



Hussein v Midworld Enterprises International Limited (Environment and Land Appeal 51 of 2021) [2024] KEELC 13507 (KLR) (4 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 51 OF 2021
SM KIBUNJA, J
DECEMBER 4, 2024**

BETWEEN

MWINYI FAKI HUSSEIN APPELLANT

AND

MIDWORLD ENTERPRISES INTERNATIONAL LIMITED RESPONDENT

(Being an appeal against the ruling of Hon. Mr. Lesootia Saitabau, PM, delivered on 4th August 2021 in Mombasa MCELC NO. E061 of 2021 (OS))

JUDGMENT

1. This appeal was commenced through the memorandum of appeal dated the 25th August 2021, raising five (5) grounds summarised as follows:
 - a. That the learned trial magistrate erred in law and in fact by ignoring the fact that the respondent's application for stay of the suit was a nullity, void ab initio, a non-starter, incurably defective, wholly incompetent and by extension an abuse of the court process, as the same was filed without authority or resolution of either the board of directors or the shareholders of the respondent's company as required in law.
 - b. That the learned trial magistrate erred in law and in fact by not appreciating the fact that the applicability of section 6 of the Civil Procedure Act is only in matters where parties in the previously filed suit are the same as the subsequent suit, litigating over the same subject matter, which was not the issue herein as both the appellant and respondent are not parties in the previously filed suits, being Mombasa ELC Nos. 232 of 2014 and 3 of 2015.
 - c. That the learned trial magistrate erred in law and in fact by failing to appreciate that adverse possession claims are individual claims and no one can litigate on behalf of another, especially where there is no express authority to so litigate. Consequently therefore, the appellant's relationship with any of the parties in the previous suits should not be the basis of linking the



appellant's proprietary interests or rights over the suit premises, being plot No. 6364/11/MN, CR. No. 45598/1, with those of the said party(ies).

- d. That the learned trial magistrate erred in law and in fact by not appreciating the fact that the respondent herein, other than not being a party in the previously filed suits, aforementioned, it did not authorize anybody in the said suits to file a claim on its behalf and therefore any decision made therein would not be binding on it, neither will it be on the appellant herein, thus the decision to stay the present suit serves no purpose to parties herein.
- e. That the learned trial magistrate erred in law and in fact by staying the appellant's suit vide his ruling delivered on 4th August 2021, yet there were no reasonable or valid grounds for such orders.

The appellant therefore prays for the following orders:

- i. The appeal to be allowed by setting aside the ruling delivered on 4th August 2021, and substituting it with an order directing for the suit to proceed for hearing and determination on merit.
 - ii. The costs of the appeal.
2. The appellant also filed the record of appeal dated the 22nd September 2022. The proceedings of 24th February 2023, 26th April 2023, 12th July 2023, 9th October 2023, 10th November 2023, 18th January 2024, 15th May 2024 and 25th July 2024, confirms that the counsel for the appellant was directed to ensure service upon the respondent. The only evidence of service filed herein, are the affidavits of service of Agnes Sidi Kazungu sworn on the 12th July 2024 and 13th September 2024 on service of record of appeal dated 22nd September 2022, on the 29th May 2024, mention notice dated 3rd July 2024, on 9th July 2024, and submissions & mention notice dated 6th August 2024, on 7th August 2024.
 3. The court directed the filing and exchange of submissions on the 26th April 2023 and 9th October 2023. The learned counsel for the appellant filed theirs dated 6th October 2023, which the court has considered.
 4. The issues for the court's determinations are as follows:
 - a. Whether the parties and subject matter in the lower court suit are the same in the previously filed suits, being ELC Nos. 3 of 2015. [Grounds (b), (c) and (d)].
 - b. Whether the application for stay is defective and or an abuse of court process. [Ground (a) and (e)].
 - c. Who pays the costs?
 5. The court has carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel, superior court's decision and come to the following determinations:
 - a. The record of appeal confirms that the appellant commenced the lower court suit through the originating summons dated the 29th April 2021 seeking for inter alia to be declared the owner of 0.1012 hectares of land parcel No. 6364 (original No. 390/154) /11/MN, CR. No. 45598/1, suit property, situated at Bamburi-Utange, Mombasa, for having been in adverse possession of the same for over 12 years. Contemporaneously filed with the originating summons is the application of even date for injunctive orders. The respondent filed a replying affidavit to the originating summons sworn by Kamau James Njendu, director, on the 7th May 2021.



- b. The respondent also filed an application dated 7th May 2021, seeking inter alia to stay the lower court suit pending the hearing and determination of Mombasa ELC Nos. 3 of 2015 and 232 of 2014. The grounds on the applications included that the previously filed two suits and the one before the lower court were over the same suit property; Ali Hussein Mwakaneno, who is father to the appellant, was a party in Mombasa ELC No. 3 of 2015, and the injunctive orders issued therein affects his family; and that the lower court suit was subjudice.
- c. The application for stay was opposed by the appellant through the replying affidavit sworn on the 17th May 2021, in which he inter alia deposed that he was not a party in those other suits; that as to his relationship with Ali Juma Mwakeneno, he stated that adverse claims are individual claims and are not based on inheritance, and the injunctive orders issued in ELC No.3 of 2015 were not against him; that the suit was not subjudice the previous matters, the application was defective and an abuse of court process and should be dismissed with costs.
- d. The learned trial magistrate heard the application and rendered his ruling subject matter of the appeal on the 4th August 2021, which is at page 160 to 162 of the record of appeal. In the said ruling the learned trial magistrate inter alia held as follows:

“It is not in dispute that there exists Mombasa Environment and Land case NO. 3 of 2015 and Mombasa Environment and Land case NO. 232 of 2014. The defendant herein is a party to those proceedings and the subject matter in the current suit is also the subject in the two cases pending before the superior court.

In her ruling in ELC No. 3 of 2015 aforementioned delivered on the 6th July 2016, and clarified on 7th February 2017, the Hon Lady Justice A. Omollo issued injunctive orders in favour of the defendant herein and in respect of the subject matter of this suit which orders are still in place.

While it may be true that the plaintiff is not a party to those proceedings, the orders of the court were directed to the defendant’s by themselves and among others their families. At paragraph 5 of his replying affidavit, the plaintiff herein does not dispute that his father is a party to the suit above and as such the injunctive orders issued affect him directly.

Noting the above, orders of this court made on 30th April 2021 are in conflict with the orders of the superior court mentioned above and the same cannot be sustained.

Section 6 of the [Civil Procedure Act](#) provides thus:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

To give effect to the provision above, for purpose of good order and sanity of proceedings before this court and the court above it is only prudent that proceedings in this matter be stayed.

In a nutshell, the defendant’s notice of motion application dated 7th May 2021 is merited, the same succeeds and is hereby granted in terms of prayer 2, 3, and 4 on the face of the application.



Costs of this application shall be borne by the plaintiff.”

The appellant, who was the plaintiff in the lower court matter, was aggrieved by the above learned trial magistrate’s decision and hence this appeal.

- e. The role of this court as a first appellate court is to re-evaluate and reconsider the evidence on record, bearing in mind that it did not see or hear the witnesses testify first-hand. This was the position in taken in the case of *Kenblest Kenya Limited versus Musyoka Kitema* [2020] eKLR where the court held,

“As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: ‘..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’ This was buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR where it was held that:

“We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui V Republic*, (1984) KLR 729 and *Susan Munyi V Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”

- f. The appellant has taken issue with the Learned trial Magistrate’s decision, and tried to distinguish the previously filed suits before this court from the one before the lower court. This court has perused the records in Mombasa ELC Nos. 3 of 2015 and 232 of 2014, and indeed, it is a fact that one Ali Juma Mwakeneno was one of the parties in the said suits and testified as PW1. The court has also noted that the two suits were heard, and decided through this court’s judgement of 6th November 2024. That as the lower court suit had been stayed pending the hearing and determination of the suits then pending before this court that have since been finalised, there is nothing now stopping the appellant from moving the trial court to proceed with the hearing of his suit to its logical conclusion.
- g. The primary purpose of this appeal was for the appellant to get the chance to prosecute his suit without being tied down or restricted by the orders issued in those two other matters that were then pending before this court. Being alive to the fact that the two previously filed suits before this court have been determined, I do not find it prudent to make any further determinations on the other issues raised in the appeal including that of the legal standing of the appellant’s adverse possession claim, as it is an issue to be determined first by the trial court. Was this court to pronounce itself on the issue, it may be taken as unnecessary intrusion to the trial court’s discretion in the matter that is squarely before it.
- h. It is clear from the learned trial magistrate’s ruling staying the lower court matter that he was merely acting in accordance with the dictates of section 6 of the *Civil Procedure Act* chapter 21 of Laws of Kenya that codifies the doctrine of subjudice. I do not find any reasonable basis to fault the learned trial magistrate decision on that issue.



- i. That considering the fact that the respondent did not participate in this appeal, the court is of the view that the appellant should meet his own costs, the provision of section 27 of Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.
6. Flowing from the foregoing determinations in this appeal, the court finds and orders as follows:
- a. That the appellant's appeal filed through the memorandum of appeal dated the 25th August 2021 is without merit and is dismissed with no order as to costs.
 - b. That the ruling of Hon. Lesootia Saitabau, PM, delivered on 4th August 2021, in Mombasa MCELC No. E061 of 2021 is hereby confirmed in its entirety.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4TH DAY OF DECEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellant : Mrs. Chengo

Respondent : No Appearance

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

