



**Chemengu v Chekukui & 6 others (Environment and Land Appeal
E012 of 2023) [2024] KEELC 6781 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E012 OF 2023
EC CHERONO, J
OCTOBER 11, 2024**

BETWEEN

BEATRICE NAMACHI CHEMENGU APPELLANT

AND

BENARD NAIBEI CHEKUKUI 1ST RESPONDENT

JUMA KAPTUNO 2ND RESPONDENT

ELIUD MONSO 3RD RESPONDENT

WYCLIFFE MATEYA 4TH RESPONDENT

SASURI CO-OP SOCIETY 5TH RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 6TH RESPONDENT

COUNTY SURVEYOR BUNGOMA COUNTY 7TH RESPONDENT

*(Being an appeal from the Ruling and decision of Hon. R.K LANGAT
(PM) delivered on 13th September, 2023 in Sirisia Principal Magistrate
ELC Case no. 2 of 2022 on an application dated 5th June, 2023)*

JUDGMENT

1. This appeal arises from the ruling of the Principal Magistrate Hon. R.K Langat delivered on 13th September, 2023 in Sirisia Principal Magistrate Court ELC Case no. 2 of 2022.
2. The brief background of this case is that the Appellant who is the Plaintiff in the primary suit filed a Notice of Motion under a Certificate of Urgency accompanied by a plaint both dated 23rd June, 2023. Upon perusal and consideration of the Notice of Motion and the supporting affidavit, the trial court directed for service and for parties to fix a date at the registry. Upon service, the 1st- 5th



Respondents who are the 1st-5th Defendant's in the primary suit filed a Notice of Preliminary Objection dated 18th July, 2022 on challenging the Court's jurisdiction and claiming the suit was res judicata. The trial Court in its ruling dated 9th September 2022 found that the Notice of preliminary objection lacked merit and dismissed the same.

3. Thereafter parties were ordered to comply with pre-trial directions and directions were taken for a hearing date. Before the matter could proceed for hearing, the Appellant herein filed an application dated 5th June, 2023 whose ruling is the subject of this appeal seeking for the following orders;
 - a. That this application be certified as urgent and the same be heard ex-parte at the 1st instance.
 - b. That this honourable court be pleased to issue an order of temporary injunction restraining the 1st, 2nd and 4th defendants jointly and severally their servants, agents and or all those working through them being servants and agents from encroaching, alienating or attempting to encroach into or attempting to create disturbance or attempting to obstruct workers or attempting to raise false accusations against the applicants or alienate the applicants plot being plot no. North Malakasi/ West Sasuri/3627 at chapatis market pending hearing and determination of this application.
 - c. The costs be provided for.
4. The application was opposed by the 1st to 5th Respondents who filed Grounds of opposition dated 3rd July, 2023. The respective parties filed their submissions for and against the application. The trial court upon considering the application i.e the one dated 5th June, 2023 delivered its ruling dismissing the application with costs.
5. Being aggrieved by the said ruling the appellants preferred the current appeal through their memorandum of appeal dated 14th September, 2023 on the following grounds;
 - a. The learned trial magistrate erred in law and fact in allowing the Respondents claim which was devoid of evidence hence arriving at a wrong decision.
 - b. The learned trial magistrate erred in law and fact in disallowing the appellants counter-claim when the appellant had proved his counter-claim on a balance of probabilities.
 - c. The learned trial magistrate erred in law and fact in allowing the Respondents grounds of opposition and submissions without putting into proper consideration that the respondents were proceeding with the illegal actions and ill motives against the appellant when the suit is before court on defence hearing and the respondents main evidence the survey report in invalid as it is no checked, satisfied and approved.
 - d. The learned trial magistrate erred in law and fact in allowing the respondents grounds of opposition and submissions and relying on them by not putting into proper consideration that's the Respondents claim was null and void as the respondents did not produce physical planning map, allotment letter or title deed to support their claim.
 - e. The learned trial magistrate erred in law and fact in allowing the Respondents claims without farming issues and giving reasons of his decision hence arriving at wrong decision.
 - f. The learned trial magistrate erred in law and fact in disallowing the appellant claim without giving reasons as the court remained silent on the counter-claim hence arriving at wrong decision.



- g. The learned trial magistrate erred in law and fact in disallowing the Appellants claim dismissing her application giving freedom to Respondents to proceed with its illegal actions and ill motives against the Appellant without putting into proper consideration that the Respondents were colluding with police officers, giving freedom to police officers to arrest and charge the appellant with trespass and malicious damage vide OB 23/08/05/2023 and OB 11/13/05/2023 reported by the 2nd respondent to Chepatis Police Station and Chepatis Police Division DCI office knowingly that it was a false report.
6. The prayers sought were as follows;
- a. The appeal be allowed.
 - b. The lower court decision be reversed by dismissing the respondents claim and allowing the appellants claim.
 - c. The costs of the appeal and lower court cost be paid for by the respondents.
 - d. The OCS Cheptais police station and DCI Cheptais police division be restrained from arresting and charging the Appellant with trespass and malicious damage reported by 2nd respondent vide OB NO. 23/08/05/2023 and OB 11/13/05/2023 pending determination of the intended appeal and pending hearing and determination of the main suit in ELC No. 2 of 2022 Sirisia Principal Magistrates Court coming for defence hearing on 8th November 2023.
 - e. Any other relief that this Honourable court may see fit to grant.
7. The parties took directions to dispense with the appeal by way of written submissions. The Appellant filed submissions dated 23rd May, 2024 while the Respondent filed his submissions dated 27th May, 2024.
8. The court has carefully considered the appeal and circumstances leading thereto as summarized above. The sole issue for determination is whether the Appellant has satisfied the grounds of the appeal.
9. My mandate as the first appellate Court is to analyze and evaluate the evidence on record afresh and to reach my own independent decision. In doing so, I must bear in mind that the trial Court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
10. It is also settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held:-
- “An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”
11. Now to determining whether the Appellant has satisfied the grounds of the appeal. The grounds of appeal as drafted generally challenge the courts decision which the Appellant alleged was arrived at erroneously.



Grounds 1,2 &6.

12. In these grounds the Appellant challenged the trial Courts decision where it is asserted that the trial court allowed the Respondents counter claim which is said to be devoid of any evidence in support and does not meet the required standard of proof. I have carefully perused the proceedings before the trial court and I note that the main suit is still pending hearing. And that the application whose ruling is subject of this appeal was filed just before the suit proceeded for hearing. This fact was properly noted by the trial Court in its judgment where the court states that;

“...I must point out that the current application was a waste of judicial time. This matter has not proceeded and is now pending hearing of the main suit...”

13. It is therefore erroneous for the Appellant to assert that the trial court allowed the Respondents claim yet the court properly acknowledged that the suit is yet to be heard and as such did not consider the defence.

Grounds 3, 4 &7.

14. The Appellant complained that the trial magistrate erred in law and in fact in allowing the grounds of opposition and submissions as presented by the Respondents in dismissing her application. It must be noted that the trial court in its judgment opined that the application as presented did not have any substantive prayer and thus found that there were no orders capable of being issued at that juncture. Notably this was not an argument advanced by the Respondents in their grounds of opposition.

15. In any event I agree with the trial courts findings as mentioned above noting that the prayers sought in the application had already been spent at the time of making the ruling and as such there was nothing for the court to grant. Therefore, these grounds of the appeal fail.

Ground 5

16. On this ground the Appellant challenges the structure of the court ruling. This ground however cannot be any further from the truth. The trial court in its ruling has properly considered the prayers sought in the application, the respondent’s grounds of opposition and has further determined the applicable law, outlined two emergent issues of determination and finally given the reasoning behind its decision which this court has found was sound. Therefore, this ground of appeal fails.

17. The upshot of the above findings is that the Appellants appeal lacks merit and the same is dismissed. Costs of the appeal to abide in the primary suit.

18. The lower court file is hereby remitted back to the Sirisia Law Courts for expeditious hearing and disposal of the pending main suit.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF OCTOBER, 2024.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

Appellant-present.

Were H/B for Mr. Sichangi for the Respondents.



Bett C/A.

