Ngechu & another v Waichinga & 4 others (Environment and Land Appeal 34A of 2020) [2022] KEELC 13462 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13462 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 34A OF 2020

BM EBOSO, J

OCTOBER 7, 2022

BETWEEN

JOSIAH JOB IRUNGU NGECHU ..... 1ST APPELLANT

KENNETH MUNGAI NG'ANG'A ..... 2ND APPELLANT

AND

MICHAEL KAHARE WAICHINGA ..... 1ST RESPONDENT

JENNIFFER MUTHONI KAHARE ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF KIAMBU ..... 3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 4TH RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY ..... 5TH RESPONDENT

(Being an Appeal arising from the Judgment of Hon C. A OTIENO (Senior Principal Magistrate) delivered at Ruiru Senior Principal Magistrate Court on 31/8/2020 in Ruiru MCLE No 166 of 2019)

JUDGMENT

Judgment

1. The key issue to be determined in this appeal is whether the trial court erred in declining to grant the appellants some of the reliefs which they had sought in their amended plaint dated December 11, 2019. The following are the reliefs that were sought in the amended plaint:

    a. A declaration that the development/construction of a multi-dwelling apartment on property known as LR No Ruiru West block 3/2542 by the 1st

and 2nd defendants has been undertaken in blatant violation of the law and is thus null and void.

b. A declaration that the development/construction of a multi-dwelling apartment on the property known as LR No Ruiru West block 3/2542 by the 1st and the 2nd defendants is illegal *ab initio*.

c. An order declaring that any approvals/ permits/ licenses granted by the 3rd, 4th, and 5th defendants to the 1st and 2nd defendants after construction of a multi-dwelling apartments has commenced on LR No Ruiru West block 3/2542 are illegal and irregular *ab initio* and the same be revoked or cancelled.

d. An order of permanent injunction restraining the 1st and 2nd defendants, their agents, proxies, workers, employees from undertaking construction and development of a multi-dwelling apartment on their parcel of land known as LR No Ruiru West block 3/2542.

e. An order of mandatory injunction compelling the defendants herein to demolish the illegal structure erected on land known as LR No Ruiru West block 3/2542.

f. An order of prohibitory injunction to issue prohibiting the 3rd, 4th and 5th defendants from issuing constructing permits, approvals and/or licenses to the 1st and 2nd defendants from construction on property known as LR No Ruiru West block 3/2542 after commencement of construction (sic).

g. An order of general damages as against the 1st and 2nd defendants for nuisance.

h. Costs of this suit.

i. Any other relief that this honourable court may deem fit to grant.

2. Upon conclusion of trial, the trial magistrate, Hon C A Otieno -Omondi rendered a judgment dated August 31, 2020, largely in favour of the appellants, in the following verbatim terms:

a. A declaration that the development/construction of a multi dwelling apartment on property known as LR No Ruiru West block 3/2542 by the 1st and 2nd defendants had been undertaken in blatant violation of the law and thus null and void.

b. A declaration that the development/construction of multi dwelling apartment on property known as LR No Ruiru West block 3/2542 by the 1st and 2nd defendants without the requisite approvals and licenses is illegal *ab initio*.

c. A permanent injunction does issue restraining the 1st and 2nd defendants, their agents, proxies, workers, employees against undertaking construction and development of a multi dwelling apartment on their parcel of land known as Ruiru West block 3/2542 without obtaining the necessary approvals and licenses.

d. An order of mandatory injunction compelling the 1st and 2nd defendants hereinto demolish any illegal structure on land known as LR No Ruiru West block 3/2542 which is beyond the 8 units for which they had approvals from

NEMA. To ensure that the 1st and 2nd defendant have enough time to comply with this order, I direct that compliance be made within 45 days of the date of this judgment.

e. In the circumstances of this case and given the orders issued, I direct that each party bear their own costs.

3. Aggrieved by the trial magistrate's failure to grant them all the reliefs that they sought in the amended plaint, the appellants bought this appeal, citing a total of 21 grounds of appeal. They prayed for the following verbatim orders from this court:

a. This appeal be allowed.

b. The judgement and court decree of the subordinate court issued on August 31, 2020 be set aside and the same be substituted with an order allowing the appellant's claim/reliefs as prayed in the amended plaint.

c. The costs of this appeal be borne by the 1st and 2nd respondents.

d. Any other relief that his honourable court may deem fit and just to grant.

4. The appeal was canvassed through written submissions dated November 29, 2021, filed by M/s Benson Njuguna & Company Advocates. Although the appellants had advanced a total of 21 grounds of appeal, their counsel condensed the 21 grounds of appeal into the following three issues and submitted on the three issues: (i) whether the appeal is merited; (ii) whether the appellant is entitled to the reliefs sought and (iii) who should bear costs of this appeal.

5. The 1st and 2nd respondents opposed the appeal through written submissions dated January 19, 2022, filed by M/s Lilan & Koech Associates, LLP. The 3rd respondent filed four sentence submissions through J. J Cheserek, legal counsel. They fully adopted the written submissions filed by the 1st and 2nd respondents. The 4th respondent filed written submissions dated January 18, 2022 through Mr Simon Ngara. The 5th respondent filed written submissions dated March 21, 2022 through Ms Carol Korir advocate. I will outline a brief background to this appeal before I determine the key issue that fall for determination in the appeal.

6. Through the amended plaint dated February 10, 2020, the two appellants contended that they were the registered proprietors of land parcel numbers Ruiru West block 3/2544 while the 1st and 2nd respondents were the registered proprietors of parcel number Ruiru West block 3/2542. The three properties are adjacent and are located within Membley Park estate, Ruiru, Kiambu county. They contended that Membley estate was a controlled and gated development with low density population of single dwelling houses, with regulations prohibiting development of multi-dwelling commercial apartments.

7. It was the appellants' case that in 2017, the 1st and 2nd respondents, in blatant violation of the law, commenced construction of a multiple dwelling block of apartments next to their properties. They itemized various particulars of illegality. They further contended that the construction works were a nuisance. They itemized various particulars of nuisance. They urged the court to grant them the above reliefs.

8. The 1st and 2nd respondents filed a statement of defence dated January 23, 2020, in which they contested the appellants' claim and contended that their project had all the requisite approvals. The 4th respondent filed a statement of defence dated December 30, 2019 in which it contended that it had issued an EIA licence relating to the project after the project proponents satisfied the

statutory requirements. The 5th respondent filed a statement of defence dated January 22, 2022 in which it contended that it had established through its project registration system that the 1st and 2nd respondents had provided it with all the necessary approvals required for the registration of a construction project prior to commencing construction and it had duly registered the project. The 3rd respondent filed a statement of defence dated March 4, 2020 in which it contended that officers from its planning and enforcement department visited the site and stopped further construction pending their looking into the building approvals.

9. At the hearing, the 2nd appellant testified as PW1. He produced 14 exhibits. Further, the appellant led evidence by one David Munene Thigiti, architect, who testified as PW2. On their part, The 1st and 2nd respondent led evidence by the 1st respondent. I now turn to the key issue in this appeal.

10. I have perused the record of appeal together with the original record of the trial court. I have considered the parties' respective submissions and the law and jurisprudence relevant to the key issue in this appeal. As observed in the opening paragraph of this judgment, and based on the three issues that the appellants framed in their written submissions, the key issue that falls for determination in this appeal is whether the trial court erred in failing to grant the appellants all the reliefs that were sought in the amended plaint.

11. Before I dispose the above issue, I will briefly set out the principles that guide this court whenever it exercises its jurisdictions as a first appellate court.

12. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013)eKLR as follows:-

> " As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

13. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kustron (Kenya) Limited* 2000 2EA 212."

14. The appellants contend in their written submissions that they are not challenging the whole of the judgment of the trial court. They are not challenging the findings of the trial court on issues of fact. What they are challenging is the trial court's decision to disallow some of the reliefs that they sought in the amended plaint. They are also challenging the manner in which the court worded some of the reliefs that it granted. They want the reliefs to be granted as prayed in the amended plaint. I will, in the circumstances, analyze each of the reliefs that were sought and make my appropriate pronouncements.

15. Prayer (a) was a plea for a declaration to the effect that the impugned development/construction had been undertaken in blatant violation of the law and was thus null and void. Prayer (b) was a plea for a declaration to the effect that the impugned development/construction was illegal *ab initio*. The two prayers were granted by the trial court as prayed. I will not say much about them.

16. Prayer (c) was a plea for a declaration to the effect that any approvals/ permits /licenses granted by the 3rd, 4th, and 5th respondents to the 1st and 2nd respondents after commencement of the impugned construction were illegal and irregular *ab initio* and the same wee to be revoked or cancelled. The trial court did not grant the said prayer. While declining to grant the relief, the trial magistrate rendered herself thus:

> " As regards prayer (c) which seeks revocation and cancellation of the approvals/ permits and licenses granted by the 3rd, 4th and 5th defendants after construction had commenced, there was no evidence led to suggest that the 3rd, 4th and 5th defendants had no authority to issue approvals or licences after the commencement of construction. It would seem that such scenarios exist given the notification of approval of regularized drawings presented by the 1st and 2nd defendants. I therefore decline to grant prayer (c) of the amended plaint."

17. I have considered at the written submissions filed by the appellants in the trial court and in this court. The appellants did not demonstrate to both courts that the authorities that issued the approvals/ licenses did not have powers to issue them at the point they issued the them. More important, the suit leading to this appeal was filed in December 2019. The amended plaint was filed in February 2020. At the point of filing the suit, the *Physical Planning Act 1996* had been repealed by the *Physical and Land Use Planning Act* 2019. The latter was the law in force. The said law provided a clear mechanism on how to ventilate grievances relating to development approvals. The new Act similarly provided a clear framework on adjudication of disputes relating to land use (change of user) and developments. It was not within the jurisdiction of a magistrate to annul or revoke an approval that had been issued.

18. Similarly, it was not within the jurisdiction of a magistrate court to annul or revoke an approval granted by the National Environment Management Authority (NEMA). Under section 129 of the *Environmental Management and Co-ordination Act* [the EMCA], that jurisdiction lay within the National Environment Tribunal.

19. It is also clear from the wording of prayer (c) that the appellants invited the court to exercise judicial review jurisdiction which, in the absence of any other statute conferring primary jurisdiction in a particular body, would lie to the third tier superior courts. The trial court did not have judicial review jurisdiction over licensing/ approving bodies.

20. For the above reasons, prayer (c) was not available. The trial magistrate properly declined to grant it.

21. Prayer (d) was a plea for a permanent injunction restraining the 1st and 2nd respondents against undertaking construction and development of a multi-dwelling structure on their land. The trial court granted the plea but made it subject to obtention of the necessary approvals and licenses. The trial magistrate stated thus:

> " I find that this order cannot issue as drawn as it would have the effect of barring the 1st and 2nd defendants from carrying out construction and development of a multi-dwelling apartment on their parcel of land known as LR No Ruiru West block 3/2542 for an indefinite period of time even after obtaining the relevant approvals and licences. The order can only issue pending their obtaining of the necessary approvals and licences for such an undertaking."

22. The above reasoning by the trial magistrate was sound. Why do I say so? First, land use is not a static phenomenon. Land use changes with time. What is zoned as a single dwelling area today may not necessary remain a single dwelling neighbourhood in five years to come. Secondly, once a development

project is approved, clear mechanisms for challenging the approval. I do not therefore see a proper basis for faulting the trial magistrate in her decision to appropriately ward the relief sought under prayer (d).

23. Prayer (e) was a plea for an order of mandatory injunction compelling the respondent to demolish the impugned structure. The trial magistrate considered the plea and rendered herself as follows:

> "I note that the change of user which the court has found to be irregularly obtained had granted the 1st and 2nd defendants permission for construction of three storeys of maximum 2 units per floor. The NEMA licence had also given him (sic) permission with regard to construction of 8 units. As indicated by the 1st defendant, he has constructed 13 units on three (3) floors which is in excess of those for which he had obtained approval. In light of this, I order that the 1st and 2nd defendants demolish the 5 units that are beyond those for which he had been granted approval by NEMA and Kiambu county government. The demolition is to take place within 45 days from the date of this judgment. This is to allow the 1st and 2nd defendants enough time to comply with this order."

24. The appellants are aggrieved by the way the relief was worded and contend that because the trial magistrate had found that construction works commenced before all licenses were procured, the trial court ought to have ordered demolition of the entire structure. The decision of the trial court was based on the fact that there were approvals in place but there was also evidence that the development went beyond what was approved. In my view, the reworded relief was properly geared towards correcting and/or remedying the breach. The appellants' concerns that the trial magistrate failed to make an order relating to supervision of the demolition, is not a proper ground for an appeal. If the appellants desired to have an order relating to supervision of demolition they were at liberty to apply to the trial court as part of the enforcement procedure. I do not find merit in the appellants' objection to the wording of relief.

25. Prayer (f) was a plea for an injunction prohibiting the 3rd, 4th and 5th respondents against issuing constructions permits, approvals and/or licenses to the 1st and 2nd respondents for construction on their property. The trial magistrate declined to grant the plea on the ground that it would amount to infringing on the mandate of the 3rd, 4th and 5th defendants yet it had not been demonstrated to the required standard that issuance of the approvals after construction had commenced was outside their respective mandate. I entirely agree with the trial magistrate that the relief sought under prayer (f) was going to fetter the statutory mandate of the three respondents. The trial magistrate had no jurisdiction to fetter what the statutes had vested in the three respondents.

26. Prayer (g) was a plea for general damages against the 1st and 2nd respondents. The trial court found that the appellant had failed to prove that nuisance was suffered. I have looked at the evidence placed before the trial court. There was no proof nuisance. Further there was no proof of any damage suffered as a result of the nuisance alleged by the appellants. Sections 107 and 109 of the *Evidence Act* placed the burden of proof on the appellants. The appellants did not discharge that burden.

27. Prayer (h) related to costs in the trial court. The trial court said the following on costs:

> "In the circumstances of this case and given the orders issued, I direct that each party bears their own costs."

28. The general principle on costs of a suit are contained in section 27 of the *Civil Procedure Act* which provides as follows:

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

29. The case of the appellants substantially succeeded. The trial court did not give a proper basis why they were not entitled to costs. Any departure from the general principle that costs follow the event must have a proper basis. I have not found any proper basis why the appellants were not awarded costs of the suit in the trial court.

30. With regard to costs of this appeal, the appeal has succeeded only on the issue of costs. The error relating to costs was committed by the trial court. Because of that, parties will bear their respective costs of this appeal.

31. In the end, this appeal is disposed as follows:-

    a. The appeal is allowed only in relation to costs of the suit in the trial court.

    b. All the other grounds of appeal are rejected.

    c. The order of the trial court relating to costs in Ruiru SPMC E & L case No 166 of 2019 is set aside and is substituted with an order that the 1st and 2nd defendants in the suit shall bear costs of the plaintiffs.

    d. Parties to bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF OCTOBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Tanui for the 1st and 2nd Respondents

Court Assistant: Sydney