REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal 191 of 2002

DR. SAMSON AUMA ……...…….……. APPELLANT

AND

JARED SHIKUKU ……..…...……..…….. 1ST RESPONDENT

JOHN KASAMANI ……..…...……..……..…….. 2ND RESPONDENT

(Appeal from a ruling of the High Court of Kenya

Kakamega (Waweru, J) dated 23rd January, 2002

in

H.C.C.C No. 175 of 2000)

****

JUDGMENT OF THE COURT

The appellant in this first appeal, Dr. Samson Auma sued Jared Shikuku (now deceased) and John Kasamani by way of a plaint dated 8th November 2000 in which he sought judgment against the respondents jointly and severally for:

"(a) A permanent order of injunction restraining the 1st and 2nd defendants by themselves, their servants, agents, representatives or assigns or any of them howsoever from entering, remaining or, cultivating, developing or carrying out any construction of any form or in any other manner interfering with the plaintiff's peaceful user, possession and title to land parcel No. North Wanga/Matungu/865.

(b) An order that the 1st and 2nd Defendants do forthwith vacate those portions of land parcel No. North Wanga/Matungu/865 which they have each encroached into failing which an order do issue for their eviction and demolition and removal of all illegal structures constructed by the defendants themselves.

(c) General Damages for trespass.

(d) Costs of this suit plus interest."

The respondents filed defence and counter-claim dated 30th November 2000. In that defence and counter-claim, the respondents jointly and severally denied the claim and stated by way of a counter-claim that the appellant had colluded with Kakamega District Land Registrar and changed the boundaries of the respondents' land parcel Nos. 1134 and 1136 to conform to the appellant's parcel No. 835 and that the

area preliminary index diagram was faulty, defective and did not reflect the position of the boundaries. Alternatively, the respondents claimed adverse possession as they had lived, cultivated and/or physically possessed the disputed portion of land peacefully and uninterrupted for over 13 years. Lastly, they asked for general damages.

After some interlocutory applications were disposed of, the entire case came up for hearing on 23rd January 2002 before the superior court (Waweru, J). The proceedings recorded on that date as appears from the record before us is short and as it is the subject of the appeal before us, we do reproduce it in its entirety:-

"**23rd January, 2002**

Coram: Waweru J.

Wasike C.C

Odhiambo h/b for Wasuna for plaintiff. Plaintiff absent.

No appearance for defendants – no evidence of service.

Odhiambo: The matter is for hearing. There is now (sic) an advocate for the defendants.

H.P.G. Waweru, J.

Omwenga: I am for the Defendants.

H.P.G. Waweru, J.

Odhiambo: I am not ready to proceed and I apply for adjournment. M. Wasuna, who has just been instructed to conduct this matter for the plaintiff is today appearing before the Court of Appeal in Mombasa in an appeal whose number I was not given. There is also Mr. Orengo who is appearing jointly with Mr. Wasuna for the plaintiff. He is bereaved and unable to attend court. I am also instructed that Rule 11A of Order X has not been complied with.

H.P.G. Waweru, J

Omwenga: I do not oppose adjournment. I do not know why the defendants have not attended court. We informed them of the hearing dated 27th December, 2001.

H.P.G. Waweru, J

Court: The case has been called outside the court for hearing. None of the parties has attended. No explanation has been given at all why they have not attended. The case is therefore dismissed under Rule 2 of Order 9B of the Civil Procedure Rules. No order as to costs."

The appellant felt aggrieved with that decision and filed this appeal premised on the following three grounds:

"**1. The learned Judge erred in law in dismissing the appellant's case without giving the appellant's advocate a chance to proceed for hearing.**

2. The learned Judge erred in fact and law in finding that none of the parties had attended court when both counsel's (sic) representing the parties were present in court.

3. The learned Judge erred in law and in fact in failing to consider the principles relevant to

application for adjournments and in failing to find that the appellant had established sufficient grounds for adjournment."

The record of appeal was filed on 21st June 2002. When the appeal came up for hearing before this Court (differently constituted) on 23rd June 2005, Mr. Kasamani, the learned counsel for the respondents, informed the Court that the first respondent, Jared Shikuku, passed away on 31st May 2003. The hearing was then adjourned to enable the appellant to consider the next course of action on the matter. On 23rd November 2006, this Court (again differently constituted) ordered that the appeal against the first respondent had abated and the appeal proceeded against the second respondent, John Kasamani only. The appeal was heard on 22nd March 2007.

