



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 196 of 2007

BETWEEN

CORNELIUS MICHUBU M'ITABATHI APPELLANT

AND

GODFREY BARIU 1ST RESPONDENT

ALBERT KIMATHI 2ND RESPONDENT

MAUA MUNICIPAL COUNCIL 3RD RESPONDENT

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

Meru (Lenaola, J.) dated 3rd July, 2007

in

H.C.C.A NO. 127 OF 2006)

JUDGMENT OF THE COURT

This appeal emanates from the ruling of the High Court at Meru (Lenaola, J.) dated 3rd July, 2007 in which the learned Judge summarily rejected the appeal filed by the appellant.

The brief facts of this appeal are that the appellant herein erected a commercial building on his property described as Maua Township/4. The portion of land in front of the commercial building served as a parking area and provided for the sewerage drainage as well as the entrance to the appellant's commercial building. The appellant learnt sometime in 1998 that the 3rd respondent had surveyed and allocated the land in front of his commercial building, which had since started being described as plot No. 79 Maua Township (suit land) to the 1st and 2nd respondents. He was apprehensive that the 1st and 2nd respondents would erect a building on the suit land which would have adverse effects on the sewage system and would also block his commercial building rendering it commercially unviable. Subsequently, the appellant filed suit in the Senior Resident Magistrate's Court at Maua seeking *inter alia* a permanent injunction restraining the respondents herein from alienating, transferring and/or transacting in any manner with the suit land. On 18th June, 1999 the subordinate court issued a temporary injunction restraining the 3rd respondent herein from alienating and/or transferring the suit property pending the

determination of the suit therein. Despite the main suit being fixed for hearing on several occasions the hearing did not take off for one reason or another.

The 1st and 2nd respondents filed a Chamber Summons application dated 8th January, 2004 seeking *inter alia* a temporary injunction restraining the 3rd respondent from establishing a bus terminus or interfering with the suit land in any other manner. Though the application was set down for hearing on 15th January, 2004 the same did not proceed and was stood over to 5th February, 2004. On 5th February, 2004 the application was stood over generally because the parties herein did not attend the *inter partes* hearing. Thereafter, the 1st and 2nd respondents filed another Chamber Summons application dated 18th August, 2006 seeking dismissal of the appellant's suit for want of prosecution. The 1st and 2nd respondents argued that the appellant had lost interest in the suit because he had failed to take any step to set the suit down for hearing since 5th February, 2004. The subordinate court in its ruling delivered on 22nd November, 2006 dismissed the appellant's suit for want of prosecution.

Being aggrieved with the decision of the subordinate court the appellant filed an appeal in the High Court vide a memorandum of appeal dated 6th December, 2006. On 3rd July, 2007, the learned Judge (Lenaola, J.), after perusing the record of appeal, summarily rejected the same on the grounds that there were no sufficient grounds for interfering with the decision of the subordinate court. The appellant was aggrieved by the decision of the High Court hence this current appeal. The appellant has raised four grounds of appeal which we believe can be consolidated into one ground; whether the learned Judge exercised his discretion properly under **section 79B** of the **Civil Procedure Act** by summarily rejecting the appellant's appeal therein.

Mr. Maitai Rimita, learned counsel for the appellant, submitted that the appellant could not fix the suit for hearing while the application dated 8th January, 2004 filed by the 1st and 2nd respondents was still pending. He further submitted that the discretionary power of summary rejection of an appeal under **section 79B** of the **Civil Procedure Act** ought to be exercised sparingly. He maintained that the learned Judge did not exercise his discretion properly because he failed to take into account that the failure by the appellant to fix the main suit for hearing was not because of his indolence or carelessness but due to the above mentioned pending application. Mr. Rimita finally urged us to allow the appeal.

Mr. Haron Gitonga, learned counsel for the 1st and 2nd respondents in opposing the appeal, argued that the learned Judge exercised his discretion properly under **section 79B** of the **Civil Procedure Act** because according to him, the burden of fixing the suit down for hearing always lies with the Plaintiff. Mr. R. P. Mugambi, learned counsel holding brief for Mr. Kaberia, who is on record for the 3rd respondent, also concurred with the submissions made by Mr. Gitonga.

The jurisdiction exercised by the High Court under **section 79B** of the **Civil Procedure Act** is discretionary. **Section 79B** provides,

'Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.'

Therefore, before we can interfere with the learned judge's discretion of rejecting the appellant's appeal summarily we must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. In **Mbogo & Another vs. Shah (1968) E.A. 93** at page 95, Sir Charles Newbold P. held,

'.....a Court of Appeal should not interfere with the exercise of the discretion of a single 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 misjustice....'

We have considered the grounds of appeal, the submissions by counsel and the law. We are of the view that the issue raised by the appellant as to whether the main suit could be fixed for hearing while there was a pending interlocutory application is a substantial ground which can only be suitably determined when the appeal goes for hearing. We further believe that a finding on the above issue would have a bearing on whether the learned magistrate was correct in dismissing the appellant's suit for want of prosecution. Therefore, the said ground which was raised in the appellant's memorandum of appeal was sufficient to warrant the admission of the appellant's appeal for hearing before the High Court. In **Nzioka vs. Kitusa (1984) KLR 487**, this Court held at page 488,

'Section 79B of the Civil Procedure Act empowers the High Court to summarily dismiss an appeal where the judge considers that there is no sufficient ground for interfering with the decree appealed from. That power should be sparingly used, and only in the clearest cases such as an appeal based entirely on points of fact, raising no questions of law and not where, as in this case, the memorandum of appeal raised substantial grounds of law.'

Further, this Court in **Mashere vs. Walusala (1986) KLR 503** in considering the power of the High Court to summarily reject an appeal held at page 504,

'It is nevertheless, a decision of the court which is supposed to be made after a careful perusal of the record and after weighing all those matters which a Judge of the High Court should take into account when exercising his discretion to deny a subject his ordinary right of appeal.'

The upshot of the foregoing is that we find that the learned Judge misdirected himself when he exercised his discretion in rejecting the appellant's appeal summarily. Accordingly, we allow this appeal and set aside the order of the High Court dated 3rd July, 2007. We further order that the appellant's appeal filed in the High Court be admitted and determined according to the law.

Dated and delivered at Nyeri this 16th day of May, 2013

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

MARTHA KOOME

.....
JUDGE OF APPEAL

J. OTIENO- ODEK

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR