



**Kezengwa v Amica Sacco & another (Environment and Land Miscellaneous Application E018 of 2021) [2022] KEELC 3489 (KLR) (16 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3489 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E018 OF 2021  
MN GICHERU, J  
MAY 16, 2022**

**BETWEEN**

**CAROLYN KAVITA KEZENGWA ..... APPLICANT**

**AND**

**AMICA SACCO ..... 1<sup>ST</sup> RESPONDENT**

**DAVID OMOTTO OTEMBO. .... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the ruling of Chief Magistrates Court at Kajiado by Hon. I. Kabuya (CPM) delivered on 17/2/2021 in Civil Case No. 44/2020)*

**RULING**

1. This ruling is on the notice of motion dated March 29, 2021 which seeks leave to appeal the entire ruling dated February 17, 2021 in ELC CMCC No. 44 of 2020 Kajiado Magistrates' Court and an injunction to restrain the respondents from dealing with L.R. KJD/Kaputiei/24998 pending the hearing and determination of the intended appeal.
2. The motion which is brought under various provisions of *the constitution* and law stated on its face is supported by eight grounds which can be summarized as follows; The Lower Court dismissed the Applicant's application for injunction. The applicant did not appeal on time because her advocate had a sick relative. The suit property was due for sale on March 30, 2021 and if the sale is not stopped, she will suffer avoidable injustice yet she has an arguable appeal with great chances of success.  
  
The application is also supported by affidavit sworn by the applicant in which she adds that the suit property is matrimonial property and was charged without her consent.
3. In its ruling of February 17, 2021, the Lower Court made a specific finding that the applicant had in fact given her consent on 30/3/2017 when she appended her signature on the charge document.



4. The application by the applicant is opposed by the first respondent and Jonathan Ngumo Mbogo, an advocate who is acting for the first respondent has filed a replying affidavit dated April 21, 2021.

He deposes that the applicant having made a false claim as per paragraph (3) above, her current application is fatally incurable, an afterthought, not supported by any evidence, seeks to introduce new evidence, she has appointed a new advocate as she no intention of appealing the ruling of February 17, 2021, has misrepresented the facts, has not indicated what she intends to do if the application is allowed, the second respondent is in huge arrears and has failed to pay the amount advanced which continues to accrue interest and that there is collusion between the applicant and the second respondent to deny the first respondent the fruits of its successful litigation.

5. I have carefully considered the application in its entirety including the affidavits, grounds, annexures and the law applicable.

I find that only two issues arise namely;

- i. Whether the court should grant leave to Appeal the ruling of February 17, 2021.
- ii. Whether the court should grant an order of injunction pending the hearing and determination of the intended Appeal.

By its very nature, the notice of motion is an appeal especially as regards the second issue for determination. That being the case the authority of *Selle and another –versus- Associated Motor Boat Co. Limited and others* (1968) E.A. 123 applies to this case where it was held as follows;

...this court is not bound to necessarily accept the findings of fact by the court below. An appeal to this court... is by way of retrial 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 draw 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..."

Applying the principles of the above case to this case, I find that the trial Magistrate made a fundamental finding of fact that the Applicant granted spousal consent on 30/3/2017. I cannot overturn this finding because no material has been presented before me to enable me do so. Yet the entire Appeal is based on this point of absence of spousal consent at the time of charging the suit land.

This finding by the trial Magistrate cuts across the two issues for determination. This is so because if the applicant gave spousal consent on 30/3/2017, can the Appeal succeed? I think it would not. If the appeal cannot succeed, should I grant leave to Appeal the ruling of February 17, 2021? I find that I should not.

For the above stated reasons, I dismiss the application dated March 29, 2021 with costs to the first respondent.

Order accordingly.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16<sup>TH</sup> DAY OF MAY, 2022.**

**M.N. GICHERU**

**JUDGE**

