



REPUBLIC OF KENYA



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**Ochieng v Awori (Environment and Land Appeal 12 of 2020)
[2022] KEELC 14477 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14477 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 12 OF 2020
FO NYAGAKA, J
OCTOBER 27, 2022**

BETWEEN

PATRICK OCHIENG APPELLANT

AND

LEONARD AWORI RESPONDENT

(Being an Appeal arising out of the Ruling and Order of Hon. S. N. Makila (Principal Magistrate) in Kitale in CMCC No. 85 of 2019 delivered on 16 th December, 2020)

JUDGMENT

Introduction

1. The present Appeal arises out of a Ruling and Order of the trial court delivered on 16/12/2020. The upshot of the Ruling was that judgment was entered in favor of the Plaintiff in the following terms:

“The Defendant removes the structures he has built on the road reserve blocking the Plaintiff from accessing his parcel No. Kiminini/Kinyoro Block 3/Matisi/540 within the next sixty (60) days failure to which the O. C. S Kitale Police Station and the Assistant County Commissioner Matisi Location are directed to evict the Defendant at his own cost.”

2. The Court further awarded costs of the suit to the Plaintiff (the Respondent herein).
3. Aggrieved by the decision, the Appellant (who was the Defendant at trial), filed a Memorandum of Appeal on 31/12/2020. In precis, the Appellant decried that the trial Court erred in entering judgment on a ruling based on the County Surveyor’s report dated 23/10/2020. Furthermore, he contended that the trial court adopted the Land Registrar’s recommendation dated 17/09/2020 which contradicted the recommendations embedded by the County Surveyor in the report dated 23/10/2020. He argued that as a result of the above, his right to a fair hearing was infringed upon. He prayed that the judgment and the consequential orders to be set aside to pave way for fair adjudication of the dispute, and the



County Surveyor's Report dated 23/10/2020 be considered and the suit be fixed for hearing. He further prayed for costs of the Appeal.

4. Worth noting is that on 08/04/2021, the Appellant filed a Record of Appeal dated 06/04/2021 in which he annexed a Ruling of this Court on stay of execution of the decree of the trial Court rather than the Ruling from which he appealed. It would appear that in the process of preparation to move the Court for Directions in the Appeal, the Appellant may have realized his error and on 26/05/2022 filed a Supplementary Record of Appeal without leave of the Court and relied on it in the appeal. The Supplementary record contained the right set of documents, namely the impugned ruling and the order issued thereto. The Court, using the saving Clause of Article 159(2)(d) of the 2010 Constitution regarding the need by Courts to do away with technicalities in determination of issues between parties unless the technicalities go to the root of a matter, exercised its discretion and allowed the use of the said Record to determine the merits of the Appeal since its filing and use was neither objected to nor was it sought to be struck out.

The Submissions

5. Parties disposed of the Appeal by way of written submissions as directed by the Court. According to the Appellants' submissions filed on 16/09/2022, the trial court entered judgment in incipient proceedings. To him, the trial court ought to have conducted a hearing by hearing both parties before entering judgment. He submitted that the County Surveyor's Report dated 23/10/2020 recommended that the issue be broadened to include more parcels in order to fairly determine the position in parcel No. 1870 and the roads. Thereafter, if the Appellant was found to be occupying a road reserve as to deny the Respondent access to his property, he would have to demolish the building on the eastern side. Alternatively, the current ground status be adopted and the map rectified to the situation on the ground. The Appellant argued that a portion of his land was hived off while that of the Respondent was enlarged. He maintained that he had not blocked the Respondent in any manner whatsoever.
6. The Appellant observed that the Land Registrar's Report was not produced by the maker, thereby infringing the rules of evidence. Furthermore, the Plaintiff did not seek a prayer touching on the Land Registrar's Report. He recommended that the court ought to have visited on the suit premises before entering judgment.
7. The Appellant cited Article 50 and Article 159 (2) (a) of the *Constitution* contending that they were infringed. He submitted that the Land Registrar failed to take into account all pre-existing documents and failed to conduct proper investigations. He prayed that the Land Registrar's Report of 12/09/2017 and that of the surveyor dated 14/08/2017 be disregarded.
8. The Respondent filed submissions on 15/07/2022. He lauded the trial Court's decision as it found that the Appellant's position lacked merit. He welcomed the Land Registrar's Report filed on 12/09/2017. He observed that from the Report there was encroachment on the road reserve between parcels no. Kiminini/Kinyoro/Block 3/Matisi/540 and Kiminini/Kinyoro/Block 3/Matisi/1870. He argued that, in the Report, the Land Registrar recommended that anyone aggrieved with those findings could appeal before the Chief Land Registrar. The Respondent then filed the suit from whose decision the appeal was preferred.
9. The Respondent continued his argument that the trial court was correct in finding that the Respondent had complied with Section 18 (2) and 19 (2) of the *Land Registration Act*. He maintained that the County Surveyor's report of 23/10/2020 lacked probative value. Resultantly, the trial court



was persuaded by the Land Registrar Report of 12/09/2017 that remained uncontested. He urged this court to uphold the trial court's findings.

10. A quick observation from the Respondent's submissions is that he annexed to them, two (2) County Surveyor's Reports dated 12/09/2017 and 23/10/2020. This court will not tire to remind parties that submissions are not pleadings hence there was no need to annex the reports to submissions. The parties herein are encouraged to read the Court of Appeal decision of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR on an exact similar issue. In it the Court stated that. "Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all." It was improper for the Respondent to purport to annex the two reports for the court to consider them whether or merits or otherwise. I will thus disregard them.

Analysis and Disposition

11. This court has considered the Memorandum of Appeal and the rival submissions filed by parties in this matter, and the relevant law both substantive and procedural. This court has also taken the time to scrutinize the record of appeal.
12. This Court is alive to the fact of it being a first appellate court. As such, it must remind itself that as an appellate court of that instance it will not normally interfere with the exercise of such discretion unless it has been shown that the discretion was not exercised judiciously [*Kiriisa vs. Attorney General & Another* [1990-1994] EA 244], but it must re-evaluate the evidence that was before the trial Court, if the appeal is on the merits or otherwise of it. Similarly, the appellate court will not interfere with the exercise of discretion of a court unless it is satisfied that it misdirected itself 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 court was clearly wrong in the exercise of the discretion and that as a result there had been injustice.
13. The elements the trial court should take into consideration in dealing with the question of adjournment are the adequacy of reasons given for the application, how far, if at all, the other party is likely to be prejudiced by the adjournment, and how far such other party can be suitably compensated by the order against the applicant to pay costs. [*Mbogo & Another vs. Shah* [1968] EA 93].
14. An abridged background of the facts leading up to the Appeal is necessary to enable this court make a determination of the present Appeal. The Plaintiff in Kitale CMCC No. 85 of 2019 instituted the suit by way of a Plaint seeking the following reliefs:
 - a. An order declaring that the Plaintiff is the legal and absolute owner of Plot No. Kiminini/ Kinyoro Block 3/Matisi/540 measuring 0.0526 Ha and that the Defendant and all those claiming under him do move out of the suit Land meant for road reserves, falling which they be evicted forthwith with the assistance of the O. C. S Kitale Police Station and Assistant County Commissioner Matisi Location at his own costs.
 - b. Costs of this suit.
 - c. Any other relief that the court may deem fit to grant for the interest of justice.
15. After the Appellant came on record, parties complied with the provisions of Order 11 of the Civil Procedure Rules. The Respondent testified on 06/11/2019. He was, however, stood down to furnish a copy of the County Surveyor's Report to the Appellant. On 04/12/2019, the trial court directed the County Surveyor to visit the suit land in the presence of both parties and file a report. It was indicated on 25/10/2020 that the Report was ready. The court directed parties to peruse it and furnish their



recommendations. It appears that parties were to furnish those recommendations by way of written submissions.

16. The Court considered the submissions of both parties and rendered its Ruling on 16/12/2020. The Appellant in his submissions filed on 07/12/2020, concluded that the Respondent, based on the County Surveyor's Report had not established any cause of action. He exhorted that the suit be dismissed with costs for offending Section 18 (2) of the *Land Registration Act*. The Respondent filed his submissions on 10/12/2020. He submitted that the County Surveyor's Report failed to meet the legal threshold for admission before the Court. He cited that it was incomplete. He remarked that the report raised acreage issues instead of addressing whether the Appellant had set up structures on the road. He concluded that the said report was inconclusive and misleading. He urged the court to disregard the same and be guided by that dated 14/07/2017 as well as the Land Registrar's recommendations dated 12/09/2017.
17. Looking at the County Surveyor's Report dated 23/10/2020, the same outlined the challenges faced. The Surveyor then gave his general observations on orientation and shape as well as the areas of the plots. His conclusion was that "...the Surveyor who conducted the subdivision did a very shoddy job and may have colluded with the seller after realizing that the areas on the ground was less than required." In that regard, he gave the following recommendations:
 - a. "The issue should be broadened to include more parcels especially those affected by mutation serial No. 04091569 so as to be able to fairly determine the positions of parcel No. 1870 and the roads;
 - b. After the above is properly established and the Defendant is found to be on the road reserve such that to deny the Plaintiff proper access to his property, then he should demolish the buildings on the eastern side;
 - c. Alternatively, the current ground status be adopted and the map rectified to suit the ground."
18. Against that background, I have also considered the trial court's "ruling" but which turned out to be a judgment. I have noted some observations as follows; firstly, the trial court asked parties to give their recommendations by way of submissions. It was based on their recommendations in the submissions that the court would have given a Ruling as to the place of the County Surveyor's Report against the disputed facts in the proceedings. So that the court was only bound to consider the parties' recommendations therein and arrive at a conclusion as to the veracity, finality or otherwise of the Report. In any event the case was still in its nascent stage. Secondly, none of the parties prayed for the orders that the court ultimately granted. In fact, the impugned prayers are not even featured in the Plaintiff.
19. The trial court, in my view, and with due respect to the learned trial magistrate exercised discretion injudiciously. Firstly, she went over and above her directions requiring the parties to address her only on the County Surveyor's Report dated 23/10/2020 by further addressing herself to a Report dated 12/09/2017. In fact, her reliance of that report of 12/09/2017 premised her final outcome. That ended up concluding the case without testing the credibility of the Report or finding therein through the parties being given opportunity to cross-examine him on his findings especially in light of the fact that he made a number of general and other unsubstantiated findings such as that "...the Surveyor...may have colluded with the seller..." Such serious allegations in a report that the Court relied on to cut short the life of the case appealed from called for further interrogation by way of cross-examination of the maker.



20. The trial Magistrate then relied on Sections 18 (2) and 19 (2) of the *Land Registration Act* that had no role or part in addressing the report of 23/10/2020. The trial court found glaring discrepancies on the Report of 23/10/2020 and yet declared and decided that she could not rely on it. I think the trial Court would have stopped at the finding of the discrepancies and directed parties to proceed for viva voce evidence. This was, in my view an injudicious step.
21. It was erroneous wrong for the trial court to state, at that juncture, that the Report of 12/09/2017, would form the basis of final orders of the court without the benefit of a full hearing. While that making of the report had not been disputed, there were other factors the trial court had to place considerations on, before ultimately deciding the matter to finality. I therefore find that indeed, the trial court improperly exercised her discretion when she entered judgment amorously.
22. The Appellant raised the ground of denial of his right to fair hearing. The right to fair trial is a wide and encompassing one. In civil cases, subject to the lawful limitations that may be imposed, it includes a party be it a Plaintiff, Petitioner or Claimant, or a Defendant or Respondent, being afforded opportunity to prepare for his/her case and being given the chance to present the evidence he/she has prepared, before an impartial court, tribunal or forum. Article 50 (1) of *the Constitution* guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. So fundamental and inalienable is this right that under Article 25 (c), this right shall not be limited.
23. The Court in *Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish and another* [2018] eKLR extensively discussed this right to fair trial in civil proceedings. It held as follows and which holding I wholly adopt:
- “While the wordings of Article 50 of *the Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials, it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time.
- The aim of the right is to ensure the fair administration of justice and adherence for one to be given an opportunity to be heard by any independent tribunal without any obstacles laid on the way.
- The contours of civil due process are the bedrock principles that a trial of the claim must precede judgment cannot be over emphasized.”
24. It behooved the trial court to ascertain, as rightly pointed by it in its analysis, whether the report dated 23/10/2020 bore any probative value and leave it at that. Thereafter, it would have been obligatory to proceed with the hearing where parties gave testimonies and decide upon the matter holistically after having heard both parties and collated and analyzed the evidence on record. Indeed, the trial court was in error in entering judgment at that juncture.
25. It is important also for this Court to make a finding regarding the trial magistrates’ reliance on a document that had not been produced in evidence and proved in accordance thereto to make final determination of the issues before it. It is a fact, observable from the Court Record, that the Report dated 23/10/2020 was prepared by the County Surveyor, one Protus Muindi, and file in the Court Registry hence filed on 28/10/2020. On the said date the trial Magistrate directed the parties to peruse



the Report “...and give their recommendations on...the same.” The Report was neither marked for identification nor produced and proved in evidence. Thus, unless it was produced and admitted on record in evidence by consent of the parties it was only a document being part of the Court record but of no evidentiary value of any kind. Therefore, the Court did not have a basis for relying on it in evidence. This Court has had on occasion before restated the procedure of proof of documentary evidence. It is worth repeating the procedure in this matter as I arrive at the finding that I have made. The decision was that of *Sofie Feis Caroline Lwangu v Benson Wafula Ndoté* [2022] eKLR where the Court had this to say:

“...first, the document is filed in court (according to the rules or legal requirements. Second, if the document is not the original, the party wanting to produce it will lay the basis for the production of the copy and not the original. Once the Court is satisfied with that basis, then third, the party will lay a further basis for production of the document. Fourth, the party will then prove the contents, state or physical appearance of the document.”

26. The trial Magistrate failed to have the Report in issue processed in the manner above stated in order for it to form the evidence that it could rely on. And, just to add, before I conclude this judgment and while it may appear basic or rather obvious, it bears restating that, civil trials, as I understand them to be conducted procedurally where viva voce evidence is adduced as was in the impugned trial proceedings, are to be run by Courts in such a manner as the Plaintiff, Petitioner or Claimant adduce evidence and be cross-examined if need be depending on the decision of the defence, in cases where the matter is defended and the witness if represented can afterward be re-examined if it is necessary in the mind of learned counsel or authorized representative, and the procedure be replicated in as many times as the number of witnesses called by the Plaintiff, Petitioner or Claimant, after which his/her case MUST be closed. The record ought to bear this. Then the Defence will, if it so desires, go through similar motions as the adverse party and its case too closed, and the record bears so. In the case of a formal proof, both the Plaintiff and Defence case have to be clearly indicated as closed before a judgment can be delivered, if it has to be procedurally right. These are steps absent in the record before me.

What Orders to issue

27. Based on the above analysis, I find that the Appeal herein is with merit. Consequently, I enter judgment as follows:
- a. The Ruling delivered as a judgment on 16/12/2020 and all consequential orders, and the proceedings leading thereto, be and are hereby set aside.
 - b. The County Surveyor’s Report dated 23/10/2020 be considered afresh, if need be, and any recommendations thereon by parties as may be delineated in their submissions be determined.
 - c. The matter shall be placed for fresh hearing and determination before any other judicial officer vested with jurisdiction than the trial Magistrate.
 - d. The Appellant shall have the costs of this Appeal.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
27TH DAY OF OCTOBER 2022.**

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

