Otieno v Asuke & 2 others (Environment and Land Appeal 19 of 2020) [2023] KEELC 21101 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21101 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL 19 OF 2020

SO OKONG'O, J

OCTOBER 26, 2023

BETWEEN

PAUL VICTONE OTIENO .... APPELLANT

AND

GEORGE ASUKE .... 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU .... 2ND RESPONDENT

NATIONAL LAND COMMISSION .... 3RD RESPONDENT

RULING

1. The appellant filed a suit against the respondents at the Chief Magistrate's Court at Kisumu namely, Kisumu CMC ELC No. 17 of 2017 seeking among others, a declaration that he was the lawful allottee of all that parcel of land known as Migosi/SSS/1-123 also known as Migosi/ SSS/Phase 2/96 (hereinafter referred to only as "the suit property"). The lower court heard the appellant's suit and dismissed the same with costs in a judgment that was delivered on 11th May 2020. The appellant was dissatisfied with the decision of the lower court and filed this appeal against the same on 13th May 2020. Together with the memorandum of appeal, the appellant filed an application by way of a Notice of Motion dated 14th May 2020 seeking an injunction to restrain the 1st respondent from taking possession or carrying out any construction works on the suit property pending the hearing and determination of the appeal. When the appellant's application came up for directions on 5th October 2021, the court ordered that the appellant files and serve a record of appeal together with his submissions on the appeal within 30 days from the order, and for the respondents to file their submissions on the appeal within 30 days of service of the appellant's record of appeal and submissions. The court fixed the appeal for judgment on 3rd March 2022 and ordered the parties to maintain the status quo.

2. The appellant neither filed a record of appeal nor submissions as ordered by the court. The appellant did not also seek an extension of time within which to comply with the order. The 2nd respondent

filed its submissions on 17th December 2021. The court proceeded to write a judgment on the appeal notwithstanding failure by the appellant to file a record of appeal and submissions. In a judgment delivered on 11th March 2022, the court dismissed the appeal with costs to the 1st and 2nd respondents. In the judgment, the court considered the appeal on merit. The court stated as follows regarding the appellant's claim over the suit property:

> "The Appellant was supposed to accept the letter of offer in writing as per the conditions set therein which he failed to do. From the evidence on record, it is clear that the Appellant failed to prove to court that he met the conditions in the letter of offer."

3. With regard to the 1st respondent's claim over the same property, the court stated as follows:

> "From the 1st Respondent's evidence, it is clear that he successfully applied and was issued with a letter of offer dated 19th November 2010 and he complied with all the conditions in the letter of offer... This court has found that the 1st Respondent lawfully acquired the suit property from the 2nd Respondent and this appeal is hereby dismissed with costs to the costs to the 1st and 2nd Respondents".

4. Following that judgment, the appellant filed a notice of his intention to appeal against the same on 18th March 2022. The appellant thereafter filed a record of appeal herein 25th March 2022.

5. What is now before the court is the appellant's application dated 12th April 2022 brought under Order 42 Rule 21 of the *Civil Procedure Rules*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Article 159 of the *Constitution*. In the application, the appellant has sought an order that; the judgment and decree of this court made on 11th March 2022 be set aside, the record of appeal filed on 25th March 2022 be deemed as properly filed and served and the appeal be readmitted for hearing inter partes. The application that was supported by the affidavit of the appellant's advocate Bruce O. Odeny sworn on 12th April 2022 was brought on the ground that the judgment of the court was delivered without the record of appeal and the appellant's submissions and as such, the appellant was denied a fair hearing. In his affidavit in support of the application, the appellant's advocate stated that he was unable to file a record of appeal within the time set by the court because his office file got lost when his office was being renovated and that the file was only found after the court had delivered a judgment in the matter.

6. The application was opposed by the 1st and 2nd respondents. The 1st respondent filed grounds of opposition on 28th April 2022 and a replying affidavit on 17th May 2023. In his grounds of opposition, the 1st respondent contended that the application was bad in law and amounted to an abuse of the court process. The 1st respondent contended that the appellant having filed an appeal against the judgment of this court in the Court of Appeal, this court lacked jurisdiction to entertain the review application as it was functus officio. In his replying affidavit, the 1st respondent averred that the appellant filed this appeal but failed to prosecute the same and that the court nevertheless heard the appeal on merit and dismissed the same. The 1st respondent averred that a record of appeal was not a legal requirement for determining appeals. The 1st respondent averred further that the loss of the appellant's advocate's office file was not a reasonable excuse for not filing a record of appeal since all the necessary pleadings and documents were in the court file which was readily available. The 1st respondent averred further that in case the appellant had a genuine problem, nothing stopped him from making an application to the court for more time instead of waiting for 5 months after he was directed to file a record of appeal to bring the present application. The 1st respondent averred that the application had been brought in bad faith with the intention of reopening a matter that had been conclusively determined by the court.

7. The 2nd respondent opposed the application through a Notice of Preliminary Objection dated 16th June 2022. The 2nd respondent contended that having delivered a final judgment in the appeal on 11th March 2022, the court was functus officio and could not entertain the appellant's application.

8. The application was argued on 29th May 2023. The appellant's advocate submitted that the application was brought under Order 42 Rule 21 of the *Civil Procedure Rules* and that the court had jurisdiction to grant the orders sought. The counsel submitted that under that rule, the court's discretion to set aside judgment in the interest of justice was unfettered.

9. In his submission in response, the advocate for the 1st respondent submitted that Order 42 Rule 21 of the *Civil Procedure Rules* was not applicable in the circumstances of this case. The 1st respondent submitted that the appeal herein was not dismissed for nonattendance. The 1st respondent submitted that under Order 42 Rules 25 and 31 of the *Civil Procedure Rules*, the court had jurisdiction to enter final judgment where there is sufficient evidence on record. The 1st respondent submitted that that was what the court did in the present case. The 1st respondent submitted that the appellant was neither seeking the setting aside of the judgment of the court or a review of the same but a re-hearing of the appeal.

10. The 1st respondent submitted further that the judgment of the court was not an ex-parte judgment. The 1st respondent submitted that the court considered the appeal on merit and rendered a judgment. The 1st respondent submitted that nothing would change even if the appeal was heard afresh. The court was urged to dismiss the application as an abuse of the process of the court. On his part, the 2nd respondent's advocate submitted that the appellant's appeal was not dismissed for want of prosecution. The 2nd respondent submitted that the appeal was heard and dismissed on merit. The 2nd respondent submitted that the court having determined the appeal on merit was funtus officio. The 2nd respondent also urged the court to dismiss the application as an abuse of the process of the court.

11. In a rejoinder, the appellant's advocate argued that the judgment of the court was not made on merit since the appellant had neither filed a record of appeal nor submissions. The appellant's advocate reiterated that the appellant was denied a fair hearing. The appellant urged the court to allow the application.

Analysis and determination

12. I have considered the application together with the supporting affidavit. I have also considered the notice of preliminary objection, grounds of opposition, and a replying affidavit filed by the respondents in opposition to the application. Finally, I have considered the submissions by the parties. The application is brought principally under Order 42 Rule 21 of the *Civil Procedure Rules*. In order to understand the circumstances under which an application under Order 42 Rule 21 of the *Civil Procedure Rules* may be brought, I reproduce below the provisions of Order 42 Rules 20 and 21 of the *Civil Procedure Rules*:

> " [Order 42, rule 20.] Dismissal of appeal for appellant's default.
>
> 20.
>
> (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed.

(2) Where the appellant appears, and the respondent does not appear and has not filed a declaration under rule 16 (3), the appeal may be heard ex parte.

[Order 42, rule 21.] Re-admission of appeal dismissed for default.

21. Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re- admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

13. I have reproduced earlier in this ruling the extracts of the judgment of the court delivered herein on 11th March 2022. I am in agreement with the respondents that Order 42 Rule 21 of the *Civil Procedure Rules* is not applicable in the circumstances in which the appellant found himself. The appellant's appeal was not dismissed for default of appearance under Order 42 Rule 20 of the *Civil Procedure Rules*. The parties appeared before the court and the court directed that the appeal would be heard by way of written submissions. The appellant was directed to file his record of appeal and submission within 30 days of the order. The court gave the respondents the same time to file their submissions in response upon service by the appellant and fixed a judgment date in the presence of the parties.

14. The appellant was supposed to have filed a record of appeal and submissions by 5th November 2021. The respondents were to file their submissions in reply by 5th December 2021 assuming that they were served immediately after the appellant filed his record of appeal and submissions. This means that by 6th December 2021, the court would have the record of appeal and all the submissions on record. By this date, the appellant had not filed a record of appeal and submissions and had not asked for an extension of time to do so. Left with no alternative and noting a possible delay in the disposal of the appeal, the 2nd respondent filed its submissions on 17th December 2021. I have seen on record a letter dated 2nd December 2021 that was written by the 2nd respondent's advocates to the appellant's advocates reminding them of the directions given by the court on the filing of a record of appeal and submissions and urging them to comply.

15. I am of the view that in the circumstances in which the court found itself, it had 2 options. The first option was to dismiss the appellant's appeal for want of prosecution, the appellant having failed to file a record of appeal and submissions as directed by the court. The other option was to consider and determine the appeal on merit on the basis of the material that was before it. Luckily for the court, at this point in time, the court had in its possession as part of its record the lower court file that contained; the pleadings that were filed in the lower court, the typed and certified copies of the proceedings of the lower court, a certified copy of the judgment of the lower court, a signed and sealed copy of the decree of the lower court, and all the exhibits that were produced in the lower court. The court chose the second option. The court considered the pleadings in the lower court, the proceedings, the judgment, the grounds of appeal and the submissions filed by the 2nd Respondent and rendered a judgment on the merit of the appeal on 11th March 2022.

16. I am in agreement with the submissions by the respondents that the court having rendered a judgment on the merit of the appeal before it, the court is functus officio. I am of the view that if the court was to accede to the appellant's application, it may lead to embarrassment. The court has already considered the pleadings by the parties in the lower court, the evidence that was adduced by the parties, the judgment of the lower court based on evidence, the grounds of appeal, and has made a finding that the appellant failed to prove in the lower court that he was the lawful owner of the suit property having

failed to adduce evidence showing that he accepted the offer by the 2nd respondent and complied with the conditions set out in the letter of offer. The court has also found that the 1st respondent proved that he was the lawful owner of the suit property and that the appellant's suit in the lower court was properly dismissed. The court is now being called upon to consider the possibility of changing its mind on those findings. The court is not prepared to do that. I am of the view that the court having rendered a merit decision, the only avenue that was left for the appellant if he was aggrieved was to file an appeal to the Court of Appeal. I have noted that he has already filed a Notice of Appeal. He should pursue that appeal in which he can challenge not only the merit of the decision but also whether the court was right to determine the appeal without a record of appeal and submissions from the appellant.

17. I am of the view that even if I am wrong in my finding that the court is functus officio, the appellant's application cannot succeed even if it is considered on merit. Under Order 42 Rule 21 of the *Civil Procedure Rules* which the appellant has relied on as the basis of his application, an appeal shall only be re-admitted for hearing where the appellant proves that:

> " .... he was prevented by any sufficient cause from appearing when the appeal was called on for hearing,.."

18. Sufficient cause was defined in *Attorney General v. Law Society of Kenya & another* [2017]eKLR as follows:

> " Sufficient cause or good cause in law means:
>
> > ...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Black's Law Dictionary, 9th Edition, page 251.
> >
> > Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

19. I am not persuaded that the appellant has shown sufficient cause why the court should set aside the judgment that was entered herein on 11th March 2022 and start hearing the appeal afresh. The appellant has not given a reasonable explanation why it failed to file a record of appeal and submissions within the time that was set by the court. The appellant's advocate's claim that the office file got lost during renovations that were taking place in his office is a mere allegation. I am in agreement with the respondents that the alleged loss of the office file could not prevent the appellant's advocates from filing a record of appeal since the lower court file and the appeal file were available and contained all the documents that the appellant would have needed to compile the record of appeal. The court has noted that the record of appeal on record is dated 22nd March 2022; just 11 days after delivery of the judgment meaning that as of that date, the appellant had all that he needed to file a record of appeal. Of more concern to the court is the appellant's failure to file an application for extension of time to file a record of appeal and submissions. I am of the opinion that if the appellant was sincere in his claim that he had difficulties in filing a record of appeal due to the loss of his advocate's office file, the remedy was to file an application for extension of time. It was not necessary to wait until the court had delivered the judgment to seek the setting aside of the same. I find the reason given for the appellant's failure to file a record of appeal unreasonable. I am also not persuaded by the appellant that the court is likely to come up with a different decision from the one that was rendered by the court on 11th March 2021. The only new material that the appellant would be placing before the court is his submissions. The appellant has

not placed draft submissions before the court from which the court would be able to say that there is some weighty or fundamental legal point that may tilt the mind of the court in favour of the appellant. I am talking of a legal point because a submission is not evidence. The dispute in the lower court was determined on the basis of evidence. This court reviewed the said evidence and agreed with the lower court. The appellant has not persuaded me that there is some piece of evidence that this court in its judgment failed to consider or misapprehended. The appellant had also contended that he was denied a fair hearing. To this, my answer is that what is expected of the court is to give the parties an equal opportunity to present their cases. That opportunity was extended to the appellant. For reasons only known to him, he did not make use of the same. The court cannot allow parties to conduct litigation at their own convenience in the name of giving them a fair hearing.

20. The upshot of the foregoing is that the Notice of Motion dated 12th April 2022 has no merit. The application is dismissed with costs to the 1st and 2nd respondents.

DELIVERED AND DATED AT KISUMU THIS 26TH DAY OF OCTOBER 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform **in the presence of:**

Ms. Khisa h/b for Ms. Omondi for the Appellant

Mr. Kojo for the 1st Respondent

N/A for the 2nd Respondent