



**Ocharo v Ocharo (Environment and Land Miscellaneous Application
E023 of 2022) [2023] KEELC 432 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E023 OF 2022
A NYUKURI, J
FEBRUARY 1, 2023**

BETWEEN

MOSES KERANDI OCHARO PLAINTIFF

AND

MARGARET BOSIBORI OCHARO DEFENDANT

RULING

Introduction

1. The Applicant instituted this matter by way of Notice of Motion dated 26th April 2022 brought under Articles 48, 50(1) and 165 of the *Constitution of Kenya* 2010 and Sections 1A, 1B, 3A and 75 (1) of the *Civil Procedure Act*, seeking the following orders;
 - a. Spent.
 - b. That the ruling/orders made by the Chief Magistrates Court at Machakos in CM ELC No. E032 of 2021 on 29th August 2021 any other consequential orders pursuant thereto be discharged, vacated, varied and set aside unconditionally forthwith.
 - c. That this Honourable Court be pleased to stay consequent ongoing contempt proceedings against the Applicant instituted by the Respondent at the Chief Magistrates Court at Mavoko in CM ELC No. E032 of 2021 pending the hearing and determination of this application or in the alternative direct the Chief Magistrates Court to proceed to the trial of the main suit.
 - d. That either party be at liberty to apply for any further orders or directions as this Honourable Court may deem fit to grant.
 - e. That the costs of this application be provided for.



2. The application is based on the grounds on its face as well as the supporting affidavit sworn by Moses Ocharo, the Applicant in this matter, on 22nd April 2022. The Applicant states that the Respondent filed a plaint in Mavoko Chief Magistrates Case ELC No. E032 of 2021, together with a Notice of Motion dated 7th May 2021 seeking conservatory orders to restrain him from trespassing or interfering with Plot No. 309 Mlolongo Gwata Phase 1 (2) within Machakos County pending hearing and determination of that suit.
3. The Applicant further stated that on 29th August 2021, the Chief Magistrate Court made orders allowing the Notice of Motion dated 7th May 2021, thereby restraining the Applicant from interfering with the suit property.
4. According to the Applicant, the orders of injunction made on 29th August 2021 were obtained through fraud and material nondisclosure by the Respondent. In that respect, the Applicant averred that the Respondent committed perjury in that at paragraphs 5 and 6 of her further affidavit, she stated that she was not holding the suit property in trust for the Respondent and that she purchased the suit property using her own money.
5. In addition, the Applicant stated that the Respondent concealed from court the fact that she had admitted before witnesses in a mediation settlement before the Assistant County Commissioner and her family members that she never contributed to the purchase of the suit property. The Applicant maintained that by her averments in the affidavits, the Respondent deceived the court, committed perjury contrary to Sections 108 to 118 of the *Penal Code* and that her application was an abuse of the court process, a pervasion of the cause of justice, frivolous, vexatious and scandalous to the court.
6. Further, that pursuant to the orders of 29th August 2021, the Applicant filed an application dated 7th December 2021 seeking leave to commence contempt proceedings against the Applicant and that therefore, the Respondent is abusing court processes. Consequently, the Applicant sought to invoke the inherent power of this court to set aside the ruling of 29th August 2021. The Applicant referred the court to the decisions in the cases of *Kenya Electricity Transmission Company Limited v Kibutu Limited* [2019] eKLR and *Lazarus v Beasley* [1956] CA ALL ER 341.
7. The application is opposed. Margaret Bosibori Ocharo, the Respondent herein, swore a replying affidavit dated 20th June 2022 in opposition to the application. She stated that the orders of 29th August 2021 were issued by the Magistrates Court upon interpartes hearing of the application and that the same were made on merit. She denied misleading the Chief Magistrates Court and stated that she neither misrepresented nor concealed material facts. She denied holding the suit property in trust for the Applicant and alleged that she purchased the same using her own money.
8. Her position was that she has a stable source of income and runs her own business and that she gave an account of all the monies the Applicant sent her. She argued that setting aside the ruling of the Chief Magistrate would be unjust, unfair and in disregard for the administration of justice. She stated that the Applicant had in fact defied the orders of the Chief Magistrate instead of appealing against the same. Her view was that this court has no jurisdiction to supervise the Magistrates Court by entertaining a miscellaneous application.
9. The application was canvassed by way of written submissions. On record are submissions filed by the Applicant on 4th October 2022 and those filed by the Respondent on 29th July 2022.



Submissions

10. Counsel for the Applicant submitted that the Applicant had sought this court's intervention not as an appellate court but as a court with designated juridical quiver to punish errant abuse of the court process. Counsel contended that the legal test to decide whether a court's judgment or ruling should be set aside where it was obtained fraudulently was applied in the case of *Takbar v GraceField Developments Ltd & Others* [2019] UKSC 13. Reliance was also placed in the case of *Flower v Llyod* [1877] Chancery Division (Vol. VI) 297, for the proposition that where fraud is practiced in the court, inducing the court to make a wrong decree, the way to obtain relief is to bring a fresh action to set aside the decree on the ground of fraud. Counsel therefore submitted that this court has jurisdiction to reopen a decided matter in cases of fraud, bias or other injustice.
11. Counsel also submitted that the Respondent concealed material facts knowingly. Counsel contended that fraud ought not only be pleaded but also proved to a standard above a balance of probabilities but not beyond reasonable doubt, which standard he argued the Applicant had met. The Applicant's position was that the circumstances under which the Respondent obtained the impugned ruling was fraudulent and had given rise to gross miscarriage of justice.
12. Reliance was placed on the cases of *Meek v Fleming* [1961] 2 QB 366 [1961] 3 ALL ER 148, *Jonesco v Beard* [1930] AC 298 and *Lazarus Estates Ltd v Beasley* [1956] 1 ALL ER 341, for the proposition that fraud vitiates a court's decision.
13. On their part, counsel for the Respondent submitted that this court has no jurisdiction to set aside the orders of the Magistrates Court and stay contempt proceedings in the absence of an appeal. Counsel argued that the instant application was an attempt by the Applicant to evade complying with the impugned orders, as there is pending before court an application for leave to seek contempt orders against the Applicant herein.
14. Reliance was placed on the case of *Chris Manga N. Behave v Richard Niagara Tanga & 2 Others* [2013] eKLR, for the proposition that stay of execution or stay of proceedings or injunction can only succeed where the Applicant shows he has an arguable appeal and that if the appeal were to succeed, it would be rendered nugatory. Counsel contended that courts will not normally grant contemnors audience until they purge the contempt and, in that respect, referred the court to the cases of *Fred Matiang'i, the Cabinet Secretary, Ministry of Interior and Coordination of National Government v Miguna Miguna & 4 Others* [2018] eKLR, and *Chairman Cooperative Tribunal & 8 Others Ex parte Management Committee Konza Ranching & Farming Cooperative Society Ltd* [2014] eKLR. Counsel therefore argued that as the Applicant was in contempt of the impugned orders, the court should not issue the orders sought.

Analysis and Determination

15. I have carefully considered the Application, the supporting affidavit, the replying affidavit and submissions. The issue that arise for determination is whether the Applicant deserves the orders sought. The Applicant's case is that the orders of injunction made by the Chief Magistrate were as a result of fraud and concealment of material facts and that this court should invoke its inherent power to set them aside. The basis for allegations of fraud and non disclosure of material facts are that the Respondent is not the owner of the suit property but swore an affidavit saying she was the owner thereof having purchased it with money from her own income; that when infact she admitted before mediation meetings held by the Assistant County Commissioner and her own family that the suit property was purchased by moneys received from the Applicant.



16. The Respondent has argued that this court lacks supervisory jurisdiction over the Magistrates Courts and local tribunals. The Applicant has not appealed against the lower court's orders but has invoked the inherent power of this court to set aside those orders.
17. Supervisory jurisdiction is a superintendent power vested in a superior court over a subordinate court and local tribunals for purposes of stopping the latter from acting extra jurisdictionally. That power is exercised sparingly only in instances where it is clear that a decision was made in flagrant breach of fundamental principles of law resulting in grave injustice.
18. The *Black's Law Dictionary*, 11th Edition, defines supervisory control as follows;

The control exercised by a higher authority over a lower court, as by prohibiting the lower court from acting extra jurisdictionally and by reversing its extra jurisdictional acts.
19. In the case of *Gallaghen v Gallaghen*, 212 SO 2d 281, 283 (La Ct. App. 1968), the court defined supervisory jurisdiction in the following terms;

Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed spere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs.
20. Article 162 of the *Constitution* provides that superior courts are the Supreme Court, the Court of Appeal, the High Court and courts of equal status to the High Court, namely the Environment and Land Court and the Employment and Labour Relations Court. I am alive to the fact that while Article 165 (6) of the *Constitution* grants the High Court supervisory jurisdiction, there is no similar provision for the Environment and Land Court. However, Article 165 (5) of the *Constitution* expressly provides that the High Court shall not have jurisdiction over matters falling within the jurisdiction of the Environment and Land Court. This therefore means that the supervisory jurisdiction of the High Court is delineated to matters only where the High Court has jurisdiction and does not extend to matters where the Environment and Land Court has jurisdiction.
21. The Constitution is clear that the High Court and the Environment and Land Court both being superior courts, have equal status, meaning that they both have the same rank, although with different jurisdictions. In the case of *Republic v Karisa Chengo & 2 Others* [2017] eKLR, the Supreme Court held that the Environment and Land Court exercises the same powers as the High Court in the performance of its judicial functions, in its specialized jurisdiction.
22. In Constitutional interpretation, the proper approach to be taken ought to be the purposive and holistic interpretation. Article 259 of the *Constitution* requires that the *Constitution* ought to be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of rights; permits the development of the law and contributes to good governance. It further requires that every Constitutional provision shall be construed according to the doctrine of interpretation that the law is always speaking.
23. In the case of *Re the Matter of Kenya National Commission on Human Rights* [2014] eKLR, the Supreme Court, in considering the meaning of a holistic interpretation of the Constitution stated as follows;

(26) But what is meant by a holistic interpretation of the *Constitution*? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a Constitutional provision, reading



it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances such scheme of interpretation does not mean an unbridled extrapolation of discrete Constitutional provisions into each other, so as to arrive at a desired result.

24. A purposive interpretation is meant to avoid the shortcomings of literal approach to interpretation, which include absurd interpretations or those that run contrary to the purpose and function of the legislative regime. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, the Supreme Court was of the view that a purposive interpretation should be given to statutes so as to reveal their true intention.
25. It would therefore be absurd and contrary to the intention of the framers of the *Constitution* to accept the argument that as there is no similar provision to Article 165 (6) of the *Constitution* that expressly grants supervisory power to the Environment and Land Court, when the supervisory power of the High Court is delineated by excluding the jurisdiction exercised by the Environment and Land Court, that on that basis the Environment and Land Court has no supervisory power over subordinate courts and tribunals dealing with matters touching on land and environment. The absurdity here will be that the Magistrates Courts gazetted to handle environment and land matters together with local tribunals handling similar matters would be free to act extra jurisdictional as there would be no superior court with supervisory powers over them.
26. Faced with a similar question, the Environment and Land Court sitting in Milimani in *Lariak Properties Limited v Metro Pharmaceuticals Limited* Nairobi ELC Miscellaneous No. E19 of 2022, held as follows;

Considering that the High Court cannot superintend over subordinate courts gazetted under the Environment and Land Court Act to handle environment and land disputes, and the Environment Land Court being of the same status as the High Court, it follows that the court has supervisory jurisdiction over those courts, notwithstanding that the Environment and Land Court Act does not expressly state so.
27. Equally, in *National Social Security Fund v Sokomania Ltd & Another* [2021] eKLR, the court held as follows;

