Kanyi v Bwana (Environment and Land Appeal E021 of 2023)
[2024] KEELC 5035 (KLR) (3 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5035 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E021 OF 2023

SM KIBUNJA, J

JULY 3, 2024

BETWEEN

DAVID MUREITHI KANYI ..... APPELLANT

AND

BULE SHAHIB SOMOE BWANA ..... RESPONDENT

(Being an appeal from the ruling of Hon. J. B. Kalo, CM, in Mombasa MCELC No. E022 of 2021: Bule Shahib Somoe Bwana, delivered on 21st August 2023)

JUDGMENT

1. The appellant, being dissatisfied with the ruling of Hon. J. B. Kalo, CM, delivered on the 21st August 2023, in Mombasa CM ELC No. 22 of 2021, lodged this appeal through the memorandum of appeal dated 25th August 2023, raising five grounds, summarized as follows:

    a. That the learned trial magistrate erred in law and fact by holding that the trial court had the requisite jurisdiction to hear and determine the suit.

    b. That the learned trial magistrate erred in law and fact by holding that the defendant had by filing a defence, admitted the court's jurisdiction.

    c. That the learned trial magistrate erred in law and fact by failing to find that the defendant had contested the court's jurisdiction first before filing his defence.

    The appellant therefore prays for his appeal to be allowed and the said ruling to be set aside, his preliminary objection be allowed and costs.

2. The court admitted the appeal on the 28th November 2023, and directed the submissions be filed and exchanged. The learned counsel for the appellant filed their submissions dated the 29th January 2024, which the court has considered.

3. The following are the issues for the court's determinations:

   a. Whether the appellant had raised his objection to the lower court's jurisdiction.

   b. Whether the trial court has jurisdiction in the suit.

   c. What orders to issue.

   d. Who pays the costs?

4. The court has carefully considered the grounds on the memorandum of appeal, the record of appeal, submissions filed by the learned counsel and come to the following conclusions:

   a. This being a first appeal, the court is required to reconsider the evidence tendered before the trial court, evaluate it itself and come to its own conclusions on whether or not it would have come to different conclusions. In the case of Mursal & another versus Manese (suing as the legal administrator of *Dalphine Kanini Manesa*) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), the court held as follows:

      > " A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others [1968] EA 123 and in Peters v Sunday Post Limited [1958] E.A. page 424."

      The court further stated as follows:

      > " A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. See Kurian Chacko vs. Varkey Ouseph AIR 1969 Kerala 316. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, Cap 21 Laws of Kenya, a court of first appeal can appreciate the entire The evidence and come to a different conclusion."

   b. The respondent commenced a suit before the Mombasa Chief Magistrate court, being ELC No. 22 of 2021, vide a plaint dated 30th August 2021, that is at page 6 of the record of appeal, seeking for inter alia, declaratory orders that the appellant was in violation of the sale agreement dated 23rd April 2018; that the appellant was not entitled to balance of purchase price for maisonette No. 14; orders of specific performance, and for the Land Registrar to register the plaintiff as owner of the said property, and injunction against the respondent. Upon being served with the suit papers, the respondent entered appearance by filing notice of appointment of advocates and notice of preliminary objection, both dated the 8th November 2021, that are at pages 45 and 46 respectively of the record of appeal. The two documents were formally filed, as confirmed by the copy of the receipt issued on 8th November 2021, at page 44 of the said record. The appellant filed his statement of defence dated the 13th June 2022 on the 14th June 2022 as confirmed by the receipt and copy at pages 52 and 53 of the record of appeal.

   c. The preliminary objection was subsequently heard, and a ruling delivered on the 21st August 2023. The ruling show that the learned trial magistrate among others, analysed various superior

courts' decisions and after making reference to section 6 of the *Arbitration Act*, came to the following determinations;

> " .... The court finds and holds that the preliminary defendant's preliminary objection dated 3. 4. 2023 is devoid of merit. The same is dismissed with costs to the plaintiff." [underlining mine]

It is this ruling that the appellant was not satisfied with, prompting this appeal.

d. The details of the preliminary objection set out in (b) above, show that the preliminary objection by the appellant is dated 8th November 2021 and filed on the same date, and not 3. 4. 2023 referred in the ruling. Indeed the appellant's statement of defence filed on 14th June 2022 is dated 13th June 2022, and at paragraph 6 thereof, had objected the court's jurisdiction in view of the valid arbitration clause in their sale agreement. There is no copy of a preliminary objection dated 3. 4. 2023 that has been filed in the record of appeal herein, and the court is unable to confirm whether one existed.

e. The record of appeal has the list of documents dated 30th August 2021 filed by the plaintiff/ respondent at page 13, and the agreement dated 23rd April 2021. The agreement appears at pages 14 to 26 and contains clause "R" which states that:

> "(R) Any dispute, difference or question whatsoever which arise between the parties including the interpretation of right or liability of any party shall be referred to an arbitrator under the rules of the *Arbitration Act* 1995 of Kenya (Act No. 11 of 2009) as amended by the Arbitration (Amendment) Act, 2009 (Act No. 11 of 2009) or other Act or Acts for the time being in force in Kenya or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other, then on the application of any one party by the Chairman of the Chartered Institute of Arbitrators [Kenya Branch] and the decision of such arbitrator shall be final and binding on the parties hereto."

The copy of the sale agreement on the record of appeal is duly executed by the parties and witnessed by counsel and therefore binding to the parties, unless otherwise proved.

f. That even though the respondent has not participated in this appeal, the fact that the sale agreement was the first document in the list of documents she filed before the trial court can only be taken to be an acknowledgement of its contents. In his ruling, the learned trial magistrate observed that "...the plaintiff does not acknowledge the existence of the arbitration clause in the contract between it and the defendant. He acted as though the same did not exist by filing the suit herein and not applying to have the matter referred to arbitration." That while that observation is correct when one only looks at the plaint, the learned trial magistrate erred in fact by not considering that the plaintiff/respondent had indeed included the sale agreement dated the 23rd April 2018 in their list of documents as shown above. The existence of the arbitration clause in the parties' sale agreement, and its tenor, does not cease to exist and to bind them merely because one party, the respondent, has not made reference to it in their pleadings. The arbitration clause remained binding to the parties unless otherwise ordered by the court, and the appellant acted properly by raising their objection to the court action through the notice of preliminary objection and statement of defence.

g. Section 6 of the *Arbitration Act* provides that where a suit has been filed, and a party applies not later than the time of entering appearance of filing defence or other pleading or steps the court shall;

> " ..stay the proceedings and refer the parties to arbitration unless it finds-
>
> (a) That the arbitration agreement is null and void, inoperative or incapable of being performed, or
>
> (b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
>
> (c) Notwithstanding that an application has been brought under section (1) and the matter is pending before court, arbitral proceedings may be commenced or continued and an arbitral award may be made."

Despite there being no dispute that the parties herein had a dispute that could have been referred to arbitration, and there being no challenge to the arbitration agreement or finding that it was null and void, inoperative or incapable of being performed, then it was a misdirection of the clear provision of the above provision of the law, for the learned trial magistrate to dismiss the appellant's preliminary objection on the court's jurisdiction that was otherwise well founded.

h. That while the learned trial magistrate had correctly held that the appellant had promptly filed the preliminary objection, as it was filed at the same time of entering appearance, as required under section 6 of the *Arbitration Act*, he misdirected himself by holding and finding that that "...once a part[y] enters appearance or files any pleadings or takes any other step in the proceedings, then they cannot raise the issue of existence of an arbitration clause." The filing of the statement of defence, having come over seven months after the filing of the preliminary objection, did not take the appellant's right to have the preliminary objection heard and determined on merit, and in accordance of the law. The preliminary objection, in short challenged the court's jurisdiction as the parties had in their sale agreement dated the 23rd April 2018, provided an alternative forum to deal with disputes between them through arbitration. The court's jurisdiction had been invoked prematurely and in view of section 6 of the *Arbitration Act*, the court should have stayed the proceedings for the parties to act as per clause "R" of their Sale agreement. The appeal therefore has merit.

i. That in line with section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that costs follow the event unless where otherwise ordered for good cause, the court grants the appellant the cost.

5. Flowing from the foregoing, the court finds merit in the appeal and the same is allowed as follows:

a. That the learned Trial Magistrate's ruling of 21st August 2023, dismissing the appellant's preliminary objection dated 8th November 2021, is hereby set aside.

b. That the appellant's preliminary objection dated 8th November 2021 on jurisdiction is upheld, and Mombasa Cmelc No. 22 of 2021 stayed pending the resolution of the parties dispute through arbitration in accordance with Clause "R" of their sale agreement dated 23rd April 2021.

c. The appellant is awarded costs in this appeal.

Orders accordingly.

DATED, SIGNED AND VIRTUALL DELIVERED ON THIS 3RD DAY OF JULY 2024.

S. M. Kibunja, J.

ELC MOMBASA.