



**Awadh (Holder of General Power of Attorney for Burka Ahmed Salim) v Ngala
(Sued as Administrator of the Estate of Stephen E. C. Ngala) (Environment and Land
Appeal 10 of 2021) [2023] KEELC 20946 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 10 OF 2021
SM KIBUNJA, J
OCTOBER 25, 2023**

BETWEEN

**MOHAMED MAHAMED AWADH (HOLDER OF GENERAL POWER OF
ATTORNEY FOR BURKA AHMED SALIM) APPELLANT**

AND

**SAIDI STEPHEN NGALA (SUED AS ADMINISTRATOR OF THE ESTATE OF
STEPHEN E. C. NGALA) RESPONDENT**

*(Being an appeal from the judgement delivered by Hon. F. N. Kyambia, CM,
on the 22nd January 2021 in Mombasa CMC Land Case No. 150 of 2019)*

JUDGMENT

1. The appellant commenced this appeal through the Memorandum of Appeal dated and filed on the February 15, 2021 setting out nine (9) grounds summarized as follows:
 - a. That the learned trial magistrate erred in fact and law by determining the suit without it being set down for hearing either viva voce, orally or written submissions, but instead through the appellant's application dated the September 16, 2019.
 - b. That the learned trial magistrate erred in fact and in law by dismissing the appellant's suit before it had gone through the full hearing and before his application dated the September 16, 2019 being heard.
 - c. The learned trial magistrate misdirected himself by finding that the appellant had relied on his filed document and failing to peruse the appellant's application where the Letters of Administration was annexed to the supporting affidavit.
2. The appellant therefore seeks for the following orders:



- a. That the judgement issued by the learned trial magistrate be varied and set aside.
 - b. An order for the appellant's suit to be heard and ruling on the application dated the September 16, 2019 be made.
 - c. Any other relief the court may deem fit.
 - d. Costs of this appeal be provided for.
3. The appellant also filed the Record of Appeal dated the February 15, 2021 and Supplementary Record of Appeal dated the February 10, 2022.
 4. The appeal came up before me on the November 3, 2022, and after hearing the counsel for the parties, directions on filing and exchanging submissions within the timelines set were given. Thereafter, the learned counsel for the appellant filed their submissions dated the November 24, 2022 and February 10, 2023, while that for the respondent filed theirs dated the January 12, 2023, which the court has considered.
 5. The following are the issues for the determinations by the court in this appeal:
 - a. Whether the matter was coming up for hearing of the main suit or application dated the September 16, 2019 when it was struck out.
 - b. Whether the learned trial magistrate erred in fact and law in finding that the suit against the defendant was a non-starter for failure to exhibit the letter of grant of administration.
 - c. Whether there was a grant of letters of administration annexed to the supporting affidavit to the application dated the September 16, 2019.
 - d. What orders to issue.
 - e. Who pays the costs.
 6. The court has carefully considered the grounds on the appeal, the Record of Appeal, Supplementary Record of Appeal, submissions filed and come to the following findings:
 - a. That this being a first appeal the court is required to reconsider the evidence tendered before the trial court, evaluate it itself and come to its own conclusions. The court should however remember that it has not seen or heard the witnesses testify and give allowance for that. This was well captured in the case of Barnabas Biwott versus Thomas Kipkorir Bundotich [2018] eKLR, in which the case of *Selle & Another v Associated Motor Boat Co Ltd* [1968] EA 123 was cited where it held that;

“...this court is not bound necessarily to accept the findings of fact by the court below. 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

The plaint dated the September 16, 2019 at pages 75 and 76 of the Record of Appeal indicates that the appellant had sued the respondent in his capacity as the Administrator of the Estate of Stephen EC Ngala. That even though the respondent had not entered appearance, and or filed a statement of defence, the appellant was still required under sections 107 to 109



of the *Evidence Act* chapter 80 of Laws of Kenya so as to discharge the burden of proof in establishing his case on a balance of probabilities. The appellant had sought for permanent injunction restraining the respondent from encroaching, entering, trespassing, interfering with the appellant's plot No MSA/XV11/1288, special and general damages, costs and interests. The appellant had also filed list of documents which is at page 79 of the Record of Appeal containing thirteen (13) items dated the 16th September 2019 among others. At item eleven (11) is "Gant [sic] for letters of administration of the Defendant Succ Cause No 21 of 2015."

- b. I have perused the court proceedings at pages 8 to 10 of the Record of Appeal and at the same position in the Supplementary Record of Appeal. The copy in the Supplementary Record of Appeal is not certified and ends at page 10 while the one in the Record of Appeal is certified and continues to page 11. It is clear that the plaintiff addressed the court on the September 1, 2020 and stated that he had served the defendant, after which the court directed the matter be mentioned on the October 12, 2020 adding that the "plaintiff is at liberty to proceed with the matter." Then during the mention of October 12, 2020, the plaintiff informed the court that "I have served the defendant. They have not entered appearance. I want the matter to proceed." The court proceeded to order that "The matter is fixed for hearing on November 24, 2020." The proceedings show that on the November 24, 2020, the plaintiff was present and he testified as PW1 inter alia stating that "I have sued the defendant seeking permanent injunction. I rely on the plaint and documents filed." The court then proceeded to fix the suit for judgement on the January 22, 2021. The proceedings of October 12, 2020 leave no doubt that what was set down for hearing on the November 24, 2020 was hearing of the suit. If it was meant to be hearing of the application dated the September 16, 2019 as the appellant alleges, then that would have been specified.
- c. After the suit was heard on the November 24, 2020, the learned trial magistrate fixed it for judgement on the January 22, 2021 when the judgement subject matter of this appeal was delivered. The judgement is at page 5 to 7 of the Record of Appeal. In paragraphs 1 and 2 of the judgement, the learned trial magistrate more or less restated the plaintiff's averments and at paragraph 3 addressed the substituted service upon the defendant and the plaintiff's testimony during the hearing. The last paragraph of the judgement dealt with the learned trial magistrate's analysis or appreciation of the pleadings and other factual materials presented by the plaintiff, including the capacity of the defendant who had been sued as the administrator of the estate of Stephen E. C. Ngala. The learned trial magistrate inter alia made the following observation and finding that;

"In the list of documents item 11 he refers to letters of administration issued to the defendant in Succession Cause No 21 of 2015, however upon perusal of the documents annexed to that list I do not find such letters of administration. It is therefore not clear that the defendant is the administrator of the deceased. In the circumstances and in the absence of the letters of the administration the plaintiff's suit is a non-starter and I strike it out with no orders as to costs."

I have on my own perused the list of documents at pages 79 to 80 and the attached documents at pages 81 and 92 in the Record of Appeal and grant of letters of administration issued in Succession Cause No. 21 of 2015 is not among them. I have also looked at the list of documents at pages 77 to 78 of the Supplementary Record of Appeal and the documents attached to it at pages 79 to 135. That even though at page 135 is a copy of the alleged grant of letter of administration, it is obvious the documents in the Supplementary Record of Appeal are



more than those attached to the list in the original Record of Appeal. No explanation has been tendered by the appellant on the difference.

- d. The claim by the appellant that the matter was meant for the hearing of the application dated the September 16, 2019, and not the main suit, is not backed by the record and must be a misapprehension on his part. The allegation that the learned trial magistrate erred by failing to peruse the documents attached to the supporting affidavit where the grant of letters of administration was itself an erroneous view as the documents meant for the main suit are those attached to the list of documents dated September 16, 2019. The documents attached to the supporting affidavit the appellant wished the learned trial magistrate had perused were meant to support the application. It was upon the appellant to have ensured he had complied with Order 11 of the Civil Procedure Rules by filing and serving a complete set of his documents in accordance with the list to support the averments in the plaint. It was also his responsibility to have moved the court for leave to file further or supplementary list of documents to add or introduce the documents he had left out like the grant of letters of administration. The finding of the learned trial magistrate that there was no evidence presented to prove that the defendant was indeed the legal administrator of the said estate cannot be faulted.
- e. The provision of Order 10 Rule 9 of the Civil Procedure Rules allows a plaintiff in a suit where no memorandum of appearance has been filed to set the suit down for hearing. It does not mean merely because the defendant has not entered appearance or filed a defence the plaintiff would automatically get the claim granted without tendering proof. That position was restated in the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, where the court held that;

“it is not automatic that instances where the evidence is not controverted, the claimants shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

The appellant was present when the hearing date of his suit was fixed. During the hearing he was sworn in and in Swahili introduced himself to the court. He then formally adopted the averments in his plaint and documents in his list and rested his testimony. He did not seek to add or refer to any other document like he has attempted to do in this appeal. The learned trial magistrate could only have considered the evidence presented by the appellant in arriving at his decision.

- f. The provision of Article 159(2)(b) and (d) of *the Constitution 2010*, sections 1A, 1B and 3A of the *Civil Procedure Act* chapter 21 of Laws of Kenya behoves of the court to ensure justice is done without delay and that judicial resources are efficiently used among others. It was therefore in order for the learned trial magistrate to come to the decision he arrived at upon perusing the plaint and the documents attached to the list and finding no evidence had been availed to confirm that the defendant was indeed the legal administrator of the estate in which respect he had been sued. Capacity of a party, just like the question of jurisdiction of the court, are issues that can be raised at any stage of the proceeding and if the court was to find that the plaintiff had failed to establish that the defendant was with capacity to be sued like in this suit, then such a suit is for striking out as against such a defendant. The striking out order leaves the claimant with the leeway to lodge the claim again, subject to the law on limitation.
- g. On the respondent’s objections on the appellant’s submissions, I have perused the court record and has not seen the submissions allegedly dated the July 4, 2022 and filed on the July 6,



2022 by the appellant. The first submissions for the appellant are those dated and filed on the November 24, 2022 through Ms. J. P. Ngoya & Austine Advocates LLP. That as the appellant was in person in the matter before the subordinate court, I do not find any basis of requiring the first counsel appointed by him during the appeal's being required to seek leave under Order 9 Rule 9 of the Civil Procedure Rules. I am in agreement with the decision in the case of *Arphaxad Mutiso Mutisya versus Rose Katungwa* [2021] eKLR, where the court was dealing with a similar issue and held that;

“The appeal herein has been filed in person by the appellant. This appeal is not a continuation of the proceedings of the lower court, but rather a commencement of new proceedings in this court by way of appeal. The appellant had the right to choose whether to remain with the same counsel or to engage another counsel or to act in person on appeal, without being required to file a notice of change of advocate; or a notice to act in person; or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

The objection is therefore rejected and the court has given due considerations all the submissions filed and on the record.

- h. Flowing from the above findings, the appeal is without merit. That in terms of section 27 of the *Civil Procedure Act* that costs follow the events, unless otherwise ordered for good cause, the respondent is granted the costs in the appeal.
7. The orders that commends themselves to be issued in view of the foregoing determinations are as follows:
 - a. That the Appellant's appeal is without merit.
 - b. The appeal be and is hereby dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF OCTOBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

APPELLANT :Mr. Omondi.

RESPONDENT:Mr. Asige

WILSON – COURT ASSISTANT

S. M. KIBUNJA, J.

ELC MOMBASA.

