



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 117 OF 2015

NAISIANOI OLONGE JEK & LEGATIE MPESHE MODO

(Suing as the administrators of the estate of

MPESHE MOYAE MODO-Deceased).....APPELLANTS

-VERSUS-

SALAU OLE SOKON LIMURINKE.....1ST RESPONDENT

GREEN VALLEY ENTERPRISES LIMITED.....2ND RESPONDENT

(Being an appeal against the ruling and order of Honourable Mary O. Ochieng (Mrs.)

(Senior Resident Magistrate) delivered on 25th February, 2015 in PMCC No. 22 of 2014)

JUDGEMENT

1. The dispute between the parties arose out of a boundary dispute involving the parcels of land known as Plot No. KJD/KITENGELA/1863 (“*the first property*”) registered in the name of the 1st respondent and Plot No. KJD/KITENGELA/1862 (“*the second property*”) bordering the first property and which property was all material times in the appellants’ possession.
2. At the onset, the 1st respondent herein lodged a suit before the Chief Magistrate’s Court at Machakos (CMCC NO. 53 OF 2013) vide the plaint dated 25th January, 2013 and amended on 10th June, 2013 and sought *inter alia*, for general damages for unlawful trespass and a permanent injunction against the appellants jointly and severally together with cost of the suit and interest on the same.
3. Subsequently, CMCC NO. 53 OF 2013 was withdrawn by the 1st respondent vide the notice of withdrawal dated 22nd May, 2014.
4. Soon thereafter, the appellants together persons not before this court instituted a suit before the ELC (ELC Case No. 760 of 2014) by way of the plaint dated 13th June, 2014 in which they sought for an injunctive order and damages against the 1st respondent for unlawful trespass, plus cost of the suit and interest thereon.
5. At around the same time, the 1st respondent filed a Notice of Motion on 10th June, 2014 in Misc. Application No. 22 of 2014 before the Senior Resident Magistrate’s Court at Kajiado and sought for an order for adoption of the decision of the Kajiado District Land Registrar made on 26th July, 2012 to the extent that the boundary line marked CF is the boundary between the first and second properties, and the property known as KJD/KITENGELA/2020 in accordance with the Registry Index Map and the field sketch shown in the Kajiado District Surveyor’s report.
6. Of relevance to this appeal, however, are the applications dated 12th August, 2014 and 10th September, 2014 both filed by the appellants under Senior Resident Magistrate’s Court Misc. Application No. 22 of 2014.
7. In the Notice of Motion dated 12th August, 2014 the appellants sought for an order for stay of proceeding of the suit pending payment of costs in the withdrawn CMCC NO. 53 OF 2013. This Motion was opposed by both the 1st and 2nd respondents who put in separate replying

affidavits in response thereto.

8. The appellants through the Notice of Motion dated 10th September, 2014 sought for an order for dismissal of the suit and for a further order of investigation of the registry officials in Kajiado. The 1st respondent challenged that Motion by way of a replying affidavit.

9. Upon filing of written submissions by the parties, the trial court dismissed both Motions with costs.

10. Being dissatisfied with the aforementioned ruling, the appellants lodged this appeal against the same vide the memorandum of appeal dated 24th March, 2015 and put forward the following grounds of appeal:

i. THAT the learned trial magistrate erred in law and fact in arriving at a decision contrary to law and facts/evidence placed before the trial court.

ii. THAT the learned trial magistrate erred in law and fact by finding that the parties had not attached a copy of the plaint of the previous suit (Milimani ELC Case No. 760 of 2014) yet the same was part of the court record.

iii. THAT the learned trial magistrate erred in law and fact by not finding that the matter miscellaneous application is sub judice by virtue of the fact of the existence of another suit before the ELC in Nairobi (Milimani ELC Case No. 760 of 2014) having the same parties, disputing on the same issues and the same parcel of land.

iv. THAT the learned trial magistrate erred in law and fact by making a finding that the backdating of the court document is a mere technicality whereas the same was meant to mislead the court hence prejudicing the appellants herein.

v. THAT the learned trial magistrate erred in law and fact by making a finding that pending payment of costs between the parties should not be a basis for staying the current suit which decision is contrary to express provisions of the law.

vi. THAT the learned trial magistrate erred in law and fact by failing to consider the appellants' submissions thereby deriving a decision that did not have the input of the appellants' arguments contrary to the rules of natural justice and in demonstration of the open bias on the part of the trial court.

vii. THAT the learned trial magistrate erred in law and fact by failing to apply precedent law thereby bringing disrepute to judicial precedence.

viii. THAT the learned trial magistrate's subject ruling and orders made therefrom were contrary to the weight of evidence and law thereby rendering the same proper to be set aside.

11. This court gave directions that the appeal be canvassed by written submissions. At the time of writing this judgment, the respondents had not put in their submissions despite this court extending time for them to do so.

12. The appellants filed their submissions on 17th December, 2019 and argued that the trial court erred in finding that the appellants had not attached a copy of the plaint in ELC Case No. 760 of 2014 yet the same had been provided, thereby resulting in a wrong finding.

13. The appellants further argued that in making its decision, the trial court not only disregarded the evidence on record but did not consider the appellant's submissions and also misdirected itself on the law, thereby warranting interference with the said decision. The appellants quoted *inter alia*, the case of **Patrick Sosio Lekakeny v Tomito Alex Tampushi & 3 others [2018] eKLR** where the court held that the where the decision of a trial court is not grounded on the evidence placed before it, such decision ought to be interfered with on appeal.

14. It is the contention of the appellants that while they had satisfied the requisite conditions associated with the *sub judice* rule under the provisions of Section 6 of the Civil Procedure Act, the trial court did not find in favour of the appellant, thus misdirected itself.

15. According to the appellants, both the Misc. Application No. 22 of 2014 filed by the 1st respondent and ELC Case No. 760 of 2014 filed by the appellants constituted the same parties and the same cause of action substantially hence the trial court ought to have found that Senior Resident Magistrate's Court Misc. Application No. 22 of 2014 is sub judice. The case of **Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga [2013] eKLR** was cited wherein the court held that:

"It is not the form in which the suit is framed that determines whether it is sub-judice. Rather it is the substance of the suit..."

16. The appellants submitted that despite having demonstrated the prejudice they stand to suffer in view of a backdated court stamp appearing on the 1st respondent's application dated 9th June, 2013 the trial court again went against the evidence on record and arrived at a decision which was contrary to the rules of natural justice.

17. The appellants also submitted that in declining to grant an order for stay of the suit in Senior Resident Magistrate's Court Misc. Application No. 22 of 2014 pending payment of costs in the previously withdrawn case, the trial court contravened the provisions of Order

25, Rule 4 of the Civil Procedure Rules.

18. It is the position of the appellants that ultimately, the trial court's decision was not consistent with the judicial precedents which have been set and the principle of *stare decisis*, portrayed by the Supreme Court in the case of **Chris Munga N. Bichage v Richard Nyagaka Tong'i & 2 others [2016] eKLR** as follows:

“...The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.”

19. In the end, the appellants urged this court to allow the appeal and interfere with the decision of the trial court by setting aside its ruling.

20. I have considered the appellants' submissions plus the various authorities cited. I also considered the eight (8) grounds of appeal constituted in the memorandum of appeal and which I will address under three (3) key limbs.

21. The **first** limb has to do with whether the learned trial magistrate's decision fell contrary to the facts presented before her, the applicable law(s) and/or the evidence on record. This is brought out in grounds (i), (v), (vi), (vii) and (ix) of the appeal.

22. As earlier noted, two (2) applications were placed before the learned trial magistrate for consideration and determination, both of which were filed by the appellants herein. For purposes of addressing this limb of appeal, I will dwell on the first which is the Notice of Motion dated 12th August, 2014 in which the appellants sought for a stay of Senior Resident Magistrate's Court Misc. Application No. 22 of 2014 pending payment of costs by the 1st respondent in CMCC NO. 53 OF 2013 which had previously been withdrawn.

23. The Motion was supported by the affidavit sworn by the appellants' advocate, *Benson W. Millimo*, who argued that having withdrawn the aforementioned case, the 1st respondent was mandated to pay costs of the withdrawn suit to the appellants before instituting another suit.

24. To oppose the Motion, the 1st respondent swore a replying affidavit in which he stated that the Motion is an abuse of the court process for the reason that the provisions of Order 25, Rule 3 of the Civil Procedure Rules provide for the procedure of recovery of costs following a withdrawn suit and that in any event, the reliefs sought in the withdrawn completely differed from those sought in Senior Resident Magistrate's Court Misc. Application No. 22 of 2014.

25. A director of the 2nd respondent, *Richard Kiplagat*, also swore a replying affidavit essentially reiterating the averments made by the 1st respondent save to add that the appellants had not filed a Bill of Costs for taxation and that they had slept on their rights, further stating that there is no law barring a party from instituting a suit on the ground of unsettled costs.

26. Upon hearing the parties, the learned trial magistrate reasoned that pursuant to the provisions of Order 25, Rule 3 of the Civil Procedure Rules, unpaid costs is no basis for staying the current suit and that in any event, the appellants had neither shown that they had taken any steps to have the costs in the withdrawn suit assessed nor demonstrated that the 1st respondent had declined to pay the costs. It is on this basis that the learned trial magistrate dismissed that particular application.

27. From my re-evaluation of the evidence and the impugned ruling, I established that there is nothing to indicate that the learned trial magistrate overlooked the appellants' submissions in her analysis and determination. Going by her decision, it is apparent that the learned trial magistrate weighed the respective submissions placed before her before arriving at her decision.

28. On the subject of payment of costs upon withdrawal of a suit, the relevant provisions are **Order 25, Rules 3 and 4** of the **Civil Procedure Rules**, both of which were brought to the attention of the trial court. **Order 25, Rule 3**; as the learned trial magistrate rightly put it; provides for the procedure for pursuing costs by a defendant in the following manner:

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

Order 25, Rule 4 on the other hand expresses that:

“If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.”

29. From my understanding of Rule 3, the onus lies with the relevant defendant to follow up on costs of a withdrawn suit. From my re-analysis of the present facts and evidence, I established that the appellants did not demonstrate that they followed up on the costs in CMCC NO. 53 OF 2013 and in compliance with the procedure set out in the aforesaid Rule. The learned trial magistrate arrived at a similar conclusion.

30. Moreover, a close reading of Rule 4 shows that whether or not to stay a suit is purely a matter of the court's discretion; the Rule does not make it mandatory for a subsequent suit to be stayed on the basis of unpaid costs in a withdrawn suit. In the present instance, it is apparent that the learned trial magistrate exercised her discretion in declining to stay the suit in Senior Resident Magistrate's Court Misc. Application No. 22 of 2014 and I am satisfied that she applied her discretion judiciously. There is nothing to indicate that she diverted from any legal and judicial principles in that regard or that she overlooked the facts and evidence presented before her.

31. This brings me to the **second** limb touching on the *sub judice* rule and covered under grounds (ii) and (iii) of the appeal. This limb specifically derives from the second Notice of Motion 10th September, 2014. Therein, the appellants sought for the dismissal of the 1st respondent's suit (Senior Resident Magistrate's Court Misc. Application No. 22 of 2014) and an order for investigation into the dealings of registry officials in Kajiado in respect to the alleged backdating of a court stamp and with a view to preferring disciplinary and criminal charges against the culprits.

32. *Tumpeine Mpeshe* put in a supporting affidavit to the Motion and stated inter alia, that Senior Resident Magistrate's Court Misc. Application No. 22 of 2014 is *sub judice* by virtue of the pending case i.e. ELC Case No. 760 of 2014 which raises similar issues and involves the same parties.

33. To challenge the Motion, the 1st respondent put in a replying affidavit and stated that the Motion lacks merit for the reason that the boundary dispute between the parties was resolved by the Land Registrar at Kajiado on 26th July, 2012 and that the Misc. Application merely seeks to have the Land Registrar's decision adopted as an order of the court.

34. The 1st respondent also stated that the appellants' attempts at challenging the powers of the Land Registrar were unsuccessful, since the High Court in Judicial Review Misc. 441 of 2012 dismissed the appellants' application and held that the Land Registrar is empowered by statute to determine boundary disputes.

35. In her analysis, the learned trial magistrate held that she was unable to determine whether the 1st respondent's Misc. Application No. 22 of 2014 was *sub judice* for the reason that none of the parties had availed a copy of the plaint and pleadings in ELC Case No. 760 of 2014 for her reference.

36. The relevant provision on the *sub judice* rule is **Section 6** of the **Civil Procedure Act** which stipulates thus:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

37. The appellants quoted the case of **Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga [2013] eKLR** in which the court reasoned that it is the substance rather than the form of a suit that guides the court in determining whether a subsequent suit is *sub judice*.

38. Upon re-examining the Motion dated 10th September, 2014 and its supporting affidavit, I note that the appellants did not list a copy of the plaint/pleadings in ELC Case No. 760 of 2014 as annexures to the affidavit. Going by this position, it is plausible that the learned trial magistrate did not have the liberty of looking at the plaint or pleadings to enable her adequately determine the issue of *sub judice*. In the premises, I see no wrongdoing on the part of the learned trial magistrate in this respect.

39. Suffice it to say that I have seen a copy of the plaint dated 13th June, 2014 on the one hand constituted on page 38 of the record of appeal. The plaintiffs therein are the appellants and persons not before this court, while the 1st respondent is sued as the defendant. The appellants sought for an injunctive order and damages against the 1st respondent for unlawful trespass, plus cost of the suit and interest thereon.

40. For comparison purposes, I also looked at the Notice of Motion dated 9th June, 2013 filed by the 1st respondent and against the appellants and the 2nd respondent in Senior Resident Magistrate's Court Misc. Application No. 22 of 2014 seeking an order for adoption of the decision of the District Land Registrar-Kajiado as an order of the court.

41. Upon re-evaluating the two separate pleadings, it became clear that whereas the parties and subject matter were substantially the same, the parties were neither litigating under the same titles nor seeking related orders nor were the issues in dispute similar. On the part of the 1st respondent, it is apparent that his Misc. Application did not constitute a suit in the real sense of the word but was merely an application seeking adoption of an order already in place. The appellants on their part had brought a cause of action in the nature of unlawful trespass.

42. Further to the foregoing, I established that the District Land Registrar-Kajiado did make an order dated 26th July, 2012 to the effect that going by the decision of the District Surveyor dated 22nd July, 2012 line CF was the boundary between the first and second properties.

43. There is nothing to indicate that the District Land Registrar's decision has been appealed against and/or set aside save for Judicial Review Misc. Application no. 441 of 2012 where the court dismissed the appellants' application vide its judgment delivered on 7th April, 2014 and held that the District Land Registrar has powers under the Land Registration Act to fix land boundaries.

44. In view of the foregoing reasons, I find that the *sub judice* rule would not be applicable herein.

45. On the **third** and final limb of the appeal to do with the backdating of the documents set out in ground (iv) of the appeal, the appellants in their Motion dated 10th September, 2014 are of the view that the 1st respondent whether by himself or through his servants/agents arranged for the backdating of the filing date on his application dated 9th June, 2013 with the intention of misleading the appellants and the court to believe that his application was lodged before filing of ELC Case No. 760 of 2014 by the appellants.

46. In reply, the 1st respondent stated that the inadvertent filing dates must have been an honest mistake on the part of the relevant judicial staff and had nothing to do with him or his advocate.

47. The learned trial magistrate on her part stated that the appellants had not demonstrated the manner in which they had been prejudiced or inconvenienced, and that in any event, the 1st respondent had stated his position that he was not privy to the confusion in dates.

48. The learned trial magistrate also made reference to the provisions of Article 159 (2) (d) of the Constitution which gives courts the power to handle matters without undue regard to technicalities.

49. Upon re-evaluation of the above, I note that the application in question, though dated 9th June, 2013, bore varying filing dates as seen in the court stamped copies. One of the copies bore the stamp of 10th June, 2014 while another bore the court stamp of 19th June, 2014.

50. However, I agree with the learned trial magistrate that the appellants did not demonstrate by way of credible evidence either that the 1st respondent had a part to play in the varying dates, or that the appellants suffered prejudice as a consequence. I also support the learned trial magistrate's decision to apply the provisions of Article 159(2) (d) of the Constitution since the varying court stamps do not, in my view, affect the substance or merits of the application. I will restate my earlier position that there is nothing to show that the learned trial magistrate at any point disregarded the appellants' submissions or misdirected herself on the law.

51. In the end therefore, the appeal is hereby dismissed with costs to the 1st and 2nd respondents.

Dated, signed and delivered virtually via Microsoft Teams at Nairobi this 19th day of June, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent