



**Oucho v Opiyo (Civil Appeal 24 of 2021)
[2022] KEELC 13708 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13708 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL APPEAL 24 OF 2021**

M SILA, J

SEPTEMBER 26, 2022

BETWEEN

JOHN ABURA OUCHO APPELLANT

AND

PARTICK OMONDI OPIYO RESPONDENT

(Being an appeal from the decision of Hon. Francis N. Kyambia, Senior Principal Magistrate, delivered on 26 March 2021, in the suit Mombasa Chief Magistrate's Court, Civil Suit No. 2921 of 2009, John Oucho vs Patrick Opiyo)

JUDGMENT

(Appellant having filed suit against the respondent seeking to have the respondent barred by an order of injunction on the basis that the respondent had sold to the appellant the disputed land; respondent filing defence claiming that they only had a loan agreement with the appellant which was secured by deposit of the original documents of ownership to the suit land which loan had been repaid; respondent filing counterclaim for return of the documents; appellant filing an application for injunction which was granted with an order for the appellant to file an undertaking as to damages which was done; appellant later withdrawing his suit but respondent proceeding on his counterclaim; judgment entered for the respondent for return of the land ownership documents and a further award of Kshs. 500,000/= made on account of the undertaking as to damages; appellant filing appeal contesting the decision of the court; no error on the part of the court in entering judgment for the respondent for return of the land ownership documents; no basis however for the court to make the award of Kshs. 500,000/= on the undertaking as to damages; the law and authorities requiring that there be an inquiry as to the damages meaning that it does not fall for the discretion of the court to make an award without any inquiry; award of Kshs.500,000/= set aside but judgment of the court otherwise affirmed)

1. The appellant, as plaintiff, commenced suit against the respondent at the Chief Magistrate's Court Mombasa, through a plaint which was filed on 14 October 2009. In the plaint, the appellant pleaded



that he purchased from the respondent the right to occupy a plot at Mrima, which plot was described as unsurveyed and unregistered, though properly defined. He pleaded that the purchase price was agreed at Kshs. 300,000/= which he claimed to have paid and that the defendant then handed over to him the documents related to the plot. He pleaded that the respondent apparently lost part of the money paid and resorted to harassing him and interfere with his possession of the plot. In the suit, the appellant sought an order of injunction to restrain the respondent from the land.

2. The respondent filed defence where he pleaded to be the owner of the disputed plot, which was said to be located in Mrima, Likoni area. He denied selling the land to the appellant. He pleaded that on 1 August 2009 the appellant lent him Kshs. 40,000/= on condition that the respondent would deposit his documents of ownership to the suit land as security and that the documents would be returned upon the loan being settled. He pleaded that he subsequently repaid the loan in the same month of August 2009 but the appellant failed to return to him his documents. In September 2009, he fell into arrears of rent (where he was residing) and he again approached the appellant for some money. He pleaded that the appellant drew a sale agreement purporting that he had sold his plot which he (respondent) refused to sign. A dispute then arose and the appellant told him that he will not hand over to him the ownership documents for the land. Apart from the defence, he also filed a counterclaim wherein he asked for an order against the appellant for return of his documents. The said documents were specified to be “ a sale agreement dated 4th August 2005 between Mrima Youth Group Likoni and the respondent, an acknowledgment of receipt of Kshs. 15,000/= by Mrima Youth Group, an acknowledgement of receipt of Kshs. 10,000/= dated 16th September, 2005, an acknowledgement of receipt of Kshs. 10,000/= dated 17th March, 2006, and an agreement dated 7th January, 2007.” A reply to defence and defence to counterclaim was filed wherein the appellant denied lending money to the respondent as claimed and asserted that the money given to the respondent was solely for purposes of purchasing the property.
3. I need to mention that together with the suit, the appellant filed an application for injunction, seeking to restrain the respondent from the suit property pending hearing and determination of the suit. In a ruling delivered on 26 October 2009, the court allowed the application for injunction but ordered the appellant to file an undertaking as to damages. The undertaking as to damages was subsequently filed on 30 October 2009.
4. The matter first proceeded for hearing before Hon. Gesora, on 3 December 2010 when the appellant testified in support of his suit. The matter was thereafter adjourned several times before the defence case commenced. On 3 February 2016, the matter went before Hon. Nyakweba, since Hon. Gesora had been transferred, and Hon. Nyakweba ordered that the case starts de novo. Subsequently, the appellant filed a notice of withdrawal of suit dated 6 May 2019, and the order of withdrawal of suit was recorded on 8 May 2019. The suit then fell into the hands of Hon. Kyambia. There was filed an application dated 13 June 2019 by the respondent, seeking orders of an injunction and leave to amend the counterclaim. The court declined to grant orders to amend the counterclaim, and on the injunction, directed that status quo be maintained as earlier ordered by the court when first dealing with the issue of injunction. The counterclaim thus remained that it was, that is one for return of documents.
5. The case proceeded for hearing of the counterclaim before Hon. Kyambia on 9 September 2020, in absence of counsel for the appellant despite the date having been taken by consent. The respondent testified and stated inter alia that the appellant took his documents which he wanted returned. He called one witness, Paul Okumu, who testified that the appellant lent the respondent Kshs. 40,000/=-, which was repaid, but the appellant declined to surrender back the land documents. There followed an application to set aside the ex parte proceedings but this was dismissed in a ruling delivered on 15 December 2020. Parties were invited to file submissions and judgment was delivered on 26 March



2021. The judgment was in favour of the respondent. Inter alia, the court observed that the appellant had withdrawn his suit and only the counterclaim was pending. The court found the evidence of the respondent uncontroverted. The court was persuaded that the respondent borrowed money from the appellant and pledged his land ownership documents as security. The court further found that the evidence by the respondent, that he had repaid the money, was uncontroverted and corroborated by DW-2. He found that no reason had been given by the appellant for failure to return the documents. The court thus issued an order to the appellant to return to the respondent the original documents to the suit land. The trial court also made an award of Kshs. 500,000/= as damages to the respondent based on the undertaking as to damages that the appellant had filed upon obtaining the order of injunction. Aggrieved by the judgment, the appellant consequently filed this appeal.

6. The appeal is based on the following grounds (slightly paraphrased to avoid obvious errors in drafting) :-
 - i. The Honourable learned Magistrate erred in law and fact in finding that the plaintiff was liable to pay compensation to the defendant arising out of the sale and purchase of the subject parcel of land as the defendant voluntarily sold the suit parcel of land to the plaintiff.
 - ii. The Honourable learned Magistrate erred in law and fact in proceeding to hear and determine a matter that had been withdrawn with the consent of the court. After the matter had been withdrawn there was no case to be adjudicated and the court had become functus officio.
 - iii. The Honourable learned Magistrate erred in law and fact in failing to consider that the court was not entitled to make a contract for the parties.
 - iv. The Honourable learned Magistrate erred in law and fact in considering matters not pleaded as a foundation of his judgment and decision.
 - v. The Honourable learned Magistrate applied wrong principles of law in arriving at the said decision and judgment.
 - vi. The Honourable learned Magistrate erred in law and fact in failing to evaluate the evidence before it and proceeded to make judgment based on uncorroborated evidence.
7. The appellant seeks orders for the judgment and decree to be set aside.
8. I directed that the appeal be heard by way of written submissions and I have taken note of the submissions filed by Mr. Magolo, learned counsel for the appellant, and Mr. Mwarandu, learned counsel for the respondent. None preferred any authorities to me.
9. To recapitulate, it is the appellant who first approached court through this suit and he was seeking orders to restrain the respondent from the disputed land on the basis that the respondent had sold to him the land. The respondent filed a defence and counterclaim, which counterclaim sought a return of the land documents given to the appellant. The court allowed the counterclaim and also made an award of Kshs. 500,000/= being the court's assessment of the damages payable in respect of the undertaking as to damages that was given by the appellant.
10. Significantly, the appellant withdrew his suit against the respondent and the appellant now seems to suggest that arising out of that withdrawal, there was no basis upon which the court continued to hear the suit. The argument of the appellant is misplaced. The withdrawal of the suit did not affect the counterclaim. The mere fact that the appellant withdrew his suit does not mean that the respondent withdrew his counterclaim. Indeed, Order 7 Rule 3, makes clear that a "counterclaim shall have the same effect as a cross-suit...". Filing a counterclaim is similar to filing a suit as plaintiff, and that is why the plaintiff in the main suit needs to file a defence to the counterclaim; he essentially becomes



a defendant in the counterclaim. The withdrawal of the main suit does not in any way prejudice the counterclaim from proceeding as the counterclaim is a separate suit. The court was thus within the law in proceeding to hear the counterclaim and if the appellant wished to defend it then he was at liberty to do so by calling evidence of his own. He did not and that is the reason the learned trial magistrate properly found that the counterclaim was not controverted.

11. I am unable to fault the trial magistrate for coming to the conclusion that the counterclaim was proved and concluding that the parties never had a sale agreement, but instead, the relationship that they had was one of loaner/loanee and that there was evidence that the loan was paid. The appellant did not come to court to give any reason why he should not be ordered to return the documents that were handed over to him as security for the loan and I see no fault on the part of the trial magistrate in him making an order to the appellant to return the documents to the respondent.
12. The only issue that I have is on the quantification of damages arising out of the undertaking as to damages. This was not an award of damages arising out of the pleading of the respondent, but it was an award made out of the undertaking as to damages arising out of the grant of an order of injunction in favour of the appellant. In making the said award, the trial magistrate relied on the case of *Chatur Radio Services vs Pronogram Limited (1994) Eklr*. I am unable to fault the trial magistrate for relying on the said decision, but the problem is that the learned trial magistrate failed to apply the principles laid down in the said suit. What the Court of Appeal held in the said case was that there needed to be an inquiry as to the damages suffered as a result of the grant of the order of injunction. The Court of Appeal did not hold that the court has jurisdiction to grant, on a whim, whatever amount it thought fit to award. I need to make clear that an award of damages under an undertaking given in respect of an injunction is not the same as an award in general damages, the latter of which is in the discretion of the court after taking into account all pertinent surrounding circumstances.
13. The appeal in the *Chatur Radio Services* case arose because the High Court judge, was of opinion that he is beholden to award a maximum amount of Kshs. 2,000/= set out in Section 64 of the [Civil Procedure Act](#). The Court of Appeal (Omolo J dissenting), held that an undertaking as to damages based on an injunction issued pursuant to Order 39 Rule 2 (2) of the then [Civil Procedure Rules](#) (similar to the current Order 40 Rule 2 (2)) called for an inquiry to be made so that the amount awardable as damages may be ascertained. In the judgment, Gicheru J, had this to say :-

Compliance with an undertaking as to damages necessarily involves an investigation as to the damages sustained by the defendant on account of wrongful grant of an interlocutory injunction. Such investigation is no less than a judicial examination and determination of the issue of the damages the defendant is entitled to. Indeed, it is in effect an interlocutory trial of that issue. On the establishment and assessment of such damages, the plaintiff who gave the undertaking is enjoined to comply therewith. This, I think is what is contemplated by the words in order XXXIX rule 2(2) of the Rules that the Court may by order grant a temporary injunction on such terms inter alia “as to an inquiry as to damages” as it thinks fit: for upon such term, the plaintiff who is seeking the injunction is undertaking to submit wholly to the power of the court granting such injunction to adjudicate on the issue of the damages sustained by the defendant by reason of an improper grant of the injunction. That, as is evident from what I have attempted to outline above, is what an undertaking as to damages is all about and the non-compliance with it is enforceable by the Court granting the injunction by attachment and/or committal under sub-rules (3) and (4) of the rule mentioned above (emphasis mine).



14. It will be seen from the above that the court is enjoined to make an inquiry. Ideally, the party against whom the injunction was granted, needs to make an application under Order 40 Rule 2 (2) for an inquiry to be made on the amount of damages that may be awardable to him. In such an inquiry, the applicant will outline what he deems to have suffered as damages, with opportunity being given to the respondent to rebut such assertion, after which the court will then proceed to make an award of damages arising out of that inquiry. The court cannot, without undertaking the said inquiry, proceed to make an award purely within its discretion.
15. It was therefore erroneous for the trial magistrate to make the award of Kshs. 500,000/= as damages arising out of the undertaking given by the appellant upon grant of the order of injunction. Instead, the trial magistrate ought to have stopped at pronouncing that the respondent is entitled to an award of damages based on the undertaking, and proceeded to inform the respondent of his right to seek an inquiry as to the damages that he may have suffered. It is only upon inquiry that the trial magistrate would have come to a specific amount that ought to have been awarded to the respondent which amount would be enforceable by attachment or other forms of execution as provided for under Order 40 of the Civil Procedure Rules.
16. For the above reasons, I will set aside the award of Kshs. 500,000/= made as damages under the undertaking given by the appellant. Instead, if the respondent is of opinion that he needs to be compensated, then he needs to file an application for inquiry as to damages, within the suit before the magistrate, and the magistrate will proceed to determine what ought to be awarded after making the inquiry.
17. This appeal succeeds to the extent above.
18. The only issue left is costs. The appellant has only partly succeeded. I will therefore order each party to bear his own costs of this appeal.
19. Judgment accordingly.

DATED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

In the presence of:-

Mr Kahindi holding brief for Mr Mwarandu for the respondent.

No appearance on part of Mr. Magolo for the appellant.

Court Assistant – Wilson Rabong’o.

