Ojiambo & 2 others v Musa (Environment and Land Appeal E010 of 2021)
[2023] KEELC 22435 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22435 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E010 OF 2021

BN OLAO, J

DECEMBER 19, 2023

BETWEEN

ANNA KNIGHT OJIAMBO ..... 1ST APPELLANT

GODFREY ODUORY OJIAMBO ..... 2ND APPELLANT

ESTHER SUNDAY ..... 3RD APPELLANT

AND

DAVID BULIMO MUSA ..... RESPONDENT

JUDGMENT

1. David Bulimo Musa (the Respondent) had impleaded Anna Knight Ojiambo, Godfrey Oduory Ojiambo and Esther Sunday (the 1st to 3rd Appellants respectively) in Busia Chief Magistrates Court Civil Case No 423 of 2011 seeking the main remedy that the Appellants by themselves, their agents, workers or anybody working through them be injuncted from selling, alienating, disposing off or in any other manner dealing with the land parcel No. Bukhayo/Mundika/7050 and that the restriction placed thereon be removed. The record in the trial Court shows that by an affidavit of service dated 13th February 2012 and filed on 20th February 2012, one Joseph Orata Kweyu a process server of this Court deposed that on 4th January 2012 he served the 1st and 3rd Appellants with the summons to Enter Appearance, Plaint, Verifying Affidavit, Notice of Motion and Certificate of Urgency at their Burumba Estate home at 4.00pm. That they also accepted service on behalf of the 2nd Appellant who was not at home. They declined to sign saying they could only do so after consulting their advocate.

2. The record further shows that on 13th April 2015, the firm of Kioko Munyithya Ngugi Advocates entered appearance for the Appellants. By a Notice of Appointment filed on 14th December 2016, the firm of Manwari & Company Advocates came on record for the Appellants.

3. Meanwhile, on 9th May 2012, the Appellants having not filed any defence, the matter proceeded to hearing ex-parte and by a judgment delivered on 23rd May 2012, Hon. I. T. Maisiba Senior Resident

Magistrate having heard the Respondent's evidence entered judgement for him as prayed together with costs and interests.

4. By a Notice of Motion dated 15th July 2015 and filed in the trial Court on the same day, the Appellants sought the following orders:

    1. Leave be and is hereby granted for Joseph Orata Kweyu to be cross-examined on the contents of his affidavit of service sworn on 3rd February 2012 (the correct date is 13th February 2012).

    2. The judgment of the Court dated and delivered on the 23rd May 2012 be and is hereby set aside.

    3. Leave be and is hereby granted to the Defendants to file a defence in reply to the suit.

    4. Costs of the application be in the cause.

    That application was not canvassed and instead the Appellants filed another Notice of Motion dated 6th December 2017 and filed on the same day. In that application, the Appellants sought the following:

    1. Leave be and is hereby granted for Joseph Orata Kweyu be cross-examined on the contents of his affidavit of service sworn on 3rd February 2012 (the correct date is 13th February 2012).

    2. The judgment of the Court dated and delivered on 23rd May 2012 be and is hereby set aside.

    3. Leave be and is hereby granted to the Defendants to file a defence to the suit land that in the meantime the suit land be restricted.

    4. Costs of the application be in the cause.

5. With the consent of the parties, that application was withdrawn on 1st March 2018 and instead, the Appellants filed an Amended Notice of Motion of even date citing the provisions of sections 3 and 3A of the *Civil Procedure Rules*, order 1 rules 9 & 10, order 8 rules 3, 4, 5, 6, 7 & 8, order 10 rule 11, and order 51 rule 10 of the *Civil Procedure Rules*. By that Amended Notice of Motion, the Appellants beseeched the Court for the following remedies:

    1. That leave be granted to amend the Notice of Motion dated 15th July 2015.

    2. Leave be and is hereby granted for Joseph Orata Kweyu to be cross-examined on the contents of his affidavit of service sworn on 3rd February 2012 (the correct date is 13th February 2012).

    3. The judgment of the Court dated and delivered on 23rd May 2012 and the consequential decree be and is hereby set aside.

    4. Leave be and is hereby granted to the Defendants to file the defence and counter-claim attached to this application and that in the meantime, the suit land be restricted.

    5. Costs of the application be in the cause.

    That application was opposed by the Respondent vide his replying affidavit dated 27th March 2018.

6. Both parties annexed to their respective pleadings various annextures including the draft defence and counter-claim by the Appellants.

7. That application came up for hearing before Hon. M. A. Nanzushi Senior Resident Magistrate who, vide a brief ruling which was delivered on 10th July 2017 dismissed it with costs.

8. That ruling is the subject of this appeal in which the Appellants pray that it be set aside and be substituted with an order allowing the application.

9. The following ten (10) grounds of appeal have been set forth:

    1. The Learned Senior Resident Magistrate erred in law and in fact in purporting to make a ruling on an application dated 7/12/2017 that had already been withdrawn on 1/3/2018 by consent.

    2. The Learned Senior Resident Magistrate erred in law and in fact in not making a considered ruling on the very weighty issues raised in the Appellant's Amended Notice of Motion dated 1st March 2018.

    3. The Learned Senior Resident Magistrate was wrong in giving the substantive issues raised in the Appellant's application a very cursory treatment instead of critically analysing the subject matter of the application.

    4. The Learned Senior Resident Magistrate erred in law and in fact in not formally setting out the issues for determination as a basis for specifically making a finding on the various critical flaws in the ex-parte judgment which were raised by the Appellants in their Amended Notice of Motion dated 1st March 2018.

    5. The Learned Senior Resident Magistrate erred in law and in fact in treating the whole matter casually by ignoring the very fundamental and substantive issues presented by the Appellants in their application.

    6. The Learned Senior Resident Magistrate's findings that she would not grant the orders sought in the application of 1st March 2018 because the subject property had changed hands is both misleading and not based on the material presented to Court since the Appellants' application sought leave to both file a defence to the suit and also file a counter-claim which would have addressed the issue of part of the suit land having changed hands by brining on board "the title holder of the sub-divisional suit land".

    7. The Learned Senior Resident Magistrate totally ignored the detailed contents of the draft defence and counter-claim together with the documents on the Appellants' list of documents presented to Court thereby occasioning a miscarriage of justice.

    8. The Learned Senior Resident Magistrate gravely misdirected her mind in holding that the best option for the Appellants was for them to appeal against the earlier ex-parte decision in which they did not participate when procedure demanded that the proper route was the one taken by the Appellants in first seeking to set aside the ex-parte judgment.

    9. By dismissing the Appellants' application to have the ex-parte proceedings set aside, the Senior Resident Magistrate thereby denied the Appellants the right of being heard in their defence without finding fault with any of the Appellants materials and documents as presented, contrary to the law.

    10. The decision of the Learned Senior Resident Magistrate is against the weight of the materials and other evidence presented in the application by the Appellants.

10. The appeal has been canvassed by way of written submission. The same have been filed by Mr Manwari instructed by the firm of Manwari & Company Advocates for the Appellants and by Mr Onsongo instructed by the firm of Obwoge-onsongo & Company Advocates for the Respondent.

11. I have considered the record of appeal and the submissions by counsel. This being a first appeal, this Court has the duty to re-evaluate the evidence and reach an independent conclusion. As was held in *Okeno v R* 1972 E.A 32:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* 1975 E.A. 336) and to the Appellant Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw it's own conclusions. *Shantilal G. Ruwala v R* 1957 E.A. 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, See *Peters v Sunday Post* 1958 E.A. 424."

12. In declining to set aside the ex-parte judgment entered against the Appellants on 23rd May 2012, the trial magistrate was exercising her discretion under order 10 rule 11 of the *Civil Procedure Rules* which provides:

> " Where judgment has been entered under this order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just." Emphasis mine.

That means that the trial Court had the discretion to set aside the ex-parte judgment dated 23rd May 2012. In the circumstances, I must be guided by the Supreme Court of Kenya's decision in *Apungu Arthur Kibira v IEBC & 3 Others* 2019 eKLR wherein the Court laid down the following guidelines to be adhered to while considering an appeal arising out of the exercise of judicial discretion:

> " We reiterate that in any 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. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir* 2010 NZCS 2011 2 IV2LR 1 Kacem where it was held:
>
> In this context, a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal as stricter:
>
> 1. error of law or principle.
> 2. taking account of irrelevant considerations.
> 3. failing to take account of a relevant consideration; or
> 4. the decision is plainly wrong."

In *Price & Another v Hilder* 1986 KLR 95, it was held that it would be wrong for an Appellate Court to interfere with the exercise of the trial Court's discretion merely because the Court's decision would have been different. And in *Mbogo & Another v Shah* 1968 EA 93, it was held that an Appellate Court will not interfere with the exercise of discretion by a trial Court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the Court should not have acted upon or failed to take into consideration matters which it should

have taken into consideration and in so doing, arrived at a wrong conclusion. The term "discretion" is defined in *Black's Law Dictionary* 10th Edition as:

> " Wise conduct and management exercised without constraint; the ability coupled with the tendency to act with prudence and propriety. Freedom in the exercise of judgment; the power of free decision making."

The same Dictionary defines the term "judicial discretion" as:

> " The exercise of judgment by a judge or Court based on what is fair under the circumstances and guided by the rules and principles of law; a Court's power to act or not act when a litigant is not entitled to demand the act as a matter of right -".

13. As the ruling being appealed was made by the trial Magistrate in the exercise of her discretion, this Court will be guided by the above precedents amongst others in determining this appeal.

14. In my view, grounds No 1, 2, 3, 4 and 5 can be considered together and a determination of the issues raised therein is sufficient to dispose of this appeal. Therein, the trial magistrate is faulted for making a ruling on the application dated 7th December 2017 (it is infact dated 6th December 2017) which had already been withdrawn on 1st March 2018, not making a considered ruling on the very weighty issues and instead giving them a cursory treatment instead of critically analysing them and treating the whole application casually and ignoring very fundamental and substantive issues.

15. As the impugned ruling is brief. I shall reproduce it in extenso for a clearer understanding of the above grounds of appeal. It reads:

> " The application in Court is dated 6/12/2017. The applicant moved Court vide Notice of Motion dated the same day. The Applicant prayed for leave to be granted to have the process server cross-examined, that the judgment delivered on 23/5/2012 be set aside and the Defendants be granted leave to file a defence out of time. This was forwarded (sic) on the ground that the process server Joseph Orata falsified the affidavit of service. That consequently, the judgment was irregularly obtained. That the Plaintiff employed fraud to deprive the complainant of their right. That the Defendants did not execute any documents used in the registration of the land by the Plaintiff.
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> The same was supported by the affidavit of the Defendant/Applicant Anne Knight Ojiambo in 26 paragraphs denying having signed the transfer documents. In response the Plaintiff stated that the Defendants were duly served and were seized of the existence of the case that the firm on record was improperly acting for the Defendant. That most importantly the land in question LR Bukhayo/Mundika/7050 is now non existence since it was sub-divided pursuant to Court decree and thus the application has been overtaken by events.
>
> I have evaluated the pleadings and the annextures there too (sic). I have also considered submissions of both parties. I note that this is a matter which has since been dealt with. Title changed hands and sub-divisions have occurred. Generally prayers sought at the point in time will be granting orders in vain. The best option for the Defendants is to appeal against the decision of the Court. I hereby dismiss the application with costs to the Plaintiff. The Respondent had a chance to appeal the decision but elected not to.
>
> M. A. Nanzushi

Senior Resident Magistrate."

It is clear from the commencement of the above ruling that the trial magistrate was considering the Appellant's Notice of Motion dated 6th December 2017 and which had infact been withdrawn and substituted with the amended Notice of Motion dated 1st March 2018. While it is true that the amended Notice of Motion dated 1st March 2018 sought substantially what was contained in the Notice of Motion dated 6th December 2016, it is also a fact that the amended Notice of Motion dated 1st March 2018 and which ought to have been the subject of the impugned ruling included a counter-claim. The fact that the trial magistrate made no reference to the amended Notice of Motion dated 1st March 2018 is clear evidence that she did not consider it yet that was what was before the Court for it's determination and which is indeed what the parties addressed in their respective submissions. The trial magistrate clearly went off tangent and delivered a ruling on an application which had already been withdrawn by the parties themselves and was therefore not available for consideration. The trial magistrate clearly erred both in law and in fact and that alone is enough to allow this appeal.

16. The claim that the trial magistrate gave only a cursory treatment to the very fundamental and substantive issues raised in the amended Notice of Motion is also well founded. The substantive issue which the trial magistrate was required to consider and determine included whether or not the ex-parte judgment delivered on 23rd May 2012 ought to have been set aside or not and if leave should have been given to the Appellants to file their defence and counter-claim. The principles as to how such remedies ought to be considered are well laid out in various cases including *Shah v Mbogo & Another* 1967 EA 116, *CMC Holdings LTD v Nzioki* 2004 KLR 173 among others. There was not even a fleeting reference to those and other various cases which have set out the principles that continue to guide Courts in determining an application such as the one that was before the trial magistrate. The complaint that the trial magistrate gave the "application a very cursory treatment" and "ignored the very fundamental and substantive issues" is well merited.

17. In grounds No 6 and 7, the trial magistrate is faulted for basing her ruling on the fact that the suit land had long changed hands. It is clear from the register that the land parcel No Bukhayo/Mundika/7050 has since been sub-divided to create land parcels No Bukhayo/Mundika/11624 and 11625. The parcel No Bukhayo/Mundika/11624 is registered in the names of one Daniel Omondi while parcel No Bukhayo/Mundika/11625 is in the name of the Respondent. In their draft defence and counter-claim, the Appellants have impleaded the said Daniel Omondi as the 2nd Defendant. The trial magistrate in her impugned ruling appears to have based her decision primarily on the reason that:

> " Title changed hands and subdivisions have occurred. Generally prayers sought out the point in time will be granting orders in vain."

In so ruling, the trial magistrate erred both in fact and in law because, by impleading the 2nd Defendant, the Appellants were bringing on board the other beneficiary of the sub-division of the original land parcel No Bukhayo/Mundika 7050 and specifically, the parcel No Bukhayo/Mundika/11625 who would then be able to defend any claim against him. That would not amount to the Court "granting orders in vain". In any event, the Respondent, as 1st Defendant in the counter-claim, is still the registered proprietor of the other parcel being Bukhayo/Mundika/11624. The trial Court made no reference to the Appellants' defence and counter-claim or if it raises triable issues yet, as set out in *Patel v E.A. Cargo Handling Services LTED* 1975 E.A. 75, that is among the issues that a Court considering an application such as the one which was before the Court must take into account.

18. In ground No 8 of the memorandum of appeal, the Appellants take issue with the trial magistrate for holding that the best option was for the Appellants to appeal against the ex-parte judgment and

thereby gravely misdirected herself. There is merit in that ground. While the Appellants had the option of appealing that judgment, order 10 of the *Civil Procedure Rules* also provided them with the option of approaching the Court to set aside that judgment. The trial Court should not have vilified the Appellants for taking the route which is provided for in law. In doing so, the trial magistrate erred both in law and in fact.

19. Grounds 9 and 10 can be considered together. Basically, the Appellants' complaint in those two grounds is that they were denied the right to be heard. That is clear from the foregoing paragraphs in this judgment.

20. It is clear from the above that in exercising her discretion, the trial magistrate erred in law and in fact by misdirecting herself in determining an application which had infact been withdrawn and which she ought not to have considered and instead failing to consider the application which she ought to have considered. The result therefore is that the Notice of Motion dated 1st March 2018 is yet to be determined. This appeal is therefore well merited.

21. Ultimately therefore, and having considered all the issues herein, this appeal is allowed and the Court makes the following disposal orders:

    1. The appeal is allowed.

    2. The matter is remitted back to the Chief Magistrates Court Busia to hear and determine the Notice of Motion dated 1st March 2018.

    3. The Busia CM's Court Civil Case No 423 of 2011 shall be mentioned before the Chief Magistrate on 13th February 2024 for further directions as to hearing.

    4. The Respondent shall meet the costs of this appeal.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 19TH DAY OF DECEMBER 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES ON 19TH DECEMBER 2023.

BOAZ N. OLAO

JUDGE

19TH DECEMBER 2023

Judgment dated, signed and delivered on this 19th Day of December 2023 by way of electronic mail with notice to the parties.

Boaz N. Olao

Judge

19th December 2023