



**Oloo v Omollo (Environment and Land Appeal E020 of 2022)
[2023] KEELC 17158 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E020 OF 2022
GMA ONGONDO, J
APRIL 26, 2023**

BETWEEN

GRADUS OCHIENG OLOO APPELLANT

AND

VITALIS OTIENO OMOLLO RESPONDENT

(Being an appeal from the ruling of Honourable E.M Onzere, Principal Magistrate in Ndhiwa Senior Resident Magistrate's court Land case number 6 of 2019 delivered on 20th May 2022)

JUDGMENT

1. On August 17, 2022, the learned trial magistrate reasoned that an application dated June 28, 2022 lodged in the trial court on June 29, 2022 by the appellant/applicant, lacked merit. As a result, she dismissed it with no orders as to costs.
2. In arriving at the finding, the trial court took into account that stay of execution pending appeal is a discretionary relief and that the court must balance the interests of the appellant with those of the respondent. The court relied on Section 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the case of *RWW-vs-EKW* (2019) KLR and noted that the suit was filed in court in the year 2019 hence called for its expeditious hearing and determination.
3. The principal order which was sought in the application was stay of further proceedings in the matter pending the hearing and determination of this appeal. The applicant asserted, *inter alia*, that the witness that the trial court was calling had been blocked from testifying by the same court. That the appeal has triable issues with high chances of success and as such, any further proceedings would be prejudicial at that stage.
4. The dismissal of the application, generated this appeal by way of an amended memorandum of appeal dated August 11, 2022 based on the grounds, *inter alia*;



- a. The Honourable court misdirected herself in fact and in law by soliciting for evidence otherwise not tabled by a party.
 - b. The Honourable court misdirected itself by failing to appreciate that in civil procedure proceedings, parties are bound by their pleadings and pleadings include witness statements.
 - c. The Honourable court is thus likely to occasion a miscarriage of justice by calling evidence that could end up being pivot of the court's decision which otherwise would be prejudicial.
5. It is crystal clear that the appellant has not sought any orders in this appeal.
 6. The appeal was heard by way of written submissions further to this court's directions of February 7, 2023
 7. It is noted that the submissions dated February 8, 2023, the appellant through the firm of Aluoch Odera, Nyauke and Company Advocates stated in part that the respondent neither listed the Land Registrar as a witness nor made any efforts to call one Pius Okello to testify in court. That the respondent (DW1) is seeking adverse possession and at the same time trying to enforce a sale of land.
 8. The respondent through Odingo and Company Advocates, filed submissions dated March 27, 2022 and urged the court to dismiss the appeal with costs. That the presence of Pius Okelo before the trial court was meant to confirm if he participated in the sub division process of the land in dispute namely L R No Kanyamwa/Kwandiku/ 3256. That the appellant will not suffer any prejudice if the said Pius Okello is summoned to give evidence in court, among other things.
 9. The appellant originated the suit against the respondent alleging that the latter trespassed into the suit land by erecting a house on the land in dispute. Therefore, he sought, inter alia, an order of eviction against the respondent.
 10. By an amended statement of defence dated August 5, 2021, the respondent denied the appellant's claim and sought that the same be dismissed as well as nullification of the title to the land in dispute which was allegedly obtained fraudulently. That the appellant had no locus standi to commence the suit against him on grounds of the alleged fraud.
 11. This being the first appeal from the trial court in the matter, I am duty-bound to review the evidence on record in order to determine whether the conclusion originally reached upon that evidence, should stand. However, this is a jurisdiction which should be exercised with caution as noted by Sir Kenneth O'Connor, P in *Peters-vs-Sunday Post* (1958) EA 424 at 429.
 12. In this regard, the issues for discussion in this appeal are as contained in the grounds of appeal and relate to;
 - a. calling of a witness or soliciting for such a witness not listed by a party,
 - b. parties are bound by their respective pleadings,
 - c. prejudice caused by the ruling of the trial court.
 13. On the first issue, the Land Registrar is the custodian of the certificate of official search (PExhibit 1) and the green card (PExhibit 2). He was to testify in the suit in respect of them as disclosed in the trial court's proceedings of March 25, 2022 and May 25, 2022.
 14. Moreover, the evidence on record reveals that Pius Okello featured in the testimonies of the appellant (PW1) and the respondent (DW1). As correctly observed by the trial court, Pius Okello will be a crucial witness in the suit.



15. So, the learned trial magistrate did exercise her discretion to make orders and issue summonses to witnesses namely the Land Registrar and Pius Oloo to give evidence in consonant with Sections 22 and 23 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya.
16. By the impugned ruling, the learned trial magistrate dismissed the appellant’s application dated June 28, 2022 for stay of proceedings of further proceedings in the suit pending the hearing and disposal of this appeal. Clearly, no stay order had been issued earlier in the suit hence the trial court applied correct legal principles in reaching the decision.
17. On the second issue, it is noteworthy that Order 15 of the [Civil Procedure Rules, 2010](#) provides for;
 - a. Framing of issues and
 - b. Materials from which issues may be framed.
18. Indeed, parties are bound by their pleadings; see [Independent Electoral and Boundaries Commission and another-vs-Stephen Mutinda Mule and 3 others](#) (2014) eKLR.
19. In addition, I subscribe to the decision in the case of *Odd Jobs-vs-Mubia* (1970) EA 476, where it was held, inter alia;

“a trial court may frame issues on a point that is not covered by the pleadings but which arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties.....”
20. The trial court invoked Section 3A and *RWW* case (both *supra*) in arriving at the impugned ruling delivered in the spirit of Articles 48, 50 (1) and 25 (c) of the [Constitution of Kenya, 2010](#); see also James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR. Therefore, I find no iota of reason to disturb the impugned ruling which is in consonant with the [Constitution](#) and the law.
21. In the foregone, whereas no orders are sought in this appeal as observed in paragraph 5 hereinabove, the orders and directions made herein are geared towards meeting the ends of justice as provided for under the provisions of the [Constitution](#) and the law inclusive case law as stated in paragraphs 15, 19 and 20 hereinabove.
22. To that end, the trial court to proceed with the hearing of the suit in the spirit of Article 159 (2) (b) of the [Constitution of Kenya, 2010](#).
23. A fortiori, this appeal lacks merit and it is hereby dismissed.
24. Costs of the appeal to be borne by the appellant.
25. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 26TH DAY OF APRIL 2023.

G. M.A ONGONDO

JUDGE

Present

1. Aluoch Odera learned counsel for the appellant
2. Mr Omwenga instructed by S.Odingo learned counsel for the respondent



3. Respondent

4. Terrence and Edith, court assistants

