



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 39 OF 2018

CAROLINE WAWIRA NJERU.....APPELLANT

VERSUS

IRENE WANGARI.....RESPONDENT

(Being an Appeal from the Judgment and/ or Ruling of the Hon. Omodho (SRM) delivered on 6th December 2018 in the Chief Magistrates Court Civil Suit No. 549 of 2013 at Thika)

BETWEEN

CAROLINE WAWIRA NJERU.....PLAINTIFF

VERSUS

IRENE WANGARI.....DEFENDANT

JUDGMENT

By a Plaint dated **12th July 2013**, the Plaintiff (Appellant) filed this suit against the Defendant (Respondent) and sought for orders that ;

- a. **A permanent Injunction restraining the Defendant, her agent or employees servants from trespassing, constructing structures and or threatening the Plaintiff with eviction from Plot No. B4 Ruiru Block 126.**
- b. **Costs of this suit**
- c. **Interest on (a) and (b) above.**

In her statement for Claim the Plaintiff (Appellant) averred that she is the owner of the suit property vide **Wawage Investment Company, share Certificate No. 276** and that she has built a house on the said suit property where she lives with her family. That in the year **2013**, the Defendant (Respondent) trespassed on **Plot No. B4 Ruiru Block 126** and threatened her with eviction and further interfering with her construction on the suit property. That the Defendant (Respondent) is a trespasser and continues to interfere with her rights of use of the said property and due to the said tortious activities, she is likely to suffer loss and or injury as the threat is imminent and likely to cause irreparable harm.

The suit was contested and the Defendant(Respondent) filed a Defence and Counter Claim dated **17th September 2013**, and denied all the allegations made in the Plaint. She averred that she is the true proprietor of the suit property having purchased it from **Jua Kazi Women Investment Company**. That the suit is an abuse of the court process and the Plaintiff (Appellant) having filed a similar suit in **Thika ELC 13 of 2013** which was dismissed on **1st July 2013** .

In her Counter Claim, the Defendant (Respondent) averred that on **27th August 1991**, vide receipt **No. 108**, paid **Kshs. 15,500/=** for the suit property in **Ruiru**, which monies were paid to **Jua Kazi Women Investment group**. That on **14th September 1991**, the Defendant (Respondent) was issued with a share certificate by the group for **Plot No. B4** and on **26th February 2013**, she learnt from one **Mr. Koigi** that a third party was undertaking construction on her plot and upon investigation, it was discovered that the Plaintiff (Appellant) was constructing on the suit property.

Further that despite the Defendant showing the Plaintiff her original ownership documents, she had refused and or neglected to cease construction on the suit property. That her Claim is for a Permanent injunction, restraining the Plaintiff (Appellant) from interfering with the Defendant's possession and enjoyment of the suit land or dealing with the suit land in any way that is inconsistent with the Defendant's proprietary rights.

The matter proceeded by way of *viva voce* evidence, wherein the Plaintiff (Appellant) called 3 witnesses and the Defendant (Respondent) did not call any witness.

PLAINTIFF'S CASE

PW 1 Caroline Waweru testified that she bought the suit property from **Catherine Kaguongo**, and upon purchase they entered into a sale agreement dated **2nd February 2012**, for a consideration of **Kshs.600,000/=**, She produced the sale agreement as Exhibit 1, Share Certificate by **Wawage Investment** as Exhibit 2, receipt for transfer exhibit 3. That she occupied the land and she has built some properties to which she produced as Exhibit 5. That she wants the Court to stop the Defendant from interfering with her land. She produced the beacon Certificate as Exhibit No. 6.

That she took possession immediately upon payment. Further that she bought the suit property from **Catherine** and not **Wawage**.

PW2 Catherine Wanjiku Kaguongo testified that she sold the suit property to the Plaintiff and that the Plaintiff paid **Kshs. 600,000/=** upon which they transferred the suit property. That transfer is done at **Wawage Investment Company**. Further that she has two other plots and she does not have a title for her property is. That there is a case between the **Wawage Directors** and the seller and the registered owner is **Francis Wakahuli** and the property is 26 acres.

That she never worked at Wawage. Further that she bought the property in **2004** from Mikjos and Wawage bought as a Company as they took over from Mikjos. That she sold it in **2013** and she as not aware of another owner before **2004**.

PW3 Francis Nguru Ngugi testified that they trade as **Wawage Investment Company** and that the Plaintiff bought the suit property and was issued with certificate of shares. That **Wawage Investment Company Limited** owns **26 acres** of **Ruiru Ruiru Block 1** and the same was sold by **Francis Wakahiu**, who is yet to transfer the property. That they undertook subdivisions and the property belongs to Caroline and he did not know the Defendant.

After the *viva voce* evidence, the parties filed their written submissions. The trial Magistrate held as follows:-

“ The said Ruling was delivered on 9th October 2015. The Plaintiff Counsel on 31st March 2016 caused this matter to be fixed for hearing at the registry on 22nd August 2016. Whichever way angle anyone wishes to interpret it, this was way after the 90 day deadline . A further perusal of the file does not show if the said party sought for time extension or variation of the Court orders . As such the said order is still in force since there are no orders setting it aside or reviewing it.

In the circumstances I proceed to expunge the proceedings of 30th July 2018 which purported to have matter heard and set the Defendant free to proceed as they may wish within the confines of the law.”

The Appellant was aggrieved by the above determination of the Court and Decree thereon and she has sought to challenge the said Judgment through the **Memorandum of Appeal** dated **17th December 2018**. The Appellant sought for the setting aside of the Judgment delivered **6th December 2018** by **Hon. G. Omodho Senior Resident Magistrate Thika**.

The grounds upon which the Appellant sought for the Appeal to be allowed are;

- 1. THAT the Learned Magistrates erred in Law and in fact in making a Ruling even though there was no Application and or prayers by any party to the suit and/ or in respect of extraneous issues that were not ending before the trial Court for determination.**
- 2. THAT the Learned trial Magistrate erred in Law and in fact in making a Ruling that the Appellant's evidence in chief and cross examination be expunged from the Court record on the Court's own motion even though the Appellant and Respondent had both testified and closed their cases awaiting Judgment.**
- 3. That the Learned Magistrate erred in Laws and in fact in failing to deliver a Judgment after the parties had closed their case and their final written submissions and directed to appear for Judgment**
- 4. That the Learned Magistrate erred in Law and in fact in raising extraneous issues and/ or contravening the spirit and the letter of Article 164 of the Constitution of Kenya 2010 and Section 1A, 3A and Section 25 of the Civil Procedure Act and order 21 of the Civil Procedure Rules .**
- 5. That the Learned Magistrate erred in Law and in fact in demonstrating open bias against the Appellant who had a legitimate expectation of having a Judgment pronounced upon evidence and submissions only for her evidence to be expunged from the Court's records on the Court's own motion.**
- 6. That the Learned Magistrate erred in Law and in fact in pronouncing a ruling in the absence of the Appellant and the**

Respondent and without notifying both parties either in open Court or through a Notice.

The Appeal was canvassed by way of written submissions and the Appellant through the Law Firm of **Mugo Moses & Company Advocates** filed her written submissions dated **18th October 2020**, and submitted that it was her legitimate expectation that once a suit is filed, a Judgment should be pronounced touching on the prayer sought in the pleadings. That the Appellant prosecuted her case and called two witnesses, but the Respondent on the other hand did not see the need to prosecute her case. Further that the Court gave a date for submission and a further date for Judgment, but when the Appellant attended Court with the expectation of the Court pronouncing its Judgment, but the Court instead made a Ruling dated **6th December 2018**, as opposed to making a Judgment as directed.

That the Court dismissed the suit allegedly because the Appellant did not comply with conditions set for reinstatement of the suit. That the Magistrate erred in dismissing the suit without seeking clarification of the facts since it is untrue that the Appellant did not comply with conditions set by **Hon . Onsaringo** for the reinstatement as the Court did not give the Appellant an opportunity to show the receipt for payment of costs, so as to demonstrate that the Applicant complied. It was further submitted that the Appellant complied with the Court's directions of fixing the matter for hearing within **45 days**, as the Appellant invited the Respondent to fix the matter for hearing on 2 occasions within the said period of **45 days**, but on one occasion the Court file could not be traced and on another occasion the fixing date happened to be an **Iddir Fitr** a **Muslim holiday** which could not be foreseen.

Further, that the Respondent did not move the Court during Pretrial or even before the hearing for the suit to be dismissed nor the proceedings be ex-punged. That equity demands that no party should be condemned unheard. As it is against the principles of natural justice for the Court to dismiss a matter without giving the Appellant an opportunity to explain whether the conditions set had been complied. It was therefore their submissions that the confusion caused can only be cleared if the Court orders that the suit be heard **de novo** so that the disputes lingering can come to rest.

The Respondent filed her written submissions dated **17th December 2020** and submitted that the cardinal principle of equity is **'he who comes to equity must come with clean hands'**. That the principles for reinstatement of **Thika MELC 549 of 2013**, were never met, but the Appellant still moved the Court by fixing the date for hearing. It was submitted that justice is to both the Appellant and the Respondent as the Appellant has been in possession of the suit property which is the subject matter of this suit to the detriment of the Respondent.

This Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial court, the submissions by the Counsels and finds as follows:-

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held 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 allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan*(1955), 22 E. A. C. A. 270).

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of ***Ocean Freight Shipping Co. LtdVs.... Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995***, where the Court held that:-

"This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong".

The Court has carefully read and considered the written submissions by the parties, the Memorandum of Appeal, the evidence adduced before the trial court, the Ruling and Judgment delivered by the trial Court and the relevant provisions of law and finds the issue for determination is ***whether the Appeal is merited.***

For the Court to determine whether or not the Appeal is merited, it ought to first determine whether the trial court was justified in expunging the proceedings of **30th July 2018**, in which the Appellant had given her evidence and called other witnesses to testify.

In expunging the said proceedings of **30th July 2018**, that purported to have the matter heard, the Court noted that in a Ruling dated **23rd June 2015**, **Hon. Onsaringo** made a Ruling in which the Court allowed the Appellant's Application and in allowing the same the Appellant was given conditions in which amongst them there was a time line of **90 days** within which the Appellant ought to have fixed the matter for hearing, failure to which the matter stands dismissed.

The Court has gone through the Court's proceedings and it is not in doubt that indeed on the **9th of October 2015**, the Court allowed the Appellant's Application seeking to reinstate the suit and in the same breath, the Court gave a rider that the same ought to have been fixed

for hearing within **90 days** failure to which the same stands dismissed.

The Proceedings produced in this Court both in the lower Court's file and in the Record of Appeal produced as evidence contain proceedings for **9th October 2015**, and the next date is **16th May 2018**. Indeed from the **9th October 2015**, the time within which the Appellant ought to have had the matter fixed for hearing lapsed between **January of February 2016**, thereabout. This matter was fixed for hearing for **30th July 2018**, which date was way beyond the **90 days**. The Appellant in his Record of Appeal has produced an Invitation to fix the matter for hearing dated **16th March 2016**. There is no doubt that at that time the 90 days had passed and automatically the suit had therefore been dismissed.

The Appellant has faulted the trial Court for failing to give her an opportunity to be heard as there were instances in which she had sought to fix the matter for hearing but she was unable to do so as either the Court file could not be found or it was a Public holiday. However no such invitation has been produced before Court. Even so, it is the Court's Considered view that if time had run out, the Appellant had an obligation to seek for an extension of time beyond the **90 days** as the suit stands dismissed automatically upon the lapse of the 90 days. See the case of *Moses Mwangi Kimari ... Vs... Shammi Kanjirappambil Thomas & 2 others [2020] eKLR where the Court held that;-*

“The appellant does not dispute non-compliance with the court's conditional orders of 8th November, 2012. He however justified his default before the trial court and now before this court on appeal on the basis of the grounds advanced as already highlighted above and which grounds were rejected by the trial court, reasoning that the appellant ought to have applied for extension of time within which to comply before seeking leave of court to re-amend.

We agree with the trial court's reasoning that although the explanations given by the appellant as reason for non-compliance with the orders of 8th November, 2012 were no doubt plausible and were also directed at the right forum, they ought to have formed basis for seeking extension of time within which to comply and upon such extension of time within which to comply being granted when the appellant could have sought leave to re-amend. As already alluded to above the appellant does not dispute non-compliance with conditional orders issued on 8th November, 2012. His complaint on appeal is that his non-compliance with those orders notwithstanding, he was entitled to a merit pronouncement on his application for leave to re-amend the plaint and that the court's failure to so pronounce itself on the said application for leave to re-amend amounted to a violation to his right to a fair hearing, especially when there was no demonstration of any prejudice likely to be suffered by the Respondents if the court were to exercise its discretion first of all to sustain his suit and then allow him to re-amend the plaint and have it also heard on merit.”

Given that by the time the matter was being heard, the matter had already been dismissed and the Court had become *functus officio* and could no longer deal with the same, there are only limited roles the Court could undertake after a final determination had been made and could not revisit the decision on a merit base. Having the same heard and a judgment entered, it would only mean that the same was being heard on a merit base, which jurisdiction the Court did not have. See the case of *Brian Muchiri Waihenya...Vs...Jubilee Hauliers Ltd & another; Geminia Insurance Co. Ltd (Interested Party) [2018] eKLR* where the Court held that

“So would this court be in order to hear the applicants application? Is this court barred from doing so by the principle that it is functus officio? The doctrine of functus officio was well stated by the Court of Appeal in *Telcom Kenya Ltd -s- John Ochanda* (suing on his behalf and on behalf of 996 former Employees of Telcom Kenya Ltd. (2014 e KLR that

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon--

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in *re-St Nazaire Co*, (1879), 12 Ch.D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.---”

23. I agree with the applicants submission that the doctrine does not bar a court from entertaining a case it has already decided but is so barred from revisiting the matter in a merit-based re-engagement with the case once final judgment has been entered and a decree issued, meaning procedural interlocutory applications only.

24. It is plain and clear that this court having pronounced the final judgment and a decree drawn, being asked to re-engage itself and to interrogate whether or not the applicant ought to be enjoined in the suit at the late hour which is already pending before the Court of Appeal would in my very considered view be against the law and laid down principles of *functus officio*.

The Appellant having failed to seek extension of time beyond the **90 days**, means that the suit stood dismissed on the lapse of the **90 days** period and the Appellant having fixed a date for hearing after the matter had been dismissed, then any action undertaken after the matter had been dismissed only means the same is **null and void**. Consequently, the Court finds no reason to upset the decision by the trial Court as the proceedings ought to have been expunged and therefore the Court finds the Appeal is **not merited**.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court, and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the said determination.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the said Appeal is disallowed entirely and

the Judgment and Decree of the trial court is upheld.

On the issue of costs, the Court finds the same is granted at the discretion of the court. Given the circumstances of the case, the Court directs that each party to bear its own costs on this Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy