



Thomas Shibule t/a Thomas Shibule Traders v National Land Commission (Environment and Land Appeal 9 of 2021) [2022] KEELC 3536 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3536 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 9 OF 2021
NA MATHEKA, J
JULY 27, 2022**

**BETWEEN
THOMAS SHIBULE T/A THOMAS SHIBULE TRADERS APPELLANT
AND
NATIONAL LAND COMMISSION RESPONDENT**

(Appeal against the Order of the Honorable Francis Kyambia (CM) delivered on the 2nd February, 2021 in the CMCC No. 1000 OF 2021- MOMBASA Court)

JUDGMENT

1. This is an Appeal against the Order of the Honorable Francis Kyambia (CM) delivered on the 2nd February, 2021 in the CMCC No. 1000 OF 2021- Mombasa Court based on the grounds that;
 1. The Honorable Magistrate erred in law and fact by directing that the Appellant's suit should proceed to formal proof hearing notwithstanding that Decree had been issued on this matter on the 9th November, 2020 and Notice to Show Cause issued on the 23rd December, 2020.
 2. The Honorable Magistrate erred in law and fact in failing to consider that it become functus officio once it entered judgment and issued a Decree on this matter hence cannot turn around and direct that the matter, should proceed for formal proof hearing.
 3. The Honorable Magistrate erred in law and fact by failing to consider that judgment was entered as prayed in the Plaintiff against the Respondents and Decree issued on the 9th November, 2020 and Notice to Show Cause issued on 23rd December, 2020 hence the suit was past formal proof stage.
 4. The Honourable Magistrate erred in law and fact in failing to consider that once a Decree was issued it marked the legal consequence of the facts found in a case between parties in a dispute which can only be challenged through an appeal and or by a motion by the agreed



5. The Honourable Magistrate erred in law and facts for failing to appreciate that the Appellant's suit was purely liquidated claim based on an award offered to the Appellant by the Respondent.
 6. The Honourable Magistrate erred in law and facts by misdirecting himself by dealing with issue which were not before him as the matter was coming up on the 2nd February, 2021 for Notice to Show Cause issued by the Honourable to the Respondents.
 7. The Honourable Magistrate erred in law and facts for failing to appreciate that the Respondent failed to defend this suit though served with Summons to enter appearance together with Plaintiff and other pleadings.
 8. The Honourable Magistrate erred in law and facts for failing to appreciate that the Appellant followed all the legal steps and or requirements whereof the Respondent was dully notified in all instances and affidavit of service filed therein.
 9. The Honourable Magistrate erred in law and facts for failing to appreciate that the Appellant rights had been violated by the Respondent as outlined in Section 113 of the Land Act 2012 requiring the Respondent to satisfy the award promptly.
 10. The Honourable Magistrate erred in law by issuing an ambiguous order which is likely cause confusion in the Appellant suit against the Respondents and deny him the fruits of the judgment.
2. The Appellant prays to this Honourable Court for orders;
 - a. That this Appeal be allowed and the order issued on the 2nd February, 2021 be set aside.
 - b. That the cost of this Appeal be provided for.
 3. The Appellant submitted that claim is a liquidated one for the award of Kshs. 15,600,00/= from the Respondent. That interlocutory judgement had been entered and the matter does not need to go for formal proof. A decree had been issued on the 9th November 2020 and hence the court was functus officio. A notice to show cause was issued to the Respondent and hearing slated for the 2nd February 2021. On the material date and in the absence of the Respondent the court directed that the matter be listed for formal proof hence the basis of this appeal.
 4. This court has considered the Appeal and submissions therein. The Respondent was served but failed to file any submissions. Interlocutory judgments, which are entered when no defence is filed, only apply to the matters specified under Order 10 Rule 6 of the 2010 Civil Procedure Rules. The said provision is drawn as follows;

Interlocutory judgment [Order 10, rule 6.]

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.
 5. In the case of *Apollo Muinde & 2 others vs Ernest Oyaya Okemba* (2019) eKLR the court held that;

It will be seen from the above that interlocutory judgment only applies in claims for pecuniary damages only, or a claim for detention of goods with or without a claim for



pecuniary damages. If the defendant does not enter appearance in such a claim, or enters appearance and does not file a defence (a situation covered by Order 10 Rule 7) the plaintiff may apply for interlocutory judgment, which can be entered and then set down the suit for assessment of damages. The so called “formal proof” is thus nothing beyond a hearing for assessment of damages in a case where one is seeking pecuniary damages and/or seeking damages for detention of goods.”

6. The Appellant in this case has to go through the process of formal proof for the liquidated claim to be assessed. I find that any decree which was issued was in era and cannot be executed as a step in the hearing of this case has been missed.

7. In the case of *Mbogo & Another vs Shab* (1968) EA 93 the Court stated that;

A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

8. In the case of *Nkuba vs Nyamiro* (1983) KLR 403, the same court stated that;

A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

9. I agree with the Trial Magistrate that from the evidence on record the matter to go to formal proof. For these reasons I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

