Kimotho v Kinuriu & 2 others (Environment and Land Appeal 16 of 2022) [2023] KEELC 20082 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20082 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL 16 OF 2022

LN GACHERU, J

SEPTEMBER 28, 2023

BETWEEN

JOHN NJOROGE KIMOTHO ..... APPELLANT

AND

MARY NJERI KINURIU ..... 1ST RESPONDENT

THE DISTRICT SURVEYOR ..... 2ND RESPONDENT

THE LAND REGISTRAR MURANG'A ..... 3RD RESPONDENT

(Being an Appeal from the Ruling/Order of Hon. S. N. Mwangi SRM in Murang'a LDT case No. 30 of 2011, delivered on 19th July 2022)

JUDGMENT

1. The Appellant, moved this Court vide the Memorandum of Appeal dated 15th August 2022, which seeks to challenge the Ruling of the trial Court of 19th July 2022, in Murang'a CMCC LDT Case No. 30 of 2021. The Appeal is premised on FIVE GROUNDS, set out therein being:

    1. That the Learned Senior Resident Magistrate erred in law and fact in dismissing the Notice of Motion Application dated 25th March 2022, on account of oust of jurisdiction by the *Environment and Land Court Act*,2011.

    2. That the Learned Senior Resident Magistrate erred in law and fact in holding that the Land Disputes Tribunal Act, was repealed without appreciating the transitional provisions provided for pending cases to be concluded

    3. That the Learned Senior Resident Magistrate erred in law and fact by ruling that there was no proof adduced that the report on encroachment filed on 18th August, 2021, was adopted as the judgment of the Court on 20th January, 2022.

4. That the Learned Senior Resident Magistrate erred in law and in fact by holding that her jurisdiction was limited by Section 18(2) of the *Land Registration Act*

5. That the Learned Senior Resident Magistrate erred in law and fact by dismissing the whole application dated 25th March on grounds that it lacks merit.

2. The Notice of Motion Application, that is the substance of this Appeal was filed by the Appellant seeking for orders:

1. That the Honourable Court be pleased to order the 1st Defendant/ Respondent to quit and vacate the Plaintiff's suit land parcel No. LOC. 20/KAMBIRWA/ 1896, forthwith.

2. That the Honourable Court be pleased to order the 1st Defendant/ Respondent to demolish structures on the boundary of the Plaintiff's land parcel No. LOC. 20/KAMBIRWA/1896, forthwith.

3. That in the event of the Defendant/ Respondent failing, refusing and/ or neglecting to quit, vacate and demolish structures on the said land, she be forcibly evicted and the structures demolished at her expense.

4. That the demolition exercise be supervised by the OCS-Murang'a Police Station.

5. That the Defendant/ Respondent do meet the costs of this application

2. The Court in dismissing the Notice of Motion Application found that the issue raised therein was a boundary dispute, which was the mandate of the Land Registrar, as provided for under Section 18(2) of the *Land Registration Act*. The trial Court further held that the claim being premised on land ought to have been filed in the Environment and Land Court, in the wake of the Environment and *Land Act*, which repealed the Land Disputes Tribunal Act, 1990. The trial Court made observation that even though there was a report filed in compliance with the orders of the High Court directing parties to file a comprehensive report, on the encroachment, there was no evidence that the report was ever adopted as an order of Court.

3. It is in the spirit of the above that the Appellant herein who was the Plaintiff/Applicant in the impugned Notice of Motion Application moved this Court on Appeal. The appeal was admitted and directions issued that the same be dispensed with by way of written submissions.

4. The Appellant filed his submissions through the Law Firm of R. M Kimani Co. Advocates and submitted on the grounds as set out in the Memorandum of Appeal.

5. On grounds 1 and 2, the Appellant submitted that direction No. 6 of Gazette Notice No. 16268, conferred upon the trial Court the mandate to hear and determine matters that had already been placed before it. Reliance was placed in the case of Mary Njoki Simon vs Monicah Wanjiru Wangonya {2020} eKLR, where the Court emphasized on the transitional framework as guaranteed by Section 30 of the *Environment and Land Court Act*.

6. On ground 3, the Appellant submitted that there was a Ruling of the Court of 22nd January 2022, which evident that the encroachment report was adopted as an order of the Court and the impugned application was meant to enforce the order.

7. On ground 4, he submitted that the boundary dispute had already been adjudicated on and the report adopted as an order of Court. It was his submissions on ground 5 that the trial Court had the mandate of enforcing the order of 22nd January, 2022, and it therefore erred in dismissing the application which sought to breathe life to the orders of Court. He relied on the case of Samuel Njagi M'nyamba vs

Gilbert Ndwiga Mwangie {2019} eKLR, where the Court observed that an order of eviction can be issued to put a litigant in possession of his land or property.

8. In the end, he urged this Court to allow the appeal and set aside the orders of the trial Court and substitute it with an order allowing the impugned Notice of Motion Application.

9. The 1st Respondent through the Law Firm of T.M Njoroge & Co. Advocates, filed her submissions and urged this Court to dismiss the appeal. In submitting so, she noted that the Sections of the Law relied on by the Appellant supported the position taken by the trial Court and as such the appeal is fallacious. It was her further submissions that the Appellant had filed another appeal before this Court and he was therefore under a mandate of executing it, instead of filing the instant Appeal. That as a result therefore, this Appeal is res judicata Murang'a ELCA No. 12 of 2019, and should thus be dismissed.

10. Before delving into the substance of this Appeal, it is imperative for this Court to first understand the origin of this suit. As per the Record of Appeal; this matter was first filed in the de funct Kiharu Land Disputes Tribunal vide LDT No. 117 of 2011. The Tribunal rendered an award on 31st May 2011, which was adopted as an order of Court on 19th August 2011, in Murang'a SPM LDT No. 30 of 2011.

11. Dissatisfied with the judgment of the Tribunal, the 1st Respondent herein moved to the Provincial Appeals Committee on appeal. Thereafter, she filed an application seeking to stay the execution of the orders of the Court adopting the award. On 13th January, 2012, the Court gave orders adopting the award of the Tribunal and directed that the Government Surveyor to mark boundaries between parcels No.1896 and 1666. This was to be witnessed by the District Officer or a representative, the Land Registrar and the Land Disputes Tribunal Elders.

12. The Appellant herein thereafter made an application to join the 2nd and 3rd Respondents herein to the trial suit and sought contempt orders against them. This was allowed and the trial Court gave orders on 1st August 2014, citing the 2nd and 3rd Respondents herein for contempt. The 2nd and 3rd Respondents herein thereafter and in compliance with the orders of the Court prepared reports which were filed in Court on 5th November, 2016.

13. The Appellant herein yet again moved the trial Court in a bid to implement the Report of the 2nd and 3rd Respondents herein vide a Notice of Motion Application dated 4th November, 2015, which sought eviction orders. On 11th June 2019, the trial Court allowed the foregoing Notice of Motion application.

14. Dissatisfied with the ruling, the 1st Respondent herein moved this Court on appeal being Murang'a ELCA No. 12 of 2019. The Appeal Court in its ruling of 14th May, 2020, allowed the appeal and gave orders:

    a. The Ruling of the Court dated the 11/6/19, is set aside in its entirety.

    b. The Land Registrar and the Surveyor, Murang'a County are ordered to visit the locus in quo in the presence of the parties and their legal representatives and mark the boundaries between the parcels of land and determine if there is any encroachment and if so the extent of the said encroachment and file their comprehensive reports together with the RIM and the necessary drawings if any in the Chief Magistrates Court within 60 days from the date herein or such other time after the COVID -19 Pandemic.

    c. On receipt of the report in b) above, the matter be heard afresh by Hon Magistrate Court on priority basis.

    d. The costs of the application and the Appeal shall be borne by each of the parties equally.

15. The 2nd Respondent prepared a report dated 18th August 2021, and a glimpse of it informs this Court that the Report was prepared in compliance with the orders of the Appeal Court. The Appellant then filed the impugned application on 28th March 2022, but which application was dismissed for lack of merits.

16. It is relevant to point out at the earliest that in the Application of 4th November 2015, the Appellant herein had sought orders similar to those sought in the impugned application of 28th March, 2022. The Appellant now wants this Court to set aside the orders of the trial Court of 19th July, 2022, and substitute them with an order allowing the impugned Notice of Motion Application.

17. 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.

18. The role of this Court on appeal is well laid out in Section 78 of the *Civil Procedure Act*, which is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. This was rehearsed by the Court in 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, re-assess and re-analyze the extracts of the record and draw its own conclusions.'

19. 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.

20. Further, the Court in Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the 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."

21. The discretionary power of the trial Court just like this Court is denoted by *the Constitution* as well as statute as such, this Court cannot unnecessarily interfere with the discretion. The circumstances that this Court can interfere with such discretion was well laid out by the Supreme Court in Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others [2019] Eklr whether 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."

22. 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."

23. Alive to the foregoing principles and pronouncements above, and having perused the Record of Appeal, considered the rival written submissions by parties, as well as the annexed Authorities and read through the Memorandum of Appeal, the Court finds the issues for determination are

    i. Whether the trial Court had the jurisdiction to entertain and/ or determine the Notice of Motion Application dated 25th March, 2022?

    ii. Whether this appeal should be allowed

    iii. Who should bear the costs of the appeal

I. Whether the trial Court had the jurisdiction to entertain and/ or determine the Notice of Motion Application dated 25th March, 2022?

24. The jurisdiction of a Court flows from *the Constitution* or statutes. What determines the competence of a Court to handle a matter was well elaborated by the Court in the case of Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR, where the Court of Appeal held:

> Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court."

25. A cursory look at the Notice of Motion application dated 25th March 2022, informs this Court that the dispute between parties herein was a boundary dispute, between the Appellant and the 1st Respondent. The Appellant and the 1st Respondent had litigated against each other at the de funct Kiharu Land Disputes Tribunal.

26. The Tribunal was established under the repealed Land Disputes Tribunal Act, and which Act under Section 3 spelt out the jurisdiction of the Tribunals. It provided:

    3.

        (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

            (a) The division of, or the determination of boundaries to land, including land held in common;

            (b) A claim to occupy or work land; or

            (c) Trespass to land,

        shall be heard and determined by a Tribunal established under section 4.

27. Thus the Kiharu Land Disputes Tribunal had the jurisdiction to determine the dispute. The Tribunal had given orders that the Government Surveyor marks boundaries between the disputing parties. As already observed hereinabove, the trial Court adopted the Tribunal's award and on 13th January 2012, and the said trial Court gave orders directing the Government Surveyor to mark boundaries between parcels No. 1896 and 1666. Thereafter, the 2nd and 3rd Respondents herein prepared reports

which were filed in Court on 5th November, 2016. It was this reports that led to the filing of several applications culminating to this appeal.

28. During the pendency of the matter, the Land Disputes Tribunal Act, was repealed and the *Environment and Land Court Act* come into force. This took away the Tribunals powers to hear and determine land matters. The advent saw the passing of the *Land Registration Act*, which conferred power on the Land Registrar to hear and determine boundary disputes as contemplated in Section 18(3) of the said Act.

29. Notably, this dispute was filed before the enactment of the *Environment and Land Court Act*, as well as the *Land Registration Act*. The Tribunal's award was given on 19th August 2011, while the *Environment and Land Court Act* was assented to on 27th August, 2011, and commenced on 30th August, 2011. This therefore meant that the proceedings herein were subject to the transitional clause provision under Section 30 of the *Environment and Land Court Act* which provided:

    (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

    (2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court"

30. This saw the Hon Chief Justice issue the Practice Directions, in the Kenya Gazette Notice No 16268, directing that all proceedings which were pending before the Magistrates Courts having been transferred from the defunct Tribunals shall continue to be heard and determined by the same Courts. This meant that this matter was to proceed before the Magistrates' Court until the establishment of the Environment and Land Court or until the logical conclusion as per the Chief Justice directions.

31. The matter in issue was not to adjudicate on the boundary dispute as it had been placed before the Tribunal. All the trial Court was called upon to do was to issue orders that were to breathe life to the Surveyor's report. The matter was rightfully well before the Magistrate's Court. Respectfully, this Court does not agree with the pronouncement of the trial Court that it lacked the jurisdiction to entertain the matter in light of the provisions of Section 18(2) of the *Land Registration Act*.

32. As at the time of filing of the Notice of Motion Application, there was established an *Environment and Land Court Act*, within Murang'a. Within the meaning of the provisions of Section 30 of the *Environment and Land Court Act*, the suit was to proceed in the Magistrate's Court until the establishment of the Environment and Land Court. The effect of this meant that the Appellant ought to have moved the Environment and Land Court at Murang'a Law Courts to have the application determined. However, the Chief Justice as already alluded to above issued directions and which direction meant that matters that were pending before the Magistrate's Court were to be concluded.

33. Presently, the matter was properly before the trial Court. While it is right as held by the trial Court that the matter involved land and it ought to have been filed before the Environment and Land Court, the trial Court by operation of the Practice Directions, had the jurisdiction to hear and determine the application. This was not a fresh matter that was improperly before it. It was a live matter that had commenced before the establishment of the Environment and Land Court. Thus the trial Court erred in finding that it was devoid of jurisdiction to determine the Application.

(ii) Whether this appeal should be allowed?

34. Having found that the trial Court had the requisite jurisdiction, the available orders that this Court can issue is to either determine the application and/or allow it, or refer the matter back to the trial Court for determination.

35. Conversely, this Court is alive to the ruling of the Court of 14th May 2020, in Murang'a ELCA 12 of 2019. The pronouncement of the Court is binding on this Court. The learned judge had been moved on Appeal by the 1st Respondent as elaborated hereinabove. The Learned Judge had issued orders setting aside similar application. Notably, this issue was raised before the trial Court, but the trial Court held that the Respondent had not established that there was a similar application and a ruling rendered.

36. The genesis of the ruling of the Court in Murang'a ELCA No. 12 of 2020, was the ruling of the trial Court of 11th June, 2020, which allowed the Appellant's application of 4th November, 2015. The prayers sought in this application of 4th November 2015, were also sought in the Application of 25th March 2022, the substance of this appeal. The impetus of this is that the impugned application was res judicata the application of 4th November, 2015.

37. The principle of res judicata is provided for in Section 7 of the Civil Procedure Act. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

    i. The suit or issue raised was directly and substantially in issue in the former suit.

    ii. That the former suit was between the same party or parties under whom they or any of them claim.

    iii. That those parties were litigating under the same title.

    iv. That the issue in question was heard and finally determined in the former suit.

    v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

38. These were echoed in the case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), where the Court of Appeal held that:

> Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

39. Indubitably, the prayers sought in the application of 4th November 2015, and 25th March 2022, are similar save for the fact that in the later, the Appellant had added an extra prayer being that the demolition exercised be supervised by the OCS. The issues raised in the later application were conclusively dealt with by the Court of concurrent jurisdiction with the trial Court. It is not clear to this Court why the parties never supplied the trial Court with a copy of the ruling of 11th June, 2019. This is oblivious of the fact that this Court has perused the lower Court file and has noted the ruling of 11th June, 2019, is in the Court file. A general comparison of the two applications bears the conclusion that the two applications are similar and was between the same parties litigating under the same title.

40. Allowing the application as sought for by the Appellant in the appeal would undermine the pronouncement of the Court in Murang'a ELCA No. 12 of 2019. It is important to point out the observation of the said Court where it stated:

> The dispute in the LDT was a boundary dispute. The said dispute was not heard and determined. Instead the panel of elders directed that the boundaries be established. By the time the boundaries were established the LDT had been repealed and abolished and all the cases emanating therefrom were now placed before the magistrate's Court. In any event the award of the tribunal had been adopted in 2011 by the Court thus bringing the matter under its jurisdiction. The Appellant has argued that the 1st Respondent should have filed a new case as the application raises a new cause of action. I would think this is getting into the arena of semantics. I say so because the dispute in the LDT was a boundary dispute. I find no justification why the 1st Respondent should have filed a fresh suit. The facts of the dispute are consistent with the case of the parties in the LDT which has not been heard and determined and which dispute is within the jurisdiction of the lower Court. In arriving at this holding, I fortify myself with the provisions of Art 159(d) of *the Constitution* that justice shall be administered without undue regard to technicalities and the overriding objectives as contained in section 1A, 1B and 3A which require this Court in particular to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

41. In light of the foregoing observation, the Court gave orders as enumerated in the judgment. This Court has perused a copy of a Report which was seemingly prepared in compliance with the above orders dated 18th August, 2021. This Report was to be a basis upon which the matter was to be heard afresh. It appears from the proceedings that parties had moved the trial Court for the report to be adopted. There is a copy of the ruling of the Court dated 22nd January 2022, which indicates as much "I will be adopting the said report as a judgment"

42. The trial Court in its ruling noted that the Appellant who was the Applicant therein had not established that the Report was adopted. It appears that the trial Court was not sufficiently guided on where the report was to be filed. As per the orders of the Appeal Court, the Report was to be filed in the Chief Magistrate's Court. This was done, hence the ruling that adopted the said report as a judgement of the Court. This has not been appealed against, and it would follow therefore that parties can move Court for execution. Even though the Court had issued directions that the matter be heard afresh, it is not clear to this Court how the parties opted to proceed. That was a preserve of the trial Court and which this Court cannot interfere with, unless when properly moved.

43. Despite the findings of this Court above that the impugned application is res judicata, it is apparent that the impugned application though similar to the application for 4th November, 2015, the facts leading to their filing differ. The impugned application is a post "judgment" one, and it essentially seeks to enforce the judgment of the Court. The ruling that sought to adopt the report as a judgment is silent on what happens now that there was an encroachment. As a result, the available recourse here is that the application dated 25th March 2022, be placed before a different magistrate for determination.

44. The appeal succeeds to the extent that the trial Court had the requisite jurisdiction to hear and determine the application. However, this Court will not allow the impugned application but directs as above.

(iii) Who should bear the costs of the appeal?

45. It is trite law that costs shall follow the events and a successful party is entitled to costs. This Court enjoys the discretion donated by Section 27 of the *Civil Procedure Act* to make such orders as to costs as it deems fit. This Court has no reason to deny the Appellant costs of the Appeal and proceeds to allow the Appeal as above stated, with costs to the Appellant.

46. Having carefully considered the Instant Appeal, the Court finds and holds it merited and the said Appeal is allowed entirely and the orders issued on 19th July 2022, are set aside with an order that the said application be submitted back to the Chief Magistrates Court, for hearing of the said Notice of Motion Application.

47. Costs of this Appeal to the Appellant.

48. Further, the Court directs that the Application dated 25th March 2022, be placed before a different Magistrate other than Hon. S. Mwangi SRM, for hearing and determination.

49. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28TH DAY OF SEPTEMBER, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of: -

M/s Kimani for the Appellant

1st Respondent

2nd Respondent - Absent

3rd Respondent

Joel Njonjo - Court Assistant.

L. GACHERU

JUDGE

28/9/2023