Kironjo v Maringa; Karani & 65 others (Respondent) (Environment & Land Case 219 of 2014) [2022] KEELC 13593 (KLR) (11 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13593 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 219 OF 2014

A KANIARU, J

OCTOBER 11, 2022

BETWEEN

BENSON NGUNGI KIRONJO ..... PLAINTIFF

AND

JOEL KITHAKA MARINGA ..... DEFENDANT

AND

PETER MATHURI KARANI & 65 OTHERS ..... RESPONDENT

RULING

1. The application before me for determination is a motion on notice dated February 23, 2022 and filed on March 3, 2022. It is expressed to be brought under section 3A of the *Civil Procedure Act*. The applicant – Joel Kithaka Maringa – is the defendant in the suit while the respondent – Benson Ngungi Kironjo – is the defendant. One – Peter Mathuri & 65 others – are also stated to be respondents. The application has three (3) prayers, which are as follows:

    1. That the notice of motion dated April 18, 2019 be referred to court No 2 – Siakago Principal Magistrates Court – for hearing and determination.

    2. That in the alternative, the notice of motion dated April 18, 2019 be referred to any other competent court for hearing and determination.

    3. That the costs of this application be awarded to the respondent.

2. The applicant anchored his application on grounds, *inter alia*, that this court ordered that this matter be transferred to magistrates court, Siakago, for hearing and determination of the application dated April 18, 2019; that Siakago magistrates court declined to hear the application for reason that it has no jurisdiction; and that it is in the interests of justice that the matter be handled by a different court. The grounds were reiterated in the supporting affidavit that came with the application.

3. The application was responded to via grounds of opposition filed on May 11, 2022 and filed on May 17, 2022. Together with grounds of opposition was also filed a replying affidavit of even date. The responses mainly fault the lower court for lack of jurisdiction to transfer the matter back to this court. This court itself was said to be funtus officio in relation to the issue of transferring this matter back to the lower court. According to the respondent, the applicant should have preferred an appeal challenging the deicison of the lower court. To the respondent, it is true that the lower court lacked jurisdiction as the High Court had earlier stated in a different ruling that the lower court lacked jurisdiction to handle the matter. This court was urged to dismiss the application.

4. The application was canvassed by way of written submissions. The applicant's submissions were filed on May 31, 2022. The respondents were faulted for "opportunistically and insincerely" supporting the finding of the lower court while they had not seen it fit to challenge this court's order referring the matter to the lower court to hear the application dated April 18, 2019. It was emphasized that it is not the suit itself that was referred to the lower court for trial – the same having already been heard and determined – but the application dated April 18, 2019 which related to reversal of some execution that had taken place pursuant to some earlier proceedings deemed to be unlawful. That is why the application dated April 18, 2019 was anchored on section 91 of *Civil Procedure Act* (cap 21), which precisely mandates the court of first instance to deal with reversal or variation of execution earlier done pursuant to its orders.

5. The respondents were blamed for using an already reversed court order in 2015 to register the land in dispute in their favour. It is a reversed order they were said to be aware of as the reversal was done on December 18, 2012 in their presence. The lower court position as regards its hearing and determination of the application dated April 18, 2019 was said to be "simply untenable under our jurisprudence".

6. Further, the applicant submitted that referring the file back to this court by the lower court after it decided to down its tools was simply in compliance with an order of this court which required that the file be re-transferred here after the lower court was done with what it had been asked to do. It is wrong to say therefore, as the respondent seemed to say, that the file should have remained in the lower court. The court was told that the application to be handled by the lower court pursuant to orders of this court still remains unheard while the respondents continue with illegal (mis)use of the disputed land. The respondents were said to be interested in causing delay as they are the ones benefiting from the land. This court was asked to allow the prayers sought.

7. The respondents submissions were filed on June 29, 2022. The application under consideration was said to have no legal basis. It was said to be improperly before this court as the lower court had no jurisdiction to transfer the matter back to this court. According to the respondent, when the lower court decided to down its tools, it should simply have left the matter so that the applicant could decide what to do. Transferring the matter to this court was said to be a nullity as the lower court had no jurisdiction to do that and this is so, submitted the respondent, even if such transfer was unchallenged.

8. The application at hand now was also faulted for not being the proper way of challenging the lower courts order. The lower court order was therefore said to be still in force. The respondent sought guidance from the cases of *Gaikia Kimani Kiarie v Peter Kimani Kiramba*[2020] eKLR and *Rebecca Chomo v Christina Cheptoo Chumo* [2021] eKLR which emphasized that a suit transferred from a court with no jurisdiction is an incompetent one and a nullity and that a court can only transfer a suit which it has jurisdiction to handle. The court was asked to dismiss the application with costs.

9. I have considered the application, the responses made, and the rival submissions. I have also had a look at the court record generally. This is a matter that has had a twirling, circuitous, and rather convoluted history. It started at Siakago, was transferred to chief magistrates court, Embu, and from where it ended

up in the high court, Embu, on appeal. The High Court referred it to Environment and Land Court at Kerugoya from where the matter found its way to this court. This court handled the matter and at some point transferred it back to Siakago where it started so that the application dated April 18, 2019 could be handled there. From Siakago, the matter is back here again.

10. My focus at this stage however is on the application before me, which seeks to persuade that the matter should be returned to Siakago or taken to another competent court for hearing and determination of the application dated April 18, 2019. When this court transferred the matter to Siakago vide its ruling dated February 6, 2020, it was for hearing and determination of the same application. It is clear that the court at Siakago addressed itself to the application and vide its ruling delivered on September 3, 2020 decided that it had no jurisdiction to do what this court had asked it to do. In the same ruling, the matter was referred back there.

11. The application now before me was prompted by this court's views expressed on February 21, 2022 when the matter came up in open court for mention. It was clear that counsel for the applicant was dissatisfied with the way the lower court had handled the matter and he wanted the matter referred back there. Counsel for the respondent however had a different view. The court felt that a more formal approach by way of filing an application would lead to better articulation of opposing views by both learned counsel, hence its suggestion that an application be filed. It needs to be clarified that the courts suggestion was not an endorsement of the approach taken by the applicants counsel.

12. As I have already pointed out I have considered the opposing views as expressed and/or manifested in the application, the responses thereto, and the rival submissions. It seems clear to me that one reason why the respondents are opposed to the application is that the lower court had no jurisdiction to refer the matter back to this court. But the respondents seem to conveniently overlook or ignore the fact that when this court referred the matter to Siakago *vide* its ruling dated February 6, 2020 it expressly ordered that the matter should come back here once the lower court was done with it. When the lower court therefore delivered its ruling and referred the matter back here, it was in my view complying with the order made in the ruling I have mentioned. It was not making its own order of transfer. It was simply complying with an order already made. The matter is not therefore here because the lower court made an order of transfer; it is here because this court ordered a re-transfer. I am more in agreement with the position of the applicant that the matter was returned here in compliance with the order of this court ruling dated February 6, 2020.

13. But there is a second point raised by the respondent which in my view carries considerable weight. The point is this: The order made by the lower court "has not been challenged through a proper legal procedure ..." The said order is therefore said to be still in force. The lower court pronounced itself through its ruling dated September 3, 2020. A challenge of that court's position as expressed in its aforesaid ruling can only come to this court by way of an appeal. This application itself is not an appeal. Infact as I have already pointed out, the application came at the court's prompting. Counsel for the applicant seems to have intended to approach the court in a more un-orthodox way, that is, by orally asking that this court takes the matter back to Siakago.

14. The fact of the matter is that a ruling exists and unless successfully challenged as by law provided, it is still a ruling that was judicially pronounced. It can not be glossed over or ignored by revisiting for hearing and determination the same application from which the ruling arose. If I agree with the applicant that application be heard again, an unacceptable scenario will arise where the application will have two rulings from courts of equal or near –equal status. It would be a procedural aberration to allow one application to have two rulings by the same court.

15. The law envisages a situation where an appeal is filed and a pronouncement is made by the superior court either through a judgement or a ruling. If the superior court decides that the application should be re-heard, a ruling that issues after that would be a legal one. My view is that the applicant needs to go back to the drawing board and decide how to approach the issue. Otherwise, my finding is that the matter is improperly before me and it would be wrong for me to order a hearing of the application dated April 18, 2019 while the lower court ruling delivered on September 3, 2020 remains not properly challenged in law. The application herein is therefore dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF OCTOBER, 2022.

In the presence of Munene for Andande for plaintiff and in the absence of Njage Wanjeru for defendant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE