



**Ndungu v Baruh (Environment and Land Appeal E093 of 2021)
[2023] KEELC 17536 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17536 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E093 OF 2021**

BM EBOSO, J

MAY 23, 2023

BETWEEN

JAMES KAMAU NDUNGU APPELLANT

AND

PETER MUTITU BARUH RESPONDENT

(Being an Appeal arising from the Judgment of Hon. C. K Kisiangani (SRM) delivered at Ruiru Senior Principal Magistrate Court on 14/10/2021 in Ruiru MCELC Case No 17 of 2020)

JUDGMENT

Background

1. This appeal challenges the Judgment rendered by Hon C. K Kisiangani, SRM, on 14/10/2021 in Ruiru SPMC MCL & E Case No 17 of 2020. The respondent in this appeal was the plaintiff in the said suit. The appellant was the defendant. The key issue that fell for determination in the trial court was whether the respondent was entitled to possession of land parcel number Ruiru/Ruiru East Block 2/8061 [the suit property]. The trial court made a finding in the affirmative, triggering the appeal. Before I delve into the key issues that fall for determination in the appeal, I will outline a brief contextual background to the appeal.
2. Through a plaint dated 31/1/2020, the respondent sued the appellant, seeking an order authorizing eviction of the appellant from the suit property. His case in the trial court was that he had purchased the suit property in a public auction conducted on behalf of a chargee who sold the suit property in exercise of the chargee's statutory power of sale. Upon purchasing the suit property, the chargor [Zipporah Muthoni Kamau] unsuccessfully challenged the sale at the Milimani Commercial Court [the Chief Magistrate Court]. The chargor's challenge having failed, the respondent was registered as proprietor of the suit property. He contended that his subsequent plea to the appellant to vacate the suit property was not heeded.



3. The appellant filed a defence dated 4/2/2021, in which he contested the respondent's claim and contended that his wife, Zipporah Muthoni Kamau [hereinafter referred to as "the deceased"], was still the registered proprietor of the suit property. He added that there subsisted Thika ELC Case No 677 of 2017 in which the deceased had sued Ezra Ndungu Kingori and 3 others, alleging fraud, and in which the respondent had been named as an interested party. He urged the court to dismiss the suit.
4. Upon taking evidence and receiving submissions from the parties, the trial court rendered the impugned Judgment, in which it found that the respondent's title "was issued legally after the fall of the hammer in an auction." The trial court observed that there was no proof of fraud on part of the respondent. The trial court ordered the appellant to vacate the suit property within 60 days.

Appeal

5. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following verbatim grounds:
 1. That the learned Magistrate erred in law and in fact by failing to find that the suit filed by the respondent violated the doctrine of res subjudice and was an abuse of the process of the court since a similar suit on the subject matter and between the same parties or parties claiming under them, namely Thika ELC 677 of 2017 (*Zipporah Muthoni v Ezra Ndungu & others*) is pending hearing and determination before this honourable court.
 2. That the learned Magistrate erred in law and fact by failing to hold that the purported title held by the respondent was obtained through collusion, fraud and misrepresentation.
 3. That the learned Magistrate erred in law and fact by failing to hold the title deed held by the respondent was obtained illegally in violation of the set procedure and through a corrupt scheme.
 4. That the learned Magistrate erred in law and fact by failing to hold that the purported purchase of the suit property by the respondent was irregular and contra statute since the charge on which the alleged sale was based was irregular, null and void.
 5. That the learned Magistrate erred in law and fact by making orders and issuing a decree against the appellant who was non-suited and who was not the proper party to the suit.
 6. That the learned Magistrate erred in law and in fact by failing to hold that the purported transfer and issuance of the Title Deed to the respondent during the pendency of Thika ELC Number 677 of 2017 violated the *lis pendens* Principle and was intended to alter the status quo, steal a match against the plaintiff in that suit and to irregularly confer a benefit to the respondent.
 7. That the learned Magistrate erred in law and fact in applying the wrong principles and rules of law in assessing the evidence adduced by the appellant and the respondent.
 8. That the learned Magistrate erred in law and fact by upholding the title deed held by the respondent.
 9. That the Judgment constitutes a grave miscarriage of justice and should be set aside.
6. The appellant urged this court to set aside the Judgment of the trial court.



Appellant's Submissions

7. The appeal was canvassed through written submissions dated 7/7/2022, filed by M/s F. N Njanja & Company Advocates. On the first ground of appeal, counsel submitted that at the time Ruiru SPMC MCL & E No 17 of 2020 was filed, there subsisted Thika ELC Case No. 677 of 2017 relating to the same subject matter and involving the same parties or parties claiming under them. Counsel argued that the suit giving rise to the impugned Judgment violated the doctrine of res subjudice and that the trial court erred in failing to find so.
8. Counsel condensed ground numbers (2), (3), and (4) into one issue and submitted that the respondent was a direct participant and a beneficiary of fraud perpetrated by him and three other parties. Counsel contended that the respondent's title was a product of fraud. Counsel added that the deceased challenged the sale through Thika ELC Case No 677 of 2017.
9. Counsel submitted that the appellant filed and produced pleadings and documents relating to Thika ELC Case No 677 of 2017 which clearly showed that the charge document which culminated in the public auction was a forgery. Counsel faulted the respondent for procuring a transfer of the suit property during the pendency of Thika ELC Case No 677 of 2017 and while aware of the allegations of fraud. Citing the provisions of Section 26(1) of the *Land Registration Act* and placing reliance on the Court of Appeal decision in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, counsel for the appellant argued that the respondent's title was tainted and its legitimacy was under challenge in Thika ELC Case No. 677 of 2017. Citing the Court of Appeal decision in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, counsel submitted that sale of the suit property through a charge that had been impugned did not confer any proprietary interest in the respondent.
10. On ground numbers 6, 7, 8 and 9, counsel for the appellant submitted that "the trial court grossly violated the doctrine of *lis pendens*" and thereby occasioned grave miscarriage of justice against the appellant. Counsel contended that the trial court elected to take the case of the respondent "on the face value" and ignored the case of the appellant whose thrust was that the title held by the respondent was stolen. Counsel contended that the alienation of the suit property by the chargee during the pendency of Thika ELC Case No 677 of 2017 was a gross violation of the doctrine of *Lis Pendens*. Relying on the decision in *Fredrick Kinyua & another v G. N Baird*, Nairobi HCCC Case No 4919 of 1989, counsel urged the court to quash the judgment of the trial court. Counsel intimated that the appellant had abandoned ground number 5. Counsel urged the court to set aside the Judgment of the trial court on the ground that it violated the principles of Res subjudice and *lis pendens*.

Respondent's Submissions

11. The respondent opposed the appeal through written submissions dated 15/6/2022, filed by M/s Bench & Company Advocates. Counsel for the respondent submitted that the respondent was a purchaser for value who purchased the suit property in a public auction conducted by a chargee in exercise of the chargee's statutory power of sale. Counsel added that although the chargor filed Thika ELC Case No 677 of 2017, the restraining order which subsisted in the said suit was vacated paving way for the vesting of the suit property in the respondent. Counsel contended that there was no irregularity in the registration of the respondent as proprietor of the suit property.
12. Counsel for the respondent added that whereas the appellant alleged fraud in the procurement of the charge, Eunice Wanjiku Kamau who testified on behalf of the appellant stated before the trial court that indeed her mother [the deceased/chargor] took a loan from Spring Board Capital Limited and failed to repay the loan and she went abroad for work so as to complete repayment.



13. Counsel added that the issues in the two suits were distinct, adding that in Thika ELC Case No 677 of 2017 the deceased plaintiff sought to stop registration of the respondent as proprietor of the suit property and the interim *ex parte* injunction which had been issued by the court was vacated after the application was heard and determined on merits. Counsel added that the issue in Ruiru SPMC E & L Case No 17 of 2020 related to possession of the suit property. Counsel urged the court to dismiss the appeal.

Analysis and Determination

14. I have read and considered the original record of the trial court alongside the record of appeal filed in this appeal. I have also read the grounds of appeal and the parties' respective submissions. Parties did not frame a common set of issues to be determined in this appeal.
15. Taking into account the grounds of appeal and the parties' respective submissions, the following are the three key issues that fall for determination in this appeal: (i) Whether the trial court violated the principle of *Res sub judice* in conducting trial and in rendering a determination in Ruiru SPMC E & L Case No 17 of 2020; (ii) Whether, in the circumstances of the case, the trial court erred in granting the respondent the reliefs that were sought against the appellant; (iii) What order should be made in relation to costs of this appeal. Before I dispose the above issues, I will briefly outline the principle which guides this court when exercising appellate jurisdiction.
16. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
17. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse 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.”
18. The first issue is whether the trial court violated the principle of *Res Subjudice* in conducting trial and in rendering a determination in Ruiru SPMC E & L Case No 17 of 2020. One of the two key grounds on which this appeal was anchored is that because there subsisted Thika ELC Case No 677 of 2017, the trial court violated the principle of *Res Subjudice* in conducting trial and in rendering a determination in Ruiru SPMC E & L Case No 17 of 2020. The appellant contended that the trial court should have downed its tools.
19. I have looked at the original record of the trial court. It does emerge from the original record of the trial court that the issue of *res sub judice* was raised and canvassed by the appellant through a notice of



preliminary objection dated 12/5/2020. For avoidance of doubt, the notice of preliminary objection read as follows:

