



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL APPEAL NO. 5 OF 2019**

**KULTHUM SAID SHONZI** (suing as the administrator of the Estate of

**SAID SHONZI (DECEASED)**.....**PLAINTIFF**

**VERSUS**

**MARIAM DENA**

**EMMANUEL LEWA**.....**RESPONDENTS**

**JUDGMENT**

**BACKGROUND**

1. Kulthum Said Shonzi (the Appellant) suing as the Administratrix of the Estate of Said Shosi (Deceased) filed *Kilifi Senior Principal Magistrate's Court Civil Suit No. 301 of 2014* against Mariam Dena (the Defendant) seeking inter alia orders of vacant possession in respect of all that Parcel of land described as Kilifi/Township/79.

2. Upon hearing the parties, the Honourable R.K Ondiek, SPM delivered a Judgment on 5<sup>th</sup> July 2017 in which he granted the Appellants prayers. Subsequently, the Appellant as the Decree-holder sought to execute the decree on 6<sup>th</sup> February 2018 through the demolition of the residential structures on the suit property.

3. That was however not to be as Emmanuel Lewa (the Objector/Respondent) applied to the same Court and obtained orders of stay of execution on 13<sup>th</sup> February 2018 on account of a sale agreement executed between himself and the Defendant in the year 2014. In his application dated the same day, the Objector had sought orders as follows: -

**1. That this application be certified as urgent and service be dispensed with at the first instance.**

**2. That there be a stay of execution of the Judgment and decree of this Honourable Court issued on the 5<sup>th</sup> day of July, 2017 pending the hearing and determination of this application.**

**3. That the Objector herein has a legal and or equitable interest in the property known as Kilifi/Township/79.**

**4. That the decree holder be permanently restrained from demolishing the Objector's legal interest and or developments on (the) property known as Kilifi/Township/79.**

**5. That the costs of the application be provided for.**

4. Upon hearing the application, the Learned Magistrate in a Ruling rendered on 26<sup>th</sup> March 2019 allowed the Objector's application in its entirety. The Appellant was aggrieved by the said Ruling and hence the Appeal herein.

5. By her Memorandum of Appeal dated and filed herein on 25<sup>th</sup> April 2019, the Appellant faults the Ruling on five grounds listed as follows: -

**1. That the Learned Trial Court erred in law and facts in failing to consider the merits of the Objector's claim for had it done so it would have arrived at a totally different decision;**

2. That the Learned Trial Court erred in law and facts in considering the Objector's application as an application for setting aside of Judgment. The application itself does not state so;

3. The Learned Trial Court erred (in) law and facts in failing to consider that the property in question belonged to the Appellant and that the Defendant in this case Mariam Dena had no right over this land;

4. That the Learned Trial Court after delivering its Judgment on the 5<sup>th</sup> day of July 2017 and after declaring that the suit land belonged to the Appellant it cannot turn around to rule that the Objector had a right over the same land; and

5. That the Learned Trial Court erred in law and facts in failing to consider the merits in (the) Replying Affidavit by the Appellant dated 25<sup>th</sup> February 2018 and (the) Appellant's written submissions dated 14<sup>th</sup> August 2018.

### The Appellant's Case

6. The Appeal proceeded by way of Written Submissions. In support of the Appeal, Mr. Ole Kina, Learned Counsel for the Appellant submitted that the Learned Trial Magistrate had totally misconstrued the purport of the objection application before him and that he proceeded as though his object was to resolve the question of setting aside the Judgment in question rather than to set aside an attachment on the basis of the objection proceedings.

7. The Appellant told the Court that the Objector's application was grounded on a Sale Agreement between the Objector and the Defendant/Judgment-debtor. It was his case that since the Court had already determined in the main suit that the Appellant was the legal owner of the suit property, it could not allow the Objector's application in the manner that it did as to do so would amount to reconsidering a decision that the Court had already made.

8. Learned Counsel for the Appellant further submitted that in making the orders permanently restraining the Appellant from demolishing developments on the suit property, the Learned Magistrate erroneously considered details of the application as conclusive evidence as if the same were made in a trial hearing. The said order was severely prejudicial to the Appellant and failed to take into account the principles for the grant of a permanent injunction.

### The Respondent's Case

9. The Defendant/Judgment debtor did not participate in this Appeal. On his part, the Objector/Respondent urged the Court to dismiss the Appeal with costs. Arguing for the dismissal of the Appeal, Mr. Atiang, Learned Counsel for the Objector urged the Court to consider and appreciate the spirit of Order 22 Rule 51 of the Civil Procedure Rules.

10. Learned Counsel submitted that the test in Order 22 Rule 51 was that an Objector must claim an interest in the subject matter and seek a declaration for legal and or equitable interest in the property which is what the Objector did. Counsel therefor told the Court that the trial Magistrate made a correct ruling after interrogating the proof of the interest.

11. The Objector further submitted that the Court must thereafter delve into the question whether the Objector has established a legal or equitable interest in the whole or part of any property attached in execution of a decree. In this respect, the Objector is required to adduce evidence to show that as at the date of attachment there was a legal or equitable interest in the property attached. It was the Objector's case that they had clearly demonstrated their interest on the property and hence the findings by the Trial Magistrate

### Analysis and Determination

12. I have given full consideration to the Memorandum of Appeal and the record as compiled. I have equally perused and considered the rival submissions and authorities as placed before me by Mr. Ole Kina, Learned Counsel for the Appellant and Mr. Atiang, Learned Counsel for the Objector/Respondent.

13. This being a first appeal, this Court is under a duty to reconsider and re-evaluate the evidence on record and to draw its own conclusions. In doing so however, the Court is constrained to bear in mind and give due diligence to the fact that the trial Court had the advantage of seeing and hearing the witnesses first hand and that it is not open for this Court to review the findings of the trial Court simply because it would have reached a different result if it were hearing the matter for the first time (*see Selle & Another –vs- Associated Motor Boar Co. Ltd & Others (1968) EA 123*).

14. In this respect, a perusal of the Objector's application dated 13<sup>th</sup> February 2016 made before the Learned Magistrate reveals that the same was made pursuant to the provisions of Order 22 Rules 51 and 52 of the Civil Procedure Rules. Order 22 Rule 51 (1) provides in this regard as follows: -

**“Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment of the proceeds of sale of such property give notice in writing to the Court and to all parties and to the decree-holder, of his objection to the attachment of such property.”**

15. Considering the provisions of the said section in *Arun C. Sharma –vs- Ashana Raikundalia T/A Raikundalia & Co. Advocates & 4 Others (2014) eKLR*; the Court observed that in such a case: -

**“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the**

attached property.”

16. That was the same finding in the earlier case of **Precast Portal Structures –vs- Kenya Pencil Company Ltd & 2 Others (1993) eKLR** where the Court observed that: -

**“The burden is on the Objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied: -**

**1. That the property was not, when attached, held by the Judgment-debtor for himself, or by some other person in trust for the Judgment-debtor; or**

**2. That the Objector holds that property on his own account.”**

17. In his Supporting Affidavit to the application leading to the impugned Ruling, the Objector depones at paragraphs 2 to 5 in proof of his entitlement to the suit property as follows; -

**“2. That on 5<sup>th</sup> August 2014, I bought the subject property measuring approximately 60ft by 50ft from Mariam Dena also known as Mariam Charo Kombe for a sum of Kshs 350,000/- (Annexed hereto and marked “EL 1” is a copy of the Sale Agreement.)**

**3. That at the time of purchase the property had no Plot Number but now it is known as Kilifi/Township/79.**

**4. That I only purchased a fraction of the property (60ft by 50ft) and not the entire property.**

**5. That since the year 2014, I have had peaceful occupation of my property until recently when my tenants were served with warrants of demolition of houses.”**

18. As it were, other than the Sale Agreement, the Objector does not state how he came to establish that the parcel of land he bought belonged to the Defendant/Judgment-debtor or how he established that the land he bought without a plot number had since become a Parcel No. Kilifi/Township/79.

19. As it turned out, the ownership of the suit property was the subject matter of the Judgment of the Learned Trial Magistrate as delivered on 5<sup>th</sup> July 2017. It was apparent that at the trial leading to the Judgment, the Appellant herein produced Letters of Administration issued to her by the High Court at Malindi together with a Letter of Allotment indicating that the suit property had been allocated to her deceased father Said Shosi. On the other hand, the Defendant/Judgment-debtor while also claiming that the suit property belonged to her equally deceased father did not present any documentary evidence that the land belonged to her father and/or that she had any authority to deal with the same.

20. Having perused the pleadings and upon hearing the testimonies of the witnesses and considering the evidence placed before the Court, the Learned Magistrate rightly concluded inter alia as follows: -

**“From the above, it is clear that the defendant has no legal right to claim the plot in question on behalf of the deceased father without letters of administration and that is not a justification to trespass on the subject property.”**

21. Where the Court had found that the person who sold the land to the Objector had no title and given that the Objector himself had failed to provide any evidence of the Vendor’s ownership of the land before he purchased the same, I did not think the Objector had established any legal or equitable interest in the land capable of protection by the Court.

22. With respect to the Learned Trial Magistrate, there was no proof of ownership of the land either by the Defendant/Judgment debtor or the Objector/Respondent herein and it was extremely prejudicial in the circumstances to issue a permanent injunction against the Appellant. If the Defendant/Judgment Debtor had no valid title to the land, she could not purport to pass any, and indeed no title was passed in the circumstances to the Objector.

23. Accordingly, I find merit in the Appeal. I allow the same and set aside the Ruling delivered by the Hon. R.K. Ondiek SPM dated 26<sup>th</sup> March 2019.

24. The Appellant shall have the costs of the Appeal and of the application in the Subordinate Court.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 3<sup>RD</sup> DAY OF JUNE, 2021**

**J.O. OLOLA**

**JUDGE**