



**Chiteri v Nyonje (Environment and Land Appeal 11 of 2019)
[2022] KEELC 15653 (KLR) (22 March 2022) (Judgment)**

Neutral citation: [2022] KEELC 15653 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 11 OF 2019
DO OHUNGO, J
MARCH 22, 2022**

BETWEEN

JAPHETH CHITERI APPELLANT

AND

BROOKWAY NYONJE RESPONDENT

(Being an appeal from the ruling of the Senior Resident Magistrate's Court at Butere (Hon. F. Makoyo, Senior Resident Magistrate) delivered on 2nd April 2019 in SRMCC No. 184 of 2001 Brookway Nyonje v Japheth M Chiteri)

JUDGMENT

1. This appeal traces its roots to Notice of Motion dated January 10, 2019, an application which the appellant filed in the subordinate court seeking the following orders:
 1. Spent
 2. That there be an interim stay of execution of the judgement and all consequential orders pending the hearing and determination of this application.
 3. That this Court do vary, review and/or set aside the judgement, ruling and all consequential orders issued in this matter pending the hearing and determination of this application.
 4. That the Court do issue an order of stay of execution against the Applicant/Defendant, and in particular evicting him from the disputed property LR No Marama/Shinamwenyul1/2 and/or demolition of his structures thereat pending the hearing and determination of this matter interparties.
 5. That costs of this application be provided for.



2. Upon hearing the application, Hon F Makoyo, Senior Resident Magistrate, delivered a ruling on April 2, 2019 and dismissed the application. Dissatisfied with the outcome, the appellant filed this appeal through Memorandum of Appeal dated April 5, 2019.
3. The following are the grounds of appeal as listed on the face of the memorandum of appeal:
 1. That the Learned Trial Magistrate erred in law and in fact in failing to find in favour the Appellant and review and or vary the orders of eviction made by the Lower Court despite overwhelming evidence to the effect that the lower Court order was untenable: in view of the fact that the High Court in Kakamega Succession Cause No 403 of 1998 had transmitted the suit property to the Appellants and he was as at the time of the application for review the registered owner.
 2. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the order of eviction against the Appellant had been overtaken by events by an order emanating from the High Court Kakamega Succession Cause No 403 of 1998.
 3. That the Learned Trial Magistrate erred in law and in fact to appreciate the fact that the order of eviction against the Applicant could not be maintained because he was the new title deed holder to he (sic) suit land in place of the Respondent; that the Applicant have constitutional protection in terms of Article 40 and 64 of the *Constitution of Kenya, 2010*.
4. On the basis of those grounds, the appellant prayed that this court sets aside the ruling and, in its place makes an order that the judgement dated March 24, 2011 and the subsequent orders of eviction dated November 23, 2018 be set aside as well and that the respondent's suit in the subordinate court be struck out. The appellant prayed, in the alternative, that this court sets aside the judgment of the subordinate court as well as eviction orders and refers the parties for a hearing of the suit *de novo*.
5. The appeal was canvassed through written submissions. The appellant in his submissions reiterated the grounds of appeal on the face of the memorandum of appeal and gave a brief history of the suit. He submitted that he is the owner of LR No Marama/Shinamwenyuli/2 having bought the parcel from the owner who was deceased at the time of filing the lower court case. He further submitted that as the subordinate court case was proceeding at Butere Law Courts, the grant issued to the father of the deceased jointly with their uncle was revoked and the estate of Samson Olubuyi was redistributed again and the respondent lost out on the title that had been issued to him as it suffered consequences of revocation and that the appellant gained property in the amended confirmed grant and subsequently the appellant processed title deed to the land measuring 0.09 Ha as the absolute proprietor.
6. The Appellant also submitted that the trial magistrate failed to frame issues before it for determination contrary to order 15 rule 2 of the *Civil Procedure Rules* and that the learned magistrate failed to bring forth details of the appeal that he indicated had dealt with the matter to render the issues before him *res judicata*. He therefore prayed that the appeal be allowed.
7. The respondent in his submissions argued that the judgement the appellant was seeking to review was made on merit on November 26, 2010 and that the application for review did not satisfy the applicable test. Further, that the application was filed after an unreasonable delay of 9 years. He therefore urged this Honourable court to dismiss the appeal with costs.
8. I have considered the grounds of appeal and the parties' respective submissions. The issue for determination is whether the application was merited.



9. The appeal emanates from an order made in exercise of discretion. The circumstances in which an appellate court can interfere with exercise of discretion are well circumscribed. In *Mbogo and Another v Shab* [1968] EA 93, the Court of Appeal stated thus:

"We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

10. The Notice of Motion dated January 10, 2019 emanated from judgement delivered on November 26, 2010 wherein B O Ochieng, Senior Resident Magistrate, ordered the appellant herein to give vacant possession of the parcel of land known as Marama/Shinamwenyuli/2094 and in default an eviction order to issue against him. Being dissatisfied with the decision, the appellant filed the application seeking, among other orders, an order for stay of execution, review and/or setting aside the judgement. All the prayers in the application were expressed to be "pending the hearing and determination of this application". The learned magistrate correctly stated that granting the orders sought would be in vain.
11. All the orders that the appellant sought have a basic requirement that the application be made without unreasonable delay. As already noted, the judgement was delivered on November 26, 2010. Notice of Motion dated January 10, 2019 was filed on January 10, 2019. There was thus a delay of 8 years. No valid explanation was offered for the delay which was inordinate and unreasonable.
12. Further, the appellant raised arguments concerning ownership of the suit property yet that very issue had been determined in the judgment. If the appellant was dissatisfied with the findings in the judgment, he ought to have appealed against it as opposed to inviting the subordinate court to sit on appeal over its own decision.
13. I have perused the entire record of the subordinate court and I am not persuaded that there was any misdirection or any wrong exercise of discretion by the learned magistrate in the manner in which he handled Notice of Motion dated January 10, 2019. In the circumstances, there is no basis upon which to interfere with the exercise of discretion by the leaned magistrate.
14. I find no merit in this appeal and I therefore dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF MARCH 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the appellant

Respondent present in person

Court Assistant: E. Juma

