



Kamoro v Bushline Properties Company Limited & another (Environment and Land Appeal E081 of 2021) [2022] KEELC 143 (KLR) (30 May 2022) (Judgment)

Neutral citation: [2022] KEELC 143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E081 OF 2021**

BM EBOSO, J

MAY 30, 2022

BETWEEN

MOSES KAMORO APPELLANT

AND

BUSHLINE PROPERTIES COMPANY LIMITED 1ST RESPONDENT

MICHAEL NDEGWA KAHUYA & MELANIA MARY WANJIKU (SUING THROUGH FRANCIS KARANJA NDUNG’U BY VIRTUE OF A POWER OF ATTORNEY) 2ND RESPONDENT

(Being an Appeal arising from the Ruling of Hon J. A Agonda, Principal Magistrate, delivered on 16/9/2021 in Ruiru MCE & L Case No 88 of 2020)

JUDGMENT

Background

1. This interlocutory appeal arose from the ruling of Hon J. A Agonda [PM] rendered on 16/8/2021 in Ruiru PMC E & L Case No 88 of 2020. Through the impugned ruling, the Magistrate Court allowed the respondent’s application for an interlocutory injunction. The import of the ruling is that the Magistrate Court restrained the appellants against interfering with the respondents’ “stay, occupation and utility” of land parcel number Ruiru/Ruiru East Block 2/19084 and Ruiru/Ruiru East Block 2/19085 pending the hearing and determination of the suit within ninety (90) days.
2. The respondents initiated the suit in the Magistrate Court through a plaint dated 24/7/2020. The plaint was subsequently amended. They contended that the appellant had illegally encroached onto their parcels of land. They sought, among other reliefs, an order restraining the respondent against encroaching on their parcels of land. Subsequent to that, the respondents filed an application dated 13/7/2021, seeking interlocutory injunctive orders in relation to parcel numbers Ruiru/Ruiru East Block 2/27624 and 27625.



3. In response to the application for interlocutory injunctive relief, the appellant filed a replying affidavit sworn on 28/7/2021. Besides filing the replying affidavit, the appellant filed a notice of preliminary objection dated 26/1/2021, objecting to the suit and urging the court to strike out the suit in limine on the following verbatim grounds:
 - 1) That the suit offends Section 6 of the Law of Procedure Act on the doctrine of *res subjudice* as according to the Judgment in Thika Judicial Review No 7 of 2018 Republic v District Land Registrar, Thika Lands Office and others.
 - 2) The suit herein offends Section 7 of the Law of Procedure Act on the doctrine of *res judicata* as according to the Judgment in Thika Judicial Review No 7 of 2018 Republic v District Land Registrar, Thika Lands Offices and others.
 - 3) The plaintiffs are guilty of filing a multiplicity of suits hence in abuse of the court process.
 - 4) The suit by the 2nd plaintiff based on trespass is statute- barred in view of the [Limitation of Actions Act](#).
4. On 29/7/2021, the Learned Magistrate gave disposal directions on both the preliminary objection and the application and slated the two items for mention to fix a date for ruling on 9/8/2021. On 9/8/2021, the Learned Magistrate confirmed that parties had filed written submissions and scheduled the matter for ruling on 16/9/2021. On 16/9/2021, she rendered a ruling which disposed the application but was completely silent on the appellant's preliminary objection dated 26/1/2021.

Appeal

5. Aggrieved by the ruling, the appellant brought the present interlocutory appeal advancing the following verbatim grounds:
 - 1) The learned trial magistrate erred in law and in fact by failing to consider the preliminary objection raised by the appellant hence denying the appellant fair hearing.
 - 2) The learned trial magistrate erred in law and in fact by failing to consider and to carry out an in-depth analysis and examination of the legal issues to be resolved as raised in the preliminary objection.
 - 3) The learned trial magistrate in failing to consider the preliminary objection failed to find that the suit and the application by the respondents:
 - a) Offends the doctrine of *res judicata* in view of the Judgment in Thika ELC Judicial Review No 7 of 2018 Republic v Land Registrar, Thika Lands office.
 - b) Offends the doctrine of *subjudice* in view of the Judgment in Thika ELC Judicial Review No 7 of 2018 Republic v Land Registrar, Thika Lands office.
 - c) Is an abuse of the court process by virtue of clear directions provided by the court in Thika ELC Judicial Review No 7 of 2018 Republic v Land Registrar, Thika Lands office and in the surveyor's report filed by the respondent.
 - d) In this case the suit based on trespass by the 2nd plaintiff is statute-barred.
 - 4) The learned trial magistrate erred in law and in fact by failing to consider that the effect of her ruling is to deny the appellant an opportunity to be heard as guaranteed in Section 87 of the [Land Registration Act](#), as proposed in the surveyor's report and Thika ELC Judicial Review No 7 of 2018 Republic v Land Registrar, Thika Lands office.



- 5) The learned trial magistrate erred in law and in fact by failing to consider and to carry out an in-depth analysis and examination of the legal issues to be resolved and evidence presented by the appellant in his replying affidavit and submissions.
- 6) The learned trial magistrate erred in law and in fact in failing to find that the respondents had failed to meet the criteria laid down in the case of *Giella v Cassman Brown & Co. Ltd* EA 358.
- 7) The learned trial magistrate erred in law and in fact in finding that the appellant has encroached on the respondent's land and issuing injunctive orders based on a surveyor's report whose effect had been overtaken by the subsequent orders of the court in Thika ELC Judicial Review No 7 of 2018 Republic v Land Registrar, Thika Lands office requiring the Land Registrar to visit the suit land and render a determination, file a plan and make a note in the register that the boundaries of the parcels have been defined; which orders are yet to be satisfied.
- 8) The learned trial magistrate erred in law and in fact in nevertheless issuing injunctive orders based on a surveyor's report that had recommended a survey of the remaining parcels and the proprietors to visit the lands offices which recommendation is yet to be satisfied.
- 9) The learned trial magistrate erred in law and in fact in issuing injunctive orders which are untenable and incapable of execution in view of the fact that boundaries are yet to be established and the fact that the proprietors are in occupation of the parcels as according to the time they acquired the parcels of land.
- 10) The learned trial magistrate erred in law and in fact in issuing injunctive orders for ninety (90) days pending the hearing and determination of the suit without providing clarification of what would happen after the lapse of the ninety (90) days.
- 11) The learned trial magistrate erred in law and in fact in failing to consider all the evidence tendered, the facts of the case and submissions tendered as a result reaching at an unfair decision.

Submissions

6. The appeal was canvassed through written submissions dated 10/12/2021, filed by John Mwariri Advocate c/o Kituo cha Sheria. Counsel for the appellant submitted that the Learned Magistrate's failure to consider the preliminary objection constituted an infringement of the appellant's right to a fair hearing guaranteed under Article 50 of *the Constitution*. Counsel added that the Environment and Land Court having rendered a Judgment in Thika Judicial Review Application Number 7 of 2018, the suit in the Magistrate Court was res judicata and that the Learned Magistrate erred in not finding so.
7. Counsel for the appellant faulted the Learned Magistrate for granting the respondent an injunction, contending that the appellant had failed to demonstrate that the decree issued in Thika ELC Judicial Review Application No 7 of 2018 had been satisfied. Counsel urged the court to set aside the ruling of the lower court and substitute it with an order striking out or dismissing the appellant's suit.
8. The respondent filed written submissions dated 17/1/2022, through the firm of Isolina Kinyua & Co Advocates. On whether the Magistrate Court erred in granting the interlocutory injunction, counsel for the respondent submitted that the Learned Magistrate was cautious and avoided addressing the issue as to whether or not the appellant had trespassed onto the respondent's land, reserving the issue for trial. Counsel submitted that the Learned Magistrate never addressed any of the issues raised in the main suit.



9. On the appellant's invitation to this court to consider and dispose the preliminary objection, counsel for the respondent submitted that this court cannot determine the preliminary objection because the Magistrate Court never made a determination on it. Counsel added that, were this court to elect to exercise its original jurisdiction and consider the preliminary objection, the court should find that adjudication of the dispute by the Magistrate Court was not sub judice because Thika ELC Judicial Review Application No 7 of 2018 was heard and determined and there was nothing pending in it to warrant invocation of the doctrine of sub judice. Counsel added that the Judicial Review Application and the suit in the lower court raised different issues hence the doctrine of res judicata was not applicable. On the appellant's contention that the respondent's suit was statute-barred, counsel submitted that the respondent's cause of action was that of the tort of continuing trespass which is distinguishable from a normal tort. Lastly, counsel for the respondent submitted that the failure by the lower court to make a determination on the preliminary objection did not constitute bias.

