



**Ndungu v Wainaina (Environment and Land Appeal E003 of 2023)
[2024] KEELC 13537 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E003 OF 2023
AK BOR, J
NOVEMBER 6, 2024**

BETWEEN

CECILIA NYAWIRA NDUNGU APPELLANT

AND

JOSEPH WAINAINA RESPONDENT

JUDGMENT

1. In this appeal, the Appellant challenges the decision of Hon. Mararo, Senior Principal Magistrate, given on 12/3/2024 in Nanyuki CM ELC Case No. E018 of 2024 on the basis that the Learned Magistrate disregarded the fact that she had not been served with the court pleadings. Secondly, that the Learned Magistrate erred by issuing final orders against her before the time required for her to respond had lapsed. The other ground of appeal is that the court issued final orders 10 days after the suit was filed by the Respondent without going through formal proof. In addition, she faulted the Learned Magistrate for signing transfer documents of the Respondent's land without giving her an opportunity to be heard resulting in the illegal transfer of Nanyuki/Municipality Block 6/250 Muthaiga Estate Nanyuki area in Laikipia County (the suit property). She added that the trial court failed to appreciate the fact that the land was valued at Kshs. 40,000,000/= and the Chief Magistrate's Court lacked jurisdiction to entertain the suit.
2. The appeal was canvassed through written submissions. The Appellant submitted that the Respondent was her husband and their marriage had not been dissolved. She contended that the Respondent filed Nanyuki CM ELC Case No. E018 of 2024 to punish her as the mother of his children because they had some differences and separated. She submitted that the Hon. Mr. Mararo who is a Senior Principal Magistrate with a pecuniary jurisdiction of Kshs. 15,000,000/= lacked jurisdiction to determine the suit whose value was more than Kshs. 15,000,000/= and that he exceeded his jurisdiction.



3. The Appellant submitted that she was not served with the pleadings in Nanyuki CM ELC No. E018 of 2024 as the process server purported in the affidavit of service. The Appellant cited various Articles of *the Constitution* including Articles 50, 47 and 2 (4) of *the Constitution* in urging that the orders issued by the Learned Magistrate were void.
4. She asserted that final orders could not be given at the ex parte stage as this would run contrary to Section 4 of the Fair Administrative Actions Act and Article 47 of *the Constitution*. She reiterated that the Learned Magistrate failed to establish whether proper service was effected upon her.
5. The Appellant submitted that when the matter came up before the Learned Magistrate on 11/6/2024, the Respondent withdrew the suit in its entirety without the orders of 12/3/2024 being set aside, discharged, vacated or varied. She argued that the purpose of this appeal was to ensure that injustice and prejudice were not occasioned to her.
6. On his part, the Respondent submitted that this appeal was an exercise in futility and a waste of the court's time because Nanyuki CM ELC Case No. E018 of 2024 was withdrawn before the record of appeal and the Appellant's submissions were filed. He maintained that the appeal was an academic exercise and had no legs to stand on since the initial suit was not alive anymore.
7. The Respondent submitted that the Appellant was previously represented by A.K Wahome and Company Advocates and that the record of appeal and submissions were filed by Abwour and Company Advocates on 13/6/2024 before that firm came on record. He submitted that the notice of change of advocates by Abwour and Company Advocates was filed on 27/6/2024 at 12:06 yet the submissions and record of appeal were filed on 13/6/2024. He argued that the record of appeal and submissions should be struck out for being filed by a person who was not on record.
8. The Respondent contended that the Appellant had introduced documents including a valuation report which were never filed in the matter before the Magistrate's Court. Further, that those documents were introduced without leave of the court and he sought to have them expunged from the record. The other ground was that the record of appeal did not contain the documents marked pages 135 – 158.
9. Regarding service of the court pleadings, the Respondent relied on the affidavit of service filed in court and maintained that the Appellant was served through the email address which they had previously used to communicate. He added that she was also served through G4S Courier and relied on the G4S shipment waybill. The Respondent maintained that the Learned Magistrate was in order to issue the orders when the application was not opposed after the Appellant failed to attend court. He denied that the Learned Magistrate had signed the transfer documents.
10. On the claim that the suit property was worth over Kshs. 40,000,000/=, the Respondent submitted that this ground was being raised on appeal and had never been addressed before the Learned Magistrate, further, that the Appellant did not take anything before the Hon. Magistrate to show that the court lacked jurisdiction to hear the suit. He urged that this could not be a ground of appeal because it was never litigated and decided upon by the Learned Magistrate. The Respondent faulted the Appellant for hurriedly filing the appeal based on grounds which were not canvassed before the trial court. Further, that the Appellant filed an application to set aside the trial court's order under certificate of urgency and when the court did not certify it as urgent, she came on appeal to this court.
11. The court had initially reserved 30/10/2024 for delivery of its judgment. When it retreated to write the judgment, it noted that the suit before the Learned Magistrate had been withdrawn and directed the parties to address it on the effect of the withdrawal of the suit on the appeal. The Appellant filed its submissions on the issue on 31/10/2024 and urged that when the Respondent withdrew the matter



- before the Magistrate Court, the contested orders which led to the filing of the appeal were never set aside.
12. The Appellant submitted that the withdrawal of the suit did not automatically set aside an interlocutory order and that there must be another order of a competent court with jurisdiction to review or set aside the order of withdrawal of a case to protect the interest of a client. Further, that the filing of an appeal did not automatically set aside the ex parte orders which were permanent in nature and compelled the Registrar to withdraw the caution and for the Executive Officer of the court to sign the transfer in favour of the Respondent. The Appellant urged that those orders were prejudicial to her.
 13. The Appellant further submitted that this court issued an order of status quo pending the hearing and determination of the appeal and therefore the appeal could only be withdrawn on condition that all existing orders were set aside and the land records remained intact without the Respondent dealing, transferring or interfering with the records to the detriment of the Appellant.
 14. The issue for determination in this appeal is whether the court should allow the appeal and set aside the orders issued by the court on 12/3/2024 in Nanyuki CM ELC Case No. E018 of 2024. The Respondent challenged the representation of the Appellant while urging that the advocates were not properly on record. The court notes that the notice of change of advocates on record is dated 5/5/2024 and bears the stamp of the court dated 13/6/2024. In the court's view nothing much turns on the issue of representation of the Appellant.
 15. The impugned orders issued on 12/4/2024 by Hon. B.M. Mararo stated that the application dated 29/2/2024 having been served and being unopposed was allowed as prayed. In that application, the Respondent sought to have the Appellant restrained from developing, transferring, leasing, charging or in any manner interfering with (the suit property) pending hearing and determination of the application inter partes and the suit.
 16. The other prayer sought to have the Land Registrar directed to remove the caution lodged by the Appellant against the suit property pending hearing and determination of the suit. The fifth prayer sought to have the Appellant directed to transfer the suit property to the Respondent and in the alternative, for the Executive Officer to sign the transfer to the Respondent and for the Land Registrar to be ordered to transfer the suit property to the Respondent.
 17. The application was founded on the grounds that the Respondent and Appellant were husband and wife but had separated in December 2022 when the Appellant left the Respondent's home and went to her parents' home. The Respondent claimed that he had transferred the title over the suit property to the Appellant at the time when they were husband and wife to hold in trust for him so as to protect the property from attachment and sale by Eco Bank Kenya Limited which was owed money by Cieni Plains Limited which the Respondent had guaranteed.
 18. The other grounds were that the Appellant had refused to transfer the suit property to the Respondent and that she had cashed various insurance policies meant for their children's education without the Respondent's knowledge. The Respondent also contended that the Appellant had placed a caveat on the company's motor vehicles as the director of the family company which had to be removed forcefully because she was paralyzing the company's operations.
 19. The application was supported by the Respondent's affidavit sworn on 29/2/2024 to which he annexed a copy of the green card showing that the land was transferred to the Appellant on 14/4/2016 and a title issued to her on 19/4/2016. A restriction was registered against the land on 9/12/2022 to the effect that there would be no dealings without the personal appearance of the registered proprietor.



20. The suit land was previously charged to Stanbic Bank Kenya Limited to secure the sum of Kshs. 13,000,000/= on 23/2/2018 but was discharged on 8/11/2022. Entry 9 on the register was a caution in favour of the Respondent registered on 20/1/2023 claiming licensee's interest. The Appellant annexed various correspondence relating to the suit property and the charge as well as the decree issued in Milimani HC Commercial and Land Division Civil Case No. 275 of 2018. He also annexed documents from the company's registry touching on Cieni Supermarket Limited.
21. The court proceedings of the trial court show that this matter came up on 26/3/2024 when the court indicated that submissions would be made on 9/4/2024. Both parties were absent on 9/4/2024 and the court directed that the notice to show cause was stood over to 11/6/2024. On 11/6/2024, the Respondent's advocate informed the court that she had instructions to withdraw the suit and the court ordered that the suit was withdrawn as to no orders as to costs.
22. There is nothing on record to support the Appellant's contention that the Learned Magistrate signed the transfer documents resulting in the illegal transfer of the suit property.
23. The Respondent contended that the Appellant had introduced documents on appeal which were never filed before the trial court. The main contention in this appeal is that the Learned Magistrate dealt with a suit whose value of the subject matter was above his pecuniary jurisdiction. In this court's view, a valuation report is the proper document to give guidance on the estimate value of the suit property. The Respondent withdrew the suit in the Magistrate's Court before the Appellant was afforded a hearing by that court. Consequently, it would not have been feasible for the Appellant to file documents in the withdrawn suit or to challenge the jurisdiction of the trial court once the suit was withdrawn.
24. In this appeal, the Appellant seeks to have the orders issued by Hon. Mararo on 12/3/2024 set aside and a declaration that the Chief Magistrates Court had no jurisdiction to hear the suit because the land was valued at more than Kshs. 40,000,000/=. The valuation report prepared in 2017 for Nanyuki/ Municipality Block 6/250 Muthaiga Estate Nanyuki area in Laikipia County which the Appellant included in the record of appeal gave the market value of the land together with the improvements on it as Kshs. 37,000,000/=.
25. The value of the suit land was well beyond the pecuniary jurisdiction of the Learned Magistrate and he ought not to have entertained the suit or issued the orders he made. Owing to the lack of jurisdiction of the trial court, the orders of 12/4/2024 are null and the status of the suit property should revert to what existed before the Learned Magistrate issued the impugned orders.
26. The court allows the appeal and sets aside the orders issued by Hon. Mr. B. Mararo, Senior Principal Magistrate on 12/3/2024 for want of jurisdiction.

DELIVERED VIRTUALLY AT NANYUKI THIS 6TH DAY OF NOVEMBER 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Jefferson Okemwa for the Appellant

Ms. Wanjiru Nderitu for the Respondent

Diana Kemboi- Court Assistant

