



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 22 OF 2019

(Formerly Kajiado HCC Appeal No. 27 of 2019)

RHOBI CHACHA.....APPELLANT

VERSUS

JUSTUS MOMANYI.....RESPONDENT

JUDGEMENT

(Being an appeal from the Ruling and Order of the Chief Magistrate's Court at Kajiado (Hon. Margaret Kasera) dated 10th July, 2019 in Kajiado SRMCC No. 27 of 2004.

Introduction

By a Memorandum of Appeal dated the 6th August, 2019, the Appellant appeals against the whole of the Judgment delivered by Hon. Margaret Kasera Chief Resident Magistrate's Court at Kajiado on the 10th July, 2019. The genesis of this appeal is the Ruling of the Principal Magistrate Hon. Margaret Kasera in the Kajiado SRMCC No. 27 of 2004 where the Court granted a Ruling in favour of the Respondent as per the prayers sought in the Notice of Motion application dated the 27th February, 2019 where he had sought the following orders:

- 1) That this matter be certified urgent and heard ex parte in the first instance.
- 2) That upon hearing this application ex parte, this Honourable Court be and is hereby pleased to issue an order of injunction against the Defendant, his agents, servants, workmen and/or employees restraining them from continuing with their construction on the Applicants plot number 496/ Res – Noonkopir T. Centre, pending the hearing of this application inter partes.
- 3) That upon hearing this application ex parte, this Honourable Court be and is hereby pleased to issue an order of injunction against the Defendant, his agents, servants, workmen and/or employees restraining them from continuing with their construction on the Applicants plot number 496/ Res – Noonkopir T. Centre, pending the hearing of this suit.
- 4) That upon hearing of this application inter partes, this Honourable Court be and is hereby pleased to issue an order stating that the Applicant herein is the true and rightful owner of plot No. 496/ res Noonkopir Trading Centre.

The appellant being dissatisfied by the whole Ruling filed an appeal at the High Court of Kenya in Kajiado on 14th October, 2019 which was later transferred to this court.

The Memorandum of Appeal contained the following grounds;

1. Trial Magistrate erred in law and in fact by disregarding the suit was heard and dismissed by judgement dated 14th February, 2012.
2. Trial Magistrate erred in law and fact by selectively applying the contents of the judgement.
3. Trial Magistrate erred in law and fact by ignoring the fact that the Appellant has suffered irreparable harm and loss of up to Kenya Shillings Five Million (Kshs. 5,000,000) in developing the land after approval of development permission which was issued by the County Director of Physical Planning on 31st July, 2017.

4. The Trial Magistrate erred in dismissing the Appellant reply against the weight of evidence.

The Appellant proposes that:

- a) This Appeal be allowed.
- b) The Ruling and Order of the trial Court be set aside.
- c) Costs of this Appeal be awarded to the Appellant.

The Appeal was canvassed by way of written submissions.

Submissions

The Appellant in her submissions contend that the Court was functus officio to deal with the impugned application which culminated in the Ruling being appealed from. She proceeded to highlight the prayers No. 3 sought in the application and intimated that there was no suit to yield the orders sought. She insists the Senior Resident Magistrate at Kajiado (Hon. S. O Temu) had already heard and determined the lower court suit vide its judgement dated the 14th February, 2012. She contends that in the Plaintiff dated the 25th February, 2004 filed in the lower court the Respondent has sought for orders of injunction against the Appellant which were dismissed in the judgement dated the 14th February, 2012. Further, that the Court was also barred by the doctrines of res judicata and issue of estoppel as the dispute concerning the ownership of the land in question was fully dealt with by the Court before dismissing the Respondent's suit. To buttress her averments, she relied on the case of **Chembe Katana Changi Vs Ministry of Lands & Settlement & 4 others (2014) eKLR and Telkom Kenya Limited Vs John Ochanda (2014) eKLR**.

The Respondent in his submissions contends that the Appellant never lodged an Appeal in respect to the Judgement wherein parties were directed to present their ownership documents to determine owner of the disputed parcel of land. Further, that the Magistrate's Ruling delivered on 10th July, 2019 declared the Respondent as the rightful owner of Plot 496/ RES Noonkopir Trading Centre and further issued an order of injunction against the Applicant. To support his arguments, he has relied on the following decisions: **Henderson V Henderson (1843) 67 ER 313; Njangu V Wambugu & Another Nairobi HCCC No. 2340 of 1999 and Jared Oduor & 2 others V Director of Public Prosecutions & 4 Others (2019) eKLR**.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and rivaling submissions, I have summarized the following issues for determination:

- Whether the Ruling delivered on 10th July, 2019 in the Kajiado SRMCC No. 27 of 2004 should be set aside.
- Whether the Appeal is merited.

As to whether the Ruling delivered on 10th July, 2019 in the Kajiado SRMCC No. 27 of 2004 should be set aside and if the Appeal is merited.

Before I proceed to make a determination on this Appeal, I wish to highlight a portion of the Judgement dated the 14th February, 2012 which is the foundation of this Appeal.

‘ The Plaintiff should have directed his claim to the County Council of Ol Kejuado since even his witness PW2 had testified that it was the County Council tractor that had demolished the structure though the Defendant was allegedly present. The Plaintiff thus misdirected his claim in that regard and it must fail. To revisit the issue of ownership of the dispute site and since it is clear it is the County Council of Ol Kejuado who can properly identify the parties respective sites, I will hesitate to declare that the site in dispute belongs to either party without confirmation in writing by the clerk to County Council of Ol Kejuado.I thus direct that the parties jointly present their allotment letters to the County Council of Ol Kejuado who then shall point out to them their respective sites if the Letters are genuine and valid since the rates have been paid. ‘

As a result of this order, I note the Respondent produced a report dated the 4th March, 2012 written by one Mr. Okoth Charles Angira, County Land Surveyor who intimated therein that the disputed plot belonged to him. From the Record of Appeal, the Respondent proceeded to file an application dated the 23rd June, 2015 seeking to review the said Judgement and annexed the aforementioned report dated the 4th March, 2012 which application was dismissed. I wish to extract an extract from the said Ruling: **‘ Attached to the application is the surveyors report dated 4th March, 2012 annexed ‘ JM2’ which shows that both the Plaintiff and the Defendant herein own plot numbers 496/ Residential and 360/ Business Noonkopir Trading Centre and that the site under dispute is plot number 496 Residential and not 360/ Business. This report was written by Okoth Charles Angira the County Land Surveyor Ol Kejuado County Council on 4th March, 2012 after the Court had delivered its verdict on 14th February, 2012. I have perused the judgement by my senior brother Hon. Temu. He dismissed the Plaintiff's case with each party bearing their costs. He directed the parties to present their allotment letters to the County Council Clerk of Ol Kejuado who shall point out to them their respective sites if the letters are genuine or not. In his judgement he did not direct the County Council Surveyor to prepare a report and file in court as has been indicated by Mr. Ombonya Learned Counsel for the Plaintiff herein. While I appreciate that the contents of the report dated 4th**

March, 2012, could have assisted the court in reaching a just finding had it been produced to court before delivery of the judgement, I am not persuaded to grant the prayers sought in the instant application. This is because the directive by Hon. Temu SRM was very clear. It has not been indicated whether the directive had been implemented and whether the parties herein presented their allotment letters as had been directed by the Court to the County Council of Ol Kejuado Clerk and the outcome of the said exercise.'

The Respondent thereafter filed two applications. In the application dated the 26th October, 2018 he sought for two prayers therein for adoption of the Surveyor's Report dated 4th March, 2012 and validation of his Letters of Allotment. There is however no indication if the said application was determined. The second application is the Notice of Motion dated 27th February, 2019 where Hon Margaret Kasera granted a Ruling in favour of the Respondent as per the prayers sought therein which has culminated in the instant Appeal.

From this analysis above, it is pertinent to decipher whether the Appellant has proved her grounds of Appeal. On the grounds whether the Trial Magistrate erred in law and in fact by disregarding the suit was heard and dismissed by judgement dated 14th February, 2012 as well as selectively applying the contents of the judgement. I note the Trial Magistrate proceeded in her Ruling to state as follows: **'The Plaintiff appeared before the County Surveyor who did a report dated 4th March, 2012. Report is by Okoth Charles Anyira County Land Surveyor. The Report JM2 indicate the plot 496/ Res Noonkopir Trading Centre is the one in dispute as per the correct map as well as the old map. I therefore allow prayer 3 and 4 of the application. This will or was heard and determined by Hon. Temu, his orders were that parties do appear before Ol Kejuado County Council for identification of the ground, which identity has been done vide report dated 4th March, 2012.**

I note the issue of the report dated the 4th March, 2012 had already been dealt with vide the Ruling to the application dated 23rd June, 2015. In the said Ruling, which I have extracted above, the Court actually challenged the veracity on whether the parties had both appeared before the said County Surveyor who prepared the report. Be that as it may, Hon Kasera disregarded this Ruling and proceeded to uphold the contents of the report dated the 4th March, 2012. I note the Appellant had actually annexed a Letter of Allotment dated 5th September, 2018 indicating her plot which was previously known as Noonkopir 360/ Business is now No. B423 and a Notification for Approval of Development in the said Plot. Further, she confirmed in her replying affidavit that her plot was validated between 2017 and 2018 by the County Government of Kajiado and she had spent Kshs. 5, 000,000 to develop it. There is no indication if these averments were controverted by the Respondent. However, with this information and noting that the issue of the Surveyor's report had been dealt with, I find that the trial Magistrate indeed erred in law and fact by disregarding this suit was heard and dismissed by judgement dated 14th February, 2012 as well as selectively applying the contents of the judgement. Further, I find that she indeed erred in law as well as fact by failing to appreciate the weight of evidence in the Appellant's Replying Affidavit while ignoring the fact that the Appellant has suffered irreparable harm and loss of up to Kenya Shillings Five Million (Kshs. 5,000,000) in developing the land after approval of development permission which was issued by the County Director of Physical Planning on 31st July, 2017. It is my considered view that the Learned Magistrate should not have proceeded to uphold the Report dated the 4th March, 2012 which had already been dealt with by another Magistrate as well as trying to determine issue of ownership which had been dismissed in Hon. Temu's Judgement. Further, that the Court was already functus officio having dismissed the Respondent's suit and directed parties to jointly present their respective letters of allotment to the County Council of Ol Kejuado to show them their plots. I further opine that since the Lower Court suit had been dismissed there was no suit to anchor the order of injunction that had been sought as required by law. Since there is no indication that the parties adhered to the judgement of Hon Temu, I direct them to proceed to do so.

It is against the foregoing that I find the appeal merited and I proceed to set aside the Ruling delivered on 10th July, 2019 in the Kajiado SRMCC No. 27 of 2004.

On the issue of costs, since the confusion has been brought by the County Government of Kajiado which is the successor of Ol Kejuado County Council, I direct each party to bear their own costs.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 27TH DAY OF JULY, 2021.

CHRISTINE OCHIENG

JUDGE