Erot v Al-Momin Foundation (Environment and Land Appeal 20 of 2022) [2023] KEELC 17557 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17557 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 20 OF 2022

FO NYAGAKA, J

MAY 25, 2023

BETWEEN

SULEIMAN ALI EROT ..... APPELLANT

AND

AL-MOMIN FOUNDATION ..... RESPONDENT

(Being an Appeal from the Ruling and Orders of Hon. D. A. Orimba, Senior Principal Magistrate in Lodwar Law Courts ELC Miscellaneous No. E001 of 2022, delivered on 09/11/2022)

JUDGMENT

The Background

1. The Appellant being dissatisfied with the ruling of the trial court delivered on 09/11/2022 in Lodwar SPM Misc. ELC No. E001 of 2022 preferred an appeal against the said ruling. In the beginning the issue of filing the appeal against the ruling was outstanding but was resolved on 19/12/2022 when learned counsel for both the parties appeared before my brother Obaga J. and recorded a consent to the effect that since leave to appeal had been granted by the trial Court, the Memorandum of Appeal be deemed duly admitted and filed.

2. The history of the instant Appeal is that vide an Ex Parte Notice of Motion Application dated 03/01/2022 received in the trial Court on 04/01/2022 in the Miscellaneous file number Lodwar SPMCC E001 of 2022, the Respondent sought a number of prayers. They included, besides the prayer for costs of the Application, an order of eviction of the Respondent, now Appellant, from a parcel of land designated as Plot No. 381 located in Lodwar Central Township, vacant delivery of possession of the said parcel of land by the Respondent therein, and the provision of security by the Officer Commanding Lodwar Police Station during the eviction. The Application was brought under Sections 152A, 152B, 152E, 152G and 152F of the *Land Act*, No. 3 of 2012, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* Chapter 21, of the Civil Procedure Rules, 2010 (sic). It was grounded on a number

of points and supported by the Affidavit sworn by one Mohammed Idris Khalid on 03/01/2022. The Affidavit contained annextures numbering five (5).

3. The Application was opposed by the Respondent therein, now Appellant, one Suleiman Eroti Ali, who swore a Replying Affidavit on 14/06/2022. It did not contain any annexture to it but had detailed contestations of the documents relied on by the Applicant as proof of ownership of the land. Accompanying it was a Request for Particulars and a Notice to Produce both dated the 14/06/2022. It would appear that both accompanying documents were served on the Applicant, now Respondent. Then the matter was disposed by way of written submissions. The Appellant filed his on 11/10/2022 while the Respondent filed its on 04/10/2022. It was upon the determination of the Application that the instant appeal arose.

4. The Memorandum of Appeal which was filed pursuant to the consent contained ten (10) grounds of appeal. These were that the learned trial magistrate erred in law and fact in:

   (1) Failing to evaluate the Affidavit evidence before him thereby arriving at a wrong decision.

   (2) Failing to apply properly the relevant provisions of both *the Constitution* of Kenya and Statute Law on the subject of land, ownership thereof and eviction from land thereby arriving at a wrong decision.

   (3) Holding that the suit land before him, being Plot. No. 381 -Lodwar Township was effectively private land owned by the Respondent whereas no evidence was placed before him by the Respondent to that it was the lawfully registered thereof by way of title deed, letter of allotment, certificate of official search or a declaration of Court of competent jurisdiction.

   (4) Failing to direct, compel and/or order the Respondent to produce ownership documents of the suit property despite the Appellant duly filing and serving a Notice to Produce Documents and Request for Particulars in that regard despite the Respondent requesting for and being granted time to produce and supply the documents and give the particulars sought and in failing to give appropriate directions upon default by the Respondent.

   (5) Ruling against his own pronouncement made during the proceedings before him that if there was no lawful evidence of ownership of the suit property placed before him, and if there was a dispute on ownership of the suit property, the proper action the Respondent should have done was to file a substantive suit wherein oral evidence would be called to settle the contention as opposed to a filing a Miscellaneous Application.

   (6) Disregarding the submissions by the Respondent in the proceedings leading to the ruling impugned that it wished to file a substantive suit through a Plaint since ownership of the suit property was in dispute and the Respondent was unable to produce documents of ownership.

   (7) Making an order of eviction from the suit land when ownership of the suit land was and is still in dispute, and failing to discern that ownership of the land was in dispute.

   (8) Lopsidedly relying only on case law provided by the Respondent while disregarding the binding case law provided by the Appellant hence reaching a wrong conclusion.

   (9) Failing, neglecting and or refusing to be bound by trite case law that eviction orders cannot issue on a miscellaneous application where it was clear from evidence that ownership of land was in dispute.

   1(0) Failing to appreciate that an applicant for eviction orders has no capacity to issue a statutory notice to vacate land to another person if the land is not registered in the applicant's name

or otherwise determined and declared by a court of competent jurisdiction to belong to the applicant and that the alleged statutory notice was void ab initio.

5. The Appellant prayed for the appeal to be allowed in entirety, with costs, an award of the costs of the lower court, and that the ruling delivered on 9/11/2022 by the trial court to be vacated and set aside. He also prayed for a permanent injunction against the Respondent, their servants and/or agents from interfering with his peaceful occupation of the suit land until such time as when the issue of ownership shall have been determined by a court of competent jurisdiction or by the National Land Commission or other competent authority.

Submissions

6. The Appeal was canvassed by way of written submissions. The Appellant filed his dated 03/03/2023 the same date while the Respondent filed its dated 06/03/2023 on even date.

7. Starting with summarizing those filed by the Appellant, this court notes that he submitted that at this stage the Court is enjoined to re-evaluate the evidence of the parties and make its own determination. He set out seven (7) issues for determination and analysed each in sequence. I will summarize the arguments in support of each in the order of the issues.

8. The first one was whether or not it was discernible from the affidavit evidence that there was a dispute in ownership of the suit property. On this he stated that none of the parties offered proof of ownership of the suit property but the onus was on the Respondent to do so. In that regard he submitted that the Respondent did not prove it yet both parties were in occupation of the property, with the Appellant having used it as his home since 1974. He referred to both the Notice to Produce documents and the Request for Particulars that he filed and served on the Respondent. He submitted that on 20/07/2022 the trial court appreciated that ownership was in dispute and that documents thereto had not been produced by the Respondent. On that date the Court ordered the Respondent to file a substantive suit and attach all relevant documents of ownership.

9. His further submission was that the Respondent did not obey the orders and no suit was filed but, shockingly, the Court proceeded to determine the Miscellaneous Application which it had ordered abandoned in favour of filing a substantive suit. He stated that the legitimate expectation of the Appellant that the dispute on ownership of the suit land would be resolved in a different suit was curtailed by the ruling hence justice was denied of him. He submitted that the dispute on ownership was clearly discernible from the evidence before Court and could not be resolved through a miscellaneous application but a substantive suit. He summed that eviction could not issue upon such proceedings and the partial eviction was illegal, malicious and done with the aim of humiliating and embarrassing the Appellant. He prayed for the status quo before the eviction to be restored and he be permitted to regain access to his house pending the resolution of the dispute whether by the court, the National Land Commission or the County Government of Turkana.

10. He submitted that the Respondent admitted to having carried out the partial eviction without warrants of eviction and the trial Court confirmed as much. On the importance of obtaining warrants of eviction he argued that eviction of a party must be carried out by an authorized officer of the Court duly executing warrants of the nature. He submitted that the officer is an auctioneer (sic), and such officers are regulated by the Auctioneers Licencing Board. He urged the court to take note of the recent forceful evictions which have led to abuse of processes of courts. He submitted that the Court finds the forceful eviction carried out on him as unlawful, against the rule of law and due process hence illegal. He urged the court to apply its supervisory power over such act which he argued as constituting impunity.

11. The Appellant relied on the cases of Diana Muchiri v Lydia Wariara Njenga & another [2022] eKLR and Ringera v. Muhindi (Environment and Land Miscellaneous Application E128 of 2021 [2022] KEELC 2481 (KLR) (7 July 2022) (Judgment). He summed it that he was not given any time to vacate the premises hence the trial magistrate was wrong.

12. On his part the Respondent began his submission by giving an introduction to the appeal and what he called a factual matrix. In it he set out a number of facts he termed as emanating from those before the lower court. I need not summarize them here since the proceedings, the application and response of the Respondent therein clearly bring them out, and I will be analyzing them below. Finally, he gave only one issue for determination. It was whether the determination of the trial court was sound and justified to stand. He recalled the role of the Court at this stage by restating the position that in sitting on appeal from a decision of the lower court, this Court is obligated to consider the evidence, re-evaluate it and make its own conclusion on it. For this, he relied on the case of Abok Adere T/A Adere & Associates versus John Patrick Mahira T/A Machira & Co. Advocates. He also cited the case of TOS v Maseno University and 3 others [2020] eKLR which dismissed the appeal other than the grounds which were preferred in the High Court.

13. His argument was that the ruling was factually sound. He discounted the factual argument by the Appellant in his Affidavit that his late father, Eli Ewoi, owned the suit property and that he, the Respondent, failed to prove ownership of the property, while the Appellant was in the process of securing ownership documents. He contended that the Appellant did not join his siblings or the Turkana County Government to prove his assertions. He submitted that he filed submissions with authorities, which the Court analyzed and it was not bound to agree with the "unhelpful" (sic) authority the Appellant gave.

14. The Respondent submitted that the property belonged to it. It based the argument on the fact that having submitted a Part Development Plan (PDP) which was approved by the County Government of Turkana, it was evidence enough that it owned the property as the acceptance could not be done except if the land belonged to the owner or his agent had presented it. He also relied on a letter dated 5/10/1987 addressed to Jamia Mosque Railway Landhies referring to the Plot No. 381 and stating that it belonged to the Institution.

15. About the Notice to Produce documents served on it, it submitted that the same was resolved when it submitted before the trial court that reliance would be placed on the documents available on record. He stated that it was upon the appellant to use Article 35 of *the Constitution* to obtain the documents from the public records in order to build his defence. Again, he submitted that the Appellant did not prove that the documents he requested for were important in advancing the dispute or assisting the Court to arrive at a just determination.

16. Regarding the form of the pleadings and proceedings, he submitted that there is nothing strange in having Miscellaneous proceedings in enforcing Sections 152A-E of the *Land Act*. He placed reliance in the case law of Ringera v Muhndi (supra). He then stated that nowadays, substance is upheld over form and that having served the Appellant with the eviction notice, as required under the Act, the Respondent was under no obligation to file a case in Court under Section 152F of the Act to challenge the Notice and that the Court had the obligation to uphold the Notice by way of ordering the eviction.

17. The Respondent submitted that the Court applied sound legal principles in arriving at his decision. It relied in the case of Grace Wangari Mureithi v David Njoroge [2021] eKLR and Margaret Karwirwa Mwongera v. Francis Kofi [2019] eKLR. It prayed for the dismissal of the Appeal.

Issues, Analysis and Determination

18. I have carefully considered the appeal before me. I have also given due regard to the submissions by both parties, the law regarding the issues both at the trial court and this one, and the case law relied on by the parties in support of their submissions. This is a first appeal against the decision of the lower court since it was not sitting on appeal in the application. Also, the Application did not proceed by way of a hearing and all that the trial magistrate did was to exercise discretion in the matter before him. I will be considering whether or not the trial court did exercise its discretion judiciously, and if it did whether it arrived at a conclusion that was manifestly wrong.

19. I begin with restating my duty as an appellate court of first instance. My role at the appellate stage, and I agree with the submissions of both learned counsel in this matter is as was given by the Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] e KLR. I have the duty to evaluate the evidence and arrive at my own conclusion. In the case of Gitobu Immanyara (supra) the Court held that:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

20. Similarly, in the case of Peters v Sunday Post Ltd [1958] EA 424, as quoted in the case of Jackson Kaio Kivuva v Penina Wanjiru Muchene (2019) eKLR the Court held:-

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."

21. Additionally, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the court held that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

22. That said, I must state here that while evaluating the evidence before the trial court, my role is not to substitute my discretion with that of the lower Court but to consider whether it was not clearly erroneous. I must make my own independent finding, while leaving the discretion of the lower Court intact as long as it was exercised based on the right principles, and only find if its end was plainly wrong.

23. As was stated in Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006):

> " ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied

that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

24. Also, in Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR the Court of Appeal held that "...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference." Additionally, in Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.

25. This point was put forth clearly in the case of Mbogo and Another v Shah [1968] EA 93 at 96) affirmed the as follows:

> " For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

26. Having laid the foundation for my duty in determining this appeal, I proceed to consider it based on a sequential consideration of certain grounds together as one since they revolve on the same issue. However, before doing so, as a preliminary point this Court finds that in the Applicant in the trial court, now Respondent, cited some irrelevant provisions of law. Although not fatal to his application, by virtue of Article 159(2)(d) of *the Constitution*, it was unnecessary to do so. I find the provisions singled out from those he cited to be irrelevant because the law provides specifically for the filing of an application of the nature which was before the trial court. The irrelevant provisions he cited were Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* each of which has its place in the practice of civil matters. As for citing the Civil Procedure Rules, 2010 generally, I found it absurd. This is of the view that bringing the application under the provisions of the *Land Act* which he cited was enough.

27. Additionally, while this court will not base its final determination of this appeal on the error in law of the trial magistrate in failing to comply with Order 21 Rule 4 of the Civil Procedure Rules because the appellant did not raise it as a ground of appeal, it is worth repeating that it is obligatory for judges and judicial officers, and indeed any other individual to act in accordance with the law where he/she is required to. Order 21 Rule 4 provides that "Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision." In the ruling that is appealed from the trial magistrate failed miserably to prepare it as required by law.

28. The first set of grounds I consider is one to three and seven (1-3 and 7) which in my view are on whether or not the trial magistrate erred in law and fact in failing to find that ownership of the suit land was in dispute. Attendant to that whether there was material evidence on record to show that indeed the issue off ownership was in contention between the parties and what the law requires as proof by documentation in regard to ownership of such type of land in Kenya.

29. In the Application, the Applicant contended that it was the owner of the land in question. To support the assertion, it annexed to the supporting affidavit a bundle which constituted copies of A Part Development Plan Application form (PPA 1 Form), two receipts dated 2021-06-1 for Kshs. 1,000/= and Kshs. 3000/= respectively, letter dated 5/10/1987 and another one dated 21/10/1987 both addressed to the Chairman of Jamia Mosque Railway Landhies marked as annexture MIK 3. It

deponed that it was the successor in title to Jamia Mosque Railways Landhies and annexed a Certificate of Registration.

30. On his part the Appellant opposed the application stating that he was born, with his siblings, and raised on the land by his deceased parents and had been thereon for 35 years. He disputed reliance by the Applicant on annexture MIK 3 as proof of ownership of the land and stated that instead it was upon the Applicant to show an allotment letter supported by a certificate of official search to prove the fact but it had not been done. He stated that the County Government of Turkana should have been enjoined as an interested party. He stated that he knew that the suit land belonged to the family and the estate of the late father would be filing suit challenging the Applicant's ownership if indeed it was true. The Respondent, on its part, did not counter the assertion that indeed the Respondent had lived on the suit land, and with his family, for all that period of time.

31. On this, the trial court having summarized and considered the submissions by learned counsel of both parties, found that the issue for determination before him was whether the applicant has satisfied the principles set down by the law for the grant of the application sought. Surprisingly, without following the requirements of Order 21 Rule 4 of the Civil Procedure Rules at all, he straight away proceeded to quote paragraph 6 from the decision by Justice Okong'o's in Ringera v. Muhindi (Environment and Land Miscellaneous Application E128 of 2022 [2022] KEELC 2481 (KLR) (7 July 2022) (Judgment). He proceeded to conclude that in the authority the court confirmed that refusal to challenge a notice is sufficient proof that there was no bar to the confirmation of eviction. I find that that was a misreading of the holding of the judge in the matter.

32. The trial magistrate further found that the cases of Wangari Mureithi v David Njoroge [2021] eKLR and Margaret Karwirwa Mwongera v Francis Kofi [2019] eKLR upheld a similar position. That was not correct as I will demonstrate below.

33. Strangely, the trial Magistrate did not endeavor to distinguish the authorities relied on by the Appellant and find why they were inapplicable. He also did not analyze the three authorities he felt bound by and compare their ration decidendi to the facts and arguments before him.

34. Beginning with an analysis of the authorities relied on by the trial Court, it is my humble view that they were distinguishable and could not support the facts of the application before him. For instance, Margaret Karwirwa Mwongera v. Francis Kofi [2019] eKLR was a decision on appeal of a ruling delivered by the trial court in a Land Disputes Tribunal matter (No. 15 of 2009, Chuka) wherein an award had been made and filed in Court for adopted. After adoption and the appeal therefrom had been dismissed, the trial court issued an eviction order after a notice of three months had been given. In the circumstances the issue of ownership was not in contention anymore.

35. About the decisions of Ringera v. Muhindi (Environment and Land Miscellaneous Application No. E128 of 2022 (2022) KEELC 2481 (KLR) (7 July 2022) (Judgment) and Wangari Mureithi v David Njoroge [2021] eKLR, while the backgrounds of and of their facts are similar to the matter that was before the Court in regard to issuance of ownership of the suit parcels in question, they differed materially from the facts before the trial Court from which the appeal was preferred to this Court. In both applications, there was no contest at all about the ownership of title whether upon issuance of the notice to vacate or after the applications for confirmation of the notices were filed.

36. Actually, in the former authority, the Respondent had been found guilty and convicted of forcible detainer by a lower court in relation to the land in question, and he never opposed the application. Even then his occupation of the suit land therein was only less than twelve years from the time of conviction on 10/06/2010 to the time of the application. In the latter, the Respondent was said to have invaded the land in 2019 which was less than three years from the time of application.

37. While at distinguishing authorities, the Diana Muchiri decision (supra) relied on by the appellant was a judgment which was on a declaration that the suit land belonged to the Plaintiff and vacant possession thereof by the defendant, together with an injunction. It proceeded to hearing. The facts therein were different from this on the instant matter. The Margaret Karwirwa Mwongera v Francis Kofi [2019] eKLR the Applicant demonstrated clearly that he was the registered owner of the land in question having bought it just before the time of issuance of the eviction notice and the application was not opposed at all despite service, unlike the instant case.

38. In the instant case, the respondent did not provide any evidence that it was the registered proprietor, and the appellant argues, and it is not denied by the Respondent herein by way of affidavit or shown otherwise, that he has been in occupation of the land for 35 years. Clearly, if indeed the Respondent owned the land from 1987 as it alleges, a question arises as to whether the Respondent can recover the land after expiry of 12 years as Section 7 and 17 of the *Limitation of Actions Act* provide.

39. Even assuming that the narrative by the Applicant that it was to be adjudged owner would be anything to go by, when did a Part Development Plan or mere letters written addressed to someone by an authority constitute evidence of ownership? Not any one given time!

40. Additionally, the PDP relied on did not identify the Plot number in relation to which it was issued. Under Section B which is titled Land Parcel Information, there is no Plot number and the sub-section numbered 28 (Ownership (lease, purchase, community allocated) is blank. The two letters dated 5/10/1987 and 21/10/1987 cannot purport to be conclusive evidence of ownership since in the first place they were copies whose authenticity became an issue immediately a Notice to Produce Documents was issued to the Applicant. In any event the latter was not certified by the issuing authority and the former purported to be certified as true copy of original on 30/10/2007 by an office it was neither issued from nor even addressed or related to. Lastly, the Applicant did not establish by way of documentary evidence a nexus between itself and the Jamia Mosque Railways Landhies entity that it purported to be successor in title thereto. It did not even show how the land which if it was owned by the Jamia Mosque Railways Landhies got lawfully transferred from the alleged original allottee to it. In any event, aside from ownership, based on the area the suit land was situate and the size thereof and developments thereon the court ought to have satisfied itself first as to whether it has pecuniary jurisdiction over the subject matter before proceeding with it. It did not. These, among many issues, are weighty matters the Court should have put into consideration but it did not hence it gravely erred in law and fact in the conclusion it reached.

41. Besides, an Application under Section 152F of the *Land Act*, Act No. 6 of 2012 as amended in 2016 is supposed to be made by the person on whom a Notice to Vacate land has been issued by an owner. It is a summary procedure which can only be granted by the Court in the clearest of cases, being where there is no contest at all as to the ownership of the land in issue: only a question of why the person in unlawful occupation is not moving out of the land outstands. Such instances include where the Court has already pronounced itself in a suit as to who the owner of the land is and the matter is settled fully as such. Where there is a contest as to ownership of any kind, the person claiming to be the owner should file a suit and seek appropriate orders as to title before and then an eviction.

42. Again, the above-referenced provision of law is clear that only a person on whom the notice has been issued can apply to court for a relief against such a notice. It provides that "Any person or persons served with a notice in terms of Sections 152C,152D and 152E may apply to Court for relief against the notice." Plainly, it has no room for the person who is issuing a notice to proceed apply to Court for the reliefs "arising from" the notice. Thus, I respectively disagree with my colleagues in the two cases cited above that the Applicants correctly moved the court for the orders sought, without first resorting to a

suit being filed for the eviction and being concluded in their favour. It is immaterial that the recipient of the notice to vacate moved the Court for the relief provided for or not since failure to do so does not confirm ownership of the land by the giver (of the notice). To give jurisprudence that supports that trajectory would defeat the purpose and history of the amendment of the Act, by introducing the Sections in issue, to provide for the manner of carrying out evictions. Further, the provisions were introduced into the law to give permission to the owner of the land to evict a trespasser. It means that once he issues the notice and it is not complied with, he should proceed to evict the trespasser while following the steps given in the law, without further recourse to court. Otherwise, for the owner to resort to a court process to confirm the vacation notice, without filing a suit, would defeat the logic and purpose of issuing the three months' notice! That is not what Parliament intended.

43. The fourth ground of appeal was that the trial magistrate erred in law and fact in failing to direct, compel and/or order the Respondent to produce ownership documents of the suit property despite being duly served with a Notice to Produce Documents and Request for Particulars. Indeed, at pages 17-20 and 21-22 of the Record of Appeal it is shown that there was a Notice to Produce Documents and a Request for Particulars both dated 14/06/2022 and filed the same date.

44. The trial Court record shows that on 15/06/2022 the Appellant raised before the court the issue of compliance about the Notice and Request, to which the Respondent's learned counsel replied that he needed time to consider. On 20/07/2022 when the matter came up for further mention the same issue was raised and a prayer made to the Court to compel the Applicant to produce the documents. To that contention the Applicant replied that he had supplied all the documents required by filing some. He then argued that the Respondent be ordered to make a formal application for the production of the documents in order for them to respond.

45. Upon hearing the submissions by both counsel on the latter date the trial court did not render himself on the issue of the Notice to Produce and Request for Particulars in relation to the Application that was before him. Instead he noted only that the application had been opposed. He said nothing more. He directed the Applicant to file a substantive suit and attach to it all documents. He fixed the matter for mention on 03/08/2022.

46. It is not clear what the trial magistrate meant by this. But the appellant argued that the application had been abandoned in favour of a step being taken to file suit. On this the Respondent did not submit anything to the contrary or its legal position. It is this Court's finding that in civil procedure there is no provision for "abandoning" an application (or suit for that matter) except in matters where an individual who was a minor at the time of the court being moved used to be represented by a next friend, and on attaining the age of majority he elects to abandon the suit or application. Even when he does that, he must, if he is the sole party on one side, make an application to court for it to dismiss the suit or application but with costs to the opposing party(ies). One cannot abandon an application, claim or suit: if he chooses not to proceed with it he can only withdraw it or pray for its dismissal.

47. That notwithstanding, on 20/07/20223 the trial court made a decision not to proceed with the application but instead directed the Plaintiff to file suit.

48. On 03/08/2022 since the Respondent's advocate was not in court the court gave a further mention on 07/09/2022 on which date it directed, in absence of the Respondent that submissions be filed on 05/10/2022. Later, the impugned ruling on the Miscellaneous Application would be delivered on 09/11/2022.

49. This Court shall not at this stage delve into the whole meaning of discovery of documents. However, the importance of the process towards ensuring that the ends of justice are met ought to be underscored. In Halsburys Laws of England it is observed as follows:

> "The function of discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation."

50. From the record of the trial court, it is beyond peradventure that the issue of the Notice to Produce Documents and the Request for Particulars were not considered by the court. In civil procedure, the import of the two documents filed cannot be gainsaid. The effect of failure by a party to comply with them upon being served is also cannot be ignored. For instance, Section 95 of the *Evidence Act* provides that, "The court shall presume that every document called for and not produced after notice to produce was attested, stamped and executed in the manner required by the law". This means that if the Appellant had in his possession and wished to produce in evidence copies of the documents he sought from the Applicant, even if they were not authentic, absence of that compliance meant the Court would presume them to be proper ones.

51. At the same time, on the Request for Particulars, while it may be argued that by the Appellant filing submissions subsequent to the filing of the two documents was an act of acquiescence, it was incumbent on the Court to pronounce himself as to the fate of the two documents even before proceeding to call for receive submissions since the information sought though them was not trivial in light of the fact that the Applicant did not produce any document to prove when it became owner (by way of allocation) of the Plot in issue or exhibit any document of ownership. Thus, the he erred in law in disregarding such an important step or not giving the Appellant an opportunity to move the court appropriately before making the final finding he did.

52. The fifth ground of appeal which relates to the ninth and which I therefore combine were of fundamental jurisprudence. In them were two issues, namely, whether the trial court was right in ruling against its own (earlier) findings and whether the eviction order could issue in a miscellaneous application. Regarding the second issue, this Court has substantially pronounced itself on it in paragraphs 41 and 42 above. It was imperative on the trial magistrate to live by his finding, which in the first place was right, that the Applicant was required to file a suit rather than an application in order to be granted the orders sought.

53. About the first issue in this ground, the record shows that on 20/07/2022 the Court made no specific on whether or not the application was to remain alive or go out of the way. He only noted that the application was opposed and proceeded to order that the Applicant should file a substantive suit and attach all documents. However, as the record subsequent to that date shows, without any explanation whatsoever or even being moved to and setting aside the order of that date, the trial magistrate proceeded to render the ruling herein. Thus, he either silently or "invisibly" retracted his reasoning and in a way 'vacated' the orders made. It means he sat on appeal on them, set them aside and proceeded to determine the application on merits.

54. Therefore, while I do not find anywhere on the record that the trial court ordered the application to be abandoned in favour of a substantive suit being filed as submitted by the appellant, I indeed find

that the learned magistrate ordered the Applicant to file a substantive suit wherein he would attach all evidence. It means he was in doubt as to the ownership of the land and was of the opinion that it required evidence to be led on it in a suit. How then would he find that the Application succeeded? I Flowing from the above I find that his decision of 09/11/2022 was clearly erroneous.

55. In any event, it is trite that when the trial court found, on 20/07/2022, that the Applicant was obligated to file suit instead of urging the Application, he became functus officio on the issue. He could not, legally, reverse his orders, except as provided for under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules which provides for review.

56. I hold so because when, on 07/09/2022, the trial court purported to direct the parties to file submissions and proceeded to rule on the application, he indirectly and without overruled himself on the earlier order. Even the 'slip rule' could not be said to be applicable in the circumstances. About the slit Rule, the Supreme Court of Kenya in Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 Others [2017] eKLR held that it does not confer upon any court jurisdiction to sit on appeal over its own judgment (or order for that matter) or to extensively review the judgment so as to alter it substantially. This is not even what the trial Court did in this matter.

57. I now analyze grounds of appeal six (6) and eight (8) together because they deal with whether the trial magistrate failed to consider the submissions and the authorities in support thereof as were given by the Appellant and if so, it was an error that would warrant setting aside the ruling appealed from. From the record, as was reproduced in summary at paragraphs 44, 45, 47 and 48 above, surprisingly, in his analysis and finding the trial magistrate was totally silent on the submissions by the Appellant. He relied only on the authorities cited by the Respondent herein (Applicant). The import of submissions in determination of issues by courts of law has been considered by this and many courts before. Of submissions, in Patrick Simiyu Khaemba v Kenya Electricity Transmission & another [2021] eKLR this Court stated follows:-

> " As such, since submissions are "marketing tools" for parties, they must contain what is being marketed... But counsel, and learned for that matter, often market their clients' issues to judges and judicial officers generally through submissions."

58. In Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR the Court stated that:

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. "

59. In Nancy Wambui Gatheru v Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 his Lordship stated as follows:

> " Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

60. Therefore, in as much as failure to consider the submissions of the Appellant could not necessarily affect the finding of this court as a basis for setting aside the ruling, it is curious that the learned trail magistrate would choose not to consider both the submissions and authorities of the Appellant at all and not mention anything whatsoever on them while relying on the applicant's. Such a step can only point to a demonstration of biasness. Nevertheless, I do not disturb the ruling on that failure.

61. The tenth ground of appeal that the court erred in law in not finding that the Applicant having not had title to the suit land could not issue the notice to vacate the land must not succeed from the start. The reasons for the finding are that the provisions in issue do not bar anyone from issuing such a notice as long as they are of the view that the are owners of land. Anyone can issue the notice but the ultimate determiner as to the success or otherwise of the notice where the recipient does not vacate voluntarily is the Court. Thus, it is not surprising to find notices being issued by all and sundry who believe to be owners. That is why the same law, Section 162F(2) of the Act as amended, provides for four types of reliefs to a person challenging the notice. These are confirmation, variation or suspension of the notice and an order for compensation.

62. The Appellant urged as one of the prayers that, in the event of success of this appeal, this Court issues a permanent injunction against the Respondent, its agents and/or servants from interfering with the Appellant's peaceful occupation of the suit land until such a time as when the dispute is duly determined by either court or a competent authority. The consideration of this prayer calls on the Court to examine the effect of setting aside the ruling of the trial Court in case the appeal is successful. In essence the Court has to look at the papers which were filed in the lower court and find out whether the similar orders were sought by the Appellant and if indeed they were, they were supported by pleadings which the law recognizes as the foundation of successfully granting an injunction.

63. It is not in dispute any longer that the 'pleadings' in the lower court were an application supported by an affidavit and the response thereto was a Replying Affidavit. There was no prayer for injunction sought by the Appellant in the lower court, and there was no pleading that would firm such a prayer. If this court finds that the Appeal is successful, it can only set aside the ruling impugned and substitute it with an order dismissing the Application. In those circumstances, the grant of an order of injunction would be based on no pleading but hollow, and that would be contrary to law. If the Appeal fails, then the ruling would be upheld. In the circumstances of the latter possibility, there would be no basis for issuing an order of injunction on a party who would have been found to have rightly evicted the Appellant. As is now clear from the above analysis, either way the prayer cannot be granted and I decline the invitation to grant it.

64. The upshot of the analysis above is that all the grounds except one succeed. Therefore, the appeal is allowed with costs to the Appellant. The ruling delivered by Hon. D. A. Orimba SPM on 09/11/2022 in Lodwar Senior Principal Magistrate's Court Miscellaneous Civil Application No. E001 of 2022 is hereby set aside and substituted with an order dismissing the Application dated 03/01/2022 with costs to the Respondent.

65. Further, the Appellant having been partially evicted as a result of the wrongful decision that has been set aside ordered to be put back into possession as was before the said eviction. Further, the status quo as was as on the date of the filing of the Miscellaneous Application in the lower court should be restored forthwith. The Officer Commanding Station, Lodwar Central Police Station is directed to, if necessary, provide security for compliance of the orders as have been issued.

66. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 25TH DAY OF MAY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE