



REPUBLIC OF KENYA



KENYA LAW
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**Chacha v Kullo & 2 others (Appeal 41 of 2020)
[2022] KEELC 2308 (KLR) (4 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
APPEAL 41 OF 2020**

**M SILA, J
MAY 4, 2022**

BETWEEN

NYAMBEYA NGENGE CHACHA APPELLANT

AND

ABDULLAH ABUKAR KULLO 1ST RESPONDENT

MARY BHOKE NYAMBEYA 2ND RESPONDENT

**ATTORNEY GENERAL (ON BEHALF OF THE REGISTRAR OF LANDS,
MOMBASA) 3RD RESPONDENT**

(Being an appeal against the ruling of Hon. F. Kyambia, Senior Principal Magistrate, dated 27 November 2020, in the suit Mombasa Chief Magistrate's Court, ELC Case No. 119 of 2020)

JUDGMENT

(Appeal against a ruling where the trial Magistrate allowed an application for injunction; case of the plaintiff being that he purchased from the appellant property and claiming that the appellant was now harassing him; plaintiff wishing to have the appellant restrained by an order of injunction pending hearing of the suit; a reply filed by a person who was not party to the suit claiming to be swearing the affidavit on behalf of the appellant; the affidavit impugned and expunged for not being filed by a recognized agent and application for injunction allowed; appellant faulting the expunging of the affidavit and the order of injunction; held that the Magistrate was correct in expunging the affidavit as deponent was not a party and there was nothing showing that she was authorised to swear the affidavit; the affidavit could have been acceptable if the deponent was only swearing it as a witness but not on behalf of the appellant; plaintiff having demonstrated a sale agreement and title in his name and being in possession of the property; in the circumstances, Magistrate did not err in allowing the application for injunction; appeal dismissed)



1. This appeal is against the ruling of the Honourable trial Magistrate in Mombasa, delivered on 27 November 2020, which ruling allowed the 1st respondent's application for injunction pending hearing of the main suit.
2. To put matters into context, the 1st respondent, as plaintiff, commenced suit, by way of plaint, on 2 September 2020 in the Chief Magistrate's Court Mombasa. The suit was against the appellant, as 1st defendant, and the 2nd respondent herein, one Mary Bhoke Nyambeya, daughter of the appellant, who was sued as the 2nd defendant. The 1st respondent pleaded to be the registered owner of the land parcel Mombasa/Block XVI/524 (the suit property) having purchased it on 4 November 2019 from the appellant. He averred that prior to the sale, the 2nd respondent had disclosed to him that the appellant wished to sell the suit property so as to cater for his medical bills at Pandya Hospital, Mombasa. A sale agreement was subsequently drawn on 18 September 2019 which agreement was asserted to have been executed by the appellant affixing his thumbprint while in hospital in the presence of an advocate. It was said that the appellant also executed, in the same fashion, a transfer of the property. Thereafter, the purchase price of Kshs. 10,000,000/= was said to have been transferred, with Kshs. 1,500,000/= being released immediately to the vendor through his daughter, the 2nd respondent, and the other sum was held by the Advocate as stakeholder pending completion of the transfer. Upon transfer, the balance of the purchase price was released to the vendor through the 2nd defendant. The 1st respondent sued claiming that despite the purchase, he was constantly being harassed by the defendants. In the suit, he sought a declaration that his right to the property has been infringed, a permanent injunction to restrain the defendants from the suit property and general damages for harassment and interference with his possession of the property.
3. Together with the plaint, the 1st respondent filed an application for an interlocutory injunction to restrain the appellant and the 2nd respondent from interfering with his possession of the suit property pending hearing of the suit. To oppose the motion on behalf of the appellant, a replying affidavit was sworn by one Pascalina Situka Nyambeya (Pascalina), who described herself as one of the daughters of the appellant, and she averred that she was making the affidavit on his behalf and with his permission. She stated that she had been coordinating the CID investigations into the matter since January 2020. In that affidavit, she deposed *inter alia* that the appellant underwent a below knee amputation on the right leg on 15 September 2020 owing to sepsis occasioned by diabetes. She averred that her father was recuperating and not able to travel to attend to a Commissioner for Oaths or directly instruct the law firm of M/s Kinyua Muyaa & Company Advocates, the firm then on record for the appellant. She proceeded to doubt the documents attached to the affidavit of the 1st respondent, which included the sale agreement and payment vouchers. She further deposed that the 1st respondent was no longer owner of the suit property as the entries registering him as owner were cancelled. She contended that not a single cent was paid to the appellant and nowhere was there any document authorising the 2nd defendant to accept payment on behalf of the appellant. She added that the appellant was not in Mombasa in October 2019 to execute the transfer instrument.
4. The 2nd respondent swore a replying affidavit to the application for injunction. In it, she averred *inter alia* that it is true that the appellant sold the suit property to the 1st respondent. She deposed that as the 3rd born daughter, she was entrusted by the whole family and that she had the consent of her father to collect the purchase price which she stated was wired into her account. She denied harassing or interfering with the possession of the 1st respondent of the suit property.
5. The 1st respondent swore a supplementary affidavit *inter alia* contesting the *locus* of Pascalina in swearing the replying affidavit as she was not party to the suit and she did not have the requisite legal instruments granting her authority to swear documents on behalf of the appellant.



6. The plaintiff was subsequently amended on 22 September 2020 to add the Attorney General as 3rd defendant (also 3rd respondent herein), sued on behalf of the Registrar of Lands, Mombasa. There was added pleading that the appellant and the 3rd respondent had fraudulently cancelled the title of the 1st respondent contrary to law. There was thus added a prayer in the amended plaintiff for revocation of the title of the appellant which had apparently been reinstated by the Land Registrar, Mombasa. The application for injunction that was filed with the original plaintiff was also amended but the prayers remained the same.
7. The application was heard inter partes and ruling delivered on 27 November 2020. In the ruling, the Honourable trial Magistrate identified two issues; first, whether the replying affidavit of Pascalina was competent, and secondly, whether the 1st respondent deserved the order for injunction. On the first issue, he found that Pascalina was not a party to the suit. He explored whether she was a recognised agent under Order 9 Rule 2 (a) and found that she was not. He stated that Pascalina had not shown that she was authorised to swear the affidavit. He thus found her affidavit to be incompetent and expunged it from the record for reasons that it was filed by a person who had no *locus*. Arising out of that, he found that the appellant had not opposed the application. He then considered the principles in *Giella v Cassman Brown* (1973) EA 358 on the grant of an order for injunction, and found in favour of the 1st respondent.
8. In this appeal, the appellant faults this grant of the order for injunction. Twenty six grounds have been raised but the gist of the complaint is that the Honourable Magistrate was wrong in disregarding the affidavit of Pascalina and was wrong in granting the injunction. I directed the appeal to be canvassed by way of written submissions and I have taken note of the submissions of Mr. Achilla, learned counsel for the appellant, and Ms. Nafula, learned counsel for the 1st respondent. Mr. Oyas, learned counsel for the 2nd defendant did not make submissions and stated that he will rely on those of Ms. Nafula. Mr. Makuto, learned State Counsel, did not also make submissions.
9. There are two issues to be determined :-
 - (i) Whether the trial Magistrate erred in expunging the replying affidavit of Pascalina; and
 - (ii) Whether the grant of the order of injunction was merited.
10. On the first issue, it is a fact that Pascalina is not a party to this suit. Neither does she hold any power of attorney donated by the appellant. In her replying affidavit, as far as her authority was concerned, she merely stated that she had the permission of the appellant to swear the affidavit and that she was swearing it on his behalf. No written permission or authority was annexed. I find no fault in the trial Magistrate finding that she was not competent to swear the affidavit on behalf of the appellant. Only the appellant or a person authorised by the appellant in writing could swear the affidavit on behalf of the appellant.
11. Pascalina could not qualify to be a recognized agent of the appellant in accordance with the provisions of Order 9 Rule 2 of the *Civil Procedure Rules*, so as to enable her swear an affidavit on behalf of the appellant. Order 9 Rule 2 spells out who recognized agents are and it provides as follows :-
 2. Recognized agents [Order 9, rule 2.]

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

 - (a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party



authorizing them to make such appearances and applications and do such acts on behalf of parties;

- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
- (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

Pascalina held no power of attorney, and neither was the dispute over a business in which she would be trading with the appellant. The appellant is also not a corporation. It follows that Pascalina could not purport to swear an affidavit on behalf of the appellant and the trial Magistrate was correct in expunging her affidavit.

12. Now, let me be clear on an issue to avoid confusion. It was raised in the appeal that a person who is not a party can still swear an affidavit. I agree and I do not contest that. A person can swear an affidavit as a witness, even if such person is not a party, and there would be nothing wrong with such affidavit. But this was not the case here. Pascalina was not swearing the affidavit as a witness, but “on behalf of” the appellant. She in fact swore to matters that she could not be competent to depose to, such as stating that the appellant did not authorise the 2nd defendant to receive the purchase price, or that the appellant could not have properly executed the sale agreement. These cannot be matters within her knowledge but squarely within the knowledge of the appellant. It was claimed that the affidavit was sworn by Pascalina because the appellant was unwell. The fact that he was unwell does not mean that anybody is now authorised to swear affidavits on his behalf and that does not override the rule on recognized agents. Nothing stopped a Commissioner for Oaths from visiting the appellant to take his deposition and have him affix his signature on an affidavit. If he was too unwell, nothing stopped counsel from asking for more time to enable him get better so as to be in a position to swear the affidavit.
13. I therefore find no fault with the Magistrate disregarding the replying affidavit of Pascalina.
14. Was the Magistrate wrong in granting the order of injunction ? I am not persuaded. First, after expunging the affidavit of Pascalina, and which I have found that he was within his rights to do so, there was nothing opposing the application for injunction. Moreover, within the said application, the 1st respondent annexed a sale agreement, and a title in his name. He was also the one in possession of the suit property. There was sufficient material to demonstrate that he had purchased the property; that he was the title holder; and that he was in possession. Even if it was contended that his acquisition of title was fraudulent, that was an issue that was going to be decided at trial. At the stage that the application was being heard, it could not be said that the 1st respondent had no *prima facie* case with a probability of success and he clearly stood to suffer if the injunction was not allowed. If the balance of convenience was to be considered, it would still tilt in his favour, since he was the party in possession of the suit property. The Magistrate did not err in allowing the application for injunction.
15. For the above reasons, I find no merit in this appeal and it is hereby dismissed with costs to the 1st respondent. I make no orders as to costs for or against the 2nd and 3rd respondents.
16. Orders accordingly.

DATED AND DELIVERED THIS 4 DAY OF MAY 2022



**JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT MOMBASA**

