



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. E11 OF 2020

BRYSON MANGLA AGOT.....APPELLANT

VERSUS

PRISCILLA NTHOKI MUTULILI.....1ST RESPONDENT

ARCHBISHOP ARTHUR KITONGA (*Suing as the Chairman of the Board of Trustees:*

REDEEMED GOSPEL CHURCH INC).....2ND RESPONDENT

(*Being an Appeal of the Judgment and Decree of the Senior Principal Magistrate’s Court at Kangundo in*

ELC Misc. Appln. No. 3 of 2020 by Hon. D. Orimba (SPM) dated and delivered on 14th October, 2020)

JUDGMENT

INTRODUCTION

1. The Appellant, a former pastor at Redeemed Gospel Church, has filed what he terms as “*Appellant’s ordered re-submissions*” and warned that should I render a decision on this Appeal, he is ready to file a Petition at the Judicial Service Commission for my removal. Having taken oath of office, where I swore to serve the people of Kenya impartially and to do justice in accordance with the Constitution, the laws and customs of this Republic without fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence, I have no hesitation in rendering my decision in respect of the issues raised in this Appeal, and to do so without delay. This is because judicial authority is derived from the people and the same is not for self-glorification or meant to be used whimsically. It is a stewardship, that must be exercised with honour and accountability. As a Judge of the Superior Court, I am immensely aware that in the exercise of this authority, my guiding light are the principles stipulated in Article 159 (2) of the Constitution which define my core duty as that of ensuring that justice is done to all irrespective of status; justice is not delayed; alternative dispute resolution forms are promoted; justice is administered without undue regard to technicalities, and most critically, the purpose and principles of the Constitution are protected and promoted.

2. The Appellants’ conduct in these proceedings has been below what is expected of a party seeking justice in our courts and ought to be discouraged. It cannot be that when a party’s arguments do not persuade the court to decide a case in their favour, such party can without basis or justification use abusive language against the court with threats to Petition to the Judicial Service Commission for adverse action against the court as has happened in this case. Anyone coming to court should be aware that courts decide cases on evidence and the law and cases are not won by bullying the court. Instead of attacking the decisions made against him, the Appellant has chosen to attack the court.

3. I have stated elsewhere and I still maintain here that although a party appearing in person may not be expected to draft clear and precise pleadings as represented litigants; decency, courtesy, respect, coherence and order, both in content and design of their pleadings is still required of them. The pleadings filed by the Appellant in this appeal are a collection of insults, threats, misplaced legal jargon together with his grievances all interwoven in a volume of incoherent texts. But what is crystal clear in all this jumble is the disdainful approach and attitude taken by the Appellant in this Appeal, as was in the court below, of “*my way or the highway*”. But it must never be lost on us that in the sacrosanct temple of justice, there is only one Highway, the Highway of the law which is paved with equity. Everyone who finds their way in court must shape their ways to be in congruence with that Highway. In this matter, the Appellant has chosen the path of threats, insults and name calling of this court, the court below, judicial staff, the Respondent and their counsel. As the core duty of this court is to deliver substantive justice to both parties, that is what this court will endeavor to deliver in this judgment.

BACKGROUND

4. By a Notice of Motion dated 26th February 2020, and brought under Section 73(1) of the Land Registration Act, sections 1A, 1B and 3A

of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, the Applicants in Kangundo ELC Misc. APP. No. 3 of 2020, now the Respondents in this appeal, sought for the following orders;

- a) That the caution registered on land parcel No. Donyo Sabuk/Komarock Block 1/14027 be removed.**
- b) That the Land Registrar do issue a Title Deed in favour of Redeemed Gospel Church Inc. Registered Trustees.**
- c) That cost of this application be borne by the Respondent.**

5. The Motion was premised on the 1st Applicant's supporting affidavit where the 1st Applicant stated that being the registered proprietor of land parcel No. DONYO SABUK/KOMAROK BLOCK 1/14027, she sold the same to Redeemed Gospel Church Inc. (VOK), the 2nd Applicant therein, but had been unable to transfer the same to the 2nd Applicant since the Respondent had registered a caution over the suit property without any justification.

6. In response to the Motion, the Respondent filed three documents; namely "Respondents objection to orders sought by Applicants' Motion", dated 1st March 2020, "Respondent's Reply to Applicant's Grounds of Motion" dated 24th July 2020 and "Respondent's reply to the 1st Applicants' supporting affidavit" dated 21st July 2020. The Respondent stated that he purchased the suit property, was reimbursed the consideration thereof by the church, that he placed the caution on the title to protect the interests of the Church and that the property belongs to the Redeemed Gospel Church.

