



**Selebwa v Khayiya (Environment and Land Appeal 20 of 2020)
[2022] KEELC 13624 (KLR) (18 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 20 OF 2020
DO OHUNGO, J
OCTOBER 18, 2022**

BETWEEN

DISMAS SELEBWA APPELLANT

AND

JAMES MURUNGA KHAYIYA RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kakamega (Hon. B. Ochieng) delivered on 5th August 2020 in MCE & L Case No. 94 of 2019 Dismas Selebwa v James Murunga Khayiya)

JUDGMENT

1. This appeal traces its roots to Notice of Motion dated 6th November 2019, an application which the Respondent filed in the subordinate court seeking the following orders:
 1. [Spent]
 2. That the Honourable Court be pleased to visit the suit land parcel Kakamega/shibuname/470 and make appropriate notes as to the actual use and occupation of the suit land by the defendant and the plaintiff as it were before the defendant was evicted on 27/7/2019 and after the eviction pending the interpartes hearing and determination of the application herein.
 3. That a temporary injunction be issued restraining the Plaintiff, his agents, servants, employees, personal representatives and or any other person acting on behalf of the Plaintiff from disposing, carrying away, removing the iron sheets, construction poles or posts and or all other construction materials resulting from the demolished houses, toilets and kiosk of the defendant from the specific portion of the suit land Kakamega/shibuname/470 initially used and occupied by the defendant before eviction so as to preserve the eviction site pending the interpartes hearing and determination of the application herein and or until further orders of the court.



4. That a temporary injunction be issued restraining the plaintiff, his agents, servants, employees, personal representatives and or any other person acting on behalf of the Plaintiff from interfering with the boundaries demarcating the specific portion of the suit land Kakamega/shibuname/470 initially used and occupied by the defendant before the eviction as well as the boundaries demarcating the specific portion of the same suit land occupied by the plaintiff before the eviction of the defendant so as to preserve the eviction site pending the interpartes hearing and determination of the application herein and or until further orders of the court.
5. That a temporary injunction be issued restraining the plaintiff, his agents, servants, employees, personal representatives and or any other person acting on behalf of the plaintiff from selling, charging, leasing, subdividing, assigning, and or transferring the suit land parcel number Kakamega/shibuname/470 pending the interpartes hearing and determination of the application herein.
6. That the orders of this Honourable Court made and issued on 16/7/2019 be reviewed, vacated and or set aside pending the full hearing and determination of the Plaintiff's suit and the defendant's counterclaim.
7. That upon granting of prayer (6) above, an order be issued allowing the defendant to proceed to the suit land parcel Kakamega/shibuname/470 and continue with the use and occupation of a portion measuring 0.5HA out of the entire suit land in particular the specific portion of the suit land that the defendant was using and or occupying prior to his eviction from the suit land.
8. That upon granting of prayer 7 above, an order be issued directing the plaintiff to deposit in court a sum of Kshs. 450,000/= (Four Hundred and Fifty Thousands Kenya Shillings Only) or any such reasonable amount sufficient enough to be released to the defendant so as to assist in reconstructing and or establishing the defendant's residence as it were on the suit land before the eviction that took place pending the full hearing and determination of the Plaintiff's suit and the defendant's counterclaim.
9. That an order be issued directing the Officer in charge of Malaika Police Station (O.C.S) who supervised the eviction of the defendant from the suit land to file a report of the eviction exercise indicating the number of houses, structures demolished and the number of the people evicted from the suit land Kakamega/shibuname/470 pursuant to the eviction order of this honorable court made on 16/7/2019.
10. That an order be issued directing the Land Registrar Kakamega County to appear in court and produce the entire land parcel file for the suit land Kakamega/shibuname/470 for purposes of cross examining the plaintiff and for scrutiny by the court and the defendant at the interpartes hearing of this application.
11. That the main suit and counterclaim be heard and determined within a period of one month upon determination of the application herein.
12. That the orders sought in terms of orders 2,3,4 and 5 above be confirmed pending the full hearing and determination of the Plaintiff's suit and the defendant's counter-claim.
13. That the court be pleased to make any other orders to meet the interest of justice.
14. That the plaintiff be condemned to pay the costs of this application.



2. Upon hearing the application, Hon. B. Ochieng, Chief Magistrate, delivered a ruling on 5th August 2020 and allowed the application in terms of prayers 3, 4, 5, 6 and 7 thereof. Dissatisfied with that outcome, the appellant filed this appeal through Memorandum of Appeal dated 17th August 2020 and amended on 13th July 2021.
3. The following are the grounds of appeal as listed on the face of the amended memorandum of appeal:
 1. That the learned trial Magistrate erred in law and fact in failing to find that there was no suit in existence as at 6.11.2019 when the respondent filed the application dated 6.11.2019 for grant of prayers for both interlocutory and mandatory injunctions thereby granting the reliefs to the respondents. (Sic)
 - 1A. That the learned trial Magistrate erred in law and fact and acted as an appellate court and purported to set aside the earlier orders granted by Hon. H. Wandera (SPM) on 16.7.2019 without taking into account he had no such Jurisdiction to vary the said orders.
 2. That the learned trial magistrate erred in fact in allowing the application dated on 6.11.2019 and more specifically granting prayers 3, 4, 5, 6 and 7 which prayers were not available to the respondent in the case.
 3. That the learned trial magistrate erred in law and fact in basing his finding on unproven allegations by the respondent.
 4. That the learned trial magistrate erred in law and fact in finding that the appellant did not file his submissions and proceeded to write his ruling without any reference to the replying affidavit or pleadings filed by the appellant.
 5. That the learned trial Magistrate erred in law and fact in failing to find that order 45 Civil procedure Rules CPR was applicable to this case as the respondent who was present in court on the 16th day of, July, 2019 when eviction orders were made had no defence or did not offer any defence to the suit or application hence the court had jurisdiction to enter summary judgement.
 6. That the learned trial Magistrate erred in law and in fact in setting aside the judgement herein in the absence of any application to the effect or under sec 3,3A of the civil procedure Act when there are legal procedures provided for such an application in the rules.
 7. That the learned trial Magistrate erred in law and in fact in entertaining a plea of fraud from the respondent when the respondent has no properly and procedurally filled pleadings on record and in the absence of any evidence on record.
 8. That the learned trial Magistrate erred in law and in fact in applying the principles of adverse possession in favour of the respondent in this matter contrary to the pleadings on record.
 9. That the learned trial Magistrate erred in law and in fact in proceeding as if the respondent's defence and counter claim had been duly filed contrary to the evidence on record and before setting aside the orders made on the 16th day of July, 2019.
4. The appeal was canvassed through written submissions. The appellant filed his submissions on 25th January 2022 and argued that through the order dated 16th July 2019, the subordinate court gave a substantive order in an interlocutory application, contrary to the general position that such orders cannot be issued at the interlocutory stage. Reliance was placed on Witmore Investment Limited v



County Government of Kirinyaga & 3 others [2016] eKLR and Nairobi West Hospital Limited v Joseph Kariba & Another [2018] eKLR.

5. The appellant therefore submitted that applying the above principle to the application dated 1st July 2019, it would be proper for the court to strike out the said application since the application was seeking an order that in effect appears to resolve with finality an issue in controversy in the main suit. He further submitted that the order dated 16th July 2019 has the effect of a summary judgement which resulted in the respondent being evicted thereby rendering the substantive issues in the suit determined and therefore making the court functus officio.. Further submitting that it was a strange aberration for the learned magistrate to embark on what is essentially an examination of the judicial conduct and pronouncements of a magistrate of the same status as himself, the appellant relied on *Kombo v Attorney General* [1995-98] 1EA 168.
6. The appellant went on to submit that the aforementioned orders created a false peace to the parties and that the real issues raised in the plaint are yet to be settled. He therefore urged the court to allow the appeal, order parties to maintain the status quo that existed before the filing of the suit and to reopen the suit in the subordinate court to allow parties to address the substantive issues therein to completion. He further urged that costs of appeal be borne by the respondent.
7. The respondent filed his submissions on 22nd March 2022 and argued that the orders of 5th August 2020 restored him back to the suit property such that the parties now co-exist as they did prior to the filing of the suit. He further submitted that the appellant’s prayers for setting aside the ruling have been overtaken by events and that if the ruling is set aside, it will mean that the respondent be evicted for the second time, yet the main suit is yet to be heard and determined. He added that the objective of the ruling appealed against has been achieved and that the subordinate court having appreciated that the respondent was illegally evicted, it would be sad to again order that he be re-evicted before hearing him.
8. It was the respondent’s further submission that the prayers sought in the appeal are ambiguous as they contradict the prayers sought in the appellant’s written submissions. While agreeing with the appellant’s submission that a court sharing jurisdiction with another court cannot review the orders of a court of similar status, the respondent argued that having been restored into possession, it would be wrong for this court to victimise him due to mistakes of the trial court.
9. In conclusion, the respondent submitted that the court should focus on the overriding objective in the dispute that can be attained by maintaining the status quo that existed before filing of the suit and that the respondent having been restored back to the land, he should remain in use and occupation of the suit land as parties ventilate the real issues in the suit. Reliance was placed on Paul Korir Sawe & Another -v- Salina C. Sawe [2021] eKLR. The respondent therefore urged that the appellant’s appeal to be dismissed with costs.
10. I have considered the grounds of appeal and the parties’ respective submissions. The issues that arise for determination in this appeal are whether the eviction order was rightly granted, whether it would be just to revert parties to the position that obtained just before the ruling dated 5th August 2020 and whether the appeal is merited.
11. There is no dispute that the bone of contention is ownership of the parcel of land known as Kakamega/Shibuname/470 (the suit property) which is being claimed by the parties who are cousins. Both parties agree that the main dispute between them is yet to be resolved since the main suit is yet to be heard and determined. A perusal of the plaint reveals that the appellant is solely seeking judgment for “immediate eviction” of the respondent together with his family and agents from the suit property while the respondent’s defence and counterclaim shows that the respondent seeks inter alia a declaration that the suit property is ancestral land and an order that the appellant is holding a portion thereof in trust



for the respondent. All those competing claims can only be resolved upon hearing and determination of the suit on the merits, a stage which is yet to be reached.

12. While this appeal was triggered by the subordinate court's ruling on Notice of Motion dated 6th November 2019, it must be remembered that the said application was in turn filed as a direct consequence of the subordinate court's orders of 16th July 2019 pursuant to which the said court ordered, inter alia, eviction of the respondent together with his family and agents from the suit property.
13. An eviction order is a final order which the appellant is seeking in his plaint. Barring exceptional circumstances, and none have been demonstrated in this matter, such an order cannot be granted at an interlocutory stage and must await hearing and determination of the suit. See *Joshua Abuga & 5 others v Kelvin Kimulu & 3 others* [2020] eKLR. While I am keenly aware that this appeal is not against the orders of 16th July 2019, it is virtually impossible to resolve this appeal without examining the orders of 16th July 2019 in view of the nexus that I have explained above.
14. In view of Article 159 (2) (b), (d) and (e) of *the Constitution*, Section 3 of the *Environment and Land Court Act* and Sections 1A and 1B of the *Civil Procedure Act*, just to name a few, the mission of every court is to render substantive justice. The subordinate court's obligation in that regard is reiterated by and Section 4 of the *Magistrates' Courts Act*, 2015. The court is not absolved from its obligations in that regard even where the opposite party is found to be absent despite service. It is an ever-present obligation that cuts across the board and applies even in undefended causes. I have no doubt in my mind, and the appellant seems to agree, that Hon. Wandere erred in granting an eviction order in the circumstances of the matter that was before her. Consequently, the eviction order of 16th July 2019 was not rightly granted.
15. As I understand it, the orders of 5th August 2020 were issued to cure the injustice brought about by the orders of 16th July 2019. In view of the constitutional edict to render substantive justice and further taking into account that the parties have since been restored to the position where they were prior to the orders of 16th July 2019, I do not find it necessary to discuss the question of whether Hon. B. Ochieng had jurisdiction to set aside the said orders. Clearly, it would be totally unjust to revert parties to the position that obtained just before the ruling dated 5th August 2020 and in effect evict the respondent yet again.
16. While every litigant has a right to a fair hearing which includes the right to challenge unfavourable decisions through appeal, litigants just like the court bear the responsibility to ensure that disputes are resolved in a just and expeditious manner. The ruling which is the subject of this appeal was delivered on 5th August 2020, on an interlocutory issue. Over two years have since lapsed as the parties haggled over this appeal yet the substantive dispute between them has stalled in the subordinate court. They now need to go back to the subordinate court and resolutely prosecute the main suit.
17. In view of the foregoing discourse, I find no merit in this appeal and I therefore dismiss it. Considering the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the appellant



No appearance for the respondent

Court Assistant: E. Juma