Analysis and Determination

10. I have considered the entire record of the trial court, including the impugned ruling. I have also considered the parties' respective submissions in this appeal; the relevant legal frameworks; and the relevant jurisprudence. The appellants itemized eleven grounds of appeal. His advocate subsequently condensed the eleven grounds of appeal into five issues and invited the court to determine the five issues. I will make brief pronouncements on the five issues that were identified by the appellant in the order in which they were itemized.
11. The first issue framed by the appellant is whether, by failing to consider the preliminary objection, the Learned Magistrate denied the appellant the right to a fair hearing. I have looked at the proceedings of the lower court. It is clear from the record of proceedings of the lower court that on 29/7/2021, the Learned Magistrate gave directions on both the application dated 13/7/2021 and the preliminary objection dated 26/1/2021. She directed the parties to canvass the two items through written submissions and slated the matter for mention on 9/8/2021 to fix a date for ruling. Indeed, parties submitted on both items. On 9/8/2021, the Learned Magistrate scheduled the matter for ruling on 16/9/2021. On 16/9/2021, she rendered a ruling in which she said nothing about the preliminary objection dated 26/1/2021.
12. The preliminary objection raised jurisdictional questions. Secondly, the preliminary objection was presented to the court on or about 28/1/2021 while the respondent's application was presented in July 2021. In my view, the Learned Magistrate having given directions on both the preliminary objection and the application, and taking into account the fact that the preliminary objection raised jurisdictional questions, the Learned Magistrate was, by law, required to dispose the preliminary objection before disposing the application. Put differently, the Learned Magistrate was required to first dispose the question as to whether she had jurisdiction to adjudicate the dispute.
13. The above approach is now a well settled principle of law in Kenya's civil procedure. Nyarangi JA emphasized this principle in *Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd* [1989] 1 KLR in the following words:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation



of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”

14. For the above reason, I agree with the appellant that the Learned Magistrate’s failure to determine the preliminary objection in the ruling reserved for that purpose constituted a serious error of omission that amounted to a miscarriage of justice. Had she determined the preliminary objection and probably upheld it, the injunction which was issued in favour of the respondent would not have been issued. Consequently, I will allow this appeal and set aside the impugned ruling on the above ground.
15. The other grounds and issues which the appellant submitted on focus on the merits of the application and the preliminary objection. The view I take on those grounds and issues is that the Magistrate Court is the right court to determine the preliminary objection. Based on the finding of the magistrate court on the preliminary objection, the application will be disposed by the Magistrate Court appropriately. It would, in the circumstances, be inappropriate for this court to pronounce itself in this Judgment on the merits of the points raised in the preliminary objection and in the application.
16. What I should point out is that, when exercising jurisdiction to grant injunctive orders in a land dispute, a court is required to pay keen attention to the parcel number of the land subject matter of the dispute. As much as possible, diligence is to be exercised to avoid typographical errors. I say so while disposing this appeal because, in their application dated 13/7/2021, the respondents sought orders in relation to land parcel numbers Ruiru/Ruiru East Block 2/27624 and Ruiru/Ruiru East Block 2/27625. However, in the impugned ruling, the Learned Magistrate issued injunctive orders in relation to parcel numbers Ruiru/Ruiru East Block 2/19084 and Ruiru/Ruiru East Block 2/19085.
17. In summary, the findings and disposal pronouncements of this court on the issues that the appellant submitted on are as follows:
 - (i) The Learned Magistrate erred in failing to first consider the appellant’s preliminary objection dated 26/1/2021.
 - (ii) This court will refrain from pronouncing itself on the issues of res judicata because the magistrate court has not pronounced itself on it.
 - (iii) This court will similarly refrain from rendering itself on the question as to whether the orders of Thika ELC Judicial Review Case No 7 of 2018 have been satisfied because the trial court is yet to make conclusive pronouncement on it.
 - (iv) The Learned Magistrate erred in issuing injunctive orders in the suit before disposing the preliminary objection dated 24/1/2021 which had raised questions of jurisdiction.

Disposal Orders

18. In the end, this appeal is disposed through the following orders:
 - a) The ruling of Hon J. A Agonda PM rendered on 16/9/2021 in Ruiru SPMC E & L Case No 88 of 2020 is set aside wholly.
 - b) The preliminary objection dated 26/1/2021 and the application dated 13/7/2021 shall be heard afresh and disposed by a different Magistrate at Ruiru Senior Principal Magistrate Court.
 - c) Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 30TH DAY OF MAY 2022



B M EBOSO

JUDGE

In the Presence of: -

Mr Mwariri for the Appellant

Ms Kinyua for the Respondent

Court Assistant: Ms Lucy Muthoni

