



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC APPEAL NO. 27 OF 2021

(FORMERLY MIGORI ELC APPEAL NO. 2 OF 2020)

OSCAR OTIENO ODONGO.....APPELLANT

VERSUS

EDITH PAYE.....1ST RESPONDENT

STEPHEN PAYE.....2ND RESPONDENT

GEORGE OMOLO ODONGO.....3RD RESPONDENT

MOCO AUCTIONEERS.....4TH RESPONDENT

SAMWEL NYAUKE T/A NYAUKE AND COMPANY ADVOCATES....5TH RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Nicodemus N. Moseti (SRM))

dated 18th day of December 2019, in the original MBITA ELC NO. 16 OF 2019)

JUDGMENT

1. This is an appeal from the ruling of the learned trial magistrate (Hon. Nicodemus Moseti, SRM) delivered on 18th December 2019 in Mbita Senior Resident Magistrate's Court Environment and Land case number 16 of 2019 where the court reasoned, inter alia;

“The suit herein raises weighty issues, the issues will be fairly determined in a full hearing. On the 2nd issues, I take note that the LR number Kasgunga/Kamreri/4241 (the suit property) has been advertised for the purposes of putting the same for auction. In as much as 4th defendant has legitimate right to realise his costs, the suit will be defeated if the property in dispute is transferred to a 3rd party. The balance of convenience therefore tilts in favour of maintaining the obtaining status quo.”

2. In that regard, the learned trial magistrate was of the considered view that there was no merit in the following three (3) applications namely:

a) The 5th respondent/interested party's application dated 8th October 2019 to the effect that the name of the 5th respondent herein be expunged as a party to the suit and or proceedings and costs of the application be provided for. The application is fortified by the 5th respondent's affidavit of even date and annexed to the application. He deposed, inter alia, that the 1st respondent has never been a client of the 5th respondent. That 1st respondent is trying to conceal material facts from the court. That therefore, the 5th respondent's application be allowed and the entire suit mounted by the 1st respondent, be dismissed with costs.

b) That the 4th defendant/appellant's application dated 28th October 2019 is seeking that the 1st respondent's suit mounted by way of a plaint dated 26th September 2019 and all pleadings pertaining thereto, be struck out, among others. The application is anchored on the annexed supporting affidavit of the appellant herein. The appellant asserted that pursuant to the consent orders of 14th September 2016, the suit property was offered as security for costs. That the respondents are attempting to frustrate the execution of the valid consent orders hence urged the court to allow the application.

c) The plaintiff/1st respondent's application dated 26th September 2019 to the effect that pending the hearing and determination of the main suit, the honourable court be pleased to issue an order restraining the defendant/respondent by themselves, servants, agents and/or legal representatives from selling by auction, transferring, alienating, evicting tenants, interfering with possession of occupation or dealing in any other manner with the plaintiff's matrimonial property namely title number for the suit property situated in Homa-Bay County, be allowed. The application is reinforced by the annexed supporting affidavit of the 1st respondent sworn on even date. She claimed that she deposited her title deed for the suit property as a security for costs in favour of the 2nd respondent out of pity. She also stated that the suit property was acquired during the subsistence of her marriage with the 2nd respondent. The appellant, Oscar Otieno Odongo is represented by the firm of O.M Otieno and Company Advocates.

3. The 1st respondent, Edith Paye is represented by the firm of J.Okerosi Ochako and Company Advocates.
4. The 5th respondent is Mr Samwel Nyauke T/A Nyauke and Company Advocates.
5. The 2nd, 3rd and 4th respondents are not represented in this appeal.
6. Originally, the appeal was lodged at Migori Environment and Land Court. On 5th October 2021, the same was transferred to this court, upon it's establishment, for hearing and determination.
7. It must be appreciated that this is the first appeal in the matter from the trial court. Thus, it is the duty of this court to analyze and evaluate the evidence on record afresh and reach it's own independent decision as held in the case of **PIL Kenya Limited-vs-Oppong (2009) KLR 442**.
8. It is also important to note that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they are based on no evidence at all, or on a misapprehension of the same, or the court is shown demonstrably to have acted on wrong principles in reaching at the findings; see the Court of Appeal decision in the case of **Mwanasokoni-vs-Kenya Bus Services Limited (1982-88) 1 KAR 278**.
9. The appellant was the 4th Respondent/defendant before the trial court. In summary, his case is as stated in paragraph 2 (b) hereinabove.
10. The 1st, 2nd and 5th respondents herein were the applicant/plaintiff, 1st respondent/defendant and interested party respectively before the trial court. The gist of their case is as captured in their respective applications and as set out in paragraph 2 (a) and (c) hereinabove.
11. The trial court heard the three (3) applications dated 8th October 2019, 28th October 2019 and 26th September 2019 and arrived at the findings as per paragraphs 1 and 2 hereinabove. Moreover, the court ordered and directed that the temporary injunction-

“...shall be in force subject to the plaintiff is hereby issued but the same shall be in force subject to the plaintiff prosecuting this case within a period of 30 days. The orders shall be extended only in exceptional circumstances.”

12. Being aggrieved by the decision of the trial court, the Appellant commenced this appeal by way of the memorandum of appeal dated 14th January 2020. The same is founded on grounds 1 to 8 set out on it's face namely:
 - i. That the learned Trial Magistrate erred in law and fact when the same failed to appreciate and/or hold that the court was devoid of jurisdiction to try MBITA ELC NO 16 OF 2019, which was otherwise an appeal against the Court order of co-ordinate jurisdiction, through the backdoor, disguised as a new suit, vide MBITA SRMCC MISC. APPLICATION NO. 1 OF 2015.
 - ii. The Learned Trial Magistrate erred in law and in fact, when the same failed to hold that the suit as mounted was challenging the execution of decision of a court of competent and co-ordinate Jurisdiction, vide MBITA SRMCC MISC APPLICATIONS NO. 1,2,3 & 4 ALL OF 2015, and the same was statutorily barred by the Provisions of Section 34 of the Civil Procedure Act and/or legally untenable where no review of appeal had successfully had been mounted.
 - iii. That at any rate, the 1st Respondent failed to demonstrate a case for grant of injunctive orders and the court acted in error in allowing the application dated the 26th day of September 2019.
 - iv. That the Learned Trial Magistrate erred in law in dismissing the Appellant's application dated the 28th day of October 2019.
 - v. That the learned trail Magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.
 - vi. The learned trial Magistrate erred when the same failed to hold that the suit as mounted was brought with unclean hands and the same was equally an abuse of the court process.
 - vii. The learned Trial Magistrate fundamentally erred in law when the same failed to consider serious issues raised by the Appellant in his written submissions dated the 19th day of November 2019.
 - viii. The learned trial Magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination of

liability.

13. On that account, the Appellant has sought the orders infra;

- a) The Ruling and/or Order of the Learned Trial Magistrate dated 18th day of December 2019, be set aside, varied and/or quashed and the 1st Respondent's Notice of Motion Application dated the 26th day of September 2019, be dismissed with costs to the Appellant.
- b) That the Honourable Court be pleased to allow the Appellant's notice of motion application dated the 28th day of October 2019, as prayed.
- c) Costs of the Appeal be borne by the 1st Respondent.
- d) Any such and/or further Orders that the Honourable Court shall deem just and expedient in the circumstances.

14. This appeal was admitted on 7th October 2020. The same was heard by way of written submissions further to the orders of the court made on 4th February 2021. The orders were extended on 24th May 2021 and further extended on 30th November 2021 in the spirit of **Articles 48, 50 (1) and 25 (c) of the Constitution of Kenya, 2010**.

15. Additionally, the extension of the orders was done in line with the case of **Philip Keipto Chemwolo and another-vs-Augustine Kubende (1986) eKLR**, where it was held that a party should not suffer the penalty of not having his or her case determined on its merits. That a party should be let in to defend; see also **James Kanyũta Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR**.

16. On 15th November 2021, learned counsel for the appellant filed submissions of even date giving the background of the matter, the trial court's directions on the three applications and the ruling thereon. Counsel framed and analyzed the eight (8) grounds of appeal as the issues for determination in favour of the appellant. Counsel termed the appeal meritorious and urged the court to allow it with costs to be borne by the respondents.

17. To buttress the submissions, counsel made reference to **section 34 of the Civil Procedure Act Chapter 21 Laws of Kenya** which prohibits filing of a new and distinct suit concerning issues arising from the execution of a decree. Further reference was made to authorities including **Kenya Anti-Corruption Commission-vs-Davy Kiprotich Koech and another (2014) eKLR** and **Samwel Ayienda Mokua-vs-Tinga Company Limited (2014) eKLR**.

18. The Respondents were duly served with the Appellant's submissions as per the Affidavit of Service sworn on 29th November 2021 by Mr. Ouma Maurice Otieno, learned counsel for the Appellant and filed herein on 30th November 2021. Therefore, they were made aware of the matter and had the right to appear and argue the appeal or decline to do so as noted in the case of **Ogada-vs-Mollin (2009) KLR 620**.

19. Be that as it may, the Respondents failed to file any submissions in this appeal.

20. In that regard, I am of the considered view that the issues for determination are grounds 1 to 8 as pointed out at paragraphs 14 and 18 hereinabove and are compressed to whether-

- a) The trial court was devoid of jurisdiction as regards the suit.
- b) The suit before the trial court was statute barred by dint of section 34 Civil Procedure Act Chapter 21 Laws of Kenya.
- c) Depending on the outcome in issues (a) and (b) above, are grounds 3, 4, 5, 6, 7, 8 and 9 set out on the face of the memorandum of appeal, tenable?

21. In **Black's Law Dictionary 10th Edition at page 980**, the term "Jurisdiction" means;

'A court's power to decide a case or issue a decree'

22. Similarly, **Halsbury's Laws of England (4th Edition) Volume 9 at page 350** defines "Jurisdiction" as;

".....the authority which a court has to decide matters that are litigated before it or taken cognizance of matters presented in a formal way for decision....."

23. In the case of **Samwel Kamau Macharia and another-vs-Kenya Commercial Bank Limited and others (2012) eKLR**, it was held-

"A court's jurisdiction flows from either the Constitution or legislation or both....."

24. The appellant contended that the trial court had no jurisdiction to entertain the suit in view of the consent orders dated 14th September

2016 of a magistrate (Hon. Samson Ongeri, PM) of co-ordinate jurisdiction over the same matter in Mbita SRMCC Misc Application Nos. 1, 2, 3 and 4 of 2015. That the said orders remain in force as they have not been vacated by review or appeal.

25. The consent orders read;

- i. *“He shall pay Kshs. 300,000/- consolidated fees in Misc. 1, 2, 3 and 4 all of 2015.*
- ii. *Such payment shall be rendered on the Auctioneer within a period of 30 days from today.*
- iii. *The defendant/applicant has deposited in this court as security for costs, a title deed for Stephen Ogola Payi, being parcel No. Kasgunga/Kamreti/4241.*
- iv. *In default of payment, the Auctioneer shall be at liberty to execute against the title aforesaid.*
- v. *The Owner of the title will sign to bind against himself”.*

26. After the consent orders, the 2nd and 3rd respondents mounted an application dated 1st February 2017 seeking to review the same orders. By the court’s ruling delivered on 31st May 2017, the application was dismissed.

27. Being aggrieved by the trial court’s ruling, the 2nd and 3rd respondents lodged an appeal namely Homa Bay HCCA No. 29 of 2017. Notably, on 2nd October 2017, the court granted them a stay of execution of the orders of the trial court pending the hearing and determination of the appeal.

28. Since the 2nd, 3rd and 5th respondents failed to prosecute the appeal, the appellant applied to the High Court to have the appeal dismissed. By a ruling delivered on 15th July 2019, the High Court dismissed the appeal.

29. It is thus, the lamentation of the appellant that the 2nd and 3rd respondents with the aid of their legal counsel have frustrated the realization of the amount decreed to him by the court 15th May 2015 when Mbita SRMCC Miscellaneous Applications Nos. 1, 2, 3 and 4 were filed. That they have tried to evade and impede the execution of the decree after they entered into a consent order which they knew they would not honour.

30. So, have the respondents applied for review or setting aside or appealed from consent orders successfully? Quite clearly, the answer thereto is in the negative.

31. It is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract; see **Brooke Bond Liebeg (T) Limited-vs-Mallya (1975) EA 266** and **Flora Wasike-vs-Destimo Wamboko (1988) KLR 429**

32. It is noteworthy that parties are bound by the terms of their contract unless coercion, fraud or undue influence in regards to the terms of the clause; see the case of **National Bank of Kenya Limited-vs-Pipe Plastic Samkolit Limited and another (2002) EA 503**

33. It was the contention of the appellant that the suit property had been advanced as security as disclosed in the consent orders. That realization of the security had matured. Thus, the new suit was prohibited by express provision of section **34 of the Civil Procedure Act Chapter 21 Laws of Kenya** which reads;

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not a separate suit.”

34. On that score, learned counsel for the appellant submitted as follows;

“...and thus the court (did) err in accepting invitation to preside over an attempt to overturn its own decision vide another suit.”

35. In conclusion, counsel urged that the appeal be allowed as prayed. That costs incurred before the trial court and this court to be borne by the Respondents.

36. In the case of **Owners of Motor Vessel Lillian ‘S’-vs-Caltex Oil Kenya Limited (1989) KLR1**, the late Nyarangi, JA, remarked;

‘Jurisdiction is everything. Without it a court has no power to take one more step....’juris

37. In **Republic-vs-Karisa Chengo and 2 others (2017) eKLR**, it was held in part that;

“Lack of jurisdictions renders a court’s decision void as opposed to it being merely voidable .When an act is void, it is a nullity ab initio. It cannot found any legal proceedings.....”

38. To that end, I find that the present dispute concerns the execution of decree of the trial court issued on 14th September 2016 by a

magistrate of coordinate jurisdiction in Mbita SRM Misc. Application Nos.1, 2, 3 and 4 all of 2015. On that strength, the Hon. learned trial magistrate was devoid of jurisdiction over the suit namely, Mbita SRMCC No. 16 of 2019 when he delivered the impugned ruling in this matter. The suit is also statute barred by virtue of **section 34(1)** (supra). Therefore, grounds 3 to 8 of the appeal also cannot hold as the appeal must fail.

39. Wherefore, this appeal mounted by way of a memorandum of appeal dated 14th January 2020, is hereby allowed as per orders (a), (b) and (c) proposed therein and as set out at paragraph 15 hereinabove.

DATED AND DELIVERED AT HOMA BAY THIS 25TH JANUARY 2022

G M A ONG'ONDO

JUDGE

In the presence of:

I) MR. H. BUNDE HOLDING BRIEF FOR O.M OTIENO LEARNED COUNSEL FOR THE APPLICANT.

II) MS. MERCY OTIENO HOLDING BRIEF FOR OBACH LEARNED COUNSEL FOR 1ST RESPONDENT.

III) OKELLO, COURT ASSISTANT.

G M A ONG'ONDO

JUDGE