



REPUBLIC OF KENYA



KENYA LAW
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Mbogo & another v Kimani (Appeal 4 of 2018)
[2022] KEELC 3784 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3784 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU

APPEAL 4 OF 2018

FM NJOROGE, J

JUNE 30, 2022

BETWEEN

MOSES NDUNG'U MBOGO 1ST APPELLANT

ROSE WANJIKU NDUNG'U 2ND APPELLANT

AND

MOSES NG'ANG'A KIMANI RESPONDENT

*(Being an Appeal against the Ruling of Hon. E. Kimilu S., Resident Magistrate
in Naivasha CMCC Land Case No. 157 of 2016 delivered on 8/5/2018)*

JUDGMENT

1. Being dissatisfied with the with the Ruling of Hon. E. Kimilu (RM) delivered on the 8/5/2018 in Naivasha Case No. 157 of 2018, the appellants have appealed to this honourable court against the said ruling and they have set forth the following grounds of appeal:
 1. That the Learned trial Magistrate erred in law and fact in dismissing the application by the appellants herein dated July 12, 2016.
 2. That the Learned trial Magistrate erred in law and fact in failing to consider the issue of the mode of service of the application to the Counsel for the appellants as was raised by the appellants in the said application.
 3. That the Learned trial Magistrate erred in law and fact in failing to consider that at the time when she proceeded with the application ex-parte, the appellants had not been properly served with the application seeking summary judgement of admission and that the proposed mode of service was only applicable when service of a party was not possible.



4. That the Learned trial Magistrate erred in law and fact in failing to appreciate that at time when she proceeded with the hearing of the suit, she lacked jurisdiction to do as there was an order staying all the lower courts matters in Malindi Petition No. 3 of 2016.
 5. That The Learned trial Magistrate erred in law and fact when she denied the Appellants the right to defend the suit by dismissing the application dated 12" July, 2016 despite there being reasonable reasons as to why they did not attend court at the hearing.
 6. That the Learned trial Magistrate erred in law and fact in refusing to address herself to the substantial issues raised by the Appellants in the application and the submissions.
 7. That The Learned trial Magistrate erred in law and fact in her decision when she found that the issues of capacity to enter into the contract as raised by the appellant in their defence were an attempt to delay the matter yet the said issues went to the root of the dispute before court.
 8. That the Learned trial Magistrate erred in law and fact in failing to appreciate that the dispute related to ownership of land and the evidence required to proof (sic) service is higher.
 9. That the Learned trial Magistrate failed to appreciate that the suit before (sic) related to a parcel of land and it could not be resolved in a summary manner and it was necessary to hear the parties before writing the judgement.
 10. That the Learned trial Magistrate erred in law and fact in failing to appreciate that the Appellants had the right to defend the suit before dismissing the application dated July 12, 2016.
 11. That by refusing to set aside the *ex parte* judgement the trial court condemned the appellants without affording them an opportunity to be heard.
 12. That The Learned trial Magistrate dismissed the appellants application dated July 12, 2016 without any basis and or justification at all.
 13. That the Learned trial Magistrate considered extraneous circumstances in her ruling.
 14. That the Learned trial Magistrate was unfair and arrived on the ruling without considering the evidence and the applicable law.
 15. That the entire ruling was arrived at without proper consideration of law and fact.
 16. That the entire ruling is oppressive to the appellants and should be set aside entirely.
2. The appellants pray that the appeal be allowed, the ruling in the subordinate court be set aside and this court orders that the suit herein do proceed for hearing before another Magistrate.
 3. On 30/1/2020 the appeal was admitted for hearing and this court gave directions that the same be canvassed by way of written submissions. The appellants filed their submissions on 5/6/2020 and the respondent filed his submissions on 4/2/2022.

Determination.

4. The circumstances in which this court can interfere with the trial magistrate's exercise of discretion are well circumscribed in the Court of Appeal case of *Mbogo and another v Shah* [1968] EA 93 where the court held that it can interfere with the discretion if it's satisfied that the trial court misdirected itself in arriving at a wrong decision resulting in a misjustice.



5. In order to have a grasp of the history of this appeal, it is essential to give a brief background. The respondent herein filed a plaint dated 3/3/2016 seeking orders among others an order of specific performance of the Sale Agreement of L.R No. Nyandarua/Olaragwai/7746. Summons were served and the appellants herein entered appearance on 23/3/2016 and filed their defence on 4/4/2016. The same was heard and the court granted interim orders until 26/8/2020 when the same was discharged and a ruling delivered in favour of the respondent dismissing the appellant's application.
6. The suit was never fixed for mention nor set down for hearing and on 18/5/2016, the respondent filed an application seeking judgment on admission and summary judgment against the appellants and the same was allowed on 21/6/2016.
7. The appellants filed an application dated 12/7/2016 praying that the summary judgment entered on 21/6/2016 be stayed pending the hearing and determination of the application which prayer was granted on interim. They also prayed that the orders made on 21/6/2016 be reviewed, vacated or set aside and the court on 8/5/2018 dismissed the application resulting in the filing of this appeal.
8. The appellants in their submission raised four issues for determination, firstly, on the issue of jurisdiction as at the time of hearing the dispute. The appellant submits that it is not in dispute that the suit Naivasha CMCC No. 157 of 2016 relates to land. Further, that at the time when the suit was filed, there was a legal question on the jurisdiction of the magistrates' courts to hear and determine land disputes which resulted to the filing of the Malindi Petition No. 3 of 2016 (Malindi case) on 13/3/2016. That in the said Petition, interim orders were issued on 14/3/2016 stopping the hearing and determination of all matters filed in the Magistrate's Court including the instant suit.
9. The appellants contend that at the time of hearing the application dated 16/5/2016, the trial court did not have jurisdiction to hear and determine the said application and as such the orders issued on 21/6/2016 were null and void. They urge this court to find that at the time the trial magistrate allowed the application for summary judgment, there were valid High Court orders staying such proceedings in the lower court.
10. On the second issue, the appellants contend that the mode of service of the application dated 16/5/2016 was not proper in the circumstances. They relied on the Court of Appeal case of *Shah v Padamshi* [1982] eKLR and Order 5 Rule 5 of the *Civil Procedure Rules* and argue that the application was served late via registered post and there was no evidence to contradict the said averments. The appellants urge the court to take judicial notice of the nature of the case and the extreme measures the court takes to ensure that parties to a case are properly served before summary decisions can be made.
11. The third issue the appellants relied on article 50(1) of the *Constitution* and contend that by dismissing their application, they were condemned unheard. They further argue that the issues raised in the defence were serious issues and they ought to have been given a chance to respond to the application dated 16/5/2016. Regarding the final issue, the appellants contend that the said prayers ought not to have been granted in the case. They cited Order 13 Rule 2 of the *Civil Procedure Rules* and the case of *Choitram v Nazari* (1984) KLR 327 and submitted that it is trite in law that for judgment to be entered on admission, the said admission ought to be very clear and unequivocal. They further argued the trial magistrate proceeded to conclude in her ruling that the 2nd appellant had knowledge of the transaction.
12. The appellants also submit that although there was admission, the same was not so obvious as the defence raised questions of law that needed to be determined by court including the desire by the appellants to refund the monies paid. In conclusion, the appellants submit that in dismissing the appellants' application, the trial magistrate did not consider the issues raised in the application and the defence by the appellants and urged the court to allow the appeal as prayed.



13. The respondent on the other hand addressed each ground of appeal as raised by the appellants. He contends that the trial court was within its mandate to dismiss the application and further that counsel for the appellants was indolent which indolence ought not to be entertained. He further argued that counsel for the appellant admitted that he received the application on 11/7/2016 and therefore they cannot claim that service was defective and/or none-existent.
14. The respondent contends that the trial magistrate had the necessary jurisdiction to hear and determine the matter before her as the same related to contract and not land matters thus the stay order was not applicable. He argues that the prayer for specific performance is one espoused in the principles of contract and cannot be construed to fall under the realm of the stay orders in the Malindi Case that stayed proceedings relating to land. He also submits that despite the appellants being served with the application in good time, counsel for the appellants did not attend court and the application dated 12/7/2016 was only meant to beat the respondent herein into submission and delay the matter.
15. The respondent further submitted that he paid the initial deposit for the suit property as well as the balance within which time ownership has vested on the 1st appellant thus the issue of capacity does not arise and thus the defence was a mere denial whose sum total was to delay the matter indefinitely and consequently deny the respondent quiet enjoyment of his property despite fulfilling all his obligations. He relied on article 159 of the Constitution and submitted that the trial magistrate was right in dismissing the application as a result of the appellants delay in progress of the case. In conclusion, he argues that the trial magistrate considered all factors before making the said ruling and urged this court to dismiss the instant appeal.
16. This court has carefully considered the appeal and the submissions therein. On the issue of jurisdiction or lack of it in ground 1 this court looked at the Constitutional Petition 3 of 2016 Malindi Law Society v Attorney General & 4 others [2016] eKLR Section 2 of the Statute Law (Miscellaneous Amendments) Act 2015 which held that in relation to the jurisdiction of the subordinate courts, in respect of matters relating to environment and use, occupation of and title to land is inconsistent with article 162(2) of the Constitution, and therefore null and void.
17. The above judgment was delivered on 11/11/2016 while the ruling by the trial court in Naivasha while granting the summary judgment was made on 21/6/2016. This means that the Magistrate's court still had jurisdiction at the time to entertain land matters prior to the declarations of section 2(b) of the Statute Law (Miscellaneous Amendments) Act 2015 being declared unconstitutional.
18. The appellants have also mentioned a conservatory order issued on 14/3/2016 which was in place at the time the trial court made its determination on the application dated 16/5/2016 on 21/6/2016. They state that the said conservatory order stayed or rather suspended the coming into force of the implementation of sections 7(3), 8(d), 26(4) (b) of the Environment and Land Act and sections 9(a) and (b) and 10 of the Magistrate's Court Act. However, this is an adversarial situation and it is this court's view that the appellants failed to provide any evidence of the existence of the said conservatory orders.
19. The rest of the grounds can be summarized into one issue of whether the trial magistrate was right in dismissing the application dated 12/7/2016 by allowing the summary judgment to hold.
20. Order 36 Rule 1 of the Civil Procedure Rules on summary judgment provides that:
 1. "In all suits where a plaintiff seeks judgment for-
 - a. A liquidated demand with or without interest; or



- b. The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by Notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for amount claimed, or for recovery of the land and rent or mesne profits”

21. In the case of *ICDC v Daber Enterprises Ltd* (2000) 1 EA 75, the Court of Appeal stated that:

“The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross examination.”

22. Further in the case of *Dhanjal Investments Ltd –v Shababa Investments Ltd*, Civil Appeal No 232 of 1997, the Court of Appeal stated as follows regarding summary judgment:

“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of *Kandlal Restaurant v Devshi & Company* (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of *Souza Figuerido & Company Ltd v Mooring Hotel Ltd* (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without condition....” [Emphasis mine]

23. What constitutes triable issues? in *Kenya Trade Combine Ltd v Shah* Civil Appeal No.193 of 1999, the Court of Appeal stated as follows:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issue which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.” [Emphasis mine]

24. It is clear that from the above authorities, where there are no triable issues disclosed, the court cannot sustain a defence on record.

25. In the instant case, it is not in dispute that the appellants filed their defence. In the defence, the 1st appellant avers that the sale agreement dated 20/9/2015 between himself and the respondent herein was null and void as it purported to dispose of the suit property that was registered in the name of Janet Wairimu Mbogo who was then deceased and that the 1st appellant herein was not an administrator of the estate.

26. The appellants herein in their defence further aver that any transfer executed in favour of any third party arising from the subdivision of the suit property not signed by the administrator of the estate of Janet Wairimu Mbogo is null and void and has no legal effect whatsoever.

27. The constitutional right to a fair hearing is provided for under article 50 (1) of *the Constitution*. It is this court’s view that the defence raises triable issues which ordinarily would have required the matter to be determined by a court at full trial and that the appellants should have been given an opportunity to defend the suit. On his part the respondent had exhibited in the summary judgment application documents showing that the main parcel had already been transferred into the 1st appellant’s name.



The appellants on the other hand, including the 1st appellant, aver that what they did with the suit land was contrary to the law, and they are relying on that claim of illegality hoping to defeat the respondent's claim in the court below in this court's view, that is an issue that the trial court ought to have considered fully after a full hearing of the evidence from both sides. Granting the application therefore drove the appellants' away from the halls of justice before they could be substantively heard on the defence they had filed.

28. It is also this court's view that the rest of the respondent's arguments are majorly premised on technicalities which seem to go against the overriding objective under section 1A, 1B of the *Civil Procedure Act* and article 159 (2) (d) of the *Constitution*. Furthermore, justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issues, unless it is demonstrably shown that the party in question has sought to merely delay or obstruct the cause of justice.
29. In view of the foregoing, the court orders as follows:
- a. The instant appeal is hereby allowed;
 - b. The order of the trial magistrate dismissing the appellants' application dated 12/7/2018 is hereby set aside and substituted with an order allowing that application in terms of prayer no 3 thereof with the appellants herein meeting the costs of that application;
 - c. Naivasha CMCC No. 157 of 2016 shall be heard and determined on its merits before any other magistrate of competent jurisdiction other than Hon. E. Kimilu, SRM.
 - d. Each party shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF JUNE, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