- “(1) That the suit is a non-starter in limine as it raises issues as those raised in Thika Environment and Land Court Case No. 677 of 2017: *Zipporah Muthoni versus Ezra Ndungu, Shawan Red Limited, Spring Board Capital Limited and Peter Mutitu Barub*, which suit is over the same subject matter and between the same parties litigating under the same titles.
- (2) That the present suit ought to be stayed with costs borne by the Plaintiff.”

20. Upon hearing the parties on the preliminary objection dated 12/6/2020, the trial court rendered a ruling dated 12/6/2020 in which it found the preliminary objection unmerited. The trial court rendered itself in the ruling thus:

“The court will first determine the preliminary objection before making a determination of the plaintiff’s application. Both parties have filed their respective submissions which I have considered. The defendant’s advocates submitted that the suit is *subjudice* since it raises the same issues over the same suit property as this one. He submitted that suit 677 of 2019 is yet to be heard and conclusively determined and the plaintiff herein has admitted to being in the suit as an interested party and therefore cannot then file the present suit. The plaintiff’s advocate submitted that he is the registered owner of the suit property and that the defendant has not stated if he has begun succession proceedings to enable him substitute his late wife in ELC 677 of 2017 which has since abated.

I have considered the pleadings filed and it is no doubt that there existed another suit Thika ELC 677 of 2017 over the suit property herein. It is also not in doubt that the suit is yet to be heard and determined save for the *ex parte* injunction that had been issued when the suit was filed. It is not in doubt that the plaintiff in suit No 677 of 2019 passed away on 25/2/2019. The issue for determination is whether this suit is *sub judice* as the defendant claims in his preliminary objection.

From the record, Thika ELC 677 of 2019 has never been heard so the real issues in contention have never been heard. The defendant in his pleading has stated that the suit had been scheduled for hearing on 30/3/2020 and also that the plaintiff therein who is his wife died on 25/2/19. He has not told the court if at all he had applied to substitute her or whether he instituted succession proceedings to substitute the plaintiff in that case. So as it was therefore that suit could have proceeded for hearing is there were no Covid issues alleged. Order 24 rule 1 provides that the death of a person does not abate the suit if the cause of action survives the deceased but the same abates after one year if no substitution of the deceased has been done. The plaintiff having passed on 25/2/19 substitution ought to have been done by 25/2/2020 and since there is no proof of the same Thika ELC 677 of 2019 abated by operation of law on 25/2/2020. The defendant cannot therefore state that this is *sub judice* since as it is there is no other suit over the subject property herein. The defendant had failed to prove the element of *sub judice*.

Since the preliminary objection was based on the rule of *sub judice*, I find that the defendant has failed to prove the same and I hereby dismiss the preliminary objection dated 12/5/2020.”



21. From the original record of the trial court, and from the record filed in this appeal, there is no evidence of any appeal that was preferred to challenge the considered ruling of the trial court on the subject of res subjudice. The appellant had every right to pursue the appeal mechanism against the ruling rendered on 17/6/2020. He elected not to challenge the ruling of the trial court. The result was that, after one year, hearing commenced in the trial court. There is no evidence to suggest that the appellant revisited the subject of res subjudice at the commencement of the trial.
22. Suffice it to state that, it is clearly irregular for the appellant to use the platform of this appeal as an avenue to challenge the ruling rendered on 12/6/2020 yet he elected not to challenge it when he had the opportunity to do so. That is an abuse of the process of the court. The platform is not available.
23. Similarly, there is no evidence of any subsequent attempt that was made by the appellant, prior to commencement of trial to obtain an order of stay of proceedings or an order of transfer of the suit to Thika ELC to be heard alongside Thika ELC Case No 677 of 2017. The appellant elected to let trial proceed and obtained a determination of the suit. The appellant resurrected the issue of res subjudice only after he lost the case in the trial court.
24. The foregoing are not the only reasons why the trial court cannot be faulted for conducting trial and rendering a determination. The key issue before the trial court was whether the respondent was entitled to possession of the suit property. The appellant declined to cede possession of the suit property despite knowing that the respondent was the registered proprietor of the suit property. The appellant was not the personal representative of the deceased. He did not give evidence before the trial court to justify why he had to continue receiving rent in respect of property that was registered in the respondent's name.
25. Further, the appellant was not a party to Thika ELC Case No 677 of 2017. He elected not to promptly pursue mechanisms that would ensure prompt substitution following the demise of the deceased. He, however, chose to continue to demand and receive rent in respect of the suit property which was registered in the name of the respondent.
26. Given the above circumstances, there is no proper basis for faulting the trial court for conducting trial and rendering a determination in Ruiru SPMC E & L Case No 17 of 2020. That is my finding on the first issue.
27. The second issue is whether, in the circumstances of the case before it, the trial court erred in granting the respondent the reliefs that were sought against the appellant. The appellant faulted the trial court for granting the reliefs on the ground that the respondent's title was obtained in violation of the doctrine of *lis pendens*.
28. The common law doctrine of *lis pendens* states that no fixed property may be transferred when a law suit relating to it is pending. The doctrine existed as part of Kenya's statute law until 2012 when the new land laws were enacted [see Section 52 of the repealed *Transfer of Property Act*]. Parliament did not deem it necessary to retain the common law principle of *lis pendens* in the new land Laws.
29. Did the common law principle of *lis pendens* invalidate the respondent's title? I do not think so. The above view is informed by the root of the respondent's title. The appellant made extensive reference to Thika ELC Case No 17 of 2017. Based on the above, this court has perused the original record relating to Thika ELC Case No 17 of 2017. It does emerge from the record that the deceased first challenged the chargee's exercise of its statutory power of sale in 2016 through Milimani Commercial Courts CMC Civil Case No 7925 of 2016. Her application seeking to block the chargee against exercising its statutory power of sale was found unmerited and the chargee was given the leeway to sell the suit



property to recover its money. Indeed, Gacheru J made the following observation in her subsequent ruling rendered on 24/5/2019 in Thika ELC Case No 677 of 2017:

“ There is no doubt that the plaintiff/applicant herein had filed another suit at Milimani Chief Magistrates Court being CMCC No 7925 of 2016 wherein she had sued the 3rd defendant herein and simultaneously filed a notice of motion application dated 17th November 2016 seeking to restrain the defendants thereon from selling the suit property herein LR No. Ruiru/Ruiru East Block 2/8061 by way of public auction.

In the said notice of motion application filed at the Milimani CM’s Court, the plaintiff/applicant had averred that she had guaranteed Ezra Ndungu Kingori a loan of Kshs 2,000,000/= and had used the suit property as security. She had further averred that the entire loan amount was liquidated in full and was shocked when she received a notice of sale of the suit property.

It is also evident that a ruling in respect of the notice of motion application dated 17th November 2016 was delivered on 12th June 2017 and after consideration of all factors, the learned magistrate dismissed the plaintiff’s application and further held that the defendant herein were at liberty to proceed appropriately. It is also evident that after the said ruling, the plaintiff/applicant filed a memorandum of appeal at Milimani ELC being Civil Application No. 24 of 2017 and sought for stay of the execution of the orders issued in the said challenged ruling.”

30. Gacheru J’s ruling rendered on 24/5/2019 vacated the interim ex parte order which had restrained the chargee against vesting the suit property in the respondent. There was no evidence before the trial court demonstrating that the order of Gacheru J was overturned. Against the above background, the suit property was registered in the name of the respondent on 31/7/2019.
31. It is also clear from the record relating to Thika ELC Case No 677 of 2017 that the estate of the deceased did not bother to promptly undertake succession and procure substitution in the said suit. The deceased having died in February 2019, it is clear that by May 2020 when the appellant filed the preliminary objection dated 12/5/2020 raising the issue of res subjudice, Thika ELC Case No 677 of 2017 had already abated in February 2020.
32. Lastly, the estate of the deceased never sought to be joined as a party to Ruiru SPMC E & L Case No 17 of 2020. Eunice Wanjiku Kamau who was the administrator of the estate elected to be a witness as opposed to being joined as a party to the suit. In her testimony, she testified that the deceased borrowed money from the chargee and was unable to repay the loan.
33. The totality of the foregoing is that there was no err in the findings and disposal orders of the trial court. That is the finding of this court on the second issue. In light of the above two findings, this court has no proper basis for faulting the trial court.
34. On costs, the general principle in Section 27 of the *Civil Procedure Act* is that costs follow the event. No proper basis has been laid to warrant a departure from the above principle.
35. The result is that this appeal is devoid of merit. The appeal is dismissed. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF MAY 2023.

B M EBOSO



JUDGE

Court Assistant: Hinga/Osodo

