



**Meja & 2 others v Saad & 2 others (Environment and Land Appeal
E003 of 2023) [2023] KEELC 19924 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

E ASATI, J

SEPTEMBER 21, 2023

BETWEEN

PETER MIHESO MEJA 1ST APPELLANT

MELVIN MINAYO OPIYO 2ND APPELLANT

REBECCA SAMMY 3RD APPELLANT

AND

AHMED ABDALLAH AHMED SAAD 1ST RESPONDENT

JOHN MADETE MEJA 2ND RESPONDENT

ISAAC VUSUNGU AMWAGA 3RD RESPONDENT

*(Being an appeal against the order of the Senior Principal Magistrate's
Court (Hon. R.M Ndombi (SRM) given on the 23/2/2023 at Vihiga
in Vihiga Senior Resident Magistrate's Court EL Case No. 7 of 2021)*

JUDGMENT

Background

1. Ahmed Abdallah Ahmed Saad, the 1st Respondent herein vide the plaint dated 17th September 2021 sued the 2nd and 3rd Respondents in Vihiga PMC EL Case No. 7 of 2021 seeking, inter alia, for an order of permanent injunction barring the 2nd and 3rd Respondents from interring the remains of one Timateo Omuga (deceased) on a piece of land known as L.R No. TIRIKI/TIGOI/685 (PARCEL B) (the suit land herein). However soon after filing the suit, the remains of the said Timateo Omuga (deceased) were buried on the said parcel of land hence necessitating an amendment to the plaint. So, vide the amended plaint dated 9th November 2021 the 1st Respondent sought against the 2nd and 3rd Respondents the following relief; -



- a. An order do issue directing that the remains of TIMATEO OMUGA (deceased) buried on the plaintiff's land parcel a portion of L.R No. TIRIKI/TIGOI/685 (PARCEL B) be exhumed.
 - b. An order of permanent injunction restraining the Defendant by himself, agents, servants, employees or any other party through whom they may be acting from using, possessing, alienating, claiming selling or disposing, trespassing being or remaining on, or however interfering with the Plaintiff's use or interest on his land parcel demarcated as L.R No. TIRIKI/TIGOI/685 (PARCEL B) the same being a portion of L.R No. TIRIKI/TIGOI/685.
 - c. A declaratory order that the Plaintiff is the legal owner of the land parcel identified demarcated as L.R NO. TIRIKI/TIGOI/685 (PARCEL B) a portion of L.R No. TIRIKI/TIGOI/685 having purchased the same from the deceased.
 - d. An order directing that the land parcel demarcated as L.R No. TIRIKI/TIGOI/685 (PARCEL B) a portion of L.R No. TIRIKI/TIGOI/685 is transferred and registered under the Plaintiff's name.
 - e. An order directing that the transfer documents are executed by the Executive Officer to ensure compliance with prayer (d)
 - f. Any other relief the court may deem fit and just to grant.
2. Though served with the summons to Enter Appearance, the 2nd and 3rd Respondents who were the Defendants in the suit filed no Memorandum of Appearance, defence or any form of response to the 1st Respondent's claim.
3. The suit was therefore heard ex parte and Judgement delivered on 9th June 2022 in favour of the 1st Respondent for; -
- a. A declaration that the Plaintiff AHMEND ABDALLAH AHMED SAAD is the legal owner of land parcel identified /demarcated as L.R No. TIRIKI/TIGOI/685 (PARCEL B) a portion of L.R No. TIRIKI/TIGOI/685.
 - b. An order that the remains of TIMATEO OMUGA (deceased) be exhumed from the plaintiff's land (Parcel B) a portion of No. TIRIKI/TIGOI/685 forthwith.
 - c. The OCS – Serem police station to oversee the exercise of exhumation by providing security and by ensuring compliance of injunction order. The Medical Superintendent in charge Vihiga County Referral Hospital to ensure exhumation done as per medical safety and regulations and body be preserved at the hospital morgue awaiting interment at an alternative site or further court directive.
 - d. An order of permanent injunction do issue restraining the Defendant herein by themselves, their agents, servants, employees or any other party through whom they may be acting from using, possessing alienating, claiming, selling, trespassing, cultivating, entering or remaining or however interfering with the Plaintiff's use or interest on land parcel demarcated as TIRIKI/TIGOI/685 (PARCEL B) the same being a portion of No. TIRIKI/TIGOI/685.
 - e. An order that the land parcel demarcated as TIRIKI/TIGOI/685 (PARCEL B) a portion of No. TIRIKI/TIGOI/685 be transferred and registered under the Plaintiff's name.
 - f. An order that the transfer documents be executed by the court Executive Officer to ensure compliance with prayer (e) above. Costs of the suit is awarded to the Plaintiff herein.



4. After the Judgment, the 1st Respondent in whose favour the Judgment was made, filed an application dated 28th September 2022 seeking, inter alia, that the 2nd and 3rd Respondents herein and their agents namely; Peter Miheso Meja, Melvin Minayo Opiyo and Rebecca Sammy (the appellants herein) show cause why they should not be committed to jail for defying court orders. The application was based on the grounds that both the 2nd and 3rd Respondents and the appellants herein had defied court orders by burying the deceased on the suit land and continuing to till the same despite the court orders having been issued and served upon them.
5. On the basis of the application, the court issued ex parte orders on 29th September 2022 that summons do issue to the Respondents John Madete Meja and Isaac Vusungu Amwaya and their representatives namely; Peter Miheso Meja, Melvin Minayo Opiyo and Rebecca Sammy to show cause why they should not be committed to civil jail for defying court orders issued on 17th September 2021 and 7th June 2022. The matter was scheduled for mention on 6th October 2022.
6. The proceedings show that both the 2nd and 3rd Respondents and the Appellants herein did not attend court as per the summons. The Court issued warrants for their arrest and ordered the OCS Serem to execute the warrants.
7. The appellants herein consequently filed an application dated 7th November 2022 seeking for orders that they be added to the suit as Interested Parties, that the judgment be varied and set aside, that there be stay of execution of the judgment, that the warrants issued be lifted and that the appellants be allowed to file their defence and defend the suit. The grounds of the application were that they were not aware and were never notified of the existence of the suit. That they were aggrieved by the judgment as the suit property is registered in the name of Meja Madete, deceased, and that the appellants are the legal beneficiaries of the land by reason of being son and granddaughters respectively of Meja Madete. That the judgment affected the Intended Interested Parties (Appellants herein) directly as they utilize the land for their livelihood and hold the same in trust for future generations.
8. In response to the application, the 1st Respondent herein (who was the Plaintiff in the suit) filed a preliminary objection to the application vide the notice of preliminary objection dated 1st December 2022 contending that the court had become functus officio hence had no jurisdiction to entertain the application.
9. The record shows that on 12th January 2023 directions were given that since the preliminary objection challenged the jurisdiction of the court, the same was to be disposed of first. The record also shows that on the same date, Counsel for the 2nd and 3rd appellants herein (Intended Interested Parties) indicated to the court that the 2nd and 3rd Intended Interested Parties had no interest and requested to be struck out from the matter. That they were remorseful and prayed to be released from jail. The court made an order striking out the 2nd and 3rd Intended Interested Parties from the proceedings.
10. On 23rd February 2023 the court delivered its ruling on the preliminary Objection. The court found that the preliminary objection had merit and upheld it. The court consequently found that the Intended Interested Parties' application dated 7th November 2022 lacked merit and dismissed it with costs to the Plaintiff (1st Respondent herein)
11. This appeal is against the ruling and orders dated 23rd February 2023.
12. The appeal is indicated at the heading of the Memorandum of Appeal to have been lodged by all the 3 Intended Interested parties. The Memorandum of Appeal is dated 21st March 2023 and it seeks for orders that: -



- a. The appeal be allowed.
 - b. The honourable court be pleased to set aside and/or vary the judgment entered on 9th June 2022 and the decree issued therefrom on 22nd June 20233 together with the orders issued on 23rd February 2023 and do issue orders that are just in the circumstances.
 - c. The entire suit in the lower court in Vihiga Senior Principal Magistrate court Civil Case ELC Misc App Case No. 7 of 2021 be struck off.
 - d. The appellants amended application be allowed in terms of orders 8,9 and 10.
 - e. A declaration that the Appellants and other legal beneficiaries of Meja Madete (the deceased) be entitled to the parcel of land known as L.R NO. TIRIKI/TIGOI/685(KAKAMEGA / TIGOI/685)
 - f. A declaration that the demarcation of the parcel of land L.R NO. TIRIKI/TIGOI/685(KAKAMEGA /TIGOI/685) by the 1st Respondent was illegal/unlawful.
 - g. An eviction order to issue against the 1st Respondent, evicting him and any other person claiming through him from the suit property L.R NO. TIRIKI/TIGOI/685(KAKAMEGA / TIGOI/685) and the same be executed by an auctioneer or the court bailiff and security be provided by the nearest police station.
 - h. A declaration that the appellants' arrest was illegal and in violation of the fundamental rights as provided under articles 27(1) , (2), 28 and 29(1) of *the constitution* 2010.
 - i. General Damages for pain and suffering
 - j. Costs of the appeal be borne by the 1st Respondent.
 - k. Any other or further relief that the court may grant.
13. On 7th June 2023, directions were taken by consent of Counsel for the parties that the appeal be canvassed by way of written submissions. In compliance, written submissions dated 15th June 2023 were field on behalf of the appellants by the firm of MUHAVI & ADVOCATES.
14. No submissions were filed by the Respondents.

Issues for determination

15. The Memorandum of Appeal raises a total of 15 grounds of appeal namely;-
- i. That the Learned Magistrate wrongly exercised her judicial discretion in the order dated 23rd February 2023 in that she upheld the 1st respondent's preliminary objection despite overwhelming evidence that the 1st Respondent's preliminary objection dated 1st December 2022 (the preliminary objection) was incurably defective and incompetent for failure to comply with the mandatory provisions of order 51 Rule 14 of the Civil Procedure Rules.
 - ii. That the Learned Magistrate failed to appreciate that she condemned the appellants unheard by failing to scrutinize the appellants' supplementary Affidavit which was in opposition to the 1st Respondent's preliminary Objection.
 - iii. That the Learned Magistrate exhibited bias by selectively evaluating the 1st Respondent's Preliminary Objection and failing to consider the totality of the appellants' case.



- iv. The Learned Magistrate erred in law and fact in approbating and reprobating at the same time and in doing so;
 - a. Erred in law in misapprehending the proper application of the provisions of order 1 rule 3, 4, 5, 10 (2), 10(4) and 22 of the Civil Procedure Rules and the relevant provisions of the law as regards joinder of parties in a suit.
 - b. Erred in law in misapprehending the proper application of the provisions Order 9 of the Civil Procedure Rules and the relevant provisions of the law as regards recognized Agents and Advocates.
 - c. Erred in law and in suit in striking out the names of the 2nd and 3rd Appellants from the proceedings and in finding that the 1st Appellant had no locus standi to file the court pleadings.
- v. That the Learned Magistrate erred in law and in fact in failing to exhaustively evaluate the evidence annexed to the Affidavit of Support of the Appellant's application and/or consider their elaborate and detailed written submissions and decide in their favour.
- vi. That the learned duty Magistrate erred in law and in fact in failing to appreciate the weight of the legal issues raised by he appellants in the application to be joined in the main suit for stay.
- vii. The learned duty Magistrate erred in law and in fact in failing to appreciate the appellants' application on record disclosed a prima facie case that the manner in which the 1st Respondent proceeded to extract a decree without serving a Notice of Entry of Judgment on the 2nd Respondent and the appellants was unprocedural
- viii. That the Learned Duty Magistrate erred in law and fact in failing to appreciate that the Draft Defence referred to in the application had established a counter-claim which was bona fide, raises triable issues and disclosed a reasonable defence and counterclaim in law against the claims in the main suit.
- ix. That the Learned Trial Magistrate erred in law and in fact in dismissing the appellants' application on the grounds that the 1st appellant was a stranger to the suit yet the application before it sought their enjoinder to the suit and review of the ex parte Judgment.
- x. The Learned Duty Magistrate erred in law and in fact in misdirecting herself and forming her own opinion that the 1st appellant was fighting for right of the 2nd and 3rd appellants and thus commercially interested over the suit land.
- xi. That the Learned Duty Magistrate erred and in fact in not appreciating that the appellants had an identifiable stake or legal interest in the proceedings and thus enjoin them as Interested Parties owing to the litigation nature of the suit which was concerned over the ownership of a portion of land demarcated by the 1st Respondent from parcel of land identified as L.R NO. TIRIKI/TIGOI/685(KAKAMEGA /TIGOI/685).
- xii. The Learned Duty Magistrate erred in law and in fact in failing to examined the authenticity of the Agreement of sale dated 2nd January 2016 and 15th June 2016 between the 1st Respondent, the 2nd Respondent (John Madete Meja) and Timateo Omuga (deceased) as the 1st Respondent had failed to meet the requisite threshold of a bon fide purchaser as the Agreement disclosed a non- existing parcel of land.



- xiii. That the Learned Magistrate erred in law and fact by not appreciating that the alleged portion of land forms part of the parcel of land identified as L.R NO. TIRIKI/TIGOI/685(KAKAMEGA /TIGOI/685) and the 2nd Respondent (John Madete Meja) and Timateo Omuga (deceased) did not have any grant of ownership and the legal capacity to sell and/or dispose of any part of the land as it was registered in the name of the deceased person (Meja Madete)
 - xiv. That the Learned Magistrate erred in law and in fact when she failed to apply the well-known principles of law and judicial precedents on a matter involving the estate of a deceased before arriving at her decision.
 - xv. That the impugned judgment and order of the subordinate court is wholly erroneous in law and in fact and contrary to equity, statute, article 159(2) of *the Constitution* of Kenya judicial precedents and a gross miscarriage of justice.
16. The preliminary issues to note in this appeal are firstly that this appeal, as indicated on the heading of the Memorandum of Appeal is an appeal against the ruling and orders of the trial court given on 23rd February 2023 in Vihiga SPMC ELC Case No. 7 of 2021. These were the order that upheld the 1st Respondent’s preliminary objection. It is therefore not an appeal against the Judgment in the suit.
- Secondly, it is clear from the proceedings that the 2nd and 3rd appellants are no longer parties in the matter. The proceedings show that on 12th January 2023 Ms Omendo Counsel for the 2nd and 3rd Applicants addressed the trial court thus; -
- “On behalf of the 2nd and 3rd interested party have no interest. They say they be struck out of the matter. They are remorseful and pray for release from civil jail.”
- Then the court ruled
- “.....2nd and 3rd Interested Parties struck out of proceedings”
- In the premises then there is only one appellant in this appeal namely Peter Miheso Meja, the 1st appellant herein.
17. From the record and submissions filed, I find that the sole issue for this court to determine in this appeal is whether or not the trial court erred in upholding the 1st Respondent’s preliminary objection.

Analysis and determination

18. This being a first appeal, this court is obligated to re-analyse the evidence and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others* [1968] EA 123 it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated
- “an appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”
19. The first ground of appeal is that the Learned Magistrate wrongly exercised her judicial discretion in the order dated 23rd February 2023 in that she upheld the 1st Respondent’s preliminary objection



- despite overwhelming evidence that the 1st Respondent's preliminary objection dated 1st December 2022 was incurably defective and incompetent for failure to comply with the mandatory provisions of order 51 Rule 14 of the Civil Procedure Rules. Order 51 Rule 14 makes provision for grounds of opposition to applications in the High Court. It provides for the various ways a Respondent may respond to an application. The appellant's case is that the preliminary objection was incurably defective and incompetent for failure to comply with the provisions of Order 51 Rule 14. Counsel for the appellant submitted that the Preliminary Objection was an afterthought as it was filed outside the requisite timelines and therefore overtaken by events. That the application dated 7th November 2022 proceeded for hearing on 17th November 2022 and the court issued directions on disposal of the same.
20. Under Order 51 Rule 14 Civil Procedure Rules one of the ways by which a Respondent who wishes to oppose any application may respond to the application is by filing a Notice of Preliminary Objection. The record shows that the 1st Respondent chose to reply to the appellant's Notice of Motion application dated 7th November 2022 by way of the Notice of Preliminary Objection dated 1st December 2022. The record also shows that on 9th November 2022 the application dated 7th November 2022 was placed before the court for directions under certificate of urgency, that the court granted prayer 2 thereof and set the application for inter partes hearing on 17/11/2022. The proceedings further show that on 17/11/2022, the court granted the 1st Respondent leave to file response to the application and the appellant leave to amend the application. In the circumstances, it is clear that the Preliminary Objection filed on 7th December 2022 was neither overtaken by events nor in contravention of the provisions of Order 51 rule 14 of the Civil Procedure Rules.
 21. The 2nd ground of appeal faults the trial court for failing to scrutinize the appellant's Supplementary Affidavit which was in opposition of the Preliminary Objection Counsel for the appellant submitted in this appeal that the court overlooked the appellant's Supplementary Affidavit which had opposed the preliminary objection. Counsel referred this court to paragraphs 5 and 6 of the said Affidavit which is on pages 196 to 198 of the Record of Appeal.
 22. I have read the Supplementary Affidavit sworn by the appellant on 28th December 2022. In paragraph 5 the appellant reproduced the provisions of Order 51 Rule 14 Civil Procedure Rules and averred that the Plaintiff/Respondent's (1st Respondent herein) application was frivolous, vexatious and that the same ought to be disregarded by the court as it does not meet the threshold of order 51 Rule 14. Paragraph 6 states that the application dated 7th November 2022 proceeded to hearing on 17th November 2022 hence the Plaintiff/Respondent's application was an afterthought, misconceived, unsubstantiated, unwarranted, incompetent and has been overtaken by events
 23. The record shows that the trial court considered the contents of the Supplementary Affidavit. The trial court in the ruling, the subject matter of the appeal herein, observed "The 1st Interested Party, Peter Miheso Meja filed a Supplementary affidavit in response to the Objection which I have also considered."
 24. My finding on this ground is that the Preliminary Objection was not in contravention of Order 51 Rule 14 of the Civil Procedure Rules, 2010 and that the trial court did not fail to scrutinize the Supplementary Affidavit. It is not shown what aspects of the Supplementary Affidavit the trial court failed to take into account.
 25. The third ground of the appeal has not been substantiated or proved. There is no demonstration of how the trial court did selectively analyze one side of the evidence in respect of the preliminary objection while neglecting the other side.



26. The 4th ground of appeal concerns joinder of parties under order 1 Rules 3, 4, 5, 10(2), 10(4) and 22 of the Civil Procedure Rules, recognized agents and striking out of the 2nd and 3rd appellants from the proceedings. Counsel for the appellant submitted that the principles guiding joinder of Interested Parties were set out by the Supreme Court in the case of Francis Karoki Muruatetu & another vs Republic & 5 others Petition No. 15 Consolidated with No. 16 of 2013 [2016]eKLR to include; the personal interest or stake that the party has in the matter must be set out in the application, that the interest must be clearly identifiable and must be proximate enough to stand a part from anything that is merely peripheral, the prejudice to be suffered by the Intended Interested party in case of non-joinder, a party must, in its application set out the case and the submission it intends to make at the case.
27. A reading of the ruling the subject matter of the appeal reveals that the trial court considered the interest of the appellant and found that that the appellant had no locus standi to participate in the suit. The court noted that the appellant's case was that he was fighting for the interest of the 2nd and 3rd Intended Interested Parties who were children of the 1st Defendant who have nowhere to plough. The court noted that the appellant had no direct cause of action.
28. The crux of the preliminary objection was that the application by the Intended Interested Parties was hopelessly incompetent and untenable. The appellant described himself in the Affidavit in support of the application as a son of Meja Madete, deceased, the registered owner of the suit land. He however did not exhibit any Grant of Letters of Administration giving him capacity to pursue the interests of the deceased's estate. He averred in paragraph 12 of the Affidavit that Succession to the estate of Meja Madete was yet to be undertaken.
29. The trial court was justified to uphold the preliminary objection and dismiss the application by the appellant. Indeed, as stated in one of the grounds of the Preliminary Objection, the appellant for as long as he had not taken out Letters of Administration to the estate of Meja Madete deceased whose estate's interest he sought to protect through the application was a stranger to the proceedings.
30. In the circumstances, grounds 5, 6, 7, 10 and 11 which relate to the preliminary objection and appellant's application have not been proved. The other grounds of appeal challenge the judgement. There is no appeal against the judgement.
31. For the foregoing reasons, I find that the trial court did not err in upholding the preliminary objection. The appellant, Peter Miheso Meja did not demonstrate sufficient stake in the matter to qualify for joinder. The other 2 appellants were no longer part of the application as they had applied to be and were removed from the proceedings. The Defendants in the suit who are the 2nd and 3rd Respondents herein neither opposed the preliminary objection nor responded to the appeal herein in any way.
32. I find further that the appeal lacks merit. Most of the prayers sought in the appeal are beyond the scope of the appeal against the ruling of the trial court on the preliminary objection. These include the prayers that:
 - a. The honourable court be pleased to set aside and/or vary the judgment entered on 9th June 2022 and the decree issued therefrom on 22nd June 2023 together with the orders issued on 23rd February 2023 and do issue orders that are just in the circumstances.
 - b. The entire suit in the lower court in Vihiga Senior Principal Magistrate court Civil Case ELC Misc App Case No. 7 of 2021 be struck off.
 - c. A declaration that the Appellants and other legal beneficiaries of Meja Madete (the deceased) be entitled to the parcel of land known as L.R NO. TIRIKI/TIGOI/685(KAKAMEGA / TIGOI/685)



- d. A declaration that the demarcation of the parcel of land L.R NO. TIRIKI/TIGOI/685(KAKAMEGA /TIGOI/685) by the 1st Respondent was illegal/unlawful.
- e. An eviction order to issue against the 1st Respondent, evicting him and any other person claiming through him from the suit property L.R NO. TIRIKI/TIGOI/685(KAKAMEGA /TIGOI/685) and the same be executed by an auctioneer or the court bailiff and security be provided by the nearest police station.
- f. A declaration that the appellants' arrest was illegal and in violation of the fundamental rights as provided under articles 27(1) , (2), 28 and 29(1) of *the constitution* 2010.
- g. General Damages for pain and suffering

33. The appeal is therefore hereby dismissed. Costs of the appeal are awarded to the 1st Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 21ST DAY OF SEPTEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Muhavi advocate for the Appellant.

Cheruiyot advocate for the 1st Respondent.

No appearance for the 2nd and 3rd Respondents.

