Macharia & another v Macharia & 2 others (Environment and Land Appeal E006 of 2023) [2023] KEELC 19184 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19184 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL E006 OF 2023

LN GACHERU, J

JULY 27, 2023

BETWEEN

GRACE WANGARI MACHARIA ..... 1ST APPELLANT

STEVEN GACHIRA CHEGE ..... 2ND APPELLANT

AND

EVAN MWANGI MACHARIA ..... 1ST RESPONDENT

SIMON WAITHAKA MACHARIA ..... 2ND RESPONDENT

HEBRON IRUNGU MACHARIA ..... 3RD RESPONDENT

(eing an Appeal from the Judgement of Hon. S. Mwangi delivered on 19 th July 2022, in Murang'a C.M. E.L.C. No. E085 of 2021)

JUDGMENT

1. The Respondents herein filed a suit against the Appellants in Murang'a CMELC No. E085 of 2021, for eviction and injunction orders against the Appellants over land parcel no. Loc. 15/ Gakuyu/ 1247. The trial Court vide its Judgment of 19th July 2022, entered judgment in favour of the Respondents against the Appellants. Dissatisfied with the said judgment, the Appellants filed the instant appeal.
2. The appeal is anchored on eight grounds as set out in the Memorandum of Appeal dated 10th February 2023, and filed on 22nd February, 2023. The Appellants are seeking for Orders:
    a. That the judgment of the Learned Magistrate Hon. S. N Mwangi in Murang'a Chief Magistrate's Court ELC Case No E085 of 2021 delivered on 19th July, 2022 and its decree thereof be set aside and the appeal be allowed as prayed.
    b. That a new trial be ordered and the Appellants be accorded an opportunity of being heard.

c. That in the alternative to prayer (b) above, the Appellants be declared the lawful owners of the portion of suit land measuring 0.5 acres out of all that suit land known as Loc. 15/ Gakuyu/1247 by doctrine of adverse possession.

d. Any other order that the Court may deem fit

e. That the costs of the Appeal be provided for.

3. The facts founding the filing of the suit were that; - the Respondents were jointly registered as the owners of the suit land together with Benson Maina Macharia, who was not party to the suit. They averred that the Appellants had trespassed into their suit land claiming purchasers' interest; That Lawrence Chege Mwangi, the Appellants' husband and father had bought land from Benson Maina Macharia.

4. The Appellants never entered appearance or filed Defence, and the matter proceeded by way of formal proof.

5. The trial Court in entering judgment in favour of the Respondents held that the Respondents had proven on a balance of probabilities that the Appellants were trespassers and awarded a sum of Kshs. 30,000 as general damages for trespass. The trial Court further issued injunction orders against the Appellants.

6. Parties were directed to dispense with the Appeal by way of written submissions. The Appellants filed their written submissions on the 29th March 2023, through the Law Firm of Ntoiti & Co. Advocates and raised three issues for determination by this Court.

7. On whether the judgment of the trial Court should be set aside, the Appellants invited this Court to the provisions of Order 10 rules 9-11 of the Civil Procedure Rules, as well as the principles to be considered when setting aside an interlocutory judgment set out in Mohammed & Another vs Shoka {1990} KLR 463. The Appellants submitted on the distinction between regular and irregular judgment as explained in the cases of Mwala vs Kenya Bureau of Standards EA LR{2001} 1 EA 148 and James Kanyiita Nderitu & Another {2016} eKLR. It was their submissions that the Judgment of the trial Court was an irregular judgment since none of the Appellants were served with Summons. That there was no evidence that the Appellants were ever served with summons within the provisions of Order 5 rule 8(1) of the Civil Procedure Rules.

8. On the issue of whether this Court should order for new trial, the Appellants submitted that they should not be condemned unheard. They relied on an Indian case of Sangram Singh vs Election Tribunal, as was quoted in Gerita Nasipondi Bukunya & 2 Others vs Attorney General {2019} eKLR, where the Court cautioned on condemning a party unheard especially in matters relating to their lives or property. They maintained that they were condemned unheard by the trial Court and that the Respondents misdirected the trial Court as to true ownership of the suit land. They submitted on how they acquired possession of the suit property and the attempts taken to acquire possession of a portion of the suit land.

9. The Appellants submitted on their claim for adverse possession and urged this Court to find that they have become adverse to 0.5 acres, of the suit land having taken possession in 1995. They relied on a litany of cases to persuade this Court that they have made out a case for adverse possession. They submitted that they are entitled to be declared the owners of a portion of the suit land.

10. The Respondents filed their written submissions on the 23rd May 2023, through the Law Firm of Kirubi Mwangi Ben & Co Advocates. It was their submission that the Appellants were duly served,

but failed to enter appearance as noted by the Court record. They submitted that the Appellants ought to have sought refuge under the provisions of Order 10.

11. The Respondents further submitted that they had established that they are the registered proprietors of the suit property and by dint of the provisions of Section 24 and 25 of the *Land Registration Act*, they were entitled to the orders sought. It was their submissions that the Appellants ought not to be allowed to circumvent the seat of justice and ventilate issues they would have raised in the trial. They submitted that the appeal is incompetent and should be dismissed.

12. The Court has considered the Memorandum and Record of Appeal and the parties rival written submissions and finds: -

13. A perusal of the Record of Appeal informs this Court that the Appellants were not party to the proceedings in the trial Court. It is also clear from the record that the suit land is jointly registered in the names of the Respondents and Benson Maina Macharia, and they were issued with a title Deed on 4th June, 1992. It is also evident from the Record of Appeal that the Appellants did not move the trial Court to either review, vary or set aside its orders of 19th July, 2022.

14. The Appellants have faulted the judgment of the trial Court on the premise that; it failed to consider that the Appellants' family have been in occupation of a portion of the suit property for over 26 acres; That the trial Court ought to have considered the Sale agreement over the suit property, and that the trial Court erred in condemning them unheard. The Appellants have now moved this Court on appeal raising new issues including a claim for adverse possession.

15. The role of this Court on appeal is well laid out in Section 78 of the *Civil Procedure Act* which is to re-evaluate, reassess and reanalyze the evidence as contained in the record of appeal. This was rehearsed by the Court in the case of Selle vs Associated Motor Boat Co. {1968} EA 123, and is well captured by Section 78 of the *Civil Procedure Act*, which espouses the role of a first appellate court as to: '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' This provision was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR, where it was held that:

> "We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the Trial judge are consistent with the evidence.

16. Further, the Court in the case of Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, rightly held: -

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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."

17. The discretionary power of the trial Court just like this Court is donated by *the Constitution* as well as Statute, therefore, this Court cannot unnecessarily interfere with the said discretion. The circumstances under which the Court can interfere with such discretion were well laid out by

the Supreme Court in the case of Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR, where the Court held:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious."

18. Madan, JA (as he then was) captured the principle more succinctly in the case of United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898, where he held as follows:

> " The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

19. This Court cannot over-emphasize its role on appeal over this matter. Additionally, it cannot simply fault or take away the discretion of the trial Court, just because it has been moved on Appeal. The Appellants have a duty to lead evidence that the trial Court's discretion ought to be interfered with on account of the principles set out hereinabove.

20. Section 107 of the *Evidence Act* makes provision for the legal burden of proof, it provides:

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

The evidential burden on the other hand is provide for under Sections 109 and 112 of the *Evidence Act* which provides:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

21. While the legal burden remains constant, the evidentiary burden may be shifted. The Appellants had the burden of adducing evidence before the trial Court to prove their case and whether the burden shifted at any point, this Court will have to peruse the record. This Court will also draw from the Record of Appeal as well as the filed submissions whether the principles enunciated above have been proven.

22. Having analyzed the foregoing and having perused the Record of Appeal and read through the rival written submissions by parties and being guided by the authorities cited, this Court must first determine whether this appeal is competently before it.

23. The Right of Appeal is a Constitutional and a statutory right as was observed by the Court in the case of Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal [2015] eKLR. Appeals from the subordinate to the High Court are anchored on the provisions of Sections

65 & 79G of the *Civil Procedure Act*. While Section 65 acknowledges that appeals from the decrees of the subordinate shall lie in the High Court as of facts and law, Section 79G makes provisions for time for filling of appeal, it provides:

> " 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."

24. It should also be noted that the right of appeal is not automatic and a party to an appeal must be alive to the provisions of Section 75 of the *Civil Procedure Act* on the type of orders that are appeal able. Presently, the Appellants were granted leave to appeal having failed to file the Appeal within the anticipated time and hence this appeal. The Appellants are seeking to challenge the proceedings that they were not part of it.

25. The matter had proceeded by way of formal proof on the strength that the Appellants herein were served with summons, but failed to enter appearance nor file a Defence. Having failed to enter appearance and file a Defence, the Respondents were required by Order 10 rule 2 of the Civil Procedure Rules to:

> " 2. Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant he shall file an affidavit of service of the summons unless the summons has been served by a process-server appointed by the court."

26. Undoubtedly, this Court has perused a copy of an Affidavit of Service sworn by Simon G Kamau, which is in compliance with the above provisions. The Respondents thereafter and in compliance with Order 10 Rule 9, caused the suit to be set down for hearing hence the formal proof and the judgment thereafter. What then was the available recourse for the Appellants having not participated in the proceedings? Order 10 Rule 11 of the Civil Procedure Rules makes provision for applications for setting aside. It provides:

> " Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

27. Intrinsically, the Appellants ought to have filed for an application to set aside the judgment of the Court. The Court explained this in the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR where the Court held:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence,

> as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other."

What the foregoing envisages is that the Appellants ought to have moved the trial Court for the said Court to exercise its "unfettered discretion".

28. A reading of Order 43 Rule 1(1) of the Civil Procedure Rules as well as Section 75 of the *Civil Procedure Act* contemplates that an appeal may lie from an order under Order 10 rule 11. This clearly means that before moving this Court on appeal, the Appellant ought to have first exhausted the statutory remedy which is moving the trial Court on an application to set aside the judgment. Thereafter if dissatisfied may move this Court on Appeal.

29. The power to set aside a judgment is the discretion of a Court and this Court will not interfere with a discretion that has not been invoked and/ or exercise. As rightly held in the case of Mbogo vs Shah & Another [1968] EA 93 that: (see the case of Caroline Elsa Anne Sturdy vs john greaves hilder[1984] eKLR)

> "I think it is well settled that this Court will not interfere with the exercise of discretion by the inferior Court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so, arrived at a wrong conclusion."

30. For this Court to determine whether such discretion was misappropriated, there must be evidence that the trial Court was moved by production of a ruling. This was not the case here.

31. It is ridiculous that the Appellant is faulting the Judgment of the trial Court for considering issues that were not placed before it. Directing the trial Court to set aside its orders will be usurping the jurisdiction of that Court to determine an application which as a matter of law and practice must be filed before it. A cursory look at the grounds of appeal informs this Court that those are issues that require calling of evidence and which could best be addressed by the trial Court, had it been properly moved. It is sad that the Appellants despite being represented by counsel opted to disregard the most immediate remedy and opted to file for this appeal.

32. If the Appellants were disputing service of summons, it was the duty of the trial Court to examine whether there was service within the provisions of Order 5 and where practical call for the process server as allowed by Order 5 rule 16. As it is, the trial Court was well guided that there was service and without anything challenging the service, the trial Court could not on suo moto move and set aside the judgment. This Court cannot be indirectly called upon to control the activities of the Lower Court.

33. This Court is alive to the provisions of Section 67(1) of the Civil Procedure Rules which provides:

(ii) An appeal may lie from an original decree passed ex parte.

34. However, it should be noted that if the Appellants are to benefit from this, then they should challenge of the merits of the judgment based on the evidence adduced and not what was not adduced. The Appellants did not challenge the available evidence before the trial Court.

35. The upshot of the foregoing is that the Appeal is not properly before this Court and therefore it follows that this Court shall proceed to dismiss the same.

(ii)Who should bear costs for the appeal?

36. Costs is the discretion of this Court and it is trite law that it shall follow the events. In exercise of this discretion this Court shall direct that the Respondents shall have the costs for this appeal.

37. In a nutshell, the Court finds that the instant Appeal is not properly before the Court and thus not merited. The Court finds no reasons to upset the trial Magistrate's findings and dismisses the instant Appeal with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

1st Appellant

M/s Mumo

2nd Appellant

1st Respondent

2nd Respondent Mr Kirubi H/B for Mwangi Ben

3rd Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

27/7/2023