REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 253 of 2006

NDICHU NDUATI……APPELLANT

AND

JEPHITHA MURIGU…….1ST RESPONDENT

ERENA WANGECHI MBUCIIMWE…….2ND RESPONDENT

*(Being an Appeal against ruling and order of the High Court Kenya at Nyeri (**Okwengu, J**.) dated 19th June, 2006.*

in

Nyeri Misc Appl. 133 of 2004)

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JUDGMENT OF NAMBUYE, JA.

The respondents' herein namely **Jephitha Murigu and Erena Wangechi Mbuciimwe** filed a civil suit in Kerugoya Resident Magistrates Court being PMCC No. 84 of 2000 vide a plaint dated 12th day of April, 2000.The suit was brought against the appellant **Ndichu Nduati,** claiming that the respondents' were the registered owners of land parcel number LR. No. Mwerua/Kithumbu/525(suit land), in respect of which the appellant was in an unlawful occupation. The appellant had also lodged a caution against the said title. Further the respondents' contended that the appellant had interfered with their quiet occupation and lawful use leading to loss and damage. In the premises the respondents' sought orders for the removal of the caution from the suit land in default the land registrar be directed to remove the caution; eviction of appellant, his servants, agents, family or any person claiming through him from the suit land; damages for unlawful caution; cost of the suit, and any other relief that the court may grant**.**

In response to the respondents' claim, the appellant put in a defence and counter claim dated the 23rd day of May, 2000 and filed on 24th May, 2004 contending that his late father one **Nduati Kangutu** purchased the suit land in the year 1961 from one **Kariuki Kathu**; the appellant's family has been in occupation since then and have therefore acquired title through adverse possession and the lodging of the caution by the appellant against the said suit title was lawful.

In consequence thereof, the appellant counter claimed for a declaration that the respondents' claim is time barred; that the respondents' are holding the suit land as trustees for the appellant and his family; and lastly, for an order directing the respondents' to transfer to the appellant the suit land free from all encumbrances.

After hearing the suit the Hon. Senior Resident Magistrate, Lucy Gitari in her judgment delivered on 18th May, 2004 found for the respondents on their claim in the plaint and dismissed the appellant's defence and counter claim. The appellant became aggrieved by that decision and desired to file an appeal to the High Court. The appellant filed an application in the High Court by way of notice of motion dated 22nd day of July, 2004 under section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya, seeking leave to appeal out of time on the grounds that failure to file appeal in time was occasioned by the courts delay in availing court proceedings to the appellant, and secondly that the intended appeal raises arguable points and also has high chances of success.

The respondents opposed the application on the grounds that no basis had been made to warrant the relief sought; that the appeal is not arguable and had no chances of success as the lower court had no jurisdiction to entertain the claim for adverse possession.

The application was heard on its merits and rejected by **Okwengu, J.** as she then was. The appellant became aggrieved and proceeded to this court and filed the current appeal citing three grounds of appeal namely:-

(1) **The learned Judge erred in failing to address herself to the merits of the appeal in her entire ruling and entirely dismissed the application for court.**

(2) **The learned Judge failed to hold that the delay was not inordinate.**

(3) **The learned Judge failed to address herself to the fact that the issue at hand was land and dismissed the application for the leave denying the applicant an opportunity to be heard in merit.**

On the day fixed for the hearing of the appeal, only learned counsel for the appellant **Mr. H.K. Mahan** appeared before court. The court being satisfied that the respondents had notice of the hearing of the appeal and there being no explanation for non attendance the court allowed the appeal to proceed to hearing. In his submissions to court, learned counsel for the appellant urged us to allow the appeal on the ground that the learned Judge exercised her discretion wrongly in withholding leave to appeal out of time considering that a reasonable explanation had been given for the delay and that the appeal was arguable and meritorious considering that the subject matter of the counter claim is a claim to land. Reliance was also placed on the case of **Shah and Others versus Akiba Bank Limited and Others (2006) 2EA (CAK) 323 and Kenya Shell Limited versus Kobil Petroleum Limited (2006) 2EA 132 (CAK).**

This being a first appeal, I am reminded of my role and obligation as a first appellate court which namely to re-evaluate and re-assess the facts on the record and arrive at my own determination on the issues raised. See the case of **Sumaria and Another versus Allied Industries Limited (2007) 2 KLR 1** wherein the Court of Appeal held inter alia that "**being a first appeal, the court was obliged to reconsider the evidence, re-evaluate it and make its own conclusion,"** with the only caveat being that interference with a finding of fact on appeal can only arise where the same was based on "**no evidence, or on a misapprehension of the evidence or that the Judge is shown demonstrably to have acted on a wrong principle in reaching the finding he did**"

Further in the case of **Musera versus Mwechesi and Another (2007) 2KLR 159** this court held,

"**an appellate court, has to be very slow to interfere with the trial Judges findings unless it is satisfied that either 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 arrived at an insupportably conclusion"**

I have revisited the record re-evaluated the facts that were placed before the learned Judge for and against the grant of the relief of leave to appeal out of time and I am satisfied that section 79G (supra) under which the application for leave to appeal out of time had been presented donates a discretion to the court when deciding whether to grant or with hold the relief of leave to appeal out of time.

The principles governing the exercise of judicial discretion in whatever circumstances that the court may be faced with have now been crystallized by case law. In the case of **Machira t/a Machira & Company Advocates versus Mwangi and Another (2002) 2 KLR 391** the Court of Appeal stated clearly that (1) "**the granting or refusal of an application for leave to appeal is a matter within the discretion of the court; that the court will only refuse leave if it is satisfied that the applicant has no realistic prospects of success on the appeal; that where leave is refused, the court ought to give short reasons which inform the applicant why leave was refused….; that the court can grant the application even when it is not so satisfied in instances where the issues of public interest or if it raises a novel point where the law requires clarifying subject to existence of a ground of appeal which merits serious judicial consideration and lastly that where the order from which it is sought to appeal was made in the exercise of judicial discretion a rather strong or case would have to be made…**"

In Kenya Shell Limited versus Kobil Petroleum Limited (supra) the Court of Appeal expounded this principle further by stressing that "**whether or not the court would grant leave to appeal is a matter of the discretion of the court. As in all discretions exercisable by courts howsoever it has to be judiciously considered."** Lastly in the case of **Leo Sila Mutiso versus Rose Hellen Wangari Mwangi NAI CA 255/1997** , the Court held:

"It is now well settled the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is grant; and fourthly the degree of prejudice to the respondent if the application is granted"

From the reasoning of the learned Judge her failure to exercise her judicial discretion in favour of the appellant was because the appellant failed to give a reasonable explanation for the delay. It is also clear from the said reasoning that the same is silent as regards the issue as to whether the said delay was in ordinate to the extent that it warranted the withholding of leave to appeal out of time and secondly whether the intended appeal is meritorious and arguable. See **Leo Sila Mutiso versus Rose Hellen Wangari Mwangi (Supra)** and **Sango Bay Estates Limited and others versus Dresdner Bank (1971) EA17** wherein it was held *inter alia* that "**where there is an arguable case leave to appeal should be given"**

In my opinion a period of 48 days delay was not so inordinate so as to deny a litigant the exercise of his undoubted right of leave to appeal out of time; save that this finding does not guarantee the appellant an outright ticket to the presentation of his intended appeal out of time. The court has also to bear in mind the need for the appellant to satisfy the other equally important ingredients namely demonstration of existence of a meritorious or arguable appeal.

The arguable point put forward by the appellant was that issues in controversy relate to land acquired through adverse possession. The respondents argued that this argument does not hold as the right of adjudication in respect to those issues was directed to wrong forum without jurisdiction rendering the appellant's claim to entitlement through adverse possession incompetent.

The remedy for a declaration of adverse possession is enshrined in section 38(1) of the Limitation of Actions Act Cap 22 Laws of Kenya. It provides:

"**Where a person claims to have become entitled by way of possession to land registered under any of the Acts cited in section 37 of…….he may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land"**

This section gives exclusive jurisdiction for adjudication of rights arising from claims of adverse possession to the High Court. This means that the appellant's claim of adverse possession anchored in the counter claim directed to the lower court was incompetent and for this reason no arguable appeal could arise from an incompetent pleading. See the case of **Eldoret CA 219/2003 Kiprop Kanda versus Gabriel Biwot Kanda and 3 others (UR)** decided by the Court of Appeal on the 23rd day of February,2007, wherein drawing inspiration from the court's own decisions on the subject namely in the case of **John Ndungu Ngethe versus Patrick Murime & Another Nairobi CA No.143 of 1998 (UR), Njuguna Ndotho versus Masai Itumo & 2 others Nakuru CA No.231 of 1999 (UR) and Mucheru versus Mucheru (2002) 2EA 455 (CAK)** made the following observations:-

"**The claim for title by adverse possession is to be mandatorily sought by way of an originating summons under order XXXVI rule 3D of the Civil Procedure Rules and this procedure having been breached the claim cannot succeed and on this basis alone the respondents suit was doomed to fail and the learned Judge was wrong to allow it"**

It is clear from the construction of the content of **section 38(1**) of the Limitation of Actions Act (supra) as fortified by the decision of the Court of Appeal in the **Kiprop Kanda case (supra**) that the appellant's plea of his entitlement to the suit land as an arguable point capable of sustaining his plea for leave to appeal out of time can only succeed if he can demonstrate that the circumstances of this case remove that plea from the requirements of the general norm and then place it in the exception rule. In the case of **Ng'ati Farmers Co-operative Society Limited versus councilor John Ledidi & 15 others Nakuru CA No.64/2004(UR)**decided on the 23rd day of July,2009 an issue was raised that the learned trial Judge erred in failing to strike out the counter claim for being incompetent in that it has brought in contravention of **order XXXVI rule 3D** of the Civil Procedure Rules; which mandates that claims for adverse possession should be mandatorily sought by way of an originating summons and that this procedure having been breached the claim could not succeed. The Court of Appeal declined that request because:-

"The suit which gave rise to that appeal raised complex and contention issues of both law and fact. It took many days spread over 4 years to hear it. Many witnesses were called to testify and several exhibits were produced. Above all the suit property is not less than 16,000 acres and there are over 3,600 settlers in occupation. The suit could not obviously be resolved in an originating summon….

We have anxiously considered the authorities cited by Mr. Kahiga in urging us to fault the procedure adopted by the respondents in writing the counter claim but we are satisfied that it was not fatal to the claim.

In reaching this conclusion we are guided by the decision of the predecessor of this court in Boyes versus Gathire (1969) EA 385 in which it was held that the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was cased to the appellant"

Applying that reasoning to the circumstances of this case I am satisfied that the facts herein are distinguishable from the facts of the **Ng'ati Farmers Co-operative Society Limited (Supra)** because firstly the proceedings had been directed to the High Court which was the right forum with donated statutory power to adjudicate over issues of adverse possession unlike in the circumstances of this case, where the appellant's counter claim had been directed to the wrong forum namely the subordinate court which had no vested jurisdiction. As such the appellants counter claim was rightly rejected by the subordinate court as it could not be salvaged and protected. It still stands faulted.

This Judgment has been prepared and delivered in accordance with Rule 32(3) of the Appellate Jurisdiction Act because the Hon. Mr. Justice P.K. Waki who is away on official assignment elsewhere is no longer performing judicial functions and since the Hon. Mr. Justice Alnashir Visram is in agreement the appeal herein is dismissed with no order as to costs.

Dated and delivered at Nyeri this 1st day of November, 2012.

R.N. NAMBUYE

JUDGE OF

JUDGMENT OF VISRAM, JA.

I have read the Judgment of Nambuye, JA in draft, and concur with the same. The orders shall be as proposed by Nambuye, JA.

Dated and delivered at Nyeri this 1st day of November, 2012.

ALNASHIR VISRAM
……
JUDGE OF APPEAL
I certify that this is a true copy of the original.

DEPUTY REGISTRAR