



REPUBLIC OF KENYA



KENYA LAW
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**Osiolo v Indete (Environment and Land Appeal 6 of 2021)
[2023] KEELC 22197 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 6 OF 2021**

E ASATI, J

DECEMBER 14, 2023

BETWEEN

SOLOMON ONG'ONDO OSIOLO APPELLANT

AND

MICHAEL ASITUWA INDETE RESPONDENT

*(Being an appeal from the ruling dated 16/4/2018 by Hon
J. A. Owiti in VIHIGA SPMC EL CASE NO.47 OF 2018)*

JUDGMENT

1. The appeal herein as is clear from the Memorandum of Appeal filed on 30th April, 2019 is against the trial court's ruling delivered on 16th April, 2018 in Vihiga PMC E & L Case No. 47 of 2018. The Ruling was in respect of a Notice of Motion application dated 11th April, 2018 filed by the Respondent seeking for orders that;
 - a. Time for execution of the eviction order of the Defendant from land parcel No. West Bunyore/ Itumbu/290 be extended
 - b. Nyaluoyo Auctioneers do enforce the eviction orders, the OCS Luanda police station do provide security and the plaintiff to meet the cost of the eviction.
2. The record shows that on 16th April, 2018 the court allowed the Notice of Motion and made orders as prayed in the application. It is that ruling of 16th April, 2018 which is the subject of this appeal.
3. The grounds of appeal as contained in the Memorandum of Appeal, are that:
 - a. The Hon. Magistrate failed in law by failing to consider that the Appellant was never served with any court proceedings.



- b. The Hon. Magistrate failed to consider that there exist pending cases between both parties in Civil Appeal No. 112 of 2017 before the High court of Kenya at Kakamega Misc App No. 114 of 2001 at Vihgia court and Civil suit at Maseno 119 of 2001.
 - c. The learned Hon. Magistrate failed to consider that the appellant had not been accorded justice by failing to hear them.
 - d. The trial Magistrate gave orders which cannot be executed.
4. A brief background to the appeal as can be gathered from the record of appeal is that the appellant was the defendant in the suit wherein he had been sued by the Respondent vide the plaint dated 15/12/2015 seeking for eviction from the suit land. The suit was heard before the trial court which found in favour of the Respondent and vide its Judgment dated 30th January 2018 gave judgment in favour of the respondent for an order of eviction of the appellant from the suit land. Costs of the suit were awarded to the Respondent. The Judgment is still intact and there is no evidence that any appeal was preferred against the Judgment.
 5. The appeal was argued by way of written submissions pursuant to directions issued on 9th March 2023. Written submissions dated 2nd June 2023 were filed on behalf of the appellant by the firm of Ben Aduol Nyanga & Co. Advocates. Counsel submitted that the appellant claims violation of his right to a fair hearing as provided for in article 50(1) of *the constitution*. That no person is to be condemned unless that person has been given prior notice of the allegation against him and a fair opportunity to be heard. Counsel relied on the case or *Pinnacle Projects Limited Vs Presbyterian Church of East Africa Ngong Parish & Another (2018)* eKLR to support the submission. Counsel submitted further that failure to afford a party the opportunity to cross-examine the witnesses availed by the other side on their testimonies strikes a fatal blow to the validity and integrity of the process.
 6. Counsel submitted that jurisdiction is everything and that if a court proceeds to hear a matter without jurisdiction the result will be nullity ab initio. Counsel relied on the case of Owners of the Motor Vessel “Lilian S” Vs Caltex Oil (Kenya) Ltd 1989 and phoenix of E.A Assurance company limited Vs S.M Thigi t/a Newspaper Service Civil Appeal No. 244 of 2010 to submit that when a claim is filed before a court devoid of jurisdiction all orders emanating from the suit are null and void. That a court cannot confer jurisdiction upon itself. That the trial court could not entertain the suit as it was beyond its pecuniary jurisdiction as provided in section 7 of the Magistrate Court’s Act 2015. That the orders given by the trial magistrate are therefore nullities.
 7. Counsel for the appellant raised two issues for determination in this appeal namely whether or not the appellant’s right to be heard was violated and whether or not the trial court had jurisdiction to hear and determine the matter.

Analysis and determination

8. As already indicated herein above, there is no appeal against the judgment. The appeal before this court is against a ruling of the trial court extending the time for execution of the judgement. The record shows that on 16/4/2018 when the order appeal against was made, the appellant had been served and was present in court. It was an application certified urgent and the court noted that the appellant had been given a chance to respond to the application in vain. The court therefore proceeded to allow the application.
9. A right or opportunity to be heard as concerns a Respondent in an application comprises being served with the application having the liberty to file response thereto and to attend court for the hearing and



be heard. In this case the Appellant has not demonstrated how the trial court failed to give him an opportunity to canvass his case.

10. I find that the grounds of appeal presented have not been proved. The appeal is hereby dismissed. Costs to the Respondent.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 14TH DAY OF DECEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi-Court Assistant.

Willie advocate for the Appellant.

No appearance for the Respondent.

