. the order and the rule), otherwise the application is defective and the court lacks Jurisdiction"*. See ***Njagi Kanyunguti and others v David Njeru Njogu Civil Appeal No. Nai 181 of 1994)***. It follows, therefore by the same token, that where a Court acts without jurisdiction, the proceedings are a nullity (***Narok County Council v Trans County Council & Another, Civil Appeal No. 25 of 2000 1 EA 161).***

(15) Secondly, we take the view that had the learned trial judge considered the appellants' grounds of opposition and the replying affidavits, he would not have failed to appreciate the substantial objections raised in the suit. Failure to hear a party in such proceedings not only subverts equality of arms but also due process. This Court has thus held in ***Central Bank of Kenya and another v Uhuru Highway development Ltd and others, Civil Appeal No. 91 of 1999*** that in an application for injunction, the Judge should look at the whole case, by balancing the strength of the case and the strength of the defence. In the instance at hand, the learned judge did not do so.

(16) This Court has also underscored the principles which should guide our courts when dealing with applications for summary judgment. A fundamental principle is that a summary judgment is a drastic measure which should be granted in the clearest of cases, given the repercussions of shutting the defendant from process. However, this does not mean that a court is precluded from entering summary judgments in appropriate cases. See the case ***Kenindia Insurance Company Ltd vs Commercial Bank of Africa & 2 Others [2006] 2 KLR 280***.

(17) We also find and hold that the learned Judge ought to have, at the minimum, addressed himself to the appellants' request for a court interpreter. We say no more about this than the highly emotive nature of land disputes and their far-reaching consequences on litigants generally.

(18) In sum, we find that this appeal has merit and therefore succeeds. This Court takes the view that substantive justice requires with equal measure to both parties in this case, that we give due consideration to the wider interests of justice and the provisions of ***section 3A*** and ***3B*** of the Appellate Jurisdiction Act, in allowing this appeal and setting aside the order of the High Court dated 7th June, 1995 at Nairobi in H.

C. C. C. No. 307 of 1995 (O.S.). Consequently, we order a rehearing of the matter on merit.

(19) In view of the peculiar circumstances of this case and considering that the error giving rise to this appeal is attributable to the court, we make no order as to costs.

Dated and delivered at Nairobi this 24th day of May, 2013.

P. KIHARA KARIUKI

…….……..
PRESIDENT,

COURT OF APPEAL

R. N. NAMBUYE

…….……..
JUDGE OF APPEAL

P. O. KIAGE

……..
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR