



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ramadhan v Mariu & 3 others (Environment and Land Appeal
4 of 2019) [2023] KEELC 17459 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 4 OF 2019**

CG MBOGO, J

MAY 23, 2023

BETWEEN

ABDULLAHI RAMADHAN APPELLANT

AND

AYUB GITAU MARIU 1ST RESPONDENT

SALOME WANGUI NJOROGE 2ND RESPONDENT

**JOSEPH GICHUKI (SUING AS TRUSTEES OF VICTORY TABERNACLE
MINISTRY INTERNATIONAL) 3RD RESPONDENT**

VICTORY TABENACLE MINISTRY INTERNATIONAL 4TH RESPONDENT

*(Being an appeal from the Ruling of the Senior Resident
Magistrate at Narok CMCC ELC Suit No.34 of 2018)*

JUDGMENT

1. The appellant herein being aggrieved by the ruling of Hon H Ng'ang'a, Senior Resident Magistrate Narok delivered on November 22, 2018 in Narok ELC No 34 of 2018 with regard to the application by notice of motion dated July 23, 2018 appealed to this court vide a memorandum of appeal dated May 7, 2019 against the whole of the said ruling on the following grounds: -
 1. The learned trial magistrate erred in law and fact in refusing to allow the enjoinder of the parties as defendant in light of their participation in the purported sale and transfer of the suit premises.
 2. The learned trial magistrate went against the provisions of the law as provided for in the *Civil Procedure Act* and the rules thereunder.



3. The learned trial magistrate failed to sufficiently consider provisions of Article 159 (2) of the Constitution of Kenya 2010 which provides for dispensing of justice without undue regard to technicalities as stated in the proposed amended defence for purposes of a just and conclusive adjudication of the case and in the interest of justice.
 4. The learned trial magistrate did not sufficiently address the reasons for inclusion of the parties and subsequent amendment to the defense thus rendering the ruling one sided and prejudicial to the appellant.
 5. The learned trial magistrate erred in law and fact by failing to consider the application wholistically and base the decision on substance without placing undue emphasis on narrowed technicalities.
 6. The learned trial magistrate misdirected himself in fact by holding that there were no drafts of intended amendments when in fact the amendments were attached and court dated stamped on August 1, 2018.
 7. The amendment should therefore be allowed.
2. The appellant therefore prays for the orders:-
- a. The appeal be allowed.
 - b. The ruling and consequent orders of the lower court (Senior Resident Magistrate) be set aside.
 - c. The appellant/defendant be allowed to amend his defence and enjoin the parties stated on the proposed amended defence and counterclaim attached hereto.
 - d. The proposed amendment per the attached amended defence and counterclaim as filed be deemed to be compliant and competent to proceed to hearing.
 - e. Costs hereof and of the lower court abide the appeal.
3. The 3rd respondent filed a replying affidavit in opposition to the appeal which was sworn on February 7, 2023 and filed in court on March 13, 2023. The respondents deposed that upon filing of the appeal, the appellant ought to have served the same upon the respondents within a reasonable time and the appellant also ought to have filed and served the appeal within 30 days from the date of the ruling.
 4. The respondents further deposed that the appeal was filed long after delivery of the ruling appealed against and in the absence of leave to file appeal out of time, the appeal is incompetent and ought to be struck out as a matter of course. Also, that the orders obtained herein are irregular and unlawful and ought to be discharged and sustaining the appeal would not be useful.
 5. On March 14, 2023, this court directed that the memorandum of appeal be canvassed by way of written submissions. None of the parties filed their written submissions. Be that as it may, this court will proceed to determine the matter that is before it.
 6. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in Mwanasokoni versus Kenya Bus Service Ltd 1982 – 88 I KAR 278.
 7. In the instant case, the appellant herein filed a notice of motion application dated July 23, 2018 before the subordinate court in ELC No. 34 of 2018 seeking leave to file amended statement of defence and



temporary injunction among other orders. The trial court delivered a ruling on the said application on November 22, 2018. The trial court found the application to be lacking in merit and dismissed the same with costs to the respondents.

8. While opposing the instant appeal, the respondents contended that the appeal has been filed out of time and in the absence of an application for leave to file out of time, the instant appeal ought to be struck out.
9. I do note from the record of appeal, the said ruling was delivered in open court on November 22, 2018 and in the presence of counsel for the appellant. However, the instant appeal dated May 7, 2019 was filed in court on May 9, 2019. This was done close to six months after the ruling was delivered.
10. Section 79G of the *Civil Procedure Act* provides as follows:

' Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.'

11. Section 95 of the *Civil Procedure Act* further provides thus:-

' Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.'

12. In the instant case, the appellant did not seek leave to file the instant appeal out of time to enable this court proceed to determine the merits or otherwise of the appeal. The appeal therefore, fails by virtue of the provision contained in Section 79G of the *Civil Procedure Act*.
13. Arising from the above, the memorandum of appeal dated May 7, 2019 is hereby struck out with costs to the respondents. The orders issued by this court on May 25, 2022 are hereby vacated.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 23RD DAY OF MAY, 2023.

MBOGO C.G.

JUDGE

23/5/2023

In the presence of:

CA:Chuma

