



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 82 OF 2019

EDDA KANINI KARIJO 1ST APPELLANT

MARY KARIJO2ND APPELLANT

VERSUS

PATRICK MUNORU 1ST RESPONDENT

JOHN MUTUMA..... 2ND RESPONDENT

(Being an appeal from the Ruling of the Honorable Sogomo G. in TIGANIA CM ELC NO 29 of 2013 dated 23.5.19)

JUDGMENT

1. The appellants were the plaintiffs in the lower court where they instituted the suit vide a plaint dated 11/04/2013 and amended on 24/07/2014 seeking an order of permanent injunction restraining the defendants/respondents from entering, trespassing, uprooting crops or in any way interfering with all that land parcel No.9080 within Karama Adjudication Section Measuring 0.50 Acres, special damages of Kshs. 53,232 plus costs and interests.

2. The plaintiffs pleaded that the 1st plaintiff was the registered and legitimate owner of land parcel No.9080, while the 2nd plaintiff was the legitimate licensee of the aforementioned suit land. The defendants had descended on the suit land demolishing the fence, and violently chased away the 2nd plaintiff with intentions of claiming the suit land.

3. The defendants, through their statement of defence dated 14.5.2013 and amended on 13.6.2018 had generally denied the plaintiff's claim, averring that the 1st defendant bought his land, parcel No.5230 within Karama Adjudication Section Measuring 0.15 Acres from the 2nd defendant's father, where his land was bordering that of the plaintiffs but the two parcels were separate and distinct.

4. The suit proceeded to hearing with the plaintiffs calling 3 witnesses. Thereafter, the court gave directions for the scene to be visited of which the District Land Adjudication and Settlement Officer (DLASO) Tigania East filed a report with a sketch map. The DLASO also appeared in court on 11.4.2019 to give more clarification on his report.

5. It is after the testimony of the DLASO that the respondents filed an application dated 23.4.2019 for summary dismissal of the suit on the grounds that the suit disclosed no reasonable cause of action against the respondents and that the appellants' claim related to a boundary dispute which can only be determined by the DLASO Tigania East Sub- County. The said application was allowed on 23/05/2019 triggering this appeal.

6. In their memorandum of appeal dated 20/06/2019 containing Nine (9) grounds, the appellants aver that the trial Magistrate erred in law and fact in:-

i. Dismissing the appellant's application for amendment of plaint without considering the same.

ii. Allowing the application dated 23.4.2019 for summary dismissal of the suit, when the same had not been served and no directions had been taken regarding the hearing of that application.

7. The appeal was canvassed by way of written submissions. The Appellants submitted that they adduced evidence before the trial court showing how trespass and damage to their property had occurred which evidence was not challenged by the respondents. Thus the summary dismissal of their suit was an utter disregard of evidence, biasness and discrimination, which the court had shown on various other occasions. For instance, the court refused to have the private surveyors report in the court file and further gave a blind eye to their application for amendment dated 22/5/2019.

8. The appellants further contend that they were never served with the application for dismissal and that the matter was coming up for directions before the trial court and not for the hearing of any application, hence the court took the law and procedure upon itself.

9. The appellants relied on the case of **SBI International V Reuben Kipkoriri JT [2017]eKLR**. They urge this court to sanction the rule of law and pave way for appellants to be fairly heard as they have a genuine and arguable case that requires a non-partisan adjudicator.

10. The respondents submitted that it was obvious that the main suit was a boundary dispute which ought to have been resolved by the DLASO as the land was still under adjudication. That the lower court was fair and not biased. That the reason why the appellant's independent survey report was not admitted into court was that the court had not directed any party to file their own independent report and the appellants were given an opportunity to cross examine the DLASO.

11. They contend that they served their application for dismissal via the email provided in the pleadings and it was the appellants who chose not to respond to the application. Further, it is submitted that the application for amendment of the plaint was filed on the date the application for summary dismissal of the suit was slated for hearing.

12. The respondents also stated that the summary dismissal was based on the DLASO'S report which indicated that the dispute was a boundary one. Thus the matter should go for hearing and determination before the DLASO.

13. The respondents relied on the following cases; **Lubna Ali Sheikh Abdalla Bajaber & Another v Chief Magistrates Court Mombasa & 2 others [2018]eKLR**, **Mbogo & Another V Shah [1968] E.A 93**, **Crescent Construction Co. Ltd V Delphis Bank Ltd Civil Appeal No 146 Of 2001**, **Lawrence Owino Omondi V Kenneth Inea Muyera (2017)**, **John Mulwa Kangaatu V Pan African Insurance Co. Ltd (2015)Eklr** and **Kassam V Bank Of Baroda (2002)**.

Analysis and determination

14. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123**.

15. However, I will limit myself to the circumstances surrounding the dismissal of the suit on 23.5.2019 pursuant to the respondents' application dated 23/04/2019. I will also give due consideration to the fate of the appellants' application for amendment of the plaint dated 22.5.2019.

16. In order to appreciate the circumstances under which the order dismissing the suit was given on 23.5.2019, it is pertinent to recapture the proceedings after the testimony of the DLASO on 11.4.2019.

“Court: Party at liberty either to file a summary application on the basis of the DLASO'S report. Mention on 23.5.2019”

17. The application dated 23.4.2019 was filed on 18.5.2019, which forms the primary subject of this appeal.

18. The proceedings of 23.5.2019 are as follows;

“Plaintiff represented by Abubakar holding brief for Mr. Thangicia Defendant represented by Mr. Muchiri holding brief for Mr. Mwongela.

Mr. Abubakar: There is an application for leave to amend the plaint filed today.

Order: Ruling unchallenged the Notice of Motion dated 23.4.2019 is allowed with costs”

19. The records of the court clearly show that there were no other proceedings between 11.4.2019 and 23.5.2019. Thus the trial court proceeded to allow the **application dated 23.4.2019 filed on 18.5.2019** when no directions had been given regarding the hearing of the said application. It is not fathomable that an application which was hardly five days old in court (as from date of filing on 18.5.2019) was ripe for determination on 23.5.2019. There are no records of how the court ascertained service of the said application, nor had directions been given on how the said application was to be heard. The submissions of the respondents that the application dated 23.4.2019 was slated for hearing on 23.5.2019 are therefore not anchored on the records in the court file.

20. The provisions of **Article 50 (1) of the Constitution** provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

21. The right to be heard is one of the Cardinal fundamental rights regarding the rules of natural justice, See **Catherine Muthoni Kiriungi & another v Chairman, Land Adjudication & Settlement Officer, Tigania East Central Division & 3 others [2017] eKLR**. In the case of **Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu [2019] eKLR**, the Court of Appeal had this to say on the aforementioned rule;

“The right to be heard is a cardinal rule established under the principles of natural justice generally expressed as audi alteram partem. This Latin phrase literally translates 'hear the parties in turn' and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means that a party, no matter how seemingly frivolous or inconsequential, must be given a fair hearing.”

22. What resonates from the case law is that a party before court has a right to be given a fair hearing as outlined in the Constitution. A cursory review of the record indicates that the date of 23.5.2019 was slated for mention and not for hearing of any application. Thus the proceedings in which the suit was dismissed on the basis of an application filed five days earlier were flawed, erroneous and un-warranted. The suit ought to be reinstated.

23. As regards the application for amendment of the plaint, the only finding this court can make is that the same was not scheduled for hearing on 23.5.2019. Having reached that conclusion, I will say nothing more since the suit has been reinstated and the appellants have a chance to move the trial court appropriately.

24. In the circumstances, I find that the appeal is merited and the order of 23.5.2019 is hereby set aside. For avoidance of doubts, the application in question (the one dated 23.4.2019) is to be considered on merits before the trial court. Each party to bear their own costs of this suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF MARCH, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 21.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE