



REPUBLIC OF KENYA



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**Mwirikia v Nyambura (Environment and Land Appeal E009 of 2021)
[2022] KEELC 14895 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E009 OF 2021**

YM ANGIMA, J

NOVEMBER 17, 2022

BETWEEN

JOHN NYAIRACHA MWIRIKIA APPELLANT

AND

LOISE NYAMBURA RESPONDENT

(Being an appeal against the Ruling and Order of Hon. Daffline N. Sure (Senior Principal Magistrate) dated 14th April, 2021 in Engineer PM ELC. 11 of 2020)

JUDGMENT

1. This is an appeal against the ruling and order of Hon Daffline N Sure (SPM) dated April 14, 2021 in Engineer PMELC No 11 of 2020 Loise Nyambura –vs- Eunice Njeri Mwirikia, John Nyairacha Mwirikia & Rehab Mwirikia. By the said ruling the trial court dismissed the Appellant’s application challenging the jurisdiction of the court and also seeking to set aside the interim injunction granted on September 16, 2020. The trial court also allowed the Respondent’s application for committal of the Appellant to civil jail for contempt of court.
2. The material on record shows that vide a notice of motion dated July 13, 2020 the Respondent sought an interim injunction restraining the Appellant and his co-defendants in PMELC No 11 of 2020 either by themselves, their servants, agents or workmen from trespassing upon or in any manner howsoever from interfering with her peaceful occupation and possession of the suit property pending the hearing and determination of the suit. The suit property was described as Nyandarua/Gita/1971 (Parcel 1971). The record shows that the said application was heard ex parte and allowed on September 16, 2020 despite the Appellant having entered appearance and filed a replying affidavit on September 14, 2020.
3. The record further shows that vide a notice of motion dated November 25, 2020 the Respondent sought the committal of the Appellant and his co-defendants to civil jail for contempt of court for a period not exceeding 6 months. The record also shows that on January 19, 2021 the Appellant filed



a notice of motion of even date challenging the jurisdiction of the trial court to entertain the suit and seeking the setting aside of the interim injunction made on September 16, 2020. The Appellant contended, inter alia, that the application for an interim injunction dated July 13, 2020 was never served upon him prior to the hearing date.

4. It is evident from the material on record that the two applications were canvassed together through written submissions before the trial court. By a ruling dated April 14, 2021 the trial court found and held that there was no merit in the Appellant's application for setting aside the interim injunction since there was adequate evidence on record of service of the application. The trial court also found and held that it had jurisdiction to entertain the suit since there was no evidence on record to demonstrate that the dispute before court was a boundary dispute which required resolution by the Land Registrar in the first instance. The Applicant's notice of motion dated January 19, 2021 was consequently dismissed with costs.
5. On the Respondent's application for committal of the Appellant and his co-defendants to civil jail for contempt of court, the trial court was satisfied that the Respondent had proved the contempt alleged against the alleged contemnors. The trial court was satisfied that the Appellant was personally served with the order of injunction made on September 16, 2020 (erroneously indicated as made on September 20, 2020) and that there was disobedience thereof. The application for committal to civil jail was consequently granted.

B. The Grounds of Appeal

6. Being aggrieved by the said ruling and orders the Appellant filed a memorandum of appeal dated April 27, 2021 raising the following 10 grounds of appeal:
 - a. "That the named Magistrate failed to appreciate that Jurisdiction of the court is a legal issue and no evidence is required to prove a point of law and provisions of the *Land Registration Act* of 2012 in particular Section 18(2).
 - b. That the learned magistrate failed to appreciate that it was the Respondent to prove that the application dated July 13, 2020 was served upon the Appellant when it was served and who served it.
 - c. That the learned Magistrate erred in law and in fact in finding that the court file speaks for itself and shows that the Appellant was served with the application dated 13.07.2020 when there is no such records in the court file.
 - d. That the learned Magistrate erred in law and in fact in failing to consider and evaluate the Appellant's averment where clearly from the record the four purported affidavits of service filed by the process server none shows when the application dated July 13, 2020 was served. The averments by the Appellant that there is no affidavit of service in the court file were not controverted by the Respondent either by way of a further affidavit or by filing written submissions.
 - e. That the learned Magistrate misdirected herself in alluding to the fact that one David Waithaka came on record when the same was not averred by the Respondent in her replying affidavit.
 - f. That the learned magistrate erred in law and in fact in finding that the Appellant and his counsel never made an application to summon Mr Patrick to be cross-examined on the content of his affidavit which was not necessary



as the affidavit is self-explanatory that Mr Patrick did not serve copies of the Respondent application dated July 13, 2020 before the application was heard and order issued.

- g. That the learned Magistrate misdirected herself in alluding that by August 19, 2020 service had been effected when there is no such evidence in the court file by way of valid return of service.
- h. That the learned Magistrate erred in law and in fact in stating in her ruling that on September 16, 2020, Mr Mburu directed the court to an affidavit of service dated September 8, 2020 which shows the defendants were served with the pleading and hearing notice at Kagongo whereas the said affidavit of service, which it is, doubted that the learned Magistrate read does not say pleadings and hearing notice were served on all the defendants.
 - i. That the learned Magistrate erred in law and in fact by failing to appreciate that the affidavit of service dated September 8, 2020 has no evidential value as it offends the provision of Section 5 of the *Oaths and Statutory Declarations Act* (Cap 15 of the Laws of Kenya).
- j. That the learned Magistrate erred in law and in fact by failing to appreciate that there is no affidavit of service so called in the court as the purported affidavit of October 8, 2020 is not commissioned by a person authorized to commission it and the learned Magistrate failed to address the issue.

7. In the result, the Appellant prayed for the following reliefs:

- a. That the appeal be allowed.
- b. That the ruling and order of the trial court dated April 14, 2021 in Engineer PMELC No 11 of 2020 be set aside.
- c. That costs of the appeal and the proceedings before the trial court be awarded to the Appellant.

C. Directions on Submissions

8. When the appeal was listed for directions, it was directed that the appeal shall be canvassed through written submissions only. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on September 16, 2022 whereas the Respondent's submissions were filed on October 24, 2022.

D. The Issues for Determination

9. Although the Appellant raised 10 grounds of appeal in his memorandum of appeal, the court is of the opinion that the main issues arising in the appeal are the following:
- a. Whether the trial court erred in law in dismissing the Appellant's notice of motion dated January 19, 2021.
 - b. Whether the trial court erred in law in allowing the Respondent's notice of motion dated November 25, 2020.



- c. Who shall bear costs of the appeal.

E. Analysis and Determination

- a. Whether the trial court erred in law in dismissing the Appellant's notice of motion dated January 19, 2021
10. The court has considered the material and submissions on record on this issue. The Appellant had challenged the jurisdiction of the trial court to entertain the suit on the basis that the land dispute constituted a boundary dispute which ought to have been referred to the Land Registrar for resolution under Section 18 of the [Land Registration Act](#), 2012.
 11. Section 18 of the [Land Registration Act](#) stipulates that:
 - ' (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 2. The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
 3. Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:
Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), Cap 299.'
 12. So, what was the evidence before the trial court of the existence of a boundary dispute between the Respondent on the one hand, and the Appellant and his co-defendants, on the other? By her plaint dated July 13, 2020 the Respondent pleaded that her late husband, John Kamau Njuguna, (the deceased) was the registered proprietor of Parcel 1971. It was further pleaded that after his demise in 2014 the Appellant and his co-defendants started trespassing upon the suit property particulars whereof were enumerated in paragraph 5 of the plaint. The particulars alleged that the Appellant had unlawfully entered the suit property, cut down trees thereon, destroyed the fence and threatened to graze domesticated animals thereon. There was no mention of a boundary dispute at all.
 13. The Appellant filed a replying affidavit sworn on September 7, 2020 in response to the Respondent's application for an interim injunction. The same was filed on September 14, 2020 by the firm of Waithaka Mwangi and Co Advocates. The Appellant denied trespassing on parcel 1971 and stated that he has resident on Title No Nyandarua/Geta/690 which belonged to his late father. He further stated that sometime in 2004 his late father had sought to exchange part of his land with the Respondent's late husband a move which was opposed by the Appellant's family members. The Appellant further questioned how the deceased came to be registered as proprietor of Parcel 1971 and surmised that the Respondent may have exhibited a 'fake' title document. It is noteworthy that the Appellant did not swear in his replying affidavit that the dispute among the parties was a boundary dispute.



14. The court is of the opinion that there is absolutely no evidence on record to demonstrate that the dispute giving rise to the suit was a boundary dispute within the meaning of Section 18(2) of the [Land Registration Act](#), 2012. In the premises, the trial court was right in finding and holding that the dispute was not a boundary dispute hence she had jurisdiction to entertain the suit.
15. The court has considered the Appellant's grievance concerning the refusal of the trial court to set aside the ex parte order of injunction made on September 16, 2020. The Appellant's main ground for seeking the setting aside was that he was never served with the notice of motion dated July 13, 2020. The trial court found and held there was an affidavit of service sworn by a process server on September 8, 2020 to the effect that the Appellant was duly served. The trial court further found that the Appellant had even sworn a replying affidavit on September 7, 2020 which was filed on September 14, 2020. So, how could the Appellant swear a replying affidavit on September 7, 2020 in response to the notice of motion dated July 13, 2020 if he was not aware of it?
16. The court is of the opinion that the trial court was right in holding and finding that the Appellant was duly served with the application for injunction. It is noteworthy that the Appellant did not apply for the process server to be cross-examined on his affidavit of service before the trial court. In the case of [INM -vs- AJMN \[2022\] eKLR](#) it was held by the High Court, inter alia, that:

' Be that as it may, an avenue lies as for the rectification of mischief on the part of a process server as provided under Order 5 Rule 16 Civil Procedure Rules. If indeed there is doubt as to the authenticity of the contents of the affidavit of service, there was need to cross-examine the process server on the contents. Counsel for the Respondent submitted that the Appellant failed to advance such a prayer in her application. The Court in *Agigreen Consulting Corp Ltd -vs- National Irrigation Board (2020) eKLR*, agreed with the finding in the case of *Shadrack Arap Baiywo -vs- Bodi Bach KSM CA Civil Appeal No 122 of 1986 [1987] eKLR*, in which the Court of Appeal quoting Chitale and Annaji Rao; The Code of Civil Procedure Volume II page 1670 stated that:

'There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.'
17. Accordingly, the trial court cannot be faulted for dismissing the Appellant's prayer for setting aside the interim injunction made on September 16, 2020. The court has noted that the Appellant was aggrieved by the fact that the extracted order indicated that it was made on September 28, 2020 instead of September 16, 2020. The court is of the opinion that this is merely a clerical error which does not affect the regularity of the proceedings before the trial court. There is no evidence on record to demonstrate that the Appellant suffered any prejudice as a result of the error.
18. The Appellant also complained that the order made on September 16, 2020 was a final as opposed to an interlocutory order. The court has noted from the notice of motion dated July 13, 2020 that the Appellant had prayed for an injunction pending the hearing and determination of the suit. The record of proceedings before the trial court on September 16, 2020 indicates that the said application was allowed as prayed with costs in the cause. However, during extraction of the order, it is apparent that it was not correctly extracted in that it omitted reference to fact that the order was last only until the hearing and determination of the main suit. This error, however, is not fatal and it did not occasion a



miscarriage of justice. The court shall direct that the said error on the order be corrected by the trial court.

- b. Whether the trial court erred in law in allowing the Respondent's notice of motion dated November 25, 2020

19. The court has considered the material and submissions on record on this issue. Whereas the Appellant contended that there was no service of the injunction order the basis of the contempt of court proceedings, the Respondent contended otherwise. The Appellant pointed out that there was no proper or valid affidavit of service on record to demonstrate service of the order alleged to have been disobeyed since the affidavit of service sworn by the process server on October 12, 2020 was not commissioned as required under Section 5 of the *Oaths and Statutory Declarations Act* (Cap.15). The Respondent did not specifically address the issue of commissioning of the process server's affidavit of service but supported the finding of the trial court that the Appellant was duly served with the order of injunction made on September 16, 2020.
20. The court has perused the affidavit of service sworn by the process server Patrick Mutisya on October 12, 2020. It is evident that it was not signed and stamped by a Commissioner for Oaths or a Magistrate as required by law. The Appellant may well have been served with a copy of the order of injunction as claimed in the affidavit of service. However, such service can only be proved by a sworn affidavit and not a draft affidavit of service. The court is persuaded that the omission by the process server to swear the affidavit of service before a commissioner for oaths was fatal to the contempt of court application dated November 25, 2020. A charge of contempt of court is a serious matter which ought to be proved to a degree higher than a balance of probabilities although not as high as beyond reasonable doubt. See *Mutitika -vs- Baharini Farm Ltd [1985] eKLR*. The court is of the opinion that such a standard cannot possibly be attained in the absence of a sworn affidavit of service. In the premises, the court is inclined to set aside the order for committal of the Appellant and his co-defendants to civil jail for contempt of court.

- c. Who shall bear costs of the appeal

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co Ltd [1967] EA 287*. It is evident from the foregoing that the Appellant has partly failed and partly succeeded in his appeal. Accordingly, the court is of the opinion that the appropriate order to make on costs is that there shall be no order as to costs.

F. Conclusion and Disposal Order

22. The upshot of the foregoing is that the court finds and holds that the Appellant's appeal partly succeeds and partly fails as indicated hereinbefore. Accordingly, the court makes the following orders for disposal of the appeal:
 - a. The trial court's order in Engineer PMELC No 11 of 2020 dismissing the Appellant's notice of motion dated January 19, 2021 is hereby upheld and affirmed.
 - b. The trial court's order allowing the Respondent's notice of motion dated November 25, 2020 for committal of the Appellant to civil jail is hereby set aside. For the avoidance of doubt, this order applies to all the defendants in Engineer PMELC No 11 of 2020.



- c. There shall be no order as to costs of the appeal.
- d. The Deputy Registrar shall remit the original record to the trial court with 14 days from the date hereof for trial and disposal of the pending suit.
- e. The trial court shall correct the errors in the extracted order as indicated in the judgment.

It is so decided.

Judgment dated and signed at Nyahururu this 17th day of November, 2022 and delivered via Microsoft Teams platform.

In the presence of:

Mr. Muthanwa for the Appellant

Mr. Okumu for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

