Zakaria v Warue (Suing as Personal Representative of Kinyua Nyaga Gatume) (Environment and Land Appeal E003 of 2020) [2023] KEELC 18837 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 18837 (KLR)

(ELCA NO. 14 OF 2020)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL E003 OF 2020

A KANIARU, J

MAY 31, 2023

BETWEEN

ERASTUS MBUBA ZAKARIA ..... APPELLANT

AND

PIERA WARUE (SUING AS PERSONAL REPRESENTATIVE OF KINYUA NYAGA GATUME) ..... RESPONDENT

(Being an appeal against the Judgment of Hon. J.W. Gichimu, Senior Principal Magistrate at Runjenjes dated 17thJune, 2019 in ELC Civil Case No. 4 of 2018)

JUDGMENT

1. This appeal is essentially an escalation of the lower court matter by the appellant – Erastus Mbuba Zakaria – where he had sued the respondent – Piera Warue – in a dispute relating to land parcels nos. Kyeni/Mufu/3372 and Kyeni/Mufu/3373, both of which are resultant land parcels from the subdivision of the then larger parcel – Kyeni/Mufu/2602. In the lower court, the appellant had complained that the respondent had occupied a portion of land parcel no. Kyeni/Mufu/3372 which belongs to him. The occupation was said to be "unlawful and unjustifiable".

2. The appellant therefore wanted the lower court to grant an order directing the District Surveyor and the Land Registrar to visit the land and "allocate common boundaries between land parcel no. Kyeni/Mufu/3372 and Kyeni/Mufu/3373 and the parties do respect the boundaries after the same is allocated." Other orders sought were that the area OCS Runyenjes police station, be ordered to provide security during execution of the orders sought; that the respondent pay general damages, costs, interests; or any other just relief the court may deem fit.

3. The respondent filed a defence in the lower court in which she pleaded, *inter alia*, that she owns Land parcel no 3373 purchased by her in 1980 and measuring 0.29 Ha. The appellant was said to have bought

his land parcel in the year 2011, which was after the beacons showing or marking the boundaries had been put in place by the then Land Registrar – J.M. Munguti – in the year 2008. According to the respondent, the respondent never visited the land before purchasing it in order to ascertain for himself where the boundaries were. She also pleaded that the appellant has never been prevented from utilizing his land.

4. The respondent also averred that there has been several cases on the same subject matter. She mentioned some of them, one being Runyenjes Civil Suit no 333 of 2013 and the other being ELC no 2 of 2014, Embu. According to the respondent, the appellant has been loosing the cases. The respondent asked the lower court to dismiss the appellant's suit, order him to pay costs of the previous suits, and also order him to pay the cost of the suit before court at the time.

5. The lower court at Runyenjes (Hon. J.W. Gichimu, SPM) heard the matter and in a judgement delivered on 23/7/2019 dismissed the appellant's suit. Among the reasons given for dismissal is that there was an order in force restraining dealings in parcel no 3373 and the appellant had not informed the court whether it had been lifted or not. The other reason was that the appellant had not informed the court why he had not sought similar orders in Civil Suit no 22 of 2013.

6. The outcome of the lower court matter is what triggered the appeal now before me. The memorandum of appeal came with seven (7) grounds as follows:

    1. That the learned trial magistrate failed to inform the appellant of his right of appeal within 30 days as should have been done.

    2. That the learned trial magistrate erred in law and fact in adjudging that the restriction orders that existed against land parcel no 3373 was a bar to his making of the orders directing the surveyor and Land Registrar to visit the site and establish the boundary.

    3. That the learned trial magistrate erred in law and fact by failing to guide the unrepresented parties in the suit, especially the appellant, before making orders that would affect his proprietary rights.

    4. That the learned trial magistrate erred in law and fact by failing to issue orders on the basis of a restrictive order that was lodged during the pendency of the suit against land parcel no Kyeni/Mufu/3373 in EMBU CMCC no 22 of 2013 which was a matter concluded in the year 2014.

    5. That the learned trial magistrate erred in fact and law by failure to consider that unrepresented parties lack legal advice and the court should have properly guided the parties therein in order to finally render a just determination.

    6. That the learned trial magistrate misdirected himself in land and fact by making a finding that the plaintiff failed to prove his case on a balance of probabilities and further condemned the plaintiff to pay costs.

    7. That the learned trial magistrate erred in law and fact by failing to consider the fact that the decision of the court would cause a miscarriage of justice by dismissing the suit.

7. The court was urged to allow the appeal with costs to the appellant.

8. The respondent did not participate in the appeal. Court records show that she was served several times but she never appeared in court. It is against this background that the court ordered the appellants side on 25/4/2022 to file submissions to dispose of the appeal.

9. The appellant's submissions were filed on 19/10/2022. The submissions give some background and antecedents relating to the case. The appellant then zeroed in on two issues for determination. The first issue was whether the lower court was wrong in adjudging that the restriction orders that existed against parcel no 3373 was a bar to making an order meant to address a boundary problem. The other issue was whether the same restrictive order issued in a concluded suit can serve to prevent a court from granting the orders sought.

10. On the first issue, it was submitted that the restrictive orders should not have been a bar as they were temporary in nature. It was emphasized that "The presence of the restrictive order against the respondents land was a technicality that should not prevail over the role of the trial court to further substantive justice" Article 159(2)(d) of the *constitution* was invoked to drive home the point that justice should be administered without undue regard to procedural technicalities. Further, it was submitted that the respondent would suffer no prejudice if the court granted an order to rectify the boundary.

11. On the second issue, it was submitted that the restrictive order had lapsed as the suit in which it had been granted was already concluded. It was said to be a temporary order and it was submitted that under order 40 rule 6 of the *Civil Procedure Rules, 2010*, that order had a lifespan of one year unless extended. The case of *Erick Kimingichi Wapang'ana & Another v Equity Bank Limited & Another* [2015] eKLR was cited to make the point. It was pointed out that the order had already lapsed in 2018 when the lower court matter was filed. The appellant then talked of being "alive to the purpose served by a restriction and that the same is issued by the registrar when he/she is satisfied of the reason but the same is not meant to hold people at (sic) hostage". Ultimately, the court was urged to allow the appeal.

12. I have considered the appeal as filed, the appellants submissions, and the entire court record in general. My duty as the first appellant court is to re-evaluate and assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo v Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.

13. A look at the lower court judgement shows that the trial magistrate declined to grant the orders sought because there was "already a restricting order (sic) still in force" and that "The plaintiff has also not told the court why the orders sought in case can not be given in CC no 22/2013"

14. I need first to clear some misunderstanding on the kind of order that formed the basis of the lower court's rejection to grant an order to rectify the boundary. I do this because the first appellant appreciates the order as one of temporary injunction which had by law lapsed by the time the lower court matter was filed. But in a rather contradictory twist, the appellant also refers to it as an order of restriction normally placed by the Land Registrar where there is good reason to do so.

15. I have looked at the court record. The order referred to is an injunctive one which is noted or placed on the land register. It is not an order of restriction as envisaged by Sections 76, 77 and 78 of the *Land Registration Act*, 2012. In my view, the Land Registrar was wrong to have placed or noted the order on the register. An order of injunction is essentially an order in personam, not in rem. It is normally directed at people requiring them to do or refrain from doing something. When people disobey it, they are normally punished for contempt of court. It is never meant to be placed on the land register. It is not an instrument for placing or noting on the land register.

16. The *Land Registration Act*, 2012, on the other hand has three legal devices that can be placed on the land register. The first one is an order of inhibition covered by Sections 68, 69, and 70 of the Act. This order is usually issued by the courts. The other is one is a caution, which is addressed by Sections 71, 72, 73, 74, and 75 of the same Act. This one is normally placed on the land register by an aggrieved party to protect an actual or perceived interest in land. The third and final order is one of restriction and I have already pointed out the provisions of law that address it. It is normally placed on the Land Register by the Registrar to prevent improper dealings in land. It is this last order that the appellant has confused with restraining order which was wrongly placed on the Land Register by the Registrar.

17. I have already pointed out that I have had a look at the court record. The lower court only mentioned the restraining order shown on the land Register. The appellants own record of appeal shows a copy of official search indicating that in addition to the restraining order shown on the register, there are also three (3) cautions; one by James Gitonga claiming beneficiary interest, the second by Michael Njeru also claiming beneficiary interest, and the last one by Joseph Njeru claiming purchaser's interest. While one can convincingly argue or submit that the restraining order had expired by the time the lower court suit was filed, I don't think one can say the same about the various cautions placed on the register. The cautions themselves seem to show that there are possible interests of other parties likely to be affected in this suit in which only two parties are disputing. The lower court did not seem to be alive to this possibility. It appears to me that this court should exercise caution to avoid a situation where orders are issued affecting interest of parties who have not been heard. Besides, one has to appreciate that the cautions are still on the land registrar. When they are still there, interference with the land would not be proper.

18. The defence of the respondent in the lower court indicated that there have been various past cases concerning the same land. The suit in the lower court also shows that the respondent was sued in her capacity as the legal representative of her late husband – Kinyua Nyaga Gatume. When the appellant therefore pleaded at paragraph 13 of his plaint that there was no pending suit, or previous cases between the parties over the same subject matter, he was completely wrong from a legal perspective. The respondent had already taken the place of her late husband who had had various cases with the appellant. It is very true therefore to say that there have been previous cases between the parties over the same subject matter. These are the cases that the respondent also mentioned in her defence. She is unrepresented and probably does not know what res-judicata is. But her reference to previous cases was actually an oblique reference to it.

19. From the record of appeal, I see proceedings from Kerugoya ELC court in HCC no 13 of 2012 between the appellant herein and the respondents late husband. In the proceedings, it was captured well that the appellant, who was plaintiff, was seeking orders of eviction of the respondent's husband from Land parcel no 3372. That suit was transferred to Runyenjes vide an order made on 14/3/2013. The record seems to suggest to me that the appellant had alleged that the respondents late husband was in illegal occupation of his land or at least a portion of it. I say this because I don't see any other reason why he was seeking an order of eviction. This same allegation of illegal occupation was made against the respondent in the matter which is the subject of this appeal.

20. My considered view is that the appellant could be trying to re-litigate matters that properly belonged in the past suits or were even litigated in those suits. When the trial court therefore wondered why the issues being urged before it could not be urged before court in the previous suits, it was making a valid point. My considered view is that the matter before the lower court was possibly *res judicata* and this is the point that the respondent was alluding to when she talked of previous cases having been filed in respect of the same subject matter.

21. I say the matter was possibly *res judicata* because the issues in the lower court had probably been urged before competent courts in previous cases or they should have been so urged.*res judicata* not only applies where matters were actually raised before a competent court and decided but also where such matters ought to have been raised but were not. The scope of *res judicata* was well captured in Richard Kuloba's seminal book; Judicial Hints on Civil Procedure: Law Africa Publishing (K) Ltd, 2nd Edition, at page 471 as follows:

> " The test whether a suit is barred by *res judicata* is this: is the plaintiff in the 2nd suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which had been adjudicated upon? If so, the plea of *res judicata* applies not only to the points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

22. The point I am making is this: The appellant is well shown to have had several cases with the respondents late husband. The respondent mentioned this fact in her defence. The appellant made reference to one such case at paragraph 4 of his memorandum of appeal and even in his submissions. In one of the cases, he was seeking an order of eviction. In the case in the lower court, he wanted the boundary issue addressed and the parties be ordered to respect the new boundaries. The respondent has already indicated that that she is satisfied with the boundaries put on the land earlier.

23. In all fairness, it seems clear that the appellant is engaging in what can be considered as piece-meal litigation or litigation in instalments. It appears clear that he has done so in the past. He appears likely to do so if this court allows him to have his way in this matter. Litigation must come to an end. I am not persuaded at all that I should allow this appeal. I do so because of the real possibility that the matter in the lower court was res judicata. I do so also for the other reasons given elsewhere in this judgement.

24. In the light of the foregoing, I make a finding that although the appeal before me was not responded to by the respondent, the legal issues surrounding it have not been addressed and its merits have not also been sufficiently demonstrated. I therefore hereby dismiss it with no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31ST DAY OF MAY, 2023.

In the presence of M/s Mwinja for appellant and Respondent present in person.

Court assistant: Leadys

A.K. KANIARU

JUDGE