



**Sagara v Wafula (Environment and Land Appeal 4 of 2019)
[2023] KEELC 22009 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22009 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 4 OF 2019
FO NYAGAKA, J
DECEMBER 5, 2023**

BETWEEN

PAUL AMISI SAGARA APPELLANT

AND

JOEL WAFULA RESPONDENT

(An Appeal arising out of the Ruling or Order of CMCC Land Case No. 47 of 2019 at Kitale by Hon. V. Karanja on 10/02/2021 between Paul Amisi Sagara (plaintiff/appellant) -vs- Joel Wafula (Defendant/Respondent))

JUDGMENT

Background

1. Through the Complaint dated 02/04/2019, Paul Amisi Sagara, the Appellant herein, instituted a suit in the subordinate court as Chief Magistrate Court Land Case No. 47/2019 (hereinafter ‘The Lower Court Case’). It was against Joel Wafula, Ebrahim Ambwere and Simon Ludeki as 1st, 2nd and 3rd Defendants respectively. It was in regard to ownership of Trans-Nzoia/Liyavo/245 (hereinafter ‘The suit land’).
2. Joel Wafula, the 1st Defendant in the Lower Court Case, is the Respondent in this Appeal.
3. A synopsis of the events leading to the dispute in the Lower Court and subsequently before this Court will suffice.
4. Before the Lower Court, the Appellant pleaded that the suit land was sold to him by the 2nd Defendant who, unbeknown to him, was not the original registered proprietor of the said land. The suit land belonged to the 3rd Defendant who was tenant of the 2nd Defendant. He had given the Title Deed of the suit land to the 2nd Defendant as security for payment of defaulted rent arrears.



5. The Appellant pleaded that he purchased the suit land from the 2nd Defendant and upon requesting for the Title Deed, it dawned on him that it did not bear the names of the 2nd Defendant. The 2nd Defendant, however, informed him of what had transpired that he came into ownership of the suit land. He assured him that he was working on transfer process.
6. It is the Appellant's case that upon settling his family on the suit land, the 1st Defendant emerged with title to the land and threatened to evict him. Apparently, the 3rd Defendant had managed to pay off his rent arrears to the 2nd Defendant, had his title to the suit land handed back to him and consequently sold the suit land to the 1st Defendant.
7. Disillusioned by the turn of events, the Appellant instituted the Lower Court Case where he sought a permanent injunction against the 1st Defendant from evicting him from the suit land, a declaration that he was entitled to remain in the said land and that in the alternative, he be refunded the purchase price inclusive of the developments thereon.
8. Before the Lower Court Case could be heard, the 1st Defendant filed the Notice of Motion Application dated 17/04/2019 (hereinafter 'The 1st Defendant's Application'). By it he sought that the Plaint be struck out for, among other reasons, that the Plaintiff had no reasonable cause of action against him.
9. It was his case that he was the absolute, indefeasible owner of the suit land and not a necessary party since there was no contract, agreement or transaction, between him or any of the Defendants with the Plaintiff for the deposition of an interest in land.
10. In its Ruling of 31/10/2019, the lower Court allowed the Application. Accordingly, it struck out the Appellant's case as against the 1st Defendant.
11. The Appellant was disgruntled. He filed the Notice of Motion Application dated 19/02/2020 (hereinafter 'The Review Application') where he sought to set aside, review and or vary the Ruling of the Court dismissing his claim against 1st Defendant.
12. In the Review Application, he pleaded that the 1st Defendant's Application was based on falsehood and misleading information. It was his case that he had since discovered new evidence indicating that the 3rd Defendant never sold the suit land to the 1st Defendant. That he was the one who had purchased it first. It, therefore, was his case that the manner in which 1st Defendant, Respondent herein, acquired his title was questionable and as such, the issues in the dispute could only be determined if all the parties participated in the dispute.
13. The Respondent opposed the Appellant's Application stating, among other reasons, that he had not met the conditions for review.
14. Upon considering the Appellant's Application, the Trial Court, in its Ruling of 10/02/2021 found that the discovery of new evidence claimed to have been made did not in any way remedy the Appellants non-compliance with mandatory provisions of Section 3(3) of the *Law of Contract Act*. The Court observed that the Appellant's remedy lied on an appeal as opposed to a review. It, thereby, dismissed the Appellants Application for lack of merit.
15. The foregoing turn of events yielded the instant Appeal. Through the Memorandum of Appeal dated 15/02/2021 the Appellant sought to challenge the decision of the lower court on the following grounds;
 - a. The learned trial magistrate erred in law by exercising her discretion injudiciously by failing to allow the Application for Review.



- b. The learned trial magistrate erred in fact in failing to take into account new evidence in the form of statements annexed in the appellant's affidavit in its motion for review.
 - c. The learned magistrate erred by misdirecting herself in the evidence and facts pleaded thereby arriving at a wrong decision.
 - d. The learned magistrate erred in law and fact by failing to take into consideration the facts in issue and in doing so arrived at a wrong decision.
16. The Appellant urged his case further through written submissions dated 13/06/2023. The Respondent opposed the Appeal through written submissions dated 03/07/2023.
17. Having carefully appreciated the arguments advanced in the Memorandum of Appeal and in the parties' written submissions, the only issue that lends itself for determination is; whether the appeal is merited.

Analysis and Determination

18. Before delving into the substance of the Appeal, this Court must restate its duty as a first appellate Court.
19. This being the appellant's first appeal, this Court's role was settled in the Case of Okemo -vs- Republic (1977) EALR 32 and further in the case of Mark Oiruri Mose -vs- R [2013] eKLR where it was stated that the first appellate court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusions. But in an appeal regarding the exercise of discretion by a trial court, the appellate court should not interfere with the discretion of the trial court unless it is shown that the judge or court misdirected himself in some matter thereby arriving at a wrong decision or he was clearly wrong and occasioned injustice.
20. Thus, in Kenya Revenue Authority & 2 Others V Darasa Investments Limited [2018] Eklr and in Coffee Board Of Kenya Vs. Thika Coffee Mills Limited & 2 Others [2014] EKLR the Court held that view. It further held that a decision on judicial review is a discretionary one. I am of the view that one on review of an order or decree under Order 45 of the Civil Procedure Rules too is.
21. The instant Appeal is predominantly anchored on the omission by the Trial Court to abide by Order 45 Rule 1 and 2 of the Civil Procedure Rules in its Ruling.
22. The Appellant contended that despite having landed on new evidence and material that entitled him to have the trial Court reinstate the Respondent to the suit, it ignored it thereby leaving out a necessary party.
23. Order 45 of the Civil Procedure Rules provide as follows;

“ Application for review of decree or order

- (1) Any person considering himself aggrieved-
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when



the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

24. Pursuant to the foregoing provision, the Appellant argued that he annexed in his Application for Review witness statements by the 2nd and 3rd Defendant.
25. The Appellant argued that whereas the Respondent herein had been struck out of the lower court case on the allegation that he bought the suit land from the 3rd Defendant and as such was not party to the dispute between the Appellant and the 2nd Defendant, he pointed out to the lower Court that the 3rd Defendant in his statement was categorical that he did not dispose his land to the 1st Defendant.
26. The Appellant further pointed out to the Trial Court that it made a finding that there was no contract of sale at the initial stage yet the 2nd Defendant in his statement admitted that indeed there was an agreement. He referred the Court to the Statement of the 2nd Defendant.
27. I have keenly perused the Record of Appeal. The Appellant herein, in a quest to have the 1st Defendant reinstated in the suit attached to his Application the Statement of Simon Ludeki recorded at Directorate of Criminal Investigations, Endebess on 24/11/2018.
28. The objective of the statement is to challenge the allegation by the Respondent that he bought the suit land from the 3rd Respondent.
29. I will reproduce the relevant excerpts. The 3rd Defendant stated as follows:

...the title deed was left at Amena Amendi Advocates up to date. I have not paid the debts for Ambwere and my title deed is still at Amena Amendi Advocates.

According to me, I have not sell (sic) the land to anybody else and the title deed still bear (sic) my name. I do not know somebody like Joel Wafula. To my knowledge I do not know where Wafula got my title deed because it still under Amena Amendi Advocates. Today 24th day November 2018, I recorded the statement with officer from DCI Endebess at my home. That is all I wish to state.
30. The significance of the 3rd Defendant’s statement is profound. He makes it very clear that he never disposed his land to the Respondent herein.
31. The Review Application did not stop at that. The Appellant further annexed the Statement of the 3rd Defendant’s wife, Ms. Mercy Ludeki. Her statement reads as follows;

“...I wish to state that when were working in Nairobi, we used to live in a rented house belonging to Mr. Ebrahim Ambwere. The rent arrears accumulated for abut two years and were unable to pay. My husband requested to him to sell out land in Kiyaro in Trans-Nzoia to recover his money. He sold it to Mr. Hamisi Paui.

In 2016, my husband sold the land to Mr. Wafula and a written agreement was made to that effect. Wafula was family friend. He used to visit us frequently.”
32. In his Review Application, the Appellant herein implored the learned Trial Magistrate to make a finding that the statement constituted new evidence and justified the reinstatement of the 1st



Defendant in the suit. Further, the Review Application made reference Statement of the 2nd Defendant where he admitted having transacted in the suit land with the Appellant herein.

33. The 2nd Defendant acknowledged receipt of money from the Appellant herein. For avoidance of doubt, a portion of the statement reads as follows:

“...Based on the foregoing authority, a buyer to the subject parcel of land by the name Paul Amisi Sagara was found and who also happened to be the initial lessee of the said land and whom we entered into an agreement, whereas he paid to me the sum of Kenya Shillings Eight Hundred Thousand (KShs.800,000/-) only in instalments until payment in full, I contacted Mr. Ludeki with whom we arranged for a meeting together with the buyer of the Land Paul Amisi Sagara whereas I introduced and handed over the said Mr. Sagara to Mr. Ludeki for purposes of them charting the way forward as regards to processing of the Title Deed for the respective parcel of land in favour of the buyer”.

34. In his closing remarks, the 2nd Defendant stated as follows:

“...To the best of my knowledge and as far as I am concerned upon receipt of the payments due to myself from Mr. Sagara and after physically handing him over to the registered owner of the said land, who is Mr. Ludeki, then my duties were deemed to have been discharged to completion.”

35. The totality of the foregoing evidence tendered in the Review Application is that it points heavily to a non-linear transaction in the suit land. There was a multiplicity of transactions.

36. The Statement of the 3rd Defendant that he did not sell the suit land to the 1st Defendant ought to have alarmed the lower Court on how the 1st Defendant came into ownership, and made it to inquire into whether or not fraud was involved in the process of acquisition of the ownership.

37. But in her statement before the Directorate of Criminal Investigations, the 3rd Defendant’s wife conceded that the suit land was sold by the 2nd Defendant to the Appellant herein to recover his rent arrears. Despite the foregoing, she, in contradiction to her husband’s statement, stated that in the year 2016, he (the 3rd Defendant) sold the land to the 1st Defendant.

38. It is apparent that ownership of the suit land is in contest between the Appellant and the 1st Defendant, a party I fault the lower court for preliminarily striking out his presence in the suit. The new evidence gathered and introduced by the Appellant in the Review Application was compelling and in tandem with Order 45 Rule 1 of the Civil Procedure Rules.

39. It was incumbent upon the Trial Court, in the interest of justice, to accord all the parties the opportunity to be heard and the veracity of their claim as to the ownership of the suit land be subjected to the intrigues of cross-examination. That way, justice would be served conclusively and expeditiously, a position Court are invited to uphold by the dictates of the Objective of the *Civil Procedure Act* provided for in Section 1A (1)(2), 1B(1)(a), (b), (c) and (d) as follows:

“ 1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-
- (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties;
 - (e) the use of suitable technology”.

40. A comprehensive discussion of the essence of Overriding Objective *Civil Procedure Act* was aptly captured by the Court of Appeal in Civil Appeal (Application) 228 of 2013, Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR when the learned Judges observed as follows:

“The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the case of Kariuki (Supra); that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepak Manlal Kamani and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009); that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004); that the overriding objective principle is intended to re-energize the process of the court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are O2 compliant (see the case of Hunter Trading Company Limited versus ELF Oil Kenya Limited, Civil Application No. Nai 6 of 2010 (UR3 (2010)); that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR). And, lastly, that the “O2” principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case



of Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR)62 of 2010”.

41. Taking guidance from Court of Appeal decision, this Court finds that the Trial Court erred. It was duty bound to ensure that the outcome of Application would facilitate the just and expeditious, proportionate and cost-effective disposal of the suit by ensuring that all the necessary parties were involved.
42. In the end, this Court finds and hereby holds that the Trial Court fell into error in rejecting the Appellant’s Application for review. It was a necessary party in the lower court case.
43. In the premises the following final Orders hereby issue:
 - a. The Ruling of the Lower Court delivered on 10th February 2021 is hereby set aside insofar as it sought to exclude the participation of the Respondent herein in Kitale Chief Magistrates Land Case No. 47 of 2019.
 - b. An Order hereby issues reinstating as the 1st Defendant one Joel Wafula, the Respondent herein, in Kitale Chief Magistrates Land Case No. 47 of 2019.
 - c. Costs of the Application in Kitale CM Land Case No. 47 of 2019 to be borne by the Respondent.
 - d. The costs of the instant appeal to be to the Appellant.
44. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE ELECTRONIC MAIL THIS 5TH DECEMBER, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE

ELC KITALE

