



**Mabuti v Stella & 2 others (Environment and Land Appeal
2 of 2020) [2023] KEELC 16695 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 2 OF 2020
EC CHERONO, J
MARCH 21, 2023**

BETWEEN

ALFRED WAWERU MABUTI APPELLANT

AND

MARGARET WAMBURA STELLA 1ST RESPONDENT

SAMUEL NJOGU MWANIKI 2ND RESPONDENT

STELLA MABUTI MBUNJE 3RD RESPONDENT

*(Being an appeal from the ruling of E.O. N Wambo SRM in
Kerugoya CMC ELC No. 68 of 2019 delivered on 17/1/2020)*

JUDGMENT

1. The 1st and 2nd respondents sued the the 3rd respondent in the subordinate court seeking orders of specific performance in terms that the 3rd respondent be compelled to transfer land parcel Kabare/gachigi/2849 to the 2nd respondent and land parcel Kabare/gachigi/2850 to the 1st respondent on the grounds that the third respondent was holding the title to the land in trust for the 1st respondent while the 2nd respondent is a purchaser for value.
2. The appellant also filed an application dated July 15, 2019 seeking orders of inhibition among others over land parcel Kabare/gachigi/2848. The said application was dismissed which prompted the instant appeal on the following grounds;
 - i. The learned magistrate erred in law in making a ruling against the weight of evidence.
 - ii. The learned trial magistrate erred in law and fact in failing to find that the appellant under Order 45 Rule 1 need not be a party in the proceedings.



- iii. That the learned trial magistrate erred in law and fact in disregarding the fact that the impugned decree given on June 20, 2019 and issued on June 24, 2019 removed the caution he had lodged against the suit land without affording him an opportunity to be heard.
 - iv. That the learned magistrate erred in law and fact in disregarding the fact that the decree given on June 20, 2019 and issued on June 24, 2019 caused the appellant to lose his development on the suit land without affording him an opportunity to be heard.
 - v. That the learned trial magistrate erred in law and fact failing to find that by allowing prayer 5 in the notice of motion dated June 15, 2019, the suit land would revert to the original owner and not remain ownerless.
 - vi. The learned trial magistrate erred in law in fact failing to find that there was sufficient reason to warrant a review and setting aside the decree given on June 20, 2019 so that the appellant could be accorded an opportunity to be heard.
 - vii. That the learned magistrate erred in law and fact by failing to consider that the decree made on June 20, 2019 and issued on June 24, 2019 adversely affected the rights and interests of the appellant yet he wasn't afforded an opportunity to be heard before the decree was issued.
3. When this matter came up for directions, the parties agreed by consent to dispose of the appeal by way of written submissions within given timelines. Only the appellant complied with those directions.
 4. Counsel for the appellant submits that under order 45 rule (1) of the *Civil Procedure Rules*, one need not be a party before he can lodge an application for review. He submits that the decree issued did not afford the appellant an opportunity to be heard in that indeed the trial magistrate acknowledged the fact that the appellants had made developments and it was therefore unfair to condemn him unheard contrary to article 50 of *the Constitution*. To buttress his position, the authority in *Richard Chomba vs Mary Wanjiru Gatumu* Succ Cause No. 345 of 2008-Embu has been cited.
 5. Counsel submits that the trial magistrate made an error by issuing orders that was against the interest of justice.

Analysis and determination

6. This appeal is against the ruling of the trial magistrate dismissing the appellant's application which had sought inter alia orders of inhibition, review and setting aside of a decree and cancellation of entries in a land register.
7. During the hearing of that application, the respondents counsel conceded to the grant of an inhibition. Thereafter, the parties were to proceed to hearing on the rest of the prayers. According to the court record, the application was to be canvassed by way of written submissions but none of the parties complied with the order.
8. A notable finding and or observation by the trial court is that the appellant filed the application without leave of the court. It was also the finding of the court that the parcels of land in which the appellant had registered caution over were not his and the subdivision of the parcels had been done without his knowledge thus the prayer for cancellation of title. The trial court stated that if the appellant had undertaken developments on the parcel, he could be compensated after a proper valuation had been done.
9. The trial court similarly found that the appellant had not established the grounds to warrant the setting aside of the consent order.



10. On the issue of the consent order, I have perused the record and note that the consent order was entered into between Margaret Wambura Stella and Samuel Njogu Mwaniki on one side as the plaintiffs and Stella Mabuti Mbunje on the other side as the defendant. The purpose of the consent was to ultimately compromise the suit, subject of this appeal. The appellant was not a party to the consent basically because he was not a party in that suit. By the time the application to set aside was filed by the appellant, the parties had already filed the consent terminating the suit and there was no suit the orders would attach.
11. On whether the order could be granted to a non-party, order rule 1 rule 10(2) states

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
12. On the issue, it was stated by Mativo J in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* (2017) eKLR that;

“One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements---”
13. Having analysed the extract of this appeal, I find that at the time of filing the said application, the parties had already recorded consent compromising the former suit and prior to filing the application, the appellant had neither sought nor obtained leave of the court to be admitted to the proceedings as an interested party. Even if the appellant had sought and obtained leave, there was no suit to be admitted to.
14. For the forgoing reasons, I find this appeal without merit and is hereby dismissed with costs to the respondents.
15. Orders accordingly.

READ,SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 21ST MARCH, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Mwangi Kinyua for Respondent

M/A Asimwa holding brief for Magee for Appellant