7. The Notice of Motion was canvassed by written submissions. The Ruling was delivered on 14th October, 2020. In his ruling, the Honourable trial Magistrate found as follows; -

As pointed out herein there is no evidence that the applicant's intention is to do any forgery as alleged by the respondent...

The upshot of the foregoing is that the applicant has made up a case for granting the orders sought. The respondent has not demonstrated to court why the caution placed by him over the suit land should not be removed.

Consequently, the application is allowed and orders granted as prayed.

8. The Appellant being dissatisfied with the trial court's decision, filed this appeal vide the Memorandum of Appeal dated 5th November 2020 and filed on 6th November 2020, which enumerated 5 Grounds of Appeal as below; -

a) That from the onset against the Appellant/Respondent, and with all due respect to the learned SPM-Hon. D. Orimba; he knowingly and in ill will erred in law and in fact by being biased and overtly exhibiting a preconceived mindset by stepping in and meddling with impunity in the arena of the dispute in a more obnoxious way to create a dispute where there was none in conspiracy to unfairly case fix.

b) That with all due respect in order that the SPM exploit his case fixing in a substantive case ELC NO. 138 OF 2019, he erred in law and in fact and allowed a material Siamese matter in demand letters improperly removed from the main case to create Miscellaneous Application No. 3 of 2020 to abet fraud and defeat justice in two cases before him.

c) That the SPM meddled in the dispute and erred in law and in fact in declining to procedurally first hear the Miscellaneous Application Number 3 of 2020 strategically brought under certificate of urgency by the Plaintiff's mother/2nd Defendant PW2-Counterclaim before proceeding with the substantive ELC 138 of 2019.

d) That the SPM deliberately meddled in the dispute by, in conspiracy skipping the hearing of Miscellaneous Application No. 3 of 2020 where the Applicants were to attend court in person on 19/08/2020 for verification of their signatures due to alleged forgeries and impersonation in the preliminary objections.

e) That with due respect to the SPM; he meddled in the dispute in law and in fact by literally converting a legally constituted court of justice of the Republic of Kenya into a personal kangaroo court for an elaborate prima facie cartel extortion.

f) The Appellant has concurrently petitioned the Judicial Service Commission for the removal of the learned magistrate for gross misconduct and overt impunity.

9. The Appellants' prayers were that the decision/Judgment of the subordinate court be set aside.

10. I note from the record of this court that the Appellant filed an application dated 20th January 2021, seeking for stay of execution. On 10th June 2021, a consent order was made that status quo be maintained pending the hearing and determination of the appeal and that the appeal to proceed by way of written submissions; with the appellant being granted 14 days to file and serve their submissions while the Respondent was to file their submissions in 14 days of service. Although this appeal was not consolidated with ELC Appeal No. 10 of 2020, on 22nd November 2021, the appellant filed consolidated submissions in respect of ELC Appeal no. 10 of 2020 and ELC Appeal No. 11 of 2020, while the Respondent's counsel filed their submissions on 7th October 2021.

APPELLANT'S SUBMISSIONS

11. The Appellant submitted that this court lacks “*personal jurisdiction*” to hear and determine this appeal, as the court will be sitting on appeal of consent orders of status quo made in this matter by another Judge. The Appellant was of the view that this court ought not to have allowed the Respondent to file submissions in this matter as that demonstrated that the court was biased as the said submissions were filed out of time. He argued that as the Respondent did not file a response to his application for stay or the Memorandum of Appeal, then judgment ought to have been entered in his favour, and therefore the court ought not have allowed the Respondent to file submissions in respect of this appeal.

12. It was the Appellant’s position that if the Respondent’s submissions are not expunged from the record and as an Appellate Court, I proceed to decline to determine this appeal for want of jurisdiction, the Appellant was ready to move the Judicial Service Commission for my removal.

13. It was further contended by the Appellant that the matters concerning parcel Donyo Sabuk/Komarock Block 1/13894 and Donyo Sabuk/Komarock Block 1/14027 are closely related and ought to have been heard together and that separating them led to a miscarriage of justice. He submitted that the trial magistrate erred in law and in fact in separating matters of Block 1/14027 from those of Block 1/13894. He further argued that the 1st Respondent should have transferred the suit property to the 2nd Respondent Church but failed to do so. He submitted that he put a caution on Block 1/14027 to protect the interests of the 2nd Respondent’s local church members.

14. The Appellant also submitted that the claim that the 1st Respondent sold the land to the 2nd Respondent is not supported by any Land Sale Agreement and is therefore a wild unsubstantiated allegation.

15. He also submitted that all pleadings by Ms. Helen Wangechi Advocate and Mr. Kelvin Akonya should be expunged from the record as null and void because they did not take out practicing certificates for 2020 and 2021.

RESPONDENT SUBMISSIONS

16. Counsel for the respondent submitted that ELC 138/2019 had since been determined even before the decision currently being appealed against as judgment was entered in favour of the Plaintiff on 30th September 2020; He submitted that the matter before the lower court as currently appealed is completely different from ELC 138/2019 as the parties, prayers, issues and suit properties in the two suits were different.

17. Counsel submitted further that land parcel No. Donyo Sabuk/Komarock Block 1/14027 has never been a donation to the church by the Appellant as the Church paid for the acquisition of the same. Counsel pointed out that by annexure marked “PNM-6” as well as his affidavit dated 21st July 2020 and filed on 6th August, 2020, the Appellant admitted that the suit property belongs to the church and ought to be registered in the name of the church.

18. Counsel submitted that it clear that Land Parcel No. Donyo Sabuk/Komarock Block 1/14027 is a property of the church, and therefore it cannot be understood why the Appellant had to register a caution on the same and refuse to lift the same; Counsel submitted that the appeal was totally unnecessary and should be dismissed with costs to the Respondents.

ANALYSIS AND FINDINGS

19. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion in order to establish whether or not to uphold the decisions of the trial magistrate. It was held in the case of *Selle vs Associated Motor Boat Co. [1986] EA 123* as follows:

“An appeal to this court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and raw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohammed Sholan, (1955) 22 E.C.A. 270).”

20. The Appellant has argued that this court has no “*personal jurisdiction*” to hear and determine this matter and has threatened to file a petition for my removal arguing that this matter had already been heard by my predecessor, who had already made an order of status quo. In my considered view, the Appellant’s contentions are baseless with no backing in law as the jurisdiction of this court is not personal, but granted under Article 162(2) (b) of the Constitution as well as Section 13 of the Environment and Land Court Act. This court has both original and appellate jurisdiction in respect of matters relating to environment and land. His contention that I will be sitting on appeal in respect of the decision of my predecessor is not correct. The only order entered in this matter by my predecessor in respect of the Appellant’s application is an order by consent of parties to maintain status quo. This judgment is not in respect of the said order but in respect of the decision of the trial Magistrate in Kangundo ELC Misc. App. No. 3 of 2020. I therefore find and hold that I have jurisdiction to hear and determine this appeal as provided for in Article 162(2) (b) of the Constitution and section 13 of the Environment and Land Court Act.

21. On the issue of the Respondent being allowed to file submissions out of time, I note that the Respondent’s submissions on record were filed on 7th October 2021 while the Appellant’s submissions on record, which he refers to as “*Appellant’s ordered submissions*” were filed on 22nd November 2021. While both parties did not file their submissions within the time frame given by the court on 10th June, 2021, the Appellant’s submissions on record were filed after the Respondent’s submissions. The Appellant has not stated the prejudice he stands to suffer if the Respondents submissions are deemed to have been duly filed. As no prejudice will be suffered by the Appellant, I see no justification to expunge the Respondent’s submissions.

22. The Appellant's other contention is that there was miscarriage of justice when case No. ELC Miscellaneous Application Number 3 of 2020 was heard separately from ELC No. 138 of 2019. Having dealt with appeals in respect of the two matters at the same time, *(both are coming up for delivery of judgment on 23rd March 2022)*, I note that the parties, the prayers sought and the suit properties in issue in the two suits are different. Suit Number ELC Misc. Application No. 3 of 2020 was filed against the Appellant by Priscilla Nthoki Mutulili and Archbishop Arthur Kitonga for Redeemed Gospel Church, seeking for orders that the Appellant removes a caution he placed on parcel DONYO SABUK/KOMAROCK BLOCK 1/14027 which belongs to Redeemed Gospel Church. The two plaintiffs in Miscellaneous Application No. 3 of 2020 were not parties to ELC 138 of 2019. On the other hand, in ELC 138 of 2019, Mr. Joshua Kioko Mutulili sought against the Appellant and his wife one Lilian Gathegu Mangla, for a declaration that parcel No. DONYO SABUK/KOMAROK BLOCK 1/13894 in excess of 1 acre belongs to him and for cancellation of the said title and issuance of fresh title reflecting only one acre for the Appellant. It is therefore clear that the two suits were in respect of different parties, different causes of action, different suit properties, different issues and different prayers and hence the trial court properly determined the two matters separately.

23. In addition, and most importantly, no application for consolidation was filed by the Appellant to consolidate the two suits in the lower court, and therefore no order for consolidation was made. The Appellant strongly believes that justice will not be served if the two matters are not consolidated and in an effort to ensure the two matters are heard together, the Appellant filed consolidated submissions and argued that Appeal Number 10 of 2020 and Appeal Number 11 of 2020 must be heard together. The Appellant has contended that this court should not determine the two appeals separately otherwise it risks a petition at the Judicial Service Commission for its removal.

24. I have considered the record of this court and I note that no application for consolidation was made by any of the parties in this suit. The only application on record is the Appellants application for stay of execution pending appeal dated 20th January, 2021, which was compromised by the parties for an order of status quo. Having found that ELC No. 138 of 2019 and ELC Miscellaneous Application No. 3 of 2020, related to different parties, different causes of action, different suit properties, different issues and different prayers, at this point, I will not treat the two suits as Siamese twins as emphasized by the Appellant. Besides, the appellant has not placed any material before this court to demonstrate the prejudice he suffered or stands to suffer in this appeal by having the two suits determined separately.

25. On whether the trial court was justified to grant the orders sought, for removal of the caution placed by the Appellant on title DONYO SABUK/KOMAROCK BLOCK 1/14027, it is my considered view that a caution can only be allowed to subsist on another's title if the cautioner has a legal right known in law, either based on contract or otherwise in respect of the title. The law governing the removal of cautions is provided for in Section 73(1) of the Land Registration Act, as follows:

“A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.”

26. The parameters for anyone who may lodge a caution are provided for in Section 71 of the Land Registration Act as follows;

“A person who; -

a) Claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

b)

c)

May lodge a caution with the registrar forbidding the registration of dispositions of the Land, lease or charge concerned and the making of entries affecting the land lease or charge.”

27. In the case *Magdalene Wambui Mbugua Muhia & 2 Others v Charles King Kigwe & 3 Others [2019 eKLR*, the court cited with approval the decision in the case of *Maria Nganga Gwako Vs. Charles Mwenzi Nganga, Civil Appeal No. 287 of 2012 (2014) eKLR* where it was held that:-

“When a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place...”

In the absence of any reasonable cause shown by the Respondent as to why the said caution should not be removed, the application for the removal of the same must succeed.”

28. It is clear that a person who can lodge and maintain a caution on another's property is a person with a bona fide right to the land whether contractual or otherwise.

29. The Appellant has argued that it is not in dispute that he was reimbursed the funds for the purchase of the suit property by the church and contends that he placed the caution on the suit property to protect the members of the 2nd Respondent church. By his own affidavit filed on 6th August 2020, he concedes that the suit property belongs to the church and that he was reimbursed the consideration for the purchase of the suit land by the church. It is my finding that the Appellant having conceded that the issue of reimbursement of the consideration in the purchase of the suit property is not in dispute, acknowledges that the purchased property belongs to the 2nd Respondent and was duly purchased by the 2nd Respondent, therefore he has no plausible reason to have the caution subsist on the 1st Respondent's land. It is my finding therefore that the trial court did not err in allowing the prayer for removal of the Appellant's caution on the 1st Respondent's land, as the reasons arrived at by the court were justified. Indeed, it is clear that this appeal is an abuse of the court process as the same was not filed

for the pursuit of justice.

30. In the end, I do not find any merit in this appeal and I proceed to dismiss the same with costs to the Respondents.

31. Orders accordingly.

DATED, DELIVERED AND SIGNED VIRTUALLY VIA THE MICROSOFT TEAMS PLATFORM IN MACHAKOS THIS 23RD DAY OF MARCH, 2022.

A. NYUKURI

JUDGE

IN THE PRESENCE OF;

MR. BRYSON MANGLA THE APPELLANT IN PERSON

MR. MURIITHI HOLDING BRIEF FOR MR. NZAKU FOR THE RESPONDENT

MS. JOSEPHINE MISIGO – COURT ASSISTANT