It is common ground that this court has supervisory jurisdiction over the Magistrates Court in respect of matters falling within its jurisdiction. I am of the view that this court would be abetting an injustice against the Applicant and undermining proper administration of justice if it fails to intervene in this matter.
28. It is therefore the finding of this court that the Environment and Land Court has supervisory jurisdiction over the subordinate courts and tribunals in the exercise of their jurisdiction in determining environment and land matters.
29. As this court has supervisory jurisdiction over the Chief Magistrates Court, the next question then would be whether the decision of the Chief Magistrate in Mavoko CM ELC No. E032 of 2021 delivered on 29th August 2021 meets the threshold for this court to exercise its supervisory power by reversing the same.
30. Supervisory jurisdiction should be exercised sparingly and only where it is manifested that there is a clear flagrant abuse of fundamental principles of law and where the impugned order has resulted in



grave injustice. The function of supervisory jurisdiction is to keep subordinate courts within their prescribed sphere so as to prevent usurpation.

31. In the case of *Dalmia Jain Airways Ltd v Sukumar Mukberjee* AIR 1951 Cal. 193, the court held that supervisory jurisdiction is to be exercised most sparingly and only in appropriate cases so as to keep subordinate courts in the bounds of their authority and to ensure that they do what is legally demanded within their duty. The court further observed that, that power does not vest the superior court with unlimited prerogative to correct all manner of wrong decisions made within the limits of the jurisdiction of the court or tribunal.
32. In short, superintendence power should never be a substitute for appellate power which is used to correct wrong decisions made by subordinate courts. Where there is no blatant abuse of fundamental principles of law and an obvious and grave injustice, it would not be a proper case for a superior court to exercise supervisory jurisdiction.
33. In the instant application, the Applicant's major complaint is that the order of 29th August 2019 was obtained by the Respondent fraudulently. According to the Applicant, the Respondent committed perjury by falsely alleging in her supporting affidavit to the application dated 7th May 2021 which sought orders of injunction, that she purchased the suit property using her own money and that therefore she is the bona fide owner thereof. Besides, the Applicant stated that the Respondent concealed material facts to the court in that she ought to have disclosed to the Magistrates Court that she had admitted before the mediation sittings that the money she used to purchase the suit property was from the Applicant. That the court believed her false allegations and granted her the orders of injunction.
34. The question therefore that this court has to deal with is whether the allegations made by the Applicant justify the exercise of the supervisory power of this court. In other words, has the Applicant demonstrated a flagrant abuse of fundamental principles of law by the subordinate court that has resulted in grave injustice to warrant this court's intervention? I do not think so.
35. In my view, where a party conceals material facts in a matter that is heard inter partes, it is the responsibility of the other party to demonstrate such concealment to the court hearing that matter. The Applicant has not even shown that he provided evidence of the alleged concealment before the subordinate court. Even if it were to be shown that there was concealment as alleged, it is important to note that the decision of the Chief Magistrate was made after consideration of the evidence provided by both sides.
36. The Magistrates Court having considered the evidence presented by both parties at the preliminary stage, believed the Respondent's version and granted the orders of injunction. The orders made were equitable orders where the court exercised its discretion. To ask this court to invoke its inherent power, to interfere with the discretionary power of the Chief Magistrate because he was more persuaded by the Respondent's argument than the Applicant's, is merely asking this court to sit on appeal on that decision without filing a Memorandum of Appeal. It is the finding of this court that the Applicant's complaint that his word is the truth and that of the Respondent is a lie, is an attack on the impugned decision on its merit and not because the decision arose from a flagrant breach of fundamental principles of law. The Applicant has not shown any violation of any fundamental principles of law by the Chief Magistrate. Therefore, his grievance ought to have been brought by way of appeal, and not by invoking the supervisory power of this court.
37. It is therefore the finding of this court that the Applicant has not demonstrated that he deserves the exercise of the supervisory jurisdiction of this court in his favour. Therefore, this court declines the



invitation to interfere with the decision of the Chief Magistrates Court made in Mavoko CM ELC No. E032 of 2021, on 29th August 2021, in the manner sought by the Applicant.

38. In the premises, the Notice of Motion dated 26th April 2022 lacks merit and the same is hereby dismissed with costs to the Respondent.

39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1ST DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mbuvi for the Respondent

Mr. Ondari for the Applicant

Josephine – Court Assistant