Mr. Wasuna, the learned counsel for the appellant, submitted that the learned Judge ought to have considered the application for adjournment which was the application before him before the hearing could start. In Mr. Wasuna's view, if after considering the application for adjournment, the learned Judge had dismissed it, then the appellant would have considered what to do with his case, but the Judge erred in that he dismissed the entire suit and did not consider the merits of the application for adjournment. Had the learned Judge applied the correct principles, in considering the adjournment application, he would not have dismissed the application for adjournment as it was in any case pointed out to him that the suit was not ready for hearing as certain procedural requirements had not been finalized to make the case ready for hearing. Mr. Kasamani, the learned counsel for the respondent, on the other hand maintained that the learned Judge cannot be faulted as indeed the suit was before him for hearing and the appellant was absent without any explanation. The matter according to Mr. Kasamani was properly decided pursuant to **Order 9B rule 2**.

We have considered the record, the rival submissions and the law. Although the suit was set down for hearing on 23rd January, 2002, when the case was called out, Mr. Odhiambo, the learned counsel holding brief for Mr. Wasuna for the appellant, made an application for adjournment. He gave reasons for the adjournment application stating, as can be seen from the part of the record we have reproduced above, that Mr. Wasuna, the learned counsel was before the Court of Appeal sitting at Mombasa while Mr. Orengo appearing with Mr. Wasuna was bereaved and, lastly, that in any case the case was not ready for full hearing as **rule 11A** of **Order X** of the Civil Procedure Rules had not been complied with. That application for adjournment was not opposed by Mr. Omwenga, the learned counsel for the respondent (the respondents). In our view, the application needed to be dealt with first on its merits and either allowed or rejected. Whichever way the learned Judge was minded to decide it, it was, in our respectful view, his duty to dispose of it first. He did not do so as the decision which we have reproduced hereinabove does not in anyway indicate that he considered it. It was a matter that called for his discretionary powers and we cannot hazard a guess which way he would have decided it had he applied his mind to it.

It would appear, however, that for reasons not canvassed in the application, the learned Judge did reject the adjournment. That was done in the exercise of his unfettered discretion. In law, we would be very slow to interfere with the exercise of the discretion by the trial court. In the case of **Maxwell vs. Keun (1928) I KB 645 at page 653**, Atkin LJ had this to say:

"**I quite agree that the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the results of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."**

That view has been consistently upheld by this Court. In the case of **Mbogo and Another vs. Shah (1968) EA 93**, the predecessor to this Court held, *inter alia*, as follows:

"**A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is**

satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

In a more recent case, the case of **Mugachia vs. Mwakibundu (1984) KLR 572,** this Court held, *inter alia*, as follows:

"**2. The granting of an adjournment involves the exercise of a discretion by the presiding judge and the Court of Appeal will not interfere with the judge's exercise of the discretion unless he has either acted on wrong principles or exercised his discretion injudiciously."**

In this case, as we have stated, the learned Judge was faced with an application for adjournment which was not opposed and which, in our view, (as first appellate court analysing and evaluating the record afresh) was not frivolous as the appellant's learned counsel was before the Court of Appeal, the other counsel was bereaved and the case was not yet ready for hearing as certain procedures were yet to be finalised before it could be heard. To avoid deciding on such an application and dismissing the entire case on another ground not canvassed before it was, in our view, a serious misdirection. The correct procedure that the superior court should have adopted was to first decide on whether or not to allow the adjournment application and make a ruling on that. If the court rejected the adjournment application, then the suit would proceed to hearing and then it would be upto the appellant's counsel to decide on how to prosecute his client's case in the absence of the plaintiff (applicant).

In our view, the action taken by the court in this matter of failing to decide the application for adjournment on its merits and proceeding to dismiss the entire case on grounds that were not before him namely the absence of the parties at a time before the hearing proper could begin involved an incorrect exercise of the learned Judge's discretion and, in our mind, did result in grave injustice as the appellant's case was terminated before the appellant could be heard on its merits. That being the case, this Court is entitled in law to interfere. In the case of **Mugachia vs. Mwakibundu** (supra) the Court held further as follows:

"**4. The decision of the Judge to refuse the adjournment and dismiss the appellant's suit involved an incorrect exercise of discretion and, if allowed to stand, would result in grave injustice to one of the parties, in that he would be shut out from a hearing of his case."**

We take the same view in this appeal. The superior court's subject ruling shut out the appellant from being heard on merit and thus resulted into injustice. It cannot stand.

In view of the foregoing, this appeal is allowed. The ruling of the superior court dismissing the case is set aside. We order that the suit shall proceed to hearing after all procedural stages are finalised. The appellant will have costs of this appeal. Judgment accordingly.

Dated and delivered at Kisumu this 15th day of June, 2007.

S.E.O BOSIRE

…….

JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……**……..**

JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR