REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL NO. E011 OF 2021

HENRY NYONGESA.....APPELLANT

VERSUS

HUDSON WANJALA BITONYAKE.....1ST RESPONDENT

ANAZETUS WAFULA WEKESA .....2ND RESPONDENT

J U D G M E N T

(Being an appeal from the ruling of the Honourable A. ODAWO – SENIOR RESIDENT MAGISTRATE dated 7th June 2021 in BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL MISCELLANEOUS APPLICATION No 196 of 2021)

1. By a Notice of Motion dated 11th February 2021 and filed under Certificate of Urgency in the Subordinate Court, **HUDSON WANJALA BITONYAKE** (the 1st Respondent herein) sought the following orders against **HENRY NYONGESA** (the Appellant) and **ANAZETUS WAFULA WEKESA** (the 2nd Respondent): -

> **1. That this application be certified as urgent.**
>
> **2. That the Officer Commanding Station (OCS) Bungoma Police Station or any nearest Police Station within the Republic of Kenya do provide security to the County Surveyors and Land Registrar – Bungoma while re – opening the road of access between land parcels NO EAST BUKUSU/NORTH SANG'ALO/5028, 5031, 5032 and 5033.**
>
> **3. That the Officer Commanding Station (OCS) Bungoma Police Station or any other Police Officers as (2) above to ensure compliance of the orders.**
>
> **4. That costs of this application be borne by the Respondents.**

The application was supported by the affidavit of the 1st Respondent (the Applicant in the Subordinate Court) to which were annexed copies of the title deeds to the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/5032** and **5033** as well as the Mutation Form in respect of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/891**. The 1st Respondent's claim in the Subordinate Court was that he is the registered proprietor of the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/5032** but the Appellant and the 2nd Respondents (who were the 1st and 2nd Respondents respectively), had blocked the road of access to his parcels of land and were hostile when the Surveyors visited the land with a view to re – opening the road of access between the land parcels **NO EAST BUKUSU/ NORTH SANG'ALO/5028**, **5031**, **5032** and **5033**. That necessitated the filing of this application. As is now clear following the filing of the record of appeal herein, that Notice of Motion was not preceded with any plaint, Originating Summons or Petition.

2. The Notice of Motion was placed before **HON A. ODAWO (SENIOR RESIDENT MAGISTRATE)** on 15th February 2021 who directed that it be served upon the Respondents therein (now the Appellant and 2nd Respondent in this appeal). The matter was set for inter – parte hearing on 1st March 2021 and there being no response by the Respondents, the application was allowed as prayed.

3. By a Notice of Motion dated 17th March 2021, the Appellant sought, inter alia, an order setting aside the orders issued on 1st march 2021 ex – debito justitiae and vacating all the proceedings leading to that order. The basis of that application was that the Notice of Motion dated 11th February 2021 had infact not been served.

4. On 22nd March 2021 the parties recorded a consent order compromising the application dated 17th March 2021 and vacating the earlier orders and granting leave to the Appellant to file his response within 7 days.

5. The Appellant having filed his response to the Notice of Motion dated 11th February 2021, it came up for hearing inter – parte on 17th May 2021 by way of written submissions and by a ruling delivered on 7th June 2021, the trial Court granted the orders as sought in the Notice of Motion dated 11th February 2021.

6. Aggrieved by that ruling, the Appellant filed a Notice of Motion dated 17th June 2021 seeking orders to stay execution of the ruling delivered on 7th June 2021 and any other consequential orders pending the hearing and determination of this appeal which was filed on 16th June 2021. An application for stay pending appeal was dismissed both by the trial Court and this Court.

