



REPUBLIC OF KENYA



KENYA LAW
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**Kiponda v Kahindi (Appeal 20 of 2021)
[2022] KEELC 14844 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14844 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
APPEAL 20 OF 2021
MAO ODENY, J
NOVEMBER 18, 2022**

BETWEEN

KAZUNGU CHARO KIPONDA APPELLANT

AND

NICOLAS GARAMA KAHINDI RESPONDENT

(Being an appeal from the ruling of Hon. D. Wasike, Senior Resident Magistrate at Malindi delivered on 24th November 2021 in Malindi Land Misc. Application No. E33 of 2021)

JUDGMENT

1. This appeal arises from the ruling dated November 24, 2021 by hon D Wasike senior resident magistrate delivered in Malindi Land Misc Application No, E33 of 2021. The appellant herein being aggrieved by the ruling lodged a memorandum of appeal dated December 6, 2021 and listed the following grounds: -
 1. That the trial magistrate erred in law and fact her failure to take into consideration the evidence, brought by the appellant.
 2. That the trial magistrate erred in law and fact in failing to find that the survey report dated 5th February 2021 at paragraph 2 had found that the respondent homestead fell within plot number 1258 whose registered owner is the appellant herein.
 3. That the trial magistrate erred in law and fact in her failure to appreciate evidence tendered thereby reaching a wrong decision.
 4. That the trial magistrate erred in law and fact in failing to find that the map anomalies only affected the ground area of the title and not the respondent occupation.



5. That the trial magistrate erred in law and fact in finding that there was a dispute on the alleged encroachment on the basis of a chief letter and a dispute on boundary in the National Land Commission filed on September 20, 2021 well after the miscellaneous application subject of this appeal had been filed.
 6. That the trial magistrate erred in law and fact in failing to find that since the respondent did not apply for relief for the notice as envisaged under section 152F of the Land Act the appellant's title to the suit property remained unchallenged at the time of filing of the appellant application dated August 3, 2021.
 7. That the trial magistrate erred in failing to grant the prayers as sought in the application dated 3rd August 2021 and directing that the appellant file a suit a procedure not envisaged with the concept of the Land Act as brought through the Land Laws (Amendment) Act 2016.
 8. That the trial magistrate erred in law and fact by in failing to appreciate the appellant submissions.
2. The appeal was canvassed by way of written submissions which were duly filed.

APPELLANT'S WRITTEN SUBMISSIONS

3. Counsel submitted on the first four grounds and referred the court to a surveyor's report in the record of appeal and urged the court to find that the survey report was proof of encroachment and that the map anomalies only affected the ground area of the title as opposed to the respondent's occupation.
4. On grounds 6 and 7 counsel submitted that the correct procedure did not envisage a suit to be filed and a contest if any ought to be launched by the respondent within the period of the eviction notice. Counsel relied on section 152F of the Land Act and an article by Justice Oscar Amugo Angote titled Evictions in Kenya: which way under the New Constitution and the Land Laws (Amendment) Act, 2016.
5. On ground 5, counsel submitted that the respondent did not avail any title document so as to give rise to a possibility of a boundary dispute.
6. Counsel submitted on ground 8 and stated that the trial court failed to answer the question whether the respondent had encroached on the suit property in making its final determination.

RESPONDENT'S SUBMISSIONS

7. Counsel for the respondent submitted that ground 1 and 3 could not stand as the appellant failed to demonstrate any effort to apply for title rectification or the said anomalies on the map. Counsel added that ground 2 and 4 could not equally stand since the question whether the respondent's homestead fell within the suit property was not an issue before the trial court.
8. Counsel cited the case of Kenya Ports Authority v Kusthon (Kenya) Limited 2000 2 EA 212, and submitted that the court should only consider the evidence on record at the trial court and make its own conclusion.

ANALYSIS AND DETERMINATION

9. The appellant raised 8 grounds of appeal which I shall condense into two grounds as follows: -
 - a. Whether the trial magistrate misdirected herself on the law and evidence in dismissing the appellant's application dated August 3, 2021 and ordering the



filing of a suit a procedure not envisaged with the concept of the Land Act as brought through the Land Laws (Amendment) Act 2016.

- b. Whether the ruling of the trial court should be set aside.
10. The court is cognizant of the fact that this is a first appeal and therefore the court is under a duty to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified.
 11. The Land Act, 2012 carries elaborate provisions on unlawful occupation of land and removal of persons who are in such unlawful occupation. section 152E thereon provides as follows: -
152E. Eviction notice to unlawful occupiers of private land
 1. if, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
 2. the notice under subsection (1) shall—
 - a. be in writing and in a national and official language;
 - b. in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - c. specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - d. be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.
 12. section 152F further provides: -
 1. Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to court for relief against the notice.
 2. The court, after considering the matters set out in sections 152C, 152D and 152E may-
 - a. confirm the notice and order the person to vacate;
 - b. cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - c. suspend the operation of the notice for any period which the court shall determine; or
 - d. order for compensation.
 13. The appellant's contention in this appeal is that a Notice under section 152E above was properly served but the respondent failed to seek redress from the courts as stipulated under section 152F above. According to the appellant, having demonstrated the ownership of the suit property and the respondent's encroachment, the trial magistrate ought to have allowed the application for eviction.
 14. In support of his case, the appellant filed a copy of a title deed of the suit property in his favour and a survey report dated February 5, 2021. The respondent challenged the application and filed a replying affidavit dated October 15, 2021 wherein he annexed his complaint to the National Land Commission



dated September 20, 2021 and a Chief's letter dated March 12, 2021 indicating the parties' dispute over the suit property.

15. This shows that it was not a clear cut dispute where the respondent could be evicted with a notice without hearing the parties. Land is an emotive issue and evictions must be carried out when parties have been heard and in a human manner. While it is true that the suit property is registered in the name of the appellant, there are issues which are still pending for resolution like a boundary dispute whereby the appellant wanted the court to rely on a survey report on the issue of encroachment. Why did the appellant seek the services of a surveyor if the matter was clear cut?
16. A party can make an application under section 152F which provides that; -
 1. Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to court for relief against the notice
 2. The court, after considering the matters set out in sections 152C, 152D and 152E may-
 - a. confirm the notice and order the person to vacate;
 - b. cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
 - c. suspend the operation of the notice for any period which the court shall determine; or
 - d. order for compensation.
17. If the court is satisfied that there was proper notice then it can either grant the order, vary, alter or make additions to the notice on such terms as it deems fit and equitable. It can also reject or suspend the operation of the notice.
18. In the case of *Julius L Marten v Caleb Arap Rotich* [2021] eKLR Mutungi J explained: -

“ 15. From a reading of sections 152C, 152D and 152E of the *Land Act*, 2012 it is not clear how a party ought to approach the court for relief under section 152F. Is it by way of a formal suit and/or miscellaneous application as in the instant suit? Any eviction order has far reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/possession of for some time. Before such an order is given the court must be satisfied on its merits which means any person who stands to be affected by any order the court may make is entitled to be heard. section 152E relating to private land envisages that there is no dispute on ownership and the occupation is unlawful. What is the situation where there is no dispute on ownership and the occupation is unlawful? What is the situation where there is disputed ownership of the property? In my view where the ownership is disputed the summary procedure that section 152F appears to contemplate would not be suitable and a formal suit would be advisable.”
19. I find that the learned trial magistrate acted within the law in not allowing the application which in effect suspended or varied the operation of the notice as she deemed equitable and just. Having found that the magistrate did not error in dismissing the appellants impugned application, the appeal is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE



NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

