Mwai v Ndegwa (Environment & Land Miscellaneous Case E020 of 2024) [2025] KEELC 1025 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1025 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT & LAND MISCELLANEOUS CASE E020 OF 2024

LN MBUGUA, J

MARCH 5, 2025

BETWEEN

JOSEPH PARMENAS MWAI ..... PLAINTIFF

AND

BONIFACE KINYUA NDEGWA ..... DEFENDANT

JUDGMENT

1. This miscellaneous suit was filed by way of a Notice of Motion application dated 28.11.2024 brought under the following provisions of law; "Order 40 rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A, 77, 78 and 79 of the *Civil Procedure Act*, Articles 165(3), (6) & (7) of the *Constitution* of Kenya 2010, and all other enabling provisions".

2. The applicant seeks the following orders;

    a. That this application be certified as urgent, service be dispensed with in the first instance and the application be heard on a priority basis.

    b. That pending hearing and determination of this application inter-partes the Honourable Court be pleased to recall and re-examine the proceedings in Chief Magistrates Court in Nanyuki in ELC No. 174 OF 2018 Boniface Kinyua vs Joseph Mwai before Hon. A.R Kithinji.

    c. That pending hearing and determination of this application inter-partes, there be a stay of execution of the ruling which was delivered by Honourbale A.R Kithinji on 13th December 2024,

    d. That this Honourable Court be pleased to set review and/or set the ruling which was delivered by Honourable A.R Kithinji Chief Magistrate Court in ELC No. 174 of 2018 on 15th November 2024.

e. That this Honourable Court be pleased to declare the said proceedings in the subordinate court in ELC No. 174 of 2018 were null and void ab initio.

f. That this Honourable Court to order that a prohibitory order do issue against the parcel of land No. Laikipia Daiga Umande Block 6/229 (Nyariginu) pending hearing and determination of this application herein.

g. That costs of this application be borne by the Respondent.

3. The application is premised on 31 grounds set out on the face of the application and the supporting affidavit of the applicant containing a record 57 paragraphs. In summary, the applicant was aggrieved by the ruling of the trial court delivered on 13.12.2024. He contends that there was an error on the face of the record of the ruling whereby crucial evidence was left out and that a survey report was ignored. Further, ground number 3 reads as follows; "That the court failed to appreciate the fact that the Respondent did have grant of letters administration ad litem hence from the word go hence the proceedings are null and void".

4. The application was served but no response was filed. Should the court then proceed to grant the orders sought, seeing that the application is unopposed.

5. In the Supreme Court of Kenya case of Tullow Oil PLC & 3 others v PS Ministry of Energy & 15 others [2020] eKLR, the court had this to say in regard to an application which was not opposed;

> " In other circumstances, depending on its nature, where an application is unopposed, and the Court sees merit in it, then it should be granted without much ado. Not the present Motion as the same is fraught with all manner of difficulties".

6. Similarly, the present application though unopposed is fraught with all manner of difficulties including but not limited to the issue of jurisdiction. The question I pose is; What kind of attires (appellate or otherwise) is this court clothed with in dealing with the issues presented before it, in view of the fact that there is no appeal or intended appeal?

7. It is quite apparent that the primary prayer sought by the applicant is a review of the Magistrates Courts ruling of 13.12.2024 as seen at ground number 29 where the applicant states that; "It will therefore in the best interest of Justice that the Honourable Court do review and/or set aside the ruling which was delivered by the Court in the Magistrate Court in ELC No. 174 of 2018 Boniface Kinyua vs Joseph Mwai".

8. The legal regime governing matters of review are anchored under Section 80 of the *Civil Procedure Act*, as well as Order 45 of the Civil Procedure rules. Section 80 of the aforementioned statute provides that;

> " Any person who considers himself aggrieved-
>
> (a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

The above provisions of law have been echoed in a raft of court decisions including National Bank of Kenya Ltd vs Ndungu Njau Nairobi *CA No. 211 of 1996* and Jeremiah Muku Methodist Church of Kenya Registered Trustees & Another [2009] eKLR.

9. The matters in controversy are live before the trial court, hence this court cannot usurp the jurisdiction of the said court unless and until the court is moved through known and lawful procedures, which is through the appellate platform. Thus no matter how unpleasant a decision of a trial court is, a superior court cannot step in to deal with the issues in controversy as such issues ought to be dealt with through the hierarchical systems of the court. This far, I find that the court has no jurisdiction on review of the magistrates court ruling.

10. It is noted that in absence of an appeal, any move to deal with the issues raised in the current suit has the potential of creating confusion and turmoil in the administration of justice. In the case of Alvin Mbae & 2 others v Kinyua Mukatha & 2 others [2018] eKLRwhere the court was dealing with the question of horizontal jurisdiction, the court stated that ;

> " A litigant cannot be allowed through a circuitous contrivance to move a judge to make a decision which will impeach the decision of another judge who has similar jurisdiction with his. If such conduct is embraced, it would spawn total confusion in the administration of Justice. It would amount to a judge fighting another judge. That is why the appeal process is there."

11. The court went on to state what would happen if a court was to deal with an issue which had been dealt with by another court of horizontal jurisdiction;

> " A studious bystander watching the court doing so would surmise that he is beholding veritable judicial phantasmagoria. A decision made by a Judge seized of concurrent and/or horizontal jurisdiction with another Judge having his decision juxtaposed against that of another Judge of similar status! He would think that the judiciary is a house of babel. I think that this would spawn judicial anarchy and chaos. I opine that the plaintiffs have been involved in a forum shopping misadventure".

12. Though the matter at hand does not relate to horizontal jurisdiction, the import of the above decision does apply herein. This is because a perusal of the rather bountiful grounds in support of the application and similarly voluminous paragraphs in the replying affidavit reveals that the applicant desires the court to deal with the issues in controversy, such as prima facie claims of ownership as well as occupation of the suit property, which issues are live before the trial court.

13. I also find that the conduct of running parallel proceedings before this court and the magistrates court is a mission of forum shopping on the part of the applicant and amounts to an abuse of the court processes. In the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR, the court had this to say on the matter of abuse of court processes.

> " Abuse of court process created a factual scenario where a party was pursuing the same matter by two court process. A party by the two court process was involved in some gamble, a game of chance to get the best in the judicial process. A litigant had no right to pursue paripasua two processes, which would have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both".

14. Still in the aforementioned decision, the Court went on to state that;

> " This suit presents a sad scenario of not only having parallel proceedings on the same issues involving the same parties but also a great risk of coordinate courts granting conflicting orders. Similarly, this court is being invited to determine substantially similar issues pending

before the court. The applicant did not disclose in its pleadings the existence of the earlier suit. This suit falls within the ambit of what constitutes abuse of court proceedings"

15. Another point for consideration is that the cited provisions of law do not turn on the prayers sought in the application. The provisions of Order 40 of the Civil Procedure Rules cited in the application relate to temporary injunctions, which are ordinarily issued on interlocutory basis pending the determination of the rights of the parties and disposal of the suit, See Josphat Yego v Joseph Kipkoech [2021] KEELC 2865 (KLR). However, this is not a substantive suit, and there would be nothing pending once the court deals with the application dated 28.11.2024. The other specific provisions of law cited by the applicant are Sections 77, 78 and 79 of the *Civil Procedure Act*. Those provisions relate to appeals, yet this is not an appeal!

16. It is further noted that even the ruling in question has not been availed by the applicant. The level of disorganization doesn't stop there. Even the grammatical errors are quite appalling. For instance, prayer no.4 in the application, the applicant states that;

> " That this Honourable Court be pleased to set review and/or set the ruling which was delivered by Honourable A.R Kithinji Chief Magistrate Court in ELC No. 174 of 2018 on 15th November 2024". While ground no. 3 in the application reads as follows;
>
> > " That the court failed to appreciate the fact that the Respondent did have grant of letters administration ad litem hence from the word go hence the proceedings are null and void"

18. Finally, I must point out that the practice of litigating serious conflicted issues of law and facts in the platform of a miscellaneous application is unacceptable and untenable. After all, the miscellaneous file does not have the substantive pleadings of the parties, yet pleadings are the foundational documents upon which, the claims of the rival litigants are anchored upon. In absence of pleadings, evidence if any produced by the parties cannot be considered. See Raila Amolo Ondinga & Another v IEBC & 2 Others (2017) Eklr, Galaxy Paints Company Ltd v Falcon Guards Ltd (2000) EKLR. Thus like Murphy's law where "anything that can go wrong will go wrong anyway", I find that there is nothing right in the suit at hand. In the circumstances, the suit is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 5TH DAY OF MARCH 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

All parties absent

Court Assistant: Nancy Mwangi