



Kortom & another v Kortom & 5 others (Environment and Land Appeal E008 of 2023) [2024] KEELC 7121 (KLR) (9 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

EM WASHE, J

OCTOBER 9, 2024

BETWEEN

NTOME OLE KORTOM 1ST APPELLANT

SIMPAIYON OLE KORTOM 2ND APPELLANT

AND

LETUATI OLE KORTOM 1ST RESPONDENT

TALALA OLE KORTOM 2ND RESPONDENT

OLEISIRIRI OLE KORTOM 3RD RESPONDENT

LAND REGISTRAR, KILGORIS 4TH RESPONDENT

LAND SURVEYOR, KILGORIS 5TH RESPONDENT

HON ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

1. The Appellants herein filed a Memorandum of Appeal dated 18.12.2023 (hereinafter referred to as “the present Appeal”) against Ruling and Decree pronounced by Hon.M.I.G Moranga, SPM dated 07.12.2023 (hereinafter referred to as “the Trial Court decision”) in the proceedings known Kilgoris SPM ELC Case No E007 of 2021 (hereinafter referred to as “the Trial Court proceedings”) on the following grounds;-
 - a. The Honourable Learned Trial Magistrate erred in law and fact by failing to understudy the legal position that the suit herein is concluded vide judgement delivered on the 4th day of October 2021 and therefore it was legally untenable to refer the instant matter to the court annexed mediation service.



- b. The Honourable Learned Trial Magistrate erred in law and fact by making an order that the parties herein do appear before the Court annexed mediation service. The said order was irrational, deficient and incompetent and therefore such orders should be set aside and/or quashed.
 - c. The Honourable Learned Trial Magistrate erred in law and fact by referring the matter herein to court annexed mediation service without advancing any good legal and justified reasons for making the said order.
 - d. The Honourable Learned Trial Magistrate erred in law and fact by referring the instant matter to mediation without understudying the fact that the Respondents herein did not file any statement of Defence even after filing the Notice of Motion dated 13th day of March 2023 which was disallowed on the 7th day of December 2023.
 - e. The Honourable Learned Trial Magistrate erred in law and fact fixing the instant matter for mention on the 29th of February 2024 without understudying the fact that the instant suit is finalised vide judgement delivered on the 4th day of October 2021. The Trial Court failed to make a determination that it is now functus officio.
 - f. The Honourable Learned Trial Magistrate erred in law and fact without understudying the fact that the Respondents did not request for any reference of the instant matter to court annexed mediation service. The said Reference of the instant matter to Court annexed mediation service was without any basis whatsoever.
 - g. The Honourable Learned Trial Magistrate erred in law and fact by making a determination that the instant finalised matter be determined by mediation without laying a foundation for such a reference to court annexed mediation service.
 - h. The Order and/or decision of the Trial Magistrate was/is contradictory and self-defeating. Consequently, the ruling herein has occasioned miscarriage of justice thus ought to be set-aside.
 - i. The Honourable Learned Trial Magistrate erred in fact and in law in failing to properly analyse, evaluate and consider the entire suit which is already determined.
 - j. The Order issued by the Trial Magistrate was/is passionate and biased and the said Order ought to be set-aside.
 - k. The Honourable Learned Trial Magistrate failed to evaluate and/or analyse the tenor of the dispute herein which had already been finalised.
2. Based on the grounds outlined hereinabove, the Appellants sought the following Orders from this Court; -
 - i. The Appeal herein be allowed and the Ruling and Order of the Trial Magistrate dated 7th day of December 2023 vide Kilgoris ELC No E007 of 2021 be set-aside, reviewed, varied and/or quashed.
 - ii. The Honourable Court be pleased to substitute therefore an order dismissing the Order by the Trial Magistrate of referring the matter to mediation when the said suit was already finalised.
 - iii. Costs be provided for.
 3. The present Appeal was duly served upon the Respondents who expressed their intention to oppose the same.



4. The Court directed that parties canvass the present Appeal by way of written submissions in support of their positions.
5. The Appellant in compliance with the said directions filed their final submissions dated 08.08.2024 while the Respondents filed their final submissions dated 12.09.2024.
6. The Court sitting as the 1st Appellant Court is guided by the authority *Selle & another v Associated Motor Boat Co.ltd & others* (1968) EA 123 in terms of its jurisdiction and how it should conduct itself in the hearing and determination of an Appeal before it; -

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. 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.”
7. It is therefore clear in the mind of this Court that any Court sitting as the first appellate Court must re-evaluate the pleadings, facts and issues that were placed before the Trial Court and arrive at its own judgement on whether or not the Appeal should be allowed or not.
8. In the present Appeal, the Appellants are dissatisfied and aggrieved not with the whole Trial Court decision but the aspect that refers the matter for Court mediation.
9. The only issue contained in the present Appeal is whether or not the Trial Magistrate erred in its decision to refer the parties for mediation after the determination of the Notice of Motion dated 13.03.2023.
10. According to the Appellants, the Respondents did not seek for any Orders of mediation in their Notice of Motion dated 13.03.2023.
11. Secondly, the Appellants pleaded and submitted that the Trial Court did not have jurisdiction to refer the parties for mediation as the dispute between them had been adjudicated and determined through the Judgement pronounced on the 05.10.2021.
12. The Judgement pronounced on the 05.10.2021 is still in force as the Respondents have never set-aside.
13. In essence, there was no dispute capable of being adjudicated through the Court Annexed Mediation as directed in the Trial Court's decision being challenged in this Appeal.
14. The Respondents on the other hand support the Trial Court decision directing the parties herein to attend the Court annexed mediation.
15. The Respondents submit through their submissions dated 12.09.2024 that indeed, they do not oppose the judgement pronounced on the 05.10.2021.
16. However, a dispute arose during the implementation of the said Judgement and Decree pronounced on the 05.10.2021.
17. The Respondents allegation is that the sub-division of the property known as LR No Transmara/Mapashi/53 by the 4th and 5th Respondent was not done with equity as some parties were give more fertile land while others were given land which is swampy and not productive.
18. In addition to the above, the Respondents stated that the sub-division and/or demarcation of the individual portions should be done in a straight line in line with the outside demarcation of



property known as LR No Transmara/Mapashi/53 and not the curvy manner in which the 4th and 5th Respondents had demarcated the same.

19. It is clear in the mind of this Court that indeed a dispute on the manner in which the sub-division and/or demarcation of the property known as LR No Transmara/Mapashi/53 should be undertaken existed.
20. Although the Trial Court through its judgement and/decreed pronounced on 05.12.2021 directed the property known as LR No Transmara/Mapashi/53 to be equally sub-divided among the Appellants and the 1st to 3rd Respondents, it did not provide the manner in which the same should be implemented.
21. Be as it may, the question before this Court is whether the Trial Court has the mandate to refer such a dispute to the Court annexed mediation with or without the parties' formal request in view of the judgement pronounced on the 05.10.2021
22. It is not in doubt that once the Trial Court pronounced its judgement on 05.10.2021, it became functus officio as regards the issues that had been placed before it through the Appellants' Plaint dated 04.03.2021.
23. However, the Trial Court still has the jurisdiction to entertain and/or deal with issues that relate to the execution of the orders that it issued in determination of a dispute.
24. The provisions of Article 159 (2) (b) of the Kenyan Constitution, 2010 recognise alternative forms of dispute resolution including reconciliation, mediation and traditional dispute resolution mechanisms as crucial and lawful methodologies of resolving disputes within the Kenyan Jurisdiction.
25. In other words, the Kenyan Courts can in the process of resolving disputes before them refer parties to these alternative forms of dispute resolution mechanisms provided under the Constitution.
26. In perusing the Trial Court decision pronounced on 07.12.2023, this Court takes note of the following determinations; -

“With Regard to the boundaries natural or physical those are known only to the parties as it is not in doubt, they had their various and distinct shares. There has been no demonstration of what was done wrong or different to disturb the status quo.

It is not therefore easy for him to understand what the revisit would do in the absence of what was done and is subsisting in the first place.

This Court is of the considered view that the parties themselves have known the portions they occupy. When is it that the Applicants knew they occupied a swampy area were the boundaries altered.

Whenever orders are sought by an applicant there must be satisfied that there is really a change of status quo that would require a court to reinstate the same. Those details are lacking in this case.”

27. The plain and simple interpretation of the above finding by the Trial Court is that indeed a dispute existed in the manner in which the property known as LR No Transmara/Mapashi/53 had been subdivided.
28. However, the Trial Court made a finding that there was no evidence to show that the Applicants had been unfairly disadvantaged during the demarcation and sub-division of the property known as LR No Transmara/Mapashi/53.



29. In other words, the Trial Court resolved the dispute regarding the manner of demarcation and sub-division by pronouncing itself that the Applicants had not demonstrated any alteration and tempering of how the parties used to occupy and use the property known as LR No Transmara/Mapashi/53 even before these proceedings.
30. In essence, this Court is of the view that once the Trial Court made the above observation, the dispute relating to the manner in which the property known as LR No Transmara/Mapashi/53 should be demarcated and/or sub-divided in compliance with the Judgement and Decree issued on 05.10.2021 was resolved.
31. This being the case, then the Trial Court erred in referring the parties herein for mediation on its own motion yet the issue for determination had already been adjudicated.
32. The present Appeal is therefore merited only on the aspect of the Order referring the parties to the Court Annexed Mediation.
33. The last issue for determination is that of costs regarding the present Appeal.
34. Costs usually follow the event but in the present Appeal, the Appellants were challenging the Order of referring the parties to the Court annexed mediation which had been pronounced by the Court on its own motion.
35. The Court's considered opinion is that it would be punitive to direct the Respondents to pay costs yet the Order which has been appealed against was not sought by them.
36. Consequently, each party will bear its own costs appertaining the present Appeal.
37. In conclusion, this Court therefore makes the following Orders relating to the Memorandum of Appeal dated 18.12.2023; -
 - A. The memorandum of appeal is merited only on the aspect of the matter being referred to the court annexed mediation.
 - B. The orders contained in the trial court decision directing the matter to be referred to the court annexed mediation is and are hereby set-aside, reviewed and/or vacated.
 - C. Each party will bear its own costs of this appeal.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 9TH of OCTOBER 2024.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Mr. Ngeno

Advocate For The Appellants: Mr. Ochwangi (n/a)

Advocate For The Respondents: Ms. Pion

