



Lelo Investments Ltd v City Council of Nairobi & 5 others (Environment and Land Appeal E016 of 2022) [2023] KEELC 20049 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E016 OF 2022
LN MBUGUA, J
SEPTEMBER 21, 2023**

BETWEEN

LELO INVESTMENTS LTD APPELLANT

AND

CITY COUNCIL OF NAIROBI 1ST RESPONDENT

HABIB ABDULLAH KHALFAN 2ND RESPONDENT

ZEHRA HABIB ABDULLAH KHALFAN 3RD RESPONDENT

STEPHEN KARANJA KUNGU 4TH RESPONDENT

HIGHWAY DYNAMICS LTD 5TH RESPONDENT

IDEAL AUCTIONEERS 6TH RESPONDENT

(Being an appeal against the Ruling of the Chief Magistrates' Court of Kenya at Nairobi City Court (Hon. Oganyo) delivered on 17th February, 2022 in NRB CMCC No. 3033 of 2008)

JUDGMENT

1. The Appellant herein had filed an Application dated 2.6.2021 in the case CMCC No. 3033 of 2008 *Nairobi City Council v Habib Khalfan and Zehra Habib Abdulla Khalfan* seeking the following orders:
 1. That this Honorable Court be pleased to certify the instant Application as urgent, the same be heard Ex-parte in the first instance and service be dispensed with.
 2. That in the interim an order of stay of execution be issued as against the vesting order made on 17th November, 2009 over LR. 27/134 Ridgeways pending the hearing and determination of this Application.



3. That Lelo Investments Ltd be enjoined in this matter as an Applicant by virtue of its status as the registered owner of all that property referred to as LR No. 27/134 Ridgeways from 2016 to date.
 4. That Highway Dynamics Ltd be enjoined in the matter as the 1st Respondent as the owner of LR No. 27/134 from 8th May, 1995 to 16th September, 2016.
 5. That Ideal Auctioneers be enjoined in the matter as the 2nd Respondent being the officers of the Court that conducted the subject auction on 18th June, 2009.
 6. That this Honorable Court be pleased to re-open these proceedings for purposes of setting aside the judgment and decree dated 14th August, 2008 for want of regularity and abuse of the Court process.
 7. That the Plaint dated 22nd May, 2008 and all subsequent proceedings herein be struck out on the grounds of abuse of the process of the Court, want of regularity and for want of cause of action as against the Defendants.
 8. That the sale by Public Auction conducted by Ideal Auctioneers on 18th June, 2009 be set aside for material irregularity.
 9. That the Interested Party's (Stephen Karanja Kungu's) Notice of Motion Application dated 18th August, 2009 and the proceedings herein and orders made on 17th November, 2009 be struck out on the grounds of abuse of the process of the Court.
 10. That this Honorable Court be pleased to unconditionally vary, set aside, review and/or discharge the vesting order made on 17th November, 2009 and any other consequential orders made thereto.
 11. That this Honorable Court be pleased to issue a mandatory injunction restraining all the Respondents whether by themselves, their agents and/or servants whatsoever from encroaching onto, trespassing onto or otherwise interfering in any manner whatsoever with the Applicant's peaceful entitlement, occupation, possession and use of any part of all that parcel of land known as Ridgeways 27/134 on account of the vesting order.
 12. That the Costs of this Application be in the cause.
2. Vide a ruling delivered on 17.2.2022, that application was dismissed triggering this appeal. The Memorandum of Appeal dated 9.3.2022 raises the following grounds.
1. The Honorable Court erred in fact and in law in finding that the wrong parties were sued and that the proceedings therefore were irregular;
 2. The Honorable Court erred in fact and in law in failing to set aside the Judgement and Decree dated 14th August, 2008 on account of material irregularities, misrepresentation and fraud.
 3. The Honorable Court erred in fact and in law in failing to set aside Public Auction dated 18th June, 2009 on account of material irregularities, misrepresentation and fraud.
 4. The Honorable Court erred in fact and in law in failing to review the Judgment and proceedings herein on account of a mistake and/or error/apparent on the court record;
 5. The Honorable Court erred in fact and in law in failing to find that the proceedings herein were irregular ex debito justitiae on account of the wrong parties being sued;



6. The Honorable Court erred in fact and in law when it failed to find that the rateable owner of the suit property in 2008 was the 5th Respondent and not the 2nd and 3rd Respondents.
7. The Honorable Court erred in fact and in law in finding that the court is functus officio.
8. The Honorable Court erred in fact and in law in failing to set aside the vesting order dated 10th November, 2009.
9. The Honorable Court erred in fact and in law in failing to find that the Appellant has met the test for review and setting aside the judgment in this case.
10. The Honorable Court erred in fact and in law in failing to find that the proceedings and subsequent orders were a nullity on the ground of fraud, error and misrepresentation.
11. The Honorable Court erred in fact and in law when it held that the irregular vesting orders conferred ownership of the suit property on the 4th Respondent despite lack of registration.
12. The Honorable Court erred in fact and in law when it failed to find that the Plaintiff's suit, proceedings and judgment was against the wrong parties and therefore merited a review and/or setting aside.
13. The Honorable Court erred in fact and in law when it unjustifiably exercised its discretion and declined to set aside the ex-parte judgement.

Issues before the Trial Court

3. The undisputed facts before the Trial Court were that in the case 3033/08 the Nairobi City Council had sued the rateable owners of the suit property LR. No. 27/134 situated at Ridgeways road of which exparte Judgment was given on 6.8.2008. The execution proceedings commenced of which an order of the suit land to be sold via public auction was given on 23.10.2008. The land was eventually purchased by one Stephen Karanja Kungu (Purchaser/Interested Party). The purchaser made on application dated 17.8.2009 under section 56 of the RTA for the Vesting of ownership of the suit land to him, of which the said application was allowed on 10.11.2009.
4. The case of the appellant before the Trial Court was that the defendants in case No. 3033 of 2008 were not the real owners of the suit property, since they had transferred ownership of the said land to the entity known as Highway Dynamics Ltd (Intended 5th Respondents) via an indenture of conveyance on 8.5.1995. The latter had in turn transferred the suit land to the appellant via an indenture of conveyance dated 16.9.2016. The appellant therefore contended that it was the lawful owner of the suit property.
5. At Paragraph 84 of the Application dated 2.6.2021, the appellant averred that it filed a case ELC 274 of 2020 Lelo Investment Ltd v Stephen Karanja Kungu on the basis that the circumstances under which the suit property was sold in the Case No. 3033/2008 were fraudulent and clandestine.
6. At paragraph 86 thereof, it is averred that the purchaser has filed a suit of trespass CMCC No. 849/2019 against Catherine Awudu and Charles Munge who are directors of the appellant (Lelo) and 1st Respondent (Highway Dynamics) respectively.
7. The appellant contended that the entire suit was a nullity as the registered owners were not notified of the suit No. 3033/2008.
8. One Charles Munge, a director of Highway Dynamics had filed a Replying Affidavit before the Trial Court dated 7.7.2021 supporting the application dated 2.6.2021.



9. The purchaser had opposed the application averring that allowing the application would amount to introduction of secondary litigation, raising new issues which were not in the original pleadings. It was argued that the then applicant (read appellant) had not demonstrated that they conducted due diligence in the alleged discovery of the new facts of the case.
10. It is pertinent to note that the Purchaser had filed a Preliminary Objection dated 10.6.2021 before the trial court averring that the Trial Court lacked jurisdiction to determine the application dated 2.6.2021 on the basis that the ownership dispute was now a subject of litigation in case no. ELC 274 OF 2020, that the application was time barred by the Limitation of Actions Act, and that the Court decree had already been executed through court orders.
11. In a ruling delivered on 22.9.2021, the Trial Court dismissed the Preliminary Objection. The purchaser has apparently lodged an appeal against the said ruling at the High Court, the same being HCCC Civil Appeal No. 644 of 2021.

Hearing before this court

12. The suit before this court was heard by way of written submissions. The appellant's submissions are dated 1.5.2023 where they raise the same same issues which they had raised in the application dated 2.6.2021 before the Trial Court. In essence, the appellant is challenging the suit No. 3033/08 and the consequential orders on the basis that the defendants therein were not the owners of the suit land.
13. In support of its case, the appellant has relied on the cases of Mary Vande & 2 others v Jane Anyanga [2019] eKLR, Amos Kanyuru Kimani v Housing Finance and Company & Another [2007] eKLR, Electrical Marketing (whole Sale/Ltd v Nairobi City Council and 2 others and Standard Chartered Financial Services Ltd & 2 others v Manchester Outfitters Ltd and 2 others [2016] eKLR.
14. The submissions of the 1st respondent (City Council of Nairobi) are dated 26.5.2023, where they aver that litigation must come to an end. They contend that they stand to be prejudiced by being dragged to court at this particular time. Their submissions primarily dwell on the averment that the supplementary Record of Appeal should be struck out as it was filed and served out of time.
15. The submissions of the 4th respondent (the purchaser) are dated 26.5.2023. He submits that the trial court did not err in dismissing the application of the appellant, as the said court had held and observed that the appellant had unreasonably delayed in filing its application for review. On this point, reference was made to the case of Evans Mudoga Matebwa v Peter Asingira Ondiri [2021] eKLR, Sheikha Mohamed Ali & 4 Others v. Hamid Mohamed Abdulkadir [2020] eKLR and Wilfred Murungi Mboroki & 16 Others v Mutua Mugambi M'Rewa & 2 Others [2022] eKLR.
16. The purchaser further argued that the appellant had failed to prove its allegations of fraud and or irregularity on the part of the purchaser in so far as the execution of the decree and the sale of the suit property was concerned. The purchaser cited the case of Nina Mweu t/a Sassma Farm V muus Kenya Limited & Another [2015] eKLR where the court held that:

“It is clear from the above rule that, for a fraud or irregularity to entitle the party to setting aside a sale, that irregularity or fraud must be material., It is not every irregularity or fraud of a minor nature that will result in setting aside the sale.”
17. The submissions of the 6th respondent (the auctioneers) are dated 29.5.2023. They contend that they merely acted on instructions given by the 1st respondent (City Council) to execute a decree emanating from the judgment delivered on 14.8.2008. They followed all the procedures in carrying out the sale



of the suit property through a public auction. They deny that the aforementioned process was marred with irregularities, misrepresentation or fraud.

18. To buttress their arguments the 6th respondents have cited the case of *Syrilla A. Barasa & 2 Others v. Margaret Aseka Barasa* [2022] eKLR Civil Appeal 110 of 2017, *Central Kenya Ltd v Trust Bank Limited & 4 others* [1996] eKLR Civil Appeal 215 of 1996 and *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR.

Determination

19. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court had this to say in regard to the duty of a first appellate court;

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

20. I find that even as the Trial Court was delivering the ruling of 17.2.2022, the subject of this appeal, there was already a plethora of litigation in various court platforms; i.e the case filed by the appellant against the purchaser in ELC 274 of 2020, while the purchaser had apparently filed a suit claiming trespass in the Magistrates Court MCCC No. 849 of 2019 against Charles Munge and Catherine Awundu, the apparent directors of the the intended 5th respondent (Highway) and the appellant respectively. There is also the appeal HCCC E644 of 2021 lodged by the purchaser at the High Court challenging the trial court’s ruling dated 22.9.2021 (on dismissal of the purchaser’s Preliminary Objection).
21. Despite the aforementioned litigation, this court has a duty to determine the matter before it. The question falling for determination is whether the Trial Court erred in not setting aside the Judgment delivered on 6.8.2008 in case No. 3033 of 2008.
22. Before delving into the issues for determination, I must point out that the manner in which the appellant has availed his Record of Appeal is deplorable. To start with, for all its bulkiness containing 840 pages, the appellant did not avail the index for the lower Court Proceedings in the Record of Appeal, hence one cannot tell with clarity where their crucial documents are to be found in that Record of Appeal. Thus, the court has had to peruse the original file to discern the said proceedings.
23. Another point of concern is that the appellant appears to have concentrated in availing a voluminous document where he ended up reproducing various documents including case laws!. Further, it is noted that the primary pleading, the Memorandum of Appeal was omitted in the main Record of Appeal and was availed haphazardly in a Supplementary Record. The same fate befalls the decree/order dated 7.3.2023 relating to the ruling of 17.2.2022. This lack of brevity was similarly manifested in the proceedings before the trial court. However, guided by the provisions of Article 159 2 (d) of the *Constitution*, this court will proceed to determine the substance of the appeal, and will disregard the procedural technicalities.
24. The provisions of Order 45 rule 1 of the *Civil Procedure Rules* sets out the grounds for review as follows:

“(1) Any person considering himself aggrieved;-



- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

25. A perusal of the original file reveals that the judgment which was being challenged by the appellant in the application dated 2.6.2021 was delivered on 6.8.2008. The appellant was not able to demonstrate before that court that the purported new evidence could not have been found earlier even after the exercise of due diligence. As rightly noted by the Trial Court and as submitted by the purchaser, there was an unreasonable delay in the filing of the Application dated 2.6.2021.
26. However, it is clear beyond peradventure that unless the root cause of the dispute is interrogated, litigation will continue to thrive right left and center. In the circumstances, the court will proceed to consider whether there is sufficient cause to warrant interference with the judgment delivered in case No. 3033 of 2008.
27. I find that the appellant has given minute details relating to the ownership of the suit property from year 1953! to date as captured in paragraph 10 to 18 of the Supporting Affidavit to the Application dated 2.6.2021. Thus despite the fact that the purchaser bought the suit property on 18.6.2009 and got the vesting order for him to be registered as the owner of the suit property on 10.11.2009, he has never been so registered. The fact that the defendants in the suit 3033 of 2008 have never made an appearance in any of these proceedings buttresses the appellant’s averments that the said defendants were not the owners of the suit property.
28. However, the actual tell tale signs that all was not well is to be found in the early proceedings of the Trial Court in case No. 3033 of 2008 which I have duly perused. To start with, the plaint there in was filed on 23.5.2008. The summons accompanying the plaint are dated 12.6.2007 and were served on 13.6.2008 as per an affidavit of service filed in court on 10.7.2008. The said summons indicated that defendants were required to appear in court on 10.7.2008. However, that happens to be the date when PW1 testified. Assuming that the year of 2007 on the summons was an error and that the correct year was 2008, then it means that there was less than a month from the time of issuance of summons to when the case was heard!. What more, the said summons were not inviting the “defendants” to enter appearance and defend the suit.
29. I pose the question; at what point were the pleadings expected to close if the hearing date was known as at the time of issuance of summons?. It is quite clear that the summons dated 12.6.2007 (or 12.6.2008) were nothing but a sham. In the case of *Mobile Kitale Service Station v Mobile Oil Kenya Limited & Another* (2004) eKLR, the court had this to say on the issue of Summons;

“Summons is a judicial document calling a party to submit to the jurisdiction of the court and if the party is not given that opportunity, how else would he submit to the jurisdiction of the court.”



30. In the case of *Frigonken Ltd v Value Pak Food Ltd*, the court stated that;
- “If there is no proper or any service of summons to enter appearance, the resulting judgment is an irregular judgment liable to be set aside by the court ex debito justitiae.”
31. Another red flag is that after PW1 testified on 10.7.2008 judgment was delivered less than a month later on 6.8.2008. The Judgment itself was a one sentence reading as follows “Ex-parte Judgment entered as per the prayers in the plaint”.
32. Thereafter, a Notice to Show Cause was somehow being extended less than a month later on 28.8.2008. The provisions of Order 22 rule 18 of the current *Civil Procedure rules* stipulate that a Notice to Show cause is issued when an application for execution is made more than one year after the date of the decree. This was still the law applicable at that time.
33. This far, it is quite clear that the proceedings before the Trial Court were choreographed from the start to ensure that the suit property was disposed off with speed. I hence come to the conclusion that the judgment delivered on 6.8.2008 in case No. 3033 of 2008 was irregular for want of proper service, for invalid execution proceedings and for being against parties who were not the registered owners of the suit property.
34. The provisions of Article 50 (1) of the *Constitution* provides that:
- “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.
35. The right to be heard is one of the Cardinal fundamental rights regarding the rules of natural justice, See *Catherine Muthoni Kiriungi & another v Chairman, Land Adjudication & Settlement Officer, Tigania East Central Division & 3 others* [2017] eKLR. In the case of *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu* [2019] eKLR, the Court of Appeal had this to say on the aforementioned rule;
- “The right to be heard is a cardinal rule established under the principles of natural justice generally expressed as audi alteram partem. This Latin phrase literally translates 'hear the parties in turn' and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means that a party, no matter how seemingly frivolous or inconsequential, must be given a fair hearing.”
36. What resonates from the above analysis is that the appellants have been condemned unheard all because of the irregular judgment delivered on 6.8.2008 in the case No. 3033 of 2008. In the end, I find that despite the passage of time, this court has to undo the irregular judgment and all its consequential orders.

Rendition

37. This appeal is allowed where by the Ruling dated 17.2.2022 in the case CMCC 3033 of 2008 is hereby set aside and the application dated 2.6.2021 is allowed in the following terms;
1. The Judgment delivered on 6.8.2008 in the case CMCC 3033 OF 2008 Nairobi and all the consequential orders are hereby set aside.



2. The parties mentioned in prayer no. 3, 4 and 5 are hereby joined in the suit CMCC 3033 OF 2008 as defendants.
3. The Purchaser, Stephen Karanja Kungu is joined in the aforementioned suit as an Interested Party.
4. The plaintiff in the case CMCC 3033 of 2008 is directed to amend their pleadings to include the aforementioned new parties within a period of Three Months, failure to which the entire suit CMCC 3033 of 2008 shall stand as dismissed.
5. This file is to be transmitted back to the City Court Magistrate's court for hearing and determination based on the amended pleadings.
6. As to costs, the court takes into consideration that the matter is starting all over again, to this end, I direct that each party bears their own costs of the suit in the suit before the Trial Court and in this Appeal.
7. A copy of this Judgment is to be placed in the Trial Court's file forthwith.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kiptoo for Appellant

Nkatha Gituma holding brief for Otieno for 1st Respondent

Kaburu for 6th Respondent (Ideal Auctioneers)

Kago for 4th Respondent

Court Assistant: Eddel

