



**REPUBLIC OF KENYA**

**Court of Appeal at Nyeri**

**Civil Appeal 11 of 2008**

**MUNUNGA TEA FACTORY LTD**

**KENYA TEA DEVELOPMEENT AGENCY .....APPELLANT**

**AND**

**SUSAN WANJIRU KARANI.....RESPONDENT**

*(Appeal against Orders of the High Court of Kenya at Embu (Justice J.N. Kaminwa J.) dated 21<sup>st</sup> June, 2006*

**in**

**Civil Appeal NO. 24 of 2006)**

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**JUDGMENT OF THE COURT**

The Respondent herein **Susan Wanjiru Karani**, filed a civil suit in Kerugoya being PMCC NO.221/2004 against the appellants herein **Mununga Tea Factory Limited and Kenya Tea Development Agency**. In a plaint dated 18<sup>th</sup> day of May, 2004 and filed on the 20<sup>th</sup> day of May, 2004 the respondent (Plaintiff in the lower court) claimed the sum of Kshs.94, 550.00 being the unpaid purchase price of tea leaves delivered by her to the appellants. She also claimed interest at 12% from 1<sup>st</sup> October, 2003 till payment in full plus costs.

In response to the respondents' claim, the appellants filed a joint defence dated the 22<sup>nd</sup> day of June,2004 and filed on the same day denying liability, and claiming that the respondent had been paid in full.

After hearing the suit, the learned Senior Resident Magistrate allowed the respondent's claim, and entered Judgment against the appellants for Kshs.94, 550.00 with costs and interest.

Being aggrieved by that Judgment, the appellants moved to the High Court at Embu and filed Civil Appeal NO.24/2006. The grounds put forward were that the learned trial magistrate erred in law and fact in giving Judgment against the weight of evidence on record; in not setting out issues for determination in his Judgment; in not giving reasons for his Judgment; in solely relying on the respondent's evidence; in failing to evaluate the appellants' evidence; in disregarding the appellants witnesses' evidence without giving reasons for doing so; and in holding that the respondent had proved her case on a balance of probability which holding is not supported by the evidence on the record.

The appeal was placed before the High Court (Khaminwa,J) for admission, and the High Court summarily rejected the appeal. Being dissatisfied with the order of summary rejection, the appellants filed an application for review seeking:-

**(3) That the Honourable court be pleased to review and or set a side the order issued on 21/6/2006.**

**(4) That this Honourable court be pleased to give such further and or better relief as it deems fit.”**

The said application was defended through a replying affidavit deponed by **John Ndana**, learned counsel for the respondent. Parties were heard on merit on the said application for review and in a ruling delivered on the 3<sup>rd</sup> July, 2007 **Khaminwa J** declined to review, and set aside the order of summary rejection of the appeal.

The appellants thereby became aggrieved with that refusal and moved to this court. The memorandum of appeal dated 4<sup>th</sup> day of January, 2008 outlines five grounds of appeal namely:-

**(1)That the learned Judge erred in law in disregarding the memorandum of appeal dated 11/4/2006 and the contents therein.**

**(2)That the learned Judge erred in law and fact in disregarding the fact that the appellants had had overwhelming chances of winning the appeal.**

**(3)That the learned Judge erred in law and fact in disregarding the supporting affidavit sworn by the counsel for the appellant in support of the chamber summons dated 7/12/2006.**

**(4)That the learned Judge erred in law and in fact in disregarding the facts adduced in the application dated 7/12/2006 and proceeded to dismiss the same.**

**(5)That the learned Judge erred in law and fact in dismissing the appeal before it was heard.**

When the appeal came before us for hearing, learned counsel for the appellants **Ms. Muriithi CNM** argued all the grounds as one. She urged us to allow the appeal on the grounds that the learned High Court Judge gave no reasons for rejecting the appeal; the learned Judge disregarded the affidavit evidence filed by both sides; failed to revisit the appellants grounds of appeal against the subordinate courts' Judgment, and failed to notice that the appeal raised arguable points of facts and law.

In opposition thereof, learned counsel for the respondent, **Mr. Ndana J**, urged us to dismiss the appeal and confirm both the learned Judges' rejection of the appellants' appeal as against the subordinates courts' decision as well as her rejection to review and set aside the order of summary dismissal of the appeal.

We have accordingly considered the afore set out rival arguments on the appeal, in the light of the contents of the entire record of appeal before us, and which we have perused and accordingly we proceed to make the following findings on the same.

(1) That it is now trite law and we take judicial notice of the same that a party aggrieved by a decision of a subordinate has an undoubted right of appeal to the High Court. A perusal of the subordinate court's Judgment on record indicates clearly that the disputants herein were given that right to be exercised within 30 days of that decision and the appellants who were the losing parties to that litigation opted to exercise that right and they indeed presented their appeal within time.

(2) We are also alive to the fact that the procedural law governing disposal of civil appeals from subordinate courts to the High Court has put in place mechanisms of sifting the resulting appeals so that only those with serious issues can proceed to hearing. Section 79 B of the CPA 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 not with standing section 79C, reject the appeal summarily”**

The learned Judge of the High Court exercised her discretion under the afore stated provision when she summarily dismissed the appellants’ appeal to the High Court.

(3) The appellant being dissatisfied with the summary dismissal order was entitled either to seek a review of the said order or appeal against it. In the circumstances of this case the appellants sought review under the old order XLIV rule (1) which provides:-

**“Any person considering himself aggrieved –**

**(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of 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 from other sufficient reason, desires to obtain a review of the decree or order may apply for a review of Judgment to the court which passed the decree or made the order without unreasonable delay”**

(4) In seeking review, the appellants put forward three grounds in the body of the application namely that there is an error apparent on the face of the record; that there is sufficient reason to warrant review and or setting aside of the order issued on 21/6/2006 and that it is meet and just to allow the application therein. The appellants also had in place a supporting affidavit deposed to by one **Magee wa Magee**. We have revisited the content of the said supporting affidavit and note that there was an assertion that the memorandum of appeal raised good grounds of appeal and that the appeal was arguable and had high chances of success; that there was an apparent error on the face of the record in that the order of summary dismissal purports that the appeal there in was against a Judgment in a divorce cause number 221 of 2004 which was not the position.

As earlier stated, the orders sought in this appeal are those of setting aside the order dismissing the appeal summarily and the one dismissing the application for review. As regards the first order, we are of the considered view that the learned Judge should not have summarily dismissed the appeal. Section 79B of the Civil Procedure Act empowers the High Court to summarily dismiss an appeal where the Judge considers that there are no sufficient grounds for interfering with the decree, see **Mashere versus Walusala (1987) KLR 455**, and also the case of **Nzioki versus Kitusa (1984) KLR 487** where in the Court of Appeal ruled inter alia that:-**“Section 78B of the Civil Procedure Act empowers the High Court to summarily dismiss an appeal where the court considers that there is no sufficient ground for interfering with the decree appealed from. Secondly that the power of summary dismissal should be used sparingly and only in the clearest of cases, such as an appeal based entirely on points of facts, raising no questions of law”**

Herein the learned Judge gave absolutely no reasons for the exercise of her discretion, and we are unable to discern any. The decision to reject a case summarily, is very drastic. Being the first appeal before the High Court and the same raising points of law and facts, it is our view that the same should not have been dismissed summarily see **Philip Ochilo Orero versus Ambrose Seko (1984) KLR 238**. An appeal court must, like any other Court, cautiously guard itself against locking out any litigant by summary procedure unless the appeal is plainly and obviously misconceived.

In the current case, it is clear that the memorandum of appeal raised arguable grounds of facts and of law, for example the learned magistrate’s failure to give reasons for his judgment and his disregard of the appellants’ witness evidence without giving reasons for doing so. It was therefore improper to dismiss the appeal summarily as the appeal raised arguable grounds.

The Appellants, in our view, were justified in making the application for review of the order dismissing their appeal, under Section 3A of the Civil Procedure Rules and Order XLIV Rule 1(1) of the Civil Procedure (Revised) Rules.

The learned judge having not heard the arguments, it was improper in our view to have dismissed the same. Litigants who come before the court must be given an opportunity, guaranteed under the Constitution, to present their case for adjudication on merits, however weak it may seem. There must be some indication that the court seized of the matter addressed itself to the questions at issue and had the record before it. In the present case, there is not even an indication whether the record had been called for and whether it was before the Court. In light costs to the Appellant. In so doing, we set aside the order of the High Court and instead order that the appeal he admitted to hearing be heard expeditiously.

Those shall be the orders of the Court.

**Dated and delivered at Nyeri this 1<sup>st</sup> day of November, 2012.**

**ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**