7. The Appellant has raised the following twelve grounds of appeal in seeking to set aside the ruling delivered on 7th June 2021: -

> **1. The Learned Magistrate erred in fact and in law by failing to appreciate that she had no jurisdiction to grant the orders being sought which orders revolve around resolving a boundary dispute – a preserve of the Land Registrar and Surveyor.**
>
> **2. The Learned Magistrate erred in law and in fact by failing to appreciate that there was no proof that the Appellant had encroached the road to warrant the granting of the orders being sought.**
>
> **3. The Learned Magistrate erred in fact and in law in allowing the application without proof that the Land Registrar and Surveyor required such security for performance of their mandate.**
>
> **4. The Learned Magistrate erred in fact and in law for failing to appreciate the fact the 1st Respondent had no locus standi to litigate on a matter vested in the Land Registrar and Surveyor.**
>
> **5. The Learned Magistrate erred in fact and in law by issuing orders over and above what the 1st Respondent sought in the application.**
>
> **6. The Learned Magistrate erred in fact and in law in considering extraneous factors that ought not to be considered and disregarding intrinsic and vital factors.**
>
> **7. The Learned Magistrate erred in fact and in law by allowing the application when the 1st Respondent had not discharged the burden of proof provided for in Section 107 of the Evidence Act.**
>
> **8. The Learned Magistrate erred in fact and in law for failing to appreciate that the issues being raised could not be handled and/or litigated in form of an application but through a substantive suit where viva voce evidence is required.**
>
> **9. The Learned Magistrate failed to adequately evaluate the replying affidavit tendered by the Appellant herein and thereby arrived at a decision un – sustainable in law.**
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> **10. The Learned Magistrate erred in fact and in law in calling for a report from the Registrar should there be an encroachment and/or need for demolition of property when there was no substantive suit.**
>
> **11. The Learned Magistrate erred in fact and in law by failing to appreciate that the orders as issued can be used to hive off a chunk of land from the Appellant's parcel of land which is already less than the registered area.**
>
> **12. The Learned Magistrate erred in fact and in law by granting orders for security when there was no such need by the Land Registrar and Surveyor and further, when the Police required no such orders as per Section 24 of the National Police Service Act.**

The Appellant therefore sought the following orders from this Court: -

(a) The appeal be allowed.

> **(b) The Subordinate Court's ruling allowing the application dated 11th February 2021 be set aside and substituted with an order dismissing the same.**
>
> **(c) The 1st Respondent do pay the costs of this appeal.**
>
> **(d) Such further relief as may appear just to the Honourable Court.**

On 30th November 2021, I directed that the appeal be canvassed by way of written submissions.

8. Submissions were subsequently filed both by **MR ANWAR** instructed by the firm of **ANWAR & COMPANY ADVOCATES** for the Appellant and by **MR ADONGO** instructed by the firm of **ADONGO & COMPANY ADVOCATES** for the 1st Respondent while the 2nd Respondent filed his submissions in person. I notice from the record that on 4th January 2022, the Appellant filed further submissions. This was done without leave. Those submissions are hereby expunged from the record.

9. I have considered the Record of Appeal and the submissions by the parties.

10. As a first Appellate Court, my duty as set out in the case of **SELLE & ANOTHER .V. ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS 1968 E.A 133** is to reconsider and re – evaluate the evidence that was before the trial Court and draw my own conclusions. Where testimony was adduced in the trial Court, I must bear in mind that I neither saw nor heard the witnesses and make due allowance for that though I am not bound to necessarily follow the trial Court's findings of fact. This Court also has the jurisdiction to consider issues of law and pursuant to the provisions of **Section 78(1)** of the **Civil Procedure Act**, it can determine a case finally, remand a case, frame issues and refer them for trial, take additional evidence or require such evidence to be taken or order a new trial.

11. In my view, this appeal can easily be determined on the basis of ground No 8 of the Memorandum of Appeal which states: -

> ***8: "The Learned Magistrate erred in fact and in law for failing to appreciate that the issues being raised could not be handled and/or litigated in form of an application but through a substantive suit where viva voce evidence is required."***

As I have already stated in this Judgment, the proceedings in the trial Court and which led to the impugned ruling the subject of this appeal were commenced by the Notice of Motion dated 11th February 2021. The 1st Respondent who was the Applicant in the Subordinate Court did not file any **plaint, Originating Summons or Petition**. The orders sought by the 1st Respondent who was the Applicant in the Subordinate Court were substantive orders. Orders No 2 and 3 were in the following terms: -

> ***2: "That the OCS Bungoma Police Station or any nearest Police Station within the Republic of Kenya do provide security to the County Surveyors and Land Registrar – Bungoma while re – opening the road of access between land parcels NO EAST BUKUSU/NORTH SANGALO/5028, 5031, 5032 and 5033."***
>
> ***3: "That the OCS Bungoma Police Station or any other Police officers as (2) above to ensure compliance of the orders."***

Order 3 Rule 1(1) of the **Civil Procedure Rules** provides that: -

> ***"Every suit shall be instituted by presenting a plaint to the Court, or in such manner as may be prescribed."*** Emphasis added

The other prescribed manner of instituting a suit are by Originating Summons or Petitions. The remedy which the 1st Respondent sought in the Subordinate Court was essentially the enforcement of his right to enjoy an easement which is protected by **Section 100(2)** of the **Land Registration Act 2012**. It reads: -

> ***"Any person referred to in subsection (1)(a) or (b) who is by this section entitled to the benefit of an easement or analogus right may take out, in their own names, any proceedings necessary for the enforcement of the easement or the analogus rights."*** Emphasis added.

That is quite a substantive right and cannot possibly be enforced through a Notice of Motion which is the manner the 1st Respondent chose to approach the Subordinate Court. It is also instructive to Note that the said Notice of Motion was not even predicated on any provision of the law which could support the route which the 1st Respondent used to seek the remedies sought from that Court. I don't think the inherent jurisdiction of the Court can be invoked in a situation such as this. Where a procedure is prescribed for the redress of a grievance, it must be followed – **SPEAKER OF NATIONAL ASSEMBLY .V. KARUME 1992 eKLR**.

A pleading is defined in **Section 2** of the **Civil Procedure Rules** to include: -

> ***"a Petition or summons and the statement in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."*** Emphasis added.

In the case of **BOARD OF GOVERNORS, NAIROBI SCHOOL .V. JACKSON IRERI GETAH C.A CIVIL APPEAL No 61 of 1999**, the Court **(AKIWUMI**, **TUNOI & BOSIRE JJ. A)** considered whether a suit could properly be commenced by way of a Chamber Summons. After citing the definition of a pleading in **Section 2** of the **Civil Procedure Act** and the provisions of **Order IV Rule 1** of the then **Civil Procedure Rules** (now **Order 3 Rule 1(1)**), the Judges addressed themselves as follows: -

> ***"Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and Rules made thereunder. The use of the term "summons" in the definition of the term pleading must be read to mean "Originating Summons" as that is "a manner ……. Prescribed" for instituting suits."***

In the same vein, a suit cannot be commenced by way of a Notice of Motion in the manner in which the 1st Respondent moved the Subordinate Court seeking the orders which were granted by the trial Magistrate. And that defect could not certainly be cured by the provisions of **Article 159(2)(d)** of the Constitution. I take the view that the Judgment in the **BOARD OF GOVERNORS**, **NAIROBI SCHOOL .V. JACKSON IRERI GETAH** case (supra), though rendered on 19th November 1999, is still good law on the issue of how a suit may be commenced. As was held by the **SUPREME COURT in RAILA ODINGA .V. IEBC & OTHERS 2013 eKLR**: -

> ***"Article 159 2(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was not meant to oust the obligations of litigants to comply with procedural***

imperatives as then seek justice from the Courts."

The same Court reiterated in the case of **LAW SOCIETY OR KENYA .V. CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 12 OTHERS PETITION No 14 of 2013** that:-

> ***"Indeed, this Court has had occasion to remind litigants that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that 'justice shall be administered without undue regard to technicalities.' It is plain to us that Article 159(2)(d) is applicable on a case – by – case basis."***

It must be clear by now that the orders issued by the trial Court in the impugned ruling could only be hinged on a suit commenced in the prescribed manner and not through a Notice of Motion. In my ruling delivered on 4th November 2021 dismissing the appellant's application for orders of stay of execution pending appeal, I stated as follows: -

> ***"The main appeal is still pending and so too is the substantive suit in the trial Court where it will be determined on it's merits."***

That ruling was delivered prior to the admission of this appeal on 29th November 2021. However, having now perused the entire record of appeal herein, it is obvious that infact no proper suit had been filed by the 1st Respondent in the Subordinate Court to justify the orders which the trial Magistrate granted and which have provoked this appeal. Indeed, the trial Magistrate granted final orders on the basis of a Notice of Motion. That was un – procedural. Those orders could only be available following a full trial after each of the parties had testified in support of their respective cases and been cross – examined on their testimonies. Only then could the trial Magistrate determine whether indeed a road of access exists between the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/5028**, **5031**, **5032** and **5033** and which ought to be re – opened as ordered.

12. It is also instructive to note that in the impugned ruling, the trial Magistrate addressed herself as follows in the last two paragraphs: -

> ***"It is for the above reasons that I proceed to allow the application dated 11.2.2021 with the provision that if the said re – opening would result to any demolitions, whatsoever, of the structures of either party, then the re – opening exercise be stopped at that point and a comprehensive report on the same be submitted to the Court by the Land Registrar. If that were to happen, any aggrieved party to move the Court appropriately regarding the same.***
>
> ***Costs in the cause."***

However, the fact of the matter is that the trial Magistrate having granted the orders sought by the 1st Respondent in his Notice of Motion dated 11th February 2021, and which was the only issue pending before her, the Court effectively became functus officio. The dispute before the Court involving the road of access had been fully canvassed, albeit un – procedurally, and a determination made. That dispute could not therefore again be re – opened by the filing of ***"a comprehensive report on the same"*** by the Land Registrar. To do so would amount to the trial Court sitting on an appeal over it's own decision. That is not allowable.

13. In their submissions, both Respondents have made the following submission in opposing this appeal: -

> ***"It is very clear that the mutation forms and amended map that forms record of appeal thereto shows that there is existence of road of access between land parcel NO E. BUKUSU/ N.SANG'ALO/5028, 5029, 5030, 5031 and 5033. That your Honour the Honourable Court issued orders both in favour of the Applicants and the Respondents herein as we may quote, prayer no 3 of the said order issued on the 7th June 2021 'That if the said re-opening would result to any demolition whatsoever of the structures of either party, then the re – opening exercise be stopped at that point and comprehensive report on the same be submitted to Court by the Land Registrar' before the trial Magistrate came to that conclusion, she was keen on the documents and annextures adduced to Court to proof that indeed there was a road of access and there was need for register and county surveyor to visit the site to re – open the road of access."***

However, as I have already stated above, the nature of the dispute before the trial Court could not be determined by way of a Notice of Motion. It could only be determined through a suit where the parties would give their viva voce evidence. The orders issued on 7th June 2021 were therefore predicated on an illegal process and must be set aside as sought in this appeal. As was held in **MCFOY .V. UNITED AFRICAN COMPANY LTD 1961 3 ALL E.R 1169**: -

> ***"If an act is void, then it is in law a nullity. It is not bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put anything on nothing and expect it to stay there."*** Emphasis added.

Rules of engagement in the resolution of disputes through the judicial process were meant for a purpose. They must be adhered to. I do not consider the manner in which the 1st Respondent approached the trial Court, and which culminated in the impugned orders, to have been a matter that can be simply wished away and curable under **Article 159(2)(d)** of the Constitution as an ***"undue regard to procedural technicalities."*** I am persuaded that this appeal is meritorious and is for allowing.

14. The up – shot of all the above is that having considered this appeal, this Court makes the following disposal orders: -

1. The appeal is allowed.

2. The Subordinate Court's ruling allowing the application dated 11th February 2021 is hereby set aside and substituted with an order dismissing the same.

3. The 1st Respondent shall meet the costs of this appeal.

4. The Respondents are at liberty to mount a proper suit if they so wish.

BOAZ N. OLAO.

J U D G E

14TH FEBRUARY 2022.

Judgment dated, signed and delivered at **BUNGOMA** on this 14th day of February 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic protocols.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

14TH FEBRUARY 2022.