



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ONYANGO OTIENO, KARANJA & MARAGA J.J.A.)

CIVIL APPEAL NO. 279 OF 2007

BETWEEN

EPHRAIM MBAE.....1ST APPELLANT

SARAH KATHURE JOHN.....2ND APPELLANT

WINFRED MAIGENE STEPHEN.....3RD APPELLANT

AND

GILBERT KABEERE M'MBIJIWE.....1ST RESPONDENT

JOCET AUCTIONEERS.....2ND RESPONDENT

COUNTY COUNCIL OF MERU.....3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Meru (Lenaola, J.) delivered on 23rd October, 2007

in

HCCC NO.15 OF 2003)

JUDGMENT OF THE COURT

This is an appeal from the Ruling and Order of the High Court at Meru (Lenaola, J.) in Meru HCCC No. 15 of 2003 dated 23rd October, 2007.

The appeal was filed on behalf of **Ephraim Mbae, Sarah Kathure John and Winfred Maigene Stephen** by the firm of the *Charles Kariuki & Co. Advocates*.

Before the Appeal could be heard, the 1st appellant – Ephraim Mbae died and so his appeal has since abated and the same was marked as such under **Rule 99(2)** of this **Court Rules**.

The remaining appeal is therefore, by Sarah Kathure and Winfred Maigene Stephen who are the 2nd and

3rd appellants respectively.

In order to put the appeal in its proper perspective, it is necessary to recap a bit of its history. The appellants herein were the plaintiffs before the High Court and the three defendants were the respondents.

There was a dispute as to the ownership of **Plots Nkubu 57A, 57B and 59** at Nkubumarket. It was alleged that the 1st respondent who was claiming ownership and 2nd respondent, a firm of Auctioneers herein with others not in court went to the said premises and demolished the buildings thereon causing the appellants to suffer damage and loss which they estimated at Kshs 12 Million. The appellants sued them jointly and severally for compensation for the said damage and loss.

Before the matter could be heard, the parties went to court on 25th March, 2003 for the hearing of an interlocutory application. On that date, one *Karimi Mbogo*, learned counsel appearing for the 2nd respondent herein informed the court that he had been served with a notice of withdrawal of the suit by the 1st appellant. The first appellant informed the court that he was desirous of withdrawing the suit and he was put in the witness-box so that he could make the informal application for withdrawal on oath.

Having been duly sworn, the 1st appellant informed the court:-

“I have withdrawn the case against the defendants.”

When cross-examined by *Mr. Mbogo* for the 2nd respondent, *Mr. Githinji* for 1st

respondent and *Mr. Mukua* for 3rd respondent, the 1st appellant at first confirmed that he had withdrawn the case against all respondents. He said that he had realized that he had been cheated by the people who had sold the plot to him that they were the true owners while in fact the plot belonged to the 1st respondent. It was on that basis that he decided to withdraw his claim. Further down in the proceedings, when subjected to cross-examination by *Mr. Mukua*, the 1st appellant stated:-

“I withdraw the case against M’mbijiwe (1st respondent) but not the County Council. I reserve my right to pursue my right against the Council.”

He further told the court on cross-examination by *Mr. Muriuki* who was still on record as acting for him:-

“Yes, I have terminated your services as my advocates Charles Kariuki & Co. Advocates that means that all the documents I had signed have been withdrawn. It is upto the other plaintiffs to decide what they do.”

These documents would include the verifying affidavit which bore his signature.

Following this withdrawal, the learned Judge (*Kasanga Mulwa, J*) proceeded to mark the suit against the 1st and 2nd respondents as withdrawn.

An issue however, arose as to whether there was any suit left since the only verifying affidavit had been sworn by the 1st appellant who purported to have the authority of two other appellants to swear it on their behalf. The court reserved that issue for determination on another date but before that issue could be revisited, the 2nd respondent through the firm of *Kirimi Mbogo & Co. Advocates* filed the notice of preliminary objection dated 9th April, 2003 basically urging that there was no proper suit left before the Court. The preliminary objection was heard by *Lenaola, J* who rendered the Ruling that is now the subject of this appeal.

According to the applicant in the preliminary objection, the appellant having withdrawn his suit,

withdrew it along with the verifying affidavit and that being so there was no suit left for 2nd and 3rd appellants to pursue as against the 2nd and 3rd respondents. He therefore, urged the court to strike out the entire suit.

Arguing on behalf of the 2nd and 3rd appellants, *Mr. C. Kariuki*, learned counsel submitted that the suit was still properly before the court and it had survived the withdrawal because the verifying affidavit was sworn on behalf of the other appellants. The learned Judge considered these arguments along with some authorities from this Court which were cited to him.

The learned Judge also considered the contents of a draft amended plaint which was annexed in an application which was yet to be prosecuted. He arrived at the conclusion that the court had the jurisdiction to strike out the plaint for lack of a valid verifying affidavit; but the court could still redeem the plaint by allowing the remaining plaintiffs to file another compliant verifying affidavit.

Having looked at the intended amended plaint, he found the same to be frivolous and so he exercised the first option of striking out the plaint.

The appellants felt aggrieved by that ruling and filed this appeal proffering the following grounds:-

1. *The learned Judge erred in law and fact in failing to find that the 1st plaintiff (sic) suit remained as against the 3rd defendant as he only withdrew case against the 1st and 2nd defendants.*
2. *The learned Judge erred in law and fact in not finding that the failure by the 2nd and 3rd plaintiff (sic) to file Verifying Affidavit was not fatal to the suit.*
3. *The learned Judge erred in law and fact in not finding that the circumstances of the case dictated that the suit be heard on merit and that the 2nd and 3rd plaintiffs be directed to file Verifying Affidavit if need be.*
4. *The entire ruling is unfair and unconstitutional as it deprived the appellants' remedy since their claim would be time barred if they were to file a fresh suit.*

They ask the court to allow the appeal, set aside the impugned ruling and allow Meru HCCC No. 15 of 2003 to be heard on merit.

The 1st respondent filed a notice of grounds for affirming the decision of the High Court upon grounds other than those relied upon by the High Court. The gist of these grounds is that, the appellants filed another case before the High Court in Meru HCCC No. 90 of 2005 which is in respect of the same subject matter and so this appeal amounts to an abuse of the court process.

He urges the court to dismiss the appeal.

In his oral address to court, *Mr. Kariuki*, learned counsel for the appellants, expounded on appellant's grounds of appeal. He submitted that the case against the 3rd respondent had not been withdrawn and so the verifying affidavit still stood. He submitted that the Judge of the High Court also erred in considering the contents of the draft amended plaint which was not yet on record and concluding that the same was frivolous. He further urged that even if the court found the affidavit defective, the learned Judge should have allowed the appellants to file a compliant verifying affidavit. He urged this Court to invoke the provisions of **Section 3A** and **3B** of the **Appellate Jurisdiction Act** and **Article 159(2)(d)** of the **Constitution** and allow this appeal.

On his part, *Mr. Opolu*, the learned counsel for the 1st and 2nd respondents submitted and rightly so that there was no application by the appellant for leave to file a compliant verifying affidavit. He submitted further that there was no authority from the 2nd and 3rd appellant to swear the verifying affidavit

and so once the 1st appellant withdrew his suit, it went with the verifying affidavit and so the 2nd and 3rd appellants' claims were left without a verifying affidavit. He stated that the Judge rendered himself correctly and his Ruling cannot be faulted. He also informed the court that after the suit was struck out, the 2nd appellant filed two other suits before the High Court in Meru, and this appeal is therefore, only an academic exercise. In conclusion, he defended the

learned Judge for considering the merits of the intended amended plaintiff saying that he did so because he was referred to the case of **Josephat Kipchirchir Sigilai Vs. Gatalsanik Enterprises Ltd & 4 Others (Civil Appeal No. 98 of 2003)** which expressly stated that failure to comply with **Order VII Rule 1(2)** of the **Civil Procedure Rules** can be cured by the court allowing the default party to file a compliant verifying affidavit. The court nonetheless put a caveat and said that this can only be done where "*the claim is neither frivolous, vexatious nor scandalous.*"

Mr. Arithi, learned counsel for the 3rd respondent urged the court to dismiss the appeal against the 3rd respondent as the 1st appellant had since died and the appeal against 3rd respondent had therefore, abated. That could nonetheless be so, but there is still the appeal by the 2nd and 3rd appellants against 3rd respondent which has not abated.

Counsel for the appellant submitted that if the appeal is allowed, then HCCC No. 15 of 2003 can be consolidated with the two other cases and heard together. He also stated that the other two suits have no claim for damages as the claim was barred by statutory limitation and so there is no abuse of the process of court.

We have carefully considered the relevant pleadings before the High Court and the entire Record of Appeal before us. We have also considered the oral submissions of all counsel appearing before us.

Having closely studied the plaintiff dated 17th February 2003, we note that the same was actually defective on its face. For instance, the claim by all the plaintiffs is lumped together. The particulars of the ownership of the suit properties is all in one paragraph i.e. paragraph six (6). The subsequent paragraphs also deal with the cause of action and the damage said to have been suffered in lump sum. There is no distinction as to what happened to each of the plots, their values, etc. Was the

12 million in respect of all of them together? Were the values of all of them equal?

Even the prayers are similar. The verifying affidavit is also clearly defective as there is no authority from the two other deponents allowing the 1st appellant to swear the same on their behalf.

This lumping up of the properties together in the same paragraphs and prayers meant that one cannot extricate one property or prayer from the other. This therefore, meant that once the first appellant withdrew his suit, all the paragraphs in question were withdrawn. In fact, the issue of the defect in the verifying affidavit here is secondary. The entire suit collapsed the moment the 1st appellant withdrew the suit as he could not extricate his claim and leave the others in the same plaintiff.

Indeed, learned counsel for the appellants must have realized this and that could explain why the intended amended plaintiff was differently crafted.

In our considered view, there was nothing in that plaintiff to salvage once the 1st appellant withdrew his suit. Allowing the remaining appellants to file a compliant affidavit in respect of an irredeemably defective plaintiff could not have served any purpose. It should be noted that the court's discretion to grant a party leave to file a compliant verifying affidavit after striking out a defective one is only exercised if and when the plaintiff sought to be verified is itself sustainable.

Our view of this matter is that, firstly, once the 1st appellant withdrew his suit, the entire plaintiff collapsed and not even the claim by the 1st appellant against the 3rd respondent could be left standing.

Secondly, the affidavit itself was defective but even if we were to assume that it was not, it had nothing to verify once the suit collapsed. There was basically no suit to salvage whichever way one was to look at the situation.

For the foregoing reasons, we find this appeal totally devoid of merit. The same is dismissed with costs to the 1st and 3rd respondents.

Dated and delivered at Nyeri this 13th day of June, 2013.

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

D. K. MARAGA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR