



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC APPEAL NO. E001 OF 2022

MOHAMUD ALI OSMAN.....APPELLANT/APPLICANT

VERSUS

HABIBA ALI OSMAN.....1ST RESPONDENT

ISMAIL ALI OSMAN.....2ND RESPONDENT

NURIA ALI OSMAN.....3RD RESPONDENT

GENYA KHALIF ADAN.....4TH RESPONDENT

RULING

1. The appellant herein filed its memorandum of Appeal on 28th January 2022 seeking to set aside the Orders issued by the Trial Court on 20th January 2022 and urging this court to make a finding that the trial court suit ought to be dismissed for want of pecuniary jurisdiction.
2. The appeal is based on the following grounds;
 - a. That the trial court erred in law in entertaining a matter in which it lacked pecuniary jurisdiction.
 - b. That the trial court erred in law by disregarding the doctrine of the sanctity of title where the state guarantees the indefeasibility of a registered title, the court erred by issuing exparte Orders against a party which held such title.
 - c. That the entire suit is incompetent, the cause of action is based on adverse possession and should have been brought by way of Originating Summons and not a plaint.
3. The appellant also filed a Notice of Motion dated 28th January 2022 seeking the following Orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That the Honourable Court be pleased to stay the proceedings in the Chief Magistrate Court Land Case Number 1 of 2022 pending the Hearing and determination of Appeal.
 - e. That the Honourable Court be pleased to grant any other Orders it deems fit and just in the premises.
4. The application was supported by the sworn affidavit of **Mohamud Ali Osman**, the Appellant herein who averred that the trial court issued an Order dated 20th January 2022 restraining himself from accessing and dealing in any way with all the property known as Garissa Town Block 1/81 in the first instance.
5. That the Order is unjust as he has a lawful claim over the suit property and he should have been accorded an opportunity to be heard. That he is the registered owner of all that property known as Garissa Town Block 1/81 which he has held the title since 1990. The same was gifted to him by his father, the Late Ali Osman who died on 11th November 2019. A Succession petition was filed thereafter in the Kadhi's Court

and the estate was distributed amongst the beneficiaries.

6. He averred that his co-beneficiaries have begun coveting his properties and demanded a share. They filed an application alleging the suit formed part of the estate. He has since challenged the application and the same is pending before the Kadhi's Court.

7. He denied that he has sought to evict the applicants from the suit premises or had the intention to dispose of the property. That the suit premises is valued at Kshs. 40,000,000/= hence exceeding the pecuniary jurisdiction of the trial court. That the Respondent's claim of adverse possession is misconceived. That the Respondents will not suffer any prejudice if the ex parte Orders are set aside.

8. The Respondents filed a Preliminary Objection to the application and appeal raising the following grounds;

a. That this Honourable Court has no jurisdiction to entertain the application and Appeal by virtue of Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya & Order 40 Rule 7 of the Civil Procedure Rules Cap 21 Laws of Kenya, 2010.

b. That the Plaintiff's Notice of Motion and Appeal be struck out for being premature, defective, incompetent and an abuse of the court process.

9. On 9/2/2022, the court directed the parties to canvass the application through written submissions. The applicant filed its list of authorities citing the following cases; **Housing Finance Company of Kenya Limited V Brick & Mortor Holdings Limited [2020] eKLR, Auni Bhalji & 4 Others v Chief Magistrate, Milimani Law Courts & 2 Others [2017] eKLR, Primrose Management Limited v Chairman of Business Premises Rent Tribunal, Nairobi & Another [2015] eKLR.**

10. The Respondent filed its written submissions on 15/2/2022 submitting that the appeal herein is incompetent. That the provisions of Order 40 Rule 7 of the Civil Procedure Rules remedy a party dissatisfied by an ex parte Order to apply to the same court to either discharge, vary or set aside the Order. That the application relies on the provisions of Order 43 Rule 1 (u) of the Civil Procedure Rules which does not provide for appeals from ex parte Orders. The Respondent relied on the following authorities i.e. **Paul Mwangunya v Abdulaziz Ahmed [2018] eKLR, Kirema M'Arimba v Joseph Kajuki [2014] eKLR, Margaret Kanini & 6 Others v Alice Muthoni [2015] eKLR, Primrose Management Limited v Chairman of the Business Premises Rent Tribunal Nairobi & Another**

Analysis and Determination

11. I have taken consideration to the appeal, notice of motion and Preliminary Objection. The main issue for determination are **(a) Whether the appeal and subsequent application filed are competent? (b) if (a) is in the affirmative Whether the appellant warrants the Orders sought?**

(a) Whether the appeal and subsequent application filed are competent?

12. Section 75 of the Civil Procedure Act provides as follows;

75. Orders from which appeal lies

(1) An appeal shall lie as of right from the following orders, and shall also lie

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

13. **Order 43 of the Civil Procedure Rules** provides for Appeals. **Order 43 Rule 1** Lists the rules from which an appeal may be filed as a matter of right. The provisions of Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions) is listed amongst the rules

14. **Order 40 Civil Procedure Rules** provides for Temporary Injunctions and interlocutory Orders. **Order 40 Rule 7** specifically provides as follows;

7. Order for injunction may be discharged, varied, or set aside [Order 40, rule 7.]

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

15. In **Kirema M'arimba v Joseph Kajuki [2014] eKLR** when the court was considering an appeal filed prior to filing an application to set aside ex parte Orders under Order 12 Rule 7 held as follows;

It should be noted that after a party has had his application seeking to set aside ex parte judgment is heard and determined, that is when a party has right of appeal; otherwise before then a party who is aggrieved by an ex parte judgment has no right of Appeal.

16. In **Primrose Management Limited v Chairman of the Business Premises Rent Tribunal, Nairobi & another [2015] eKLR** the Court was called upon to issue judicial review Orders on the premise of an ex parte application filed in the trial Court. The Court held as follows;

28. Apart from attending the Tribunal and opposing the application, the applicant was entitled to apply for setting aside the said *ex parte* orders. In this case the Applicant have not shown the reason why the Court ought to exempt it from seeking to set aside the *ex parte* orders of injunction granted by the 1st respondent or opposing the extension thereof at the *inter partes* hearing.

29. Judicial review it ought to be remembered is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.

17. In **Housing Finance Company of Kenya Limited v Brick & Mortar Holdings Limited [2020] eKLR** the trial Court had issued *ex-parte* Orders. The Appellant filed an appeal against the aforesaid Orders citing that the trial court did not have pecuniary jurisdiction. Upon hearing the appeal, the Court made the aforesaid determination;

It is the firm belief of this Court that, it is the duty of every court, before entertaining any matter before it, and in particular *ex-parte*, to first satisfy itself that it has jurisdiction to handle the same. This will enable that court to save the parties the unnecessary costs in setting aside worthless proceedings and orders arising from unlawful exercise of jurisdiction.

16. Accordingly, this Court finds that the trial Court did not have the pecuniary jurisdiction to entertain the application before it and the suit generally.

17. Having found that the trial court lacked jurisdiction, I need not then delve to what the effect of the orders it gave was.

18. The *ex-parte* Orders herein were issued on 20th January 2022. The same lasted for fourteen days. This court on 9/2/2022 stayed the proceedings in the trial court pending the hearing and determination of this matter.

19. I have considered the grounds raised in the appeal and the application. The aforesaid grounds raise factual dispositions which can be properly determined at an *Inter parties* stage of the application. The trial court still has jurisdiction to set- aside, discharge, and/or vary its Orders.

20. There being no Orders pending before the trial Court the proper Order to issue is for the determination of the issues raised herein at the trial Court. I say this because the appellant states that the court lacks pecuniary jurisdiction based on a valuation report filed in this honorable court. The trial court did not have the chance to see the aforesaid report. The report may as well be disputed by the Respondent. More issues also abound as to the jurisdiction of the trial court in hearing the matter. A court's jurisdiction may be usurped by the filing of a preliminary objection, defence, replying affidavit, and/or grounds of opposition. All these alternatives are available to the appellant herein at the trial court level.

21. The court therefore finds that the appeal herein is premature and the same is therefore dismissed with costs to the Respondent. It is so ordered.

READ, DELIVERED AND SIGNED VIRTUALLY AT GARISSA THIS 25TH FEBRUARY, 2022

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Hon. E.C. Cheronno

ELC JUDGE

In the presence of:

1. Applicant/Advocate: Absent
2. Respondent/Advocate: Absent
3. Court Assistant: Ijabo