



REPUBLIC OF KENYA



**Ogega & 7 others v Ochwoga & another (Environment and Land Appeal
15 of 2022) [2023] KEELC 18625 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 15 OF 2022**

M SILA, J

JULY 11, 2023

BETWEEN

JULIUS MAGANGA OGEGA 1ST APPELLANT
CHRISTOPHER OSORO NYAKUNDI 2ND APPELLANT
RAPHAEL ROSANA MAGANGA 3RD APPELLANT
DAVID NYAKUNDI OGEGA 4TH APPELLANT
DANIEL NYABUTO 5TH APPELLANT
JARED OMWANDO OGEGA 6TH APPELLANT
JOSHUA OMBATI OGEGA 7TH APPELLANT
SIMION ONDARI 8TH APPELLANT

AND

EVANS OCHWOGA 1ST RESPONDENT
MILKA MOGOI NYAKWAE 2ND RESPONDENT

RULING

(Preliminary objection raised that this appeal is incompetent as no leave was sought before filing it; the appeal being one against a ruling on an application for injunction under order 40 of the Civil Procedure Rules; such orders being appealable as of right; preliminary objection dismissed).

1. A Preliminary Objection has been raised that this appeal is incompetent and deserves to be struck out. This ruling is in respect of that preliminary objection. The appeal itself is against the ruling of Hon Paul Biwott, Chief Magistrate, Ogembo Law Courts delivered on 6 July 2022. The appellants were sued, as defendants, in the said suit, which was commenced by way of a plaint filed on 23 March 2022



by the respondents. In the plaint, the respondents pleaded that they are the legal representatives of the estate of Kemunto Kenyanya (deceased). They averred that the land parcel Bassi/Bogetaorio II/238 was registered in the name of the deceased. They contended that the appellants had trespassed into the said land, and in the suit, they asked for orders of eviction and permanent injunction against the appellants. Together with the plaint, the respondents filed an application seeking interlocutory orders of injunction which application was expressly stated to be brought under the provisions of Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules, 2010 and Section 1A, 1B, 3A and 63 of the Civil Procedure Act. The respondent sought to restrain the appellants from “entering upon, trespassing unto, cultivating, sinking trenches, subdividing the suit land, planting or interfering with and/or in any manner dealing with suit land that is LR No Bassi/Bogetaorio II/238.”

2. The appellants opposed the application by filing a notice of preliminary objection claiming that the case is *res judicata*, and also a replying affidavit sworn by the 7th appellant. In the replying affidavit, it was deposed that there had been a previous suit, Kisii Chief Magistrates’ Court ELC Case No 92 of 2019 against the 1st respondent’s father and the 2nd respondent, but they did not file any defence, and this led to cancellation of their title deeds, thus having the title to revert back to the name of Kemunto w/o Kenyanya. A copy of the plaint and decree was attached. From what I can see in that suit, the 7th appellant sued on behalf of the estate of Kemunto Kenyanya. The claim was that the late Kemunto was proprietor of the land parcel Bassi/Bogetaorio II/238. It was averred that the late Kemunto died in the year 1974 but in the year 1983, the 1st defendant in the suit, one David Ogega Ogachi, fraudulently caused the land to be registered in his name inter alia without first undergoing the succession process. The land was then subdivided into the parcels No 2702, 2703 and 2704, which parcels were respectively registered in the names of Kiriment Ochwoga Nyamugutu, Milka Mogoi Nyakwae (2nd respondent in this appeal) and Seventh Day Adventist Church (Gekongo SDA). The decree, dated 16 June 2021, indicates that the suit was allowed hence having the title parcel No 238 reinstated and registered in name of Kemunto (deceased). Apart from the foregoing, the appellants contended that the respondents had fraudulently obtained a grant ad litem in respect of the estate of the late Kemunto.
3. The preliminary objection on the contention that the suit was *res judicata* was heard first and ruling delivered on 2 June 2022. The trial Magistrate was not persuaded that the suit was *res judicata*. His reasons were that the parties were different and it was not shown that the land in dispute was directly the subject of the case Kisii CMCC No 92 of 2019. The preliminary objection having been dismissed, the application for injunction proceeded for hearing, and ruling was delivered on 6 July 2022 in favour of the respondents. The court was of opinion that they had established that they had purchased the land through the sale agreement displayed and they had thus demonstrated a *prima facie* case. The court stated that the subject matter of the suit needs to be conserved and issued the order of injunction as prayed, with the OCS Itumbe Police Station being ordered to ensure compliance of the order. The court directed that the case be fixed for full hearing.
4. This appeal was then filed, and from its title, it indicates that it is an appeal against the ruling delivered on 6 July 2022. The following are the grounds of appeal :-
 - (i) That the learned trial Magistrate grossly erred in law by granting an order of temporary injunction in a matter that he lacked jurisdiction and was *res judicata*.
 - (ii) The learned trial Magistrate erred in law by not appreciating and or not taking judicial notice of the legal threshold in the grant of temporary injunction.



- (iii) The learned trial (Magistrate) erred in law by ignoring the provisions of Section 82 of the *Law of Succession Act* relating to the purchase of the land belonging to a deceased person's estate.
 - (iv) The learned trial Magistrate granted an order of injunction without appreciating the binding precedents by the superior courts on the grant of orders of temporary injunction.
 - (v) That the learned trial Magistrate grossly misdirected himself in law by delivering a ruling that is hollow and not based on any sound legal basis or grounds.
5. The appellants ask this court to disallow the order of injunction and declare the suit res judicata and to have it struck out.
6. The respondents' preliminary objection is that the appeal is incompetent as no leave was sought before filing it as required by "Order 43 Rules 2 and 3" (sic) of the *Civil Procedure Rules* and Section 75 of the *Civil Procedure Act*.
7. I have taken note of the provisions of Section 75 which provides as follows :-

"75. Orders from which appeal lies

- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
 - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
 - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
 - (f) an order under section 64;
 - (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
 - (h) any order made under rules from which an appeal is expressly allowed by rules.



- (2) No appeal shall lie from any order passed in appeal under this section."

8. It will be observed that the sub-section 1 lists down what may be appealable as a matter of right and for which one does not seek leave of the court. Part of what is appealable as of right, and which is referred to in Subsection 1 (h), are orders made under the rules and for which the rules permit an appeal. These are expressly provided in Order 43 and I think it is useful to set out the whole of Order 43. It is drawn as follows :-

"Order 43 - Appeals From Orders

1. Appeals from Orders [Order 43, rule 1.]

- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—
- (a) Order 1 (parties to suits);
 - (b) Order 2 (pleadings generally);
 - (c) Order 3 (frame and institution of suit);
 - (d) Order 4, rule 9 (return of plaint);
 - (e) Order 7, rule 12 (exclusion of counterclaim);
 - (f) Order 8 (amendment of pleadings);
 - (g) Order 10, rule 11 (setting aside judgment in default of appearance);
 - (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
 - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
 - (j) Order 19 (affidavits);
 - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - (m) Order 24, rules 5, 6 and 7 (legal representatives);
 - (n) Order 25, rule 5 (compromise of a suit);
 - (o) Order 26, rules 1 and 5(2) (security for costs);
 - (p) Order 27, rules 3 and 10 (payment into court and tender);
 - (q) Order 28, rule 4 (orders in proceedings against the Government);
 - (r) Order 34 (interpleader);



- (s) Order 36, rules 5, 7 and 10 (summary procedure);
 - (t) Order 39, rules 2, 4 and 6 (furnishing security);
 - (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
 - (v) Order 41, rules 1 and 4 (receivers);
 - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - (x) Order 45, rule 3 (application for review);
 - (y) Order 50, rule 6 (enlargement of time);
 - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
 - (aa) Order 53 (judicial review orders).
- (2) An appeal shall lie with the leave of the court from any other order made under these Rules.
 - (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
 - (4) Save where otherwise expressly provided in this rule, "order" includes both an order granting the relief applied for and an order refusing such relief.

2. Procedure [Order 43, rule 2.]

The rules of Order 42 shall apply, so far as may be, to appeals from orders.

3. Saving [Order 43, rule 3.]

Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

9. What was before the Magistrate was an application for injunction and that application specifically expressed that it is brought pursuant to the provisions of Order 40 Rules 1, 2, 4 and 10 of the [Civil Procedure Rules](#). Applications under Order 40 rules 1, 2, 3, 7 and 11, are appealable as of right as noted in Order 43 Rule 1 (1) (u) above. I already mentioned that the title of this appeal states that it is an appeal against the ruling of 6 July 2022. That ruling was on the application for injunction, which, as I have pointed out, is appealable as of right. There is therefore no substance to the contention that the appellant needed leave to file this appeal in so far as it relates to the application for injunction, and on that basis, this application is a non-starter and a clear abuse of the process of court.
10. As to whether or not this court can proceed, upon hearing the appeal, to make an order declaring the respondents' suit as res judicata and to have it struck out, that is a matter to be addressed when arguing the appeal. It is within the hearing of the appeal that parties will be at liberty to address court on what kinds of orders the court may make given the circumstances of this case.



11. For reasons above, the preliminary objection is dismissed with costs.

12. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 11 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

