



**Musingi v Makau (Environment and Land Appeal E044 of 2021)
[2023] KEELC 17281 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E044 OF 2021**

CA OCHIENG, J

MAY 9, 2023

BETWEEN

NICKSON NICHODEMUS MUSINGI APPELLANT

AND

MULINGE MAKAU RESPONDENT

(Being an Appeal from the Ruling of Kangundo Senior Principal Magistrate's Court in ELC. Misc. Appln. No. E3 of 2021 delivered on 22nd September, 2021 by Hon. D. Orimba - (SPM))

JUDGMENT

Introduction

By a Memorandum of Appeal dated the September 29, 2021 the Appellant appealed against the Ruling of Hon D Orimba, Senior Principal Magistrate made on the September 22, 2021 in Kangundo Misc ELC No E3 of 2021 between *Mulinge Makau Versus Nickson Nichodemus Musingi*. The genesis of this Appeal is the Ruling by Hon D Orimba, Senior Principal Magistrate which was made in favour of the Respondent wherein, he was granted an injunction restraining the Appellant from the suit land.

The Appellant being dissatisfied with the whole of the said Ruling filed a Memorandum of Appeal dated the September 29, 2021 which contains the following grounds:

1. That the learned trial Magistrate erred in fact and in law in granting substantive orders in the absence of a suit.
2. That the learned trial Magistrate erred in fact and in law in failing to follow the principles on injunctions.
3. That the learned trial Magistrate erred in fact and in law by erroneously concluding that there were pleadings filed.



4. That the learned trial Magistrate erred in fact and in law in failing to consider that the Appellant had substantially paid the purchase price.
5. That the learned trial Magistrate erred in fact and in law by not appreciating that Appellant is in possession and/or occupation of the suit property and has substantially developed it.
6. That the learned trial Magistrate erred in fact and in law in failing and/or ignoring to consider the Appellant's submissions.
7. That the learned trial Magistrate erred in fact and in law by arriving to the conclusion that time was of essence in relation to the land Sale Agreement dated June 4, 2020.
8. That the learned trial Magistrate erred in fact and in law in granting orders in vain.

It Is Proposed To The Court For Orders that:

- a. The Appeal be allowed.
- b. The Ruling in the Kangundo Misc ELC No E3 of 2021 parties being *Mulinge Makau Vs Nickson Nichodemus Mosingi* be set aside and the Respondent's Application dated June 2, 2021 be dismissed.
- c. The cost of the Appeal be given to the Appellant.

The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

- 9 The Appellant in his submissions provided the background of the lower court matter and argued that the learned Magistrate erred in granting substantive orders in the absence of a suit. Further, that he failed to adhere to the principles dealing with injunction and concluding that there were pleadings notwithstanding the absence of a Plaintiff. He argued that the Respondent did not file a requisite suit as envisaged under Order 40 of the *Civil Procedure Rules*. He contended that the learned Magistrate failed to appreciate that he had paid a substantial portion of the purchase price totaling Kshs 700,000 as well as developed the suit land. He stated that the learned Magistrate failed to appreciate that the mode of service of the purported notice for breach of land Sale Agreement was through a WhatsApp, a fact that is subject for determination during hearing. Further, that the purported Sale Agreement contains several alterations which required parties to give evidence for the court to determine the intention of the parties at the time of signing it. He reiterated that the learned Magistrate erred by indicating that time is of essence, yet this was not contained in the Sale Agreement. To buttress his averments, he relied on the case of *Joseph Kisaulu Nzesya Vs Nzouwa Kiswii* (2018) eKLR.

Respondent's Submissions

- 10 The Respondent in his submissions insisted that the instant Appeal is not merited as there was a binding contract between the Appellant and himself in which the Appellant failed to meet his obligations. Further, that in the Replying Affidavit the Appellant had admitted he was yet to finalize paying the purchase price. He argued that although the Sale Agreement dated the June 4, 2020 did not provide for a specific clause to be used to gauge breach and for eventual termination, it is now settled in law that once timelines have been set by parties on payment of purchase price, it must be honoured. Further, that the Appellant was served with a termination notice vide a letter dated the March 15, 2021. To support his averments, he relied on the following decisions: *Lole Vs Butcher* (1949) All ER 1107; *Elijah Kipkorir Barmalel & Another Vs John Kiplagat Chemweno & 3 Others* (2010) eKLR and



Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), IWL R 1980 at page 1993 citing Lord Person in *Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board* (1973) IWL R 601 at 609.

Analysis and Determination

11 Upon consideration of the Memorandum of Appeal, Record of Appeal and rivaling submissions, the following are the issues for determination are: Whether the Appellant is entitled to the orders sought in the Appeal. Whether the Appeal is merited. Who should bear the costs of the Appeal.

12 I will deal with the issues jointly but before I proceed to do so, I will provide a background of the Appeal herein. The Respondent had entered into a Sale Agreement with the Appellant dated the June 4, 2020. The Appellant claims he paid Kshs 600,000 as purchase price while the Respondent insists he only paid Kshs 400,000. After execution of the Sale Agreement, the Respondent allowed the Appellant to take possession of the suit land. The Respondent claimed the Appellant failed to honour his obligations as per the Sale Agreement culminating in his issuing a termination notice dated the March 15, 2021 which was delivered via WhatsApp. Further, that through the said Notice, he informed the Appellant that the contract was rescinded and he needed to collect the purchase price that he had paid. The Respondent thereafter proceeded to file the Kangundo Miscellaneous ELC No E 3 of 2021 through a Notice of Motion Application dated the June 22, 2021 where he sought for the following orders:

1. That this application be and is hereby certified urgent to be heard *ex parte* in the first instance.
2. That the Respondents by themselves, their servants, agents and/or assigns be and are hereby restrained from entering, sub dividing or selling property known as Plot No 50 A in Kimiti Farmers Cooperative Society determination of this application inter partes.
3. That a declaration does issue that the Respondent is in breach of the Sale Agreement dated 4th June, 2021 and the same be deemed as rescinded and the Applicant be allowed to regain possession of the suit land.
4. That the Respondent be directed to collect his deposit less costs of this application seeking to restrain the Appellant from the suit property.

13 Further, the said miscellaneous cause was canvassed by way of written submissions after which the Court in its Ruling delivered on September 22, 2021 granted the Respondent the prayers as sought. The said Ruling is the fulcrum of the Appeal herein. This being a first Appeal, the court is expected to evaluate the evidence presented in the lower court without having the benefit of having seen the witnesses and arrive at its own conclusion. See the case of *Selle & Another V Associated Motor Boat Co Ltd & Others* (1968) EA 123 where it was held that:-

I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."



- 14 I have had a chance to peruse the proceedings in the Lower Court including the impugned Ruling and note that the suit was commenced vide miscellaneous cause. I note the impugned Application was brought under Order 40 of the *Civil Procedure Rules*.
- 15 Order 3 Rule 1 of the *Civil Procedure Rules* makes provisions on institution of a suit and provides that:
- (1) Every suit shall be instituted by presenting a Plaint to the Court, or in such other manner as may be prescribed.”
- 16 While Order 40 Rule 1 of the *Civil Procedure Rules* states inter alia:
1. Where in any suit it is proved by affidavit or otherwise- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”
- 17 From a reading of the legal provisions I have cited above, it is evident that injunctive orders can only be issued within a suit instituted by way of a Plaint or in a prescribed manner.
- 18 In the case of *Joseph Kibowen Chemjor vs William C Kiseru* [2013] eKLR, Justice Munyao Sila observed as follows:-
- I am alive to the provisions of Article 159 (2) (d) of the *Constitution* which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be “pleadings”, goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of “suit by a letter” which Mr Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party. If I am to allow the current “pleadings” to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.”
- 19 See also the case of *Joseph Kisaulu Nzesya Vs Nzouwa Kiswii* (2018) eKLR.
- 20 From the lower court, I note there was no Plaint nor Defence filed. The Respondent proceeded to file a miscellaneous cause and seek orders of injunction which were granted. Further, from the impugned Application, certain issues arose. There was a dispute in respect to how much purchase price was paid. There was a further dispute in respect to the right agreement signed as well as the terms therein. From



the annexures, it is clear that there was indeed a Sale Agreement in respect to the sale of suit land and a portion of the purchase price was received, after which the Appellant took possession of the suit land.

- 21 Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the decisions quoted, I find that the miscellaneous cause as filed in the Lower Court could not have been deemed to be a pleading as the trial Magistrate did. Further, I find that the miscellaneous cause in the lower court stood incompetent. I opine that the issues raised in the Affidavits were substantive and it would have been pertinent if this matter was set down for hearing as well as determined on merit. It is my considered view that since the issues raised in the lower court required *viva voce* evidence before the same could be determined on merit, it was improper for the trial Magistrate to proceed and disregard the arguments of the Respondent therein and deliver a Ruling which conclusively determined the suit without giving the Respondent an audience as envisaged under Article 50 of the Constitution. I hold that the Applicant therein ought to have first filed a Plaint to ventilate his claim and seek injunctive orders.

It is against the foregoing that I find this Appeal merited.

I will proceed to make the following final Orders:

- a. The Appeal be and is hereby allowed.
- b. The Ruling in the Kangundo Misc Elc No E3 Of 2021 Parties Being *Mulinge Makau Vs Nickson Nichodemus Mosingi* be and is hereby set aside and the Respondent's Application dated 2nd June, 2021 is struck off.
- c. The cost of the Appeal is awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF MAY, 2023

CHRISTINE OCHIENG

JUDGE

