County Government of Kakamega v Mukunga & another (Environment and Land Appeal 9 of 2019) [2022] KEELC 2941 (KLR) (17 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2941 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL 9 OF 2019

DO OHUNGO, J

MAY 17, 2022

BETWEEN

COUNTY GOVERNMENT OF KAKAMEGA ..... APPELLANT

AND

THOMAS MUNIKA MUKUNGA ..... 1ST RESPONDENT

OFFICER IN CHARGE, KHAYEGA AP CAMP ..... 2ND RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court at Kakamega (Hon. E Malesi, Senior Resident Magistrate) delivered on 5th March 2019 in Kakamega MCL & E Case No. 1014 of 2018 Thomas Munika Mukunga vs County Government of Kakamega & The Officer in Charge, Khayega AP Camp)

JUDGMENT

1. The dispute between the parties in this appeal was lodged in the subordinate court through plaint filed on November 30, 2018 by the first respondent. He averred that he was the owner of Plot A34 located at Khayega Market, upon which he constructed a two storeyed building with the consent of the appellant. That onNovember 27, 2018, the appellant demolished the building without notice and with the assistance of police officers provided by the second respondent. The first respondent therefore sought judgment against the appellant and the second respondent, among other prayers, for an order stopping further demolition and compensation at current value of the building.

2. Contemporaneously with the plaint, the first respondent filed an application by way of notice of motion dated 30th November 2018, seeking the following orders:

    1. [Spent]

    2. Thatpending the inter partes hearing and determination of this Application, an order of injunction be and hereby granted restraining the [appellant and

second respondent] from either by themselves, or through their assigns, agents, subordinates, officers or any person claiming through them from continuing with any further demolition of the [first respondent's] building on plot A34 at Khayega Market.

3. Thatpending the inter partes hearing and determination of this Application, an order be and is hereby granted directing the [second respondent] to provide the [first respondent] with two Administration Police Officers to accompany him to his building at Khayega Market accompanied with his agents for purposes of determining the value of demolition done on the building.

4. That the costs of this Application be in the course. (sic)

3. Upon hearing the application, the subordinate court (E Malesi, Senior Resident Magistrate) delivered a compact ruling onMarch 5, 2019, in the following terms:

> I do not want to belabor much on the application dated November 30, 2018. The same was canvassed at length by counsels of both parties. Most important is the assertion that the suit property has extensively been demolished and sits precariously thus becoming hazardous to the market users. The suit property is said to be situate in a market. This assertion has been admitted. The fate of this building is therefore sealed. The demolition must be completed to remove the hazard on the innocent members of the public. However the substantive suit prays for specific orders. At the end of it compensation is an issue which will have to be dealt with. In that regards therefore security ought to be deposited in court to cover the issue of compensation depending on which way the case shall be determined. There is professional valuation on record which values the replacement value at Kshs.4,500,000/=. i (sic) would direct that an amount equivalent thereof be deposited in court within the next 60 days. costs of this application shall abide the outcome of the main suit.

4. Dissatisfied with that outcome, the appellant filed this appeal through memorandum of appeal dated April 4, 2019. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:

1. That the learned magistrate erred in law and in fact by directing the appellant to deposit Kshs. 4,500,000/= as security for compensation when the same was not prayed for in the application dated the 30th day of November, 2018 or even pleaded in the plaint.

2. That the learned magistrate erred in law and in fact by directing the appellant to deposit Kshs. 4,500,000/= as security for compensation by basing the security to be deposited on a professional valuation report which was not part of the documents filed by the 1st respondent in support of his application.

3. That the learned magistrate erred in law and fact by failing to appreciate that in considering a professional valuation report filed after the 1st respondent's application had already been argued was fundamentally prejudicial to the appellant.

4. That the learned magistrate erred in law and fact by failing to appreciate that considering a professional valuation report filed after the 1st respondent's application had already been argued contravened the appellant's basic tenets of fair hearing and rules of natural justice as guaranteed by the *Constitution*.

5. That the learned magistrate erred in law and in fact by unjustifiably directing the appellant to deposit Kshs. 4,500,000/= as security for compensation at an interlocutory stage before the hearing of the substantive suit without the 1st respondent establishing any basis.

6. That the learned magistrate erred in law and fact by unjustifiably directing the appellant to deposit Kshs. 4,500,000/= as security to cover the issue of compensation depending on which way the main suit will be determined without appreciating that there is established mechanism for enforcement of judgment rendered by court.

7. That the learned magistrate erred in law and fact by failing to appreciate the submissions by the appellant's counsel, the applicable provisions of the law and the general circumstances of the case.

5. On the basis of those grounds, the appellant urged the court to set aside the ruling.

6. The appeal was canvassed through written submissions. It was argued on behalf of the appellant that by ordering the deposit of KShs 4,500,000, the learned magistrate erred in granting a relief that had not been sought. Reliance was placed on the case of *Otieno, Ragot & Company Advocates V National Bank of Kenya Limited* [2020] eKLR. Further, the appellant faulted the learned magistrate for making a finding based on a valuation report that was filed after the application had been heard and without leave of the court, thereby depriving the appellant an opportunity to address the report, contrary to article 50 of the *Constitution* of Kenya 2010. Additionally, it was argued that the learned magistrate erred by making a final determination of the suit at an interlocutory stage. The case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR was cited. The appellant therefore urged the court to allow the appeal as prayed.

7. In response, it was submitted on behalf of the first respondent that the subordinate court was well within its discretion to allow the entire building to be demolished to avert the risk to the public while at the same time ordering the appellant to deposit in court a sum equivalent to the estimated value of the building awaiting the determination of the suit. It was further argued that in determining the quantum of security of costs to be deposited, the court is called upon to order for security that is ultimately binding upon the losing party. Reliance was placed on the case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR. Further relying on *Ocean View Beach Hotel Limited vs Salim Sultan Moloo & 5 others* [2012] eKLR, the first respondent argued that under order 26 rule 1 of the *Civil Procedure Rules*, there is no requirement that security for costs must be preceded by an application. Based on those arguments, the first respondent urged the court to dismiss the appeal with costs.

8. The second respondent did not participate in the hearing of the appeal and did not file any submissions.

9. I have carefully considered the grounds of appeal and the parties' respective submissions. The only issue that arises for determination is whether the learned magistrate erred in granting the orders that he gave.

10. The first respondent has advanced arguments on whether or not an order for security for costs could be made. All those arguments are, in my view, misplaced. In fact, the subordinate court did not make any order for security for costs.

11. What was before the court was an application seeking an interlocutory injunction. The principles that guide any court which is considering such an application are well known. They were laid down in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973] E.A 358 and reiterated with more clarity in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. In summary, such an applicant must establish a prima facie case with a probability of success. Even if he succeeds on that first limb, an

injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

12. I have reproduced the whole of the ruling of the subordinate court at paragraph 3 of this judgment. At a glance, one can see that the applicable principles were not considered by the court. Instead, the court seemed to focus on peripheral issues such as the fate of the building and securing compensation for its ultimate value. While the court may have been actuated by noble intentions, the court was simply not called upon to deal with those issues within the confines of the application that was before it. If anything, it is the first respondent that had moved the court to stop the demolition, regardless of the stage it had reached. When a court misdirects itself and as a result arrives at a wrong decision, its exercise of discretion can be interfered with by an appellate court. *See Mbogo and Another v Shah* [1968] EA 93.

13. A court of law must focus on the issues that are placed before it for determination. The mode of distilling and placing issues before the court for determination is through pleadings. Pleadings literally set the agenda for the court, leaving no room for some unknown "any other business" or AOB. Just as the parties are not permitted to go beyond the pleadings, the court too must remain within the issues that flow from the pleadings. See *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR.

14. The order for depositing KShs 4,500,000 was neither sought by the first respondent in Notice of Motion dated November 30, 2018 nor were the appellant and the second respondent given an opportunity to address the court on whether such an order could issue. It literally emerged out of the blue, thereby astounding even the first respondent who has struggled to justify it. In those attempts, the first respondent argued, without foundation, that the amount was for security for costs under order 26 rule 1 of the *Civil Procedure Rules*. In fact, the learned magistrate seemed to be looking in a totally different direction, as can be seen from his statement "At the end of it compensation is an issue which will have to be dealt with. In that regards therefore security ought to be deposited in court to cover the issue of compensation depending on which way the case shall be determined."

15. As the Supreme Court stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, a court's jurisdiction flows from either *the Constitution* or legislation or both and a court of law can only exercise jurisdiction as conferred on it by law. In proceeding to make orders that were not within the application that was before it, the subordinate court exceeded its jurisdiction and its orders in that regard became a nullity. In essence, Notice of Motion dated November 30, 2018 remains undetermined. Nevertheless, considering the age of the matter, the subordinate court should focus on and expedite the hearing and determination of the main suit.

16. In view of the foregoing discourse, I find merit in this appeal. In the result I make the following orders:

    a. This appeal is allowed.

    b. The order of the subordinate court requiring the appellant to deposit KShs 4,500,000 in court is set aside.

    c. The appellant is awarded costs of this appeal. The first respondent will bear those costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Ativa holding brief for Mr Mukele for the appellant

Ms Kadenyi for the 1st respondent

No appearance for the 2nd respondent

Court Assistant: E. Juma