



REPUBLIC OF KENYA



KENYA LAW
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**Obuya v Okello & 2 others (Environment and Land Appeal
E056 of 2022) [2024] KEELC 5164 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E056 OF 2022**

GMA ONGONDO, J

JULY 9, 2024

BETWEEN

JANES OINGA OBUYA APPELLANT

AND

AWUONDO OKELLO 1ST RESPONDENT

PETER NGERE OKOMBO 2ND RESPONDENT

DAVID ODHIAMBO OKOMBO 3RD RESPONDENT

(An appeal arising from the Ruling in Mbita Principal Magistrate's Court Environment and Land Case number E010 of 2020 by Hon. N. Moseti, PM on 12th October 2022)

JUDGMENT

1. The instant appeal was ignited by the ruling of Honourable N. Moseti, PM delivered on 12th October 2022 where he held that the suit at the trial court was prematurely instituted without exhausting the remedies provided in the Adjudication Act.
2. Being aggrieved by the said determination, the appellant through M/S Madoro Khairalla and Company Advocates, mounted the appeal by way of a memorandum of appeal dated 31st October 2022 based on the grounds, inter alia;
 - a. The Ruling is flawed both in law and facts and therefore constitutes a travesty of justice.
 - b. The trial magistrate failed to appreciate the totality of the matters at issue in the said case and in the process failed to appreciate the totality of the matters at issue in the said case and in the processes failed to appreciate the contextual position of the parties and the prevailing circumstances of the case.



- c. The trial magistrate misinterpreted the law in arriving at the ruling, was influenced by extraneous factors, actors and issues.
 - d. The ruling flies in the face of cardinal doctrines and maims of justice. In particular, the ruling endeavors to advance an illegality on the face of both the law and facts notwithstanding the fact that courts of justice do not aid an illegality.
 - e. The trial magistrate failed to consider the submissions of the plaintiff in arriving at his ruling.
 - f. The ruling in all intent and purpose aids the fraudulent and illegal activities of the defendants/respondents upon the suit property.
 - g. The trial magistrate failed to appreciate the gist of the plaintiff's application and instead misunderstood the position of the plaintiff in the application and in the process ultimately depriving the plaintiff of his legal rights and entitlements.
 - h. The ruling occasions double jeopardy upon he plaintiff/applicant in total disregard of the law.
 - i. The trial magistrate overstretched his mandate and jurisdiction by awarding the defendants costs of the application having ruled that he himself did not have the jurisdiction to preside over and determine the case before him. In other words, the trial magistrate took what he himself did not have from the plaintiff and gave the same to the defendants. In other words, the trial magistrate stole from the plaintiff and proceeded to deliver the same to the defendants. In other words, the trial magistrate stole form the plaintiff and proceeded to deliver the same to the defendants despite the plaintiff' pain, suffering and damages the defendant's illegal activities were occasioning upon the suit property.
 - j. The award of costs to the defendants was insensitive and reckless on the part of the trial magistrate as it flouted every element of logic and law both theory and practice.
3. The appeal was heard by way of written submissions.
 4. As at the time of completion of preparation of the instant ruling, the case tracking system shows that learned counsel for the appellant did not file submissions herein.
 5. On the other hand, learned counsel for the respondents filed submissions dated 3rd June 2024 and identified three issues for determination thus:
 - a. Whether the appellant sought leave to appeal the trial court's ruling and whether the appellant is entitled to an order of injunction.
 - b. Whether the appellant should have instituted and whether the trial court had jurisdiction to entertain a case where there was a pending appeal to the Minister.
 - c. Whether the Honourable court was right in upholding the Preliminary Objection by the respondents.
 6. Learned counsel submitted that the appellant lodged the instant appeal out of time. That the appellant also failed to first obtain leave of the trial court as stipulated under Section 75(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as read with Order 43 Rule 1 of the Civil Procedure Rules, 2010. That the application did not meet the threshold for grant of an order of injunction. That further, there is a pending appeal before the Minister which ought to be dispensed with before a suit can be lodged in court. To buttress the submissions, counsel referred to authoritative pronouncements including Speaker of the National Assembly -vs- James Njenga Karume [1992] eKLR, among others.



7. In that regard, the issues for determination in this appeal are as per the grounds of appeal which are condensed to whether this appeal is merited and the orders to issue thereby to meet the ends of justice.
8. At the trial court, the appellant instituted the suit by way of a plaint dated 17th December 2020 seeking the orders infra:
 - a. A permanent injunction restraining the defendant, his agents, servants and/or anyone claiming under or deriving authority from the defendant from entering, trespassing and/or encroaching, interfering with and/or in any manner, whatsoever, dealing with suit land, that is Plot Nos. 1573 KAKSINGRI WEST B ADJUDICATION and /or any portion thereof.
 - b. Costs of this suit.
 - c. Interest on (a) and (c) at court rates as from the date of filing this suit until payment in full.
9. The respondents opposed the claim vide their joint statement of defence dated 28th September 2021. At paragraph 7 thereof, they intimated to raise a preliminary objection to the suit thus:

“...In reply to paragraph 11 of the plaint the defendants aver that the consent should not have been issued as there is a pending Appeal Case No 515/2017 as regards to the suit property which is yet to be determined hence the defendants shall raise a preliminary objection to have the plaintiff’s claim struck out at the earliest opportunity...”
10. In rendering his ruling on the preliminary objection, the learned trial magistrate noted that:

“...A perusal of the court record demonstrates that the suit land is pending appeal by the Minister. This fact is not contested by the plaintiff. It is thus, apparent that the register in respect of the suit land has not become final...”
11. The learned trial magistrate relied on Section 29 of the *Land Adjudication Act* as well as the case of Speaker of the National Assembly -vs- James Njenga Karume [1992] eKLR, among others, in the impugned ruling.
12. The respondents’ counsel submitted that the appellant lodged this appeal out of time and without first obtaining leave of the trial court as stipulated under Section 75(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as read with Order 43 Rule 1 of the Civil Procedure Rules, 2010.
13. It is borne in mind that section 75 of the *Civil Procedure Act* Chapter 21 Laws of Kenya sets out the orders from which appeal lies. Section 79 G of the same Act stipulates the time for filing of appeals from subordinate courts.
14. Section 75(1) of the *Civil Procedure Act*, 2010 provides as follows:

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 - (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-
 - (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) An order on an award stated in the form of a special case;
 - (c) An order modifying or correcting an award;



- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (f) An order under section 64;
 - (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (h) Any order made under rules from which an appeal is expressly allowed by rules.
15. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Under Rule 2 of the Order, it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under the said Order 43 Rule (1), leave to appeal must be obtained before such an appeal can be preferred.
16. The procedure for obtaining leave is provided under Order 43 Rule (3) which states as follows:
- (3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
17. Clearly, the subject of the instant application does not fall under any of the Orders set out under Order 43 Rule (1) (supra) in respect of which an appeal lies as of right. On that account, the appellant did not have an automatic right of appeal against the ruling made on 12th October 2022 by the trial court. Therefore, he required to obtain the leave of the court as envisaged under Section 75(1) of the Civil Procedure Act (supra) and Order 43 Rule (3) of the Civil Procedure Rules (supra).
18. Under the said Order 43 rule (3), such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms. Any failure thereof cannot be remedied under Article 159 (2) (d) of the Constitution of Kenya 2010 as held by the Court of Appeal in the case of Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko and 2 others (2013) eKLR.
19. In my considered view, where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal. Consequently, no competent appeal can be lodged against such an order. I find that is the obtaining situation in the present matter.
20. To that end, the instant appeal is also untenable. Therefore, the appeal must fail and is hereby struck out with costs to the respondents.
21. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 9TH DAY OF JULY 2024

G. M.A ONG'ONDO

JUDGE

In the presence of;

1. Madoro K learned counsel for the appellant.



2. Nyarige N Learned counsel for the respondents.

3. Luanga T, court assistant.

