Willy v Musonga (Environment and Land Appeal E003 of 2022)
[2023] KEELC 18795 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18795 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND APPEAL E003 OF 2022

LG KIMANI, J

JULY 13, 2023

BETWEEN

AURELIA MUNYIVA WILLY ..... APPELLANT

AND

MUTIA MUSILA MUSONGA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate at Kitui Chief Magistrate's Courts Case no. ELC 74 of 2019 Hon. S. Mbungi (Mr.) delivered on 21st January 2022)

JUDGMENT

1. This is an appeal from the judgment and decree of the Chief Magistrate's Court at Kitui in case No. ELC 74 of 2019: Aurelia Munyiva Willy vs Mutia Masila Musonga by Hon. S. Mbungi (Chief Magistrate) delivered on 21st January 2022. The Appellant herein was the Defendant while the Respondent was the Plaintiff before the trial court.

2. The appeal is premised on the grounds set out in the Memorandum of Appeal dated 21st February 2022. The summary of the grounds of appeal is that the Honourable Learned Magistrate erred in law and in fact in allowing the lower court case to proceed ex parte without the Appellant's participation or service of a hearing notice and condemning her unheard. Further, that the trial court did not appreciate that the case involved two different parcels of land being Yatta/Ilika/562 and Yatta/Ilika/568 meaning that she had not trespassed on the Plaintiff's land as decreed. The appellant further claims that the trial court did not consider her pleadings and the evidence placed before the Court and as such contends that the judgment was unfair, erroneous, without proper basis and against the weight of the evidence on the court record.

3. The Plaintiff filed a plaint dated 9th September 2019 in which he claimed that the Defendant had trespassed and entered into his land known as Yatta/Ilika/562 on diverse dates between the year 2018

and August 2019. However, the Plaintiff sought orders against land parcel Yatta/Ilika/568 a declaration that he is the owner of the land and a permanent injunction restraining the Defendant from trespassing on the said land.

4. The Defendant denied any form of trespass and stated that the Respondent acquired title by concealment of material facts relevant to the case and that she would petition for cancellation of the same.

Evidence before the Trial Court.

5. The hearing proceeded ex parte in absence of the Defendant on 20th May 2021 when counsel for the Plaintiff confirmed to the court that he had served notice of hearing upon the Defendant and filed an affidavit of service.

6. The Plaintiff, Mutia Masila Musonga gave evidence stating that the Defendant had trespassed onto is land parcel No.Yatta/Ilika/568. He adopted his witness statement while producing his bundle of documents. In his witness statement, the Plaintiff denied that the Defendant owns any land in Ilika and claimed that she had entered his land and occupied a big chunk of the same without any lawful cause or authority. The Plaintiff's prayer was that the court order the Defendant to vacate the land and if she does not do so she be forcefully evicted.

7. In his judgment, the trial magistrate relied on the certificate of official search for land Parcel Yatta/Ilika/568 and Section 26 of the *Land Registration Act* No.3 of 2012 and found that the defendant did not come to court to prove that she did not trespass on the suit land. He thus entered judgment in the Plaintiff's favour declaring that the suit land belonged to the him, ordered that defendant to vacate and issued orders of injunction against her. The court further awarded the Plaintiff a sum of Ksh. 100,000 as general damages for trespass.

Appellant's submissions

8. Counsel for the Appellant submitted and denied the contents of the Plaint and claimed that the Appellant had recorded a further statement dated 16th October 2020 admitting that Land Parcel Yatta/Ilika/568 is registered in the Respondent's name but as the daughter in law and the entire family of Mungami Isika Mutiana owns and possesses Land Parcel Yatta/Ilika/567 which actually shares a common boundary with the Respondent's Parcel 568. She had further stated therein that on January 2019 she reported to the area chief that the Respondent had encroached onto their land Land Parcel Yatta/Ilika/567 and the chief advised that a surveyor be involved in boundary verification which was settled by Kitui County surveyors on 13th March 2019.

9. The Appellant noted that the Respondent had issued a demand letter dated 7th June 2019 that recognized Land Parcel Yatta/Ilika/567 as registered in the Appellant's father in law's name Muungami Isika Mutiana. The Appellant also acknowledged that she did not attend Court for the hearing on 20th May 2021 but had expressed interest in pursuing the case by previously attending all court sessions.

10. It is the Appellant's contention that the trial magistrate was wrong to allow the case to proceed ex parte without her participation, seeing that she only failed to attend the hearing but had attended all other previous court sessions. It is her submission that land matters are sensitive in nature and the court ought to have exercised discretion and granted an adjournment.

11. Relying on Sections 1A, 1B and 3A of the *Civil Procedure Act* on the overriding objective and inherent power of the court as well as the holding in the case of Wachira Karani v Bildad Wachira (2016) eKLR, the Appellant submitted that the fundamental duty of the court is to do justice between the parties.

12. Secondly, the Appellant submitted that a party can only prove ownership of land by documentation such as a Title Deed or a copy of search records or an Agreement for purchase but that the Respondent did not produce the copy of title and only stated in his list of documents that he had attached a certificate of search. She also noted the discrepancy on the Plaint referring to two different parcels of land, land parcel Yatta/Ilika/568 and land parcel Yatta/Ilika/562, wondering which parcel that the Appellant was said to have trespassed on.

13. It is the Appellant's conclusion that the Respondent did not produce any document to support the fact that he is the registered proprietor of the suit property, contrary to Section 107 of the *Evidence Act* CAP 80. Counsel stated that there are no records for Land Parcel Yatta/Ilika/568 in the Kitui Land registry as the land is in dispute and the appeal to the minister was launched by the relevant parties.

The Respondent's submissions

14. In response, counsel for the Respondent submitted that the appeal was filed out of time contrary to Section 79G of the *Civil Procedure Act* since the judgment of the Court was delivered on 21st February 2022 while the appeal was filed on 21st February 2022, 32 days from the date of the judgment, without leave of the court.

15. Further, the Respondent submitted that the hearing did not proceed without the Appellant's participation as the hearing date was taken in court in the presence of the Appellant's counsel by consent. The Respondent notes that the Appellant was not condemned unheard but that she failed to attend court out of her own choice.

16. According to the Respondent, the legal remedy for an act of trespass is an award of damages and that the appeal lacks merit on the face of it and ought to be dismissed with costs as they relied on the High Court's sitting at Nairobi decision in 680 Africa Ltd vs Eva Vivian Wanjiru Mbogoro(2014) eKLR.

Analysis and Determination

17. The first issue that must be addressed is the Respondents claim that the appeal was filed out of time contrary to Section 79G of the *Civil Procedure Act* since the judgment of the Court was delivered on 21st January 2022 while the appeal was filed on 21st February 2022, 32 days from the date of the judgment, out of time and without leave of the court.

18. The Court dealt with the issue of time bar and found that the appeal was filed within the required time when the court made the ruling dated 11th October 2022 when dealing with the application for stay of execution dated 9th March 2022 and stated;

> " After computing the days from 21st January 2022 to 21st February 2022, the 30th day would be 20th February 2022 which happens to have been on a Sunday which according to Order 50 Rule 3 of the Civil Procedure Rules is an excluded day. It is thus the courts view that the appeal was filed within the prescribed statutory time limit. Order 50 Rule 3 of the Civil Procedure Rules provides for time expiring on Sunday or day offices closed and states:
>
> "Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."

19. On the substantive merits of the appeal the court is alive to the role of an appellate court as has been stated in various cases and in particular the case of Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, where the Court of Appeal stated that;

> " 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 allowances in this respect."

20. In the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR relied upon the Appellant, the same was stated with regard to the duty of the first appellate court:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

21. The Court has considered the grounds of appeal as set out in the Memorandum of Appeal, the written submissions by Counsel for the parties and the authorities cited. The grounds of appeal in the courts view can be summarized as hereunder; ground 1-7,15, 16, 17, dealt together;

I. Whether the trial court erred in proceeding with hearing the suit ex parte without hearing the defendant in her defence and considering the documents filed.

Grounds of appeal 8-14, 18, 19 dealt together

II. Whether the Plaintiffs suit had merit and whether he was entitled to the orders granted

22. The first set of grounds of appeal raise the question of whether the trial court erred in proceeding with hearing the suit ex parte without hearing the defendant in her defence and considering the documents filed. The hearing before the trial court proceeded in the absence of the Appellant, who feels that she was denied a fair hearing. The proceedings filed in court show that the suit was heard on 20th May 2021. The said date was taken in court before the Hon. Mbungi CM on 11th February, 2021, with the consent of both advocates for the parties as the proceedings indicate; Mr. Mutisya holding brief for Kalili for the Defendant and Seth Atonga for the Plaintiff. It is the Appellant's contention that the Court should have adjourned the case because she had shown interest in pursuing the case by attending all other previous court sessions. However, it is noted that the Appellant did not attend court and neither did her advocate attend to seek an adjournment. The court had no reason to adjourn without being moved by any of the parties since the defendant was obviously aware of the same.

23. The consequences of a party failing to attend court when a suit is set for hearing are set out in Order 12 of the Civil Procedure Rules, 2010. Rule 2 thereof stipulates that:

> " If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is attends satisfied —
>
> (a) that notice of hearing was duly served, it may proceed ex parte;
>
> (b) that notice of hearing was not duly served, it shall direct a second notice to be served; or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing."

24. Since counsel for the Appellant was already notified of the hearing date in court, there was no need for service of a hearing notice and the Trial Court acted within the rules by proceeding ex parte. Counsel did not attend court to give reasonS why the defendant was unable to attend. Further, the Defendant had the opportunity to make an application to set aside the judgement entered ex parte by making an application under Order 12, rule 7. of the Civil Procedure Rules which provides that;

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

25. The Appellant failed to make the said application where she would have had an opportunity to explain the reasons for non-attendance at the hearing of the suit. For the above reasons grounds of appeal No. 1 – 7, 15, 16 and 17 fail.

26. The Appellant contended that this was a land matter and that proceedings relating to the Environment and land Court are of a different and sensitive nature as compared to ordinary civil proceedings. Counsel relied on the case of Apollo Muinde & 2 others v Ernest Oyaya Okemba [2019] eKLR where it was held as follows:

> " The claim before this court was not one seeking pecuniary damages and neither was it one that was a claim for detained goods. It was a case seeking declaration of ownership of land and a mandatory injunction. Those are not prayers upon which one can apply for interlocutory judgment. In a situation where no appearance is filed to such a suit, or an appearance is filed and no defence is filed within the specified period, the avenue of the plaintiff is to apply for a date for hearing, and even then, since he has no interlocutory judgment in his favour, he needs to serve the defendant with a hearing notice, unless the court orders otherwise, for the matter will actually be proceeding for full hearing on merits and the defendant needs to be informed of this and opt whether to attend or not. If the defendant has actually made an appearance, then clearly, he must be served through his counsel, if he has one, or if in person, he must be personally sered. "Formal proof" cannot be undertaken in a case where one claims a declaration of ownership of land or is seeking orders of permanent and/or mandatory injunction, or such other related claims."

27. In the courts view the above authority does not apply to the circumstances of this suit since the Defendant had already entered appearance and filed a defence and the issue of interlocutory judgement and formal proof do not apply.

28. The remaining grounds of appeal raise the question Whether the Plaintiffs suit had merit and whether he was entitled to the orders granted. When the Plaintiff proceeded ex parte he gave evidence and stated that he was producing in evidence the documents filed in court as exhibit 1-3. In order to determine which documents were tendered in evidence the court looked at the Plaintiffs list of documents filed in court dated 9th September 2019 and noted that the documents listed include a certificate of search but the list did not indicate the parcel of land the search relates to. The record of appeal does not contain a certificate of official search and neither does the original court file.

29. It is further noted that the trial court stated that the Plaintiff had produced a certificate of official search showing that he is the absolete registered owner of all the suit parcel of land. However, the said

search was actually not on record. There is further a discrepancy in the Plaint where it refers to the suit property as Yatta/Ilika/562 at paragraph 4 but refers to the suit property as Yatta/Ilika/568 in the prayers. This discrepancy would have been cured by the presence of the search certificate of copy of title deed.

30. It is the courts view that failure by the Plaintiff to produce in evidence either the title deed to the suit land or an official search was an error that vitiates the findings and judgement of the court. Further, failure by the trial court to note that though the Plaintiff stated that he had produced in evidence the documents contained in the list of documents filed in court, and dated 9th September 2019 the said search document was not attached to the list of documents and was not on the court record.

31. In the Courts view, the fact that the evidence adduced by the Plaintiff was not challenged did not entirely mean that the Court was not obliged to interrogate the evidence tendered. The court still had an obligation to interrogate the Plaintiff's evidence and determine whether the same was merited to enable the court come up with logical conclusion as exparte evidence was not automatic proof of his case to the required standard. The Plaintiff has to discharge the burden of proof. See the case of Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR, the Court which stated:-

> "I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not."

32. Further the case of Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR, the Court held that: -

> "It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."

33. Having failed to prove to the required standard that the Respondent was the registered owner of the suit land, it is the courts finding that the Plaintiff did not prove that he was entitled to the rights of a proprietor of land as provided under section 25 of the *Land Registration Act* which provides;

> "The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenance belonging thereto, free from all other interests and claims whatsoever, but subject."

34. Section 26 of the *Land Registration Act* further shows the importance of production of a certificate of title as prima facie evidence of ownership of registered land and states that;

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—.."

35. It is thus the courts view that the Plaintiff did not prove ownership of the suit land and he was thus not entitled to the orders issued by the trial court. The trial court thus erred in entering judgement in his favour.

36. The final order of the court is that the appeal herein has merit and the following orders made;

    a. The Appeal herein is allowed;

    b. The judgement and decree arising from the Chief Magistrates Court at Kitui in CMCC No. 74 of 2019, Mutia Masila Musonga vs Aurelia Munyiva Willy is hereby set aside.

    c. Costs of the appeal are awarded to the Appellant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 13TH DAY OF JULY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

Judgement read in open court and virtually in the presence of-

Musyoki Court Assistant

Mwanzia for the Appellant

Kilonzi holding brief for Kalili for the Respondent.