



Duba v Catholic Diocese of Marsabit & 3 others (Environment and Land Appeal E005 of 2022) [2023] KEELC 22249 (KLR) (11 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL E005 OF 2022
PM NJOROGE, J
DECEMBER 11, 2023**

BETWEEN

HASSAN DABASO DUBA APPELLANT

AND

THE CATHOLIC DIOCESE OF MARSABIT 1ST RESPONDENT

GALMA GALGALO JARSO 2ND RESPONDENT

SOLE ALI HALAKE 3RD RESPONDENT

MURKU HUQA 4TH RESPONDENT

(An Appeal from the Ruling of the Honourable Senior Resident Magistrate (Hon. Mbayaki Wafula) in Marsabit CMCC 1 OF 2013, delivered on 4th July, 2021)

JUDGMENT

1. The Memorandum of Appeal in this Appeal reads as follows:

Memorandum Of Appeal

Hassan Dabaso Duba, the Appellant herein, being aggrieved by the Judgment of the Honourable Senior Resident Magistrate, delivered on the 4th of July, 2021, Hereby appeal to this Honourable Court against part of the said Judgment and sets out herein below his grounds of appeal amongst other grounds.

1. That the Learned Senior Resident Magistrate erred in law and in fact in not considering prayer No. 4 of the appellant's application dated 29th January, 2013 whereas the appellant had offered sufficient cause to warrant the court to give orders for monetary compensation to the Plaintiff/Appellant for loss of his parcel of land.



2. That the Learned Senior Resident Magistrate erred in law and in fact for failing to exercise her discretion judiciously, thereby neglecting prayer No. 4 of the Appellant's application dated 29th January, 2013.
3. That the Learned Senior Resident Magistrate erred in law and in fact for failing to find and/or for reasons that the Learned Senior Resident Magistrate failed to find that the Plaintiff/Appellant would suffer injustice and/or prejudice for absolving the 1st Defendant/Respondent from Liberty.
4. That the Learned Senior Resident Magistrate erred in law and fact by disregarding all the evidence that was adduced by the appellant as proof that the 1st Defendant heavily contributed to the case at hand.
5. That the Learned Senior Resident Magistrate erred in law and fact in arriving at a judgment that was against the weight of evidence on record and particularly on the fact that 1st Defendant was absolved from liberty when he in fact heavily contributed to the case.
6. That the Learned Senior Resident Magistrate erred in law and fact to forth (sic) by the Appellant during hearing, to be considered for granting of monetary compensation of the suit land and finding the 1st Defendant liable.
7. That the decision demonstrated partially and bias.

It Is Proposed To Ask This Court For Orders

- a. That this Honourable Court be pleased to allow this Appeal.
- b. That this Honourable Court be pleased to reverse and set aside part of the Judgment of Marsabit CMCC No. 1 of 2013 delivered on the 14th July, 2021 and substitute it with a decision of this court.
- c. That the costs of this appeal be awarded to the appellant.

Dated At Nakuru On This 30th Day Of May, 2021

2. The court had ordered that the appeal be canvassed by way of Written Submission. Only the appellant filed submissions.

The respondent despite having been accorded ample opportunity did not file submissions.

3. A conspectus is that the trial Magistrate failed to consider prayer 4 in his plaint and by so doing caused him injustice. Indeed in his submissions he argues that by failing to consider prayer 4 in the Plaint, the trial Magistrate evinced partiality and bias. The Appellant quoted the case of Al-malik Brothers Motors Limited Versus Jackline Kemunto Ondari And Another, Kisii Hight Court No. 120 Of 2006 as follows:

“I have considered the above submissions with great respect to the trial (Magistrate) he did not comply with the mandatory provisions of Order XX Rule 4 of the Civil Procedures Rules (now repealed in his ruling).

4. The Appellant means that all prayers in the plaint should have been considered by the trial Magistrate.



5. I find it necessary to reproduce the prayer in the Appellant's Plea at the lower court. The orders sought are;
 - a. A declaration that all that parcel of land situated within Kubi Basaga Sub-Location, Dirib Gombo Location, Marsabit County measuring approximately 5 acres belongs to the plaintiff exclusively and that the defendant had illegally and unlawfully entered the same.
 - b. An order directing the defendant to forthwith vacate all that parcel of land situated within Kubi Basaga Sub-Location, Dirib Gombo location of Marsabit measuring approximately five (5) acres belonging to the Plaintiff.
 - c. An order of permanent injunction do issue restraining the defendant whether by itself or through its registered trustees, employees, agents, servants or anyone else acting at its behest from entering into or engaging in any extraction or construction works or act on that parcel of land situated in Kubi Basaga Sub Location, Dirib Gombo Location of Marsabit County measuring approximately five (5) belonging to the Plaintiff.
 - d. In the alternative, an order do issue compelling the defendant to compensate the Plaintiff for the loss of his parcel of land. (This is prayer No. 4 in the Plea).
6. By juxtaposing the prayers in the plea and the orders issued by the trial court, we are able to get a quick answer.
7. Prayer (4) in the Plea clearly indicates that it was in the alternative. Having granted the first three orders to the Appellant, it would have been otiose for the trial Magistrate to grant the alternative prayer. He would have only granted the prayer, if he considered it fit to grant it, if the other prayers failed.
8. Parties must be bound by their pleadings. The alternative prayer sought would have been tenable had the other prayers failed and even then if the trial court had found merit in the prayer.
9. In the circumstances, I issue the following orders:-
 - a. This appeal is dismissed.
 - b. As the Respondent did not file submissions and thereby failed to meaningfully participate in the proceedings, I issue /No Order As To Costs.

DELIVERED IN OPEN COURT AT ISIOLO THIS 11TH DAY OF DECEMBER, 2023.

HON. JUSTICE P.M NJOROGE

JUDGE

In The Presence Of:

Court Assistant: Balozi/Rahma

