



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

APPEAL NO. 6 OF 2020

HESBON PYATICH LOKWANGAR.....APPELLANT

VERSUS

KENNETH LOTODO LOYATUM.....1ST RESPONDENT

THE COUNTY LAND REGISTRAR WEST POKOT.....2ND RESPONDENT

JULIUS CHARITO KANYONGU.....3RD RESPONDENT

(Being an Appeal against the Ruling of Hon.M.M. Nafula, Senior Resident Magistrate

in Kapenguria SPMC Land Case No. 17 of 2020 delivered on 26/8/2020)

JUDGMENT

1. Being dissatisfied with the with the Ruling of **Hon. M.M Nafula (SRM)** delivered on the **26/8/2020** in **Kapenguria Land Case No. 17 of 2020**, the Appellant has appealed to this Honourable Court against the said ruling and sets forth his grounds of appeal as follows:

- 1. That the learned trial Magistrate erred in law and in fact in holding that the appellant has not met the threshold for granting an interlocutory injunction.**
- 2. That the learned Trial Magistrate erred in law and in fact in holding and finding that the appellant has not demonstrated that he is the legal owner thus disregarding the sale agreement and continuous occupation of the suit land for thirteen (13) years since 2007.**
- 3. The learned Trial Magistrate erred in law and in fact in holding that the suit land was procedurally transferred to the 1st respondent.**
- 4. The learned Trial Magistrate erred in law and in fact in holding that the 1st respondent had shown and proved that he is the legal owner.**
- 5. The learned Trial Magistrate erred in law and fact in holding that the 1st respondent had demonstrated how he had been utilizing the land.**
- 6. The learned Trial Magistrate erred in law and in fact in venturing into the substance of the suit without giving the parties an opportunity to testify hence displaying actual bias against the appellant. In essence the learned Trial Magistrate made a determination of the proceedings without venturing into the merits of the case.**
- 7. The learned Trial Magistrate erred in ignoring the affidavit evidence by the appellant and submissions made by counsel for the appellant.**
- 8. The learned Trial Magistrate erred in law and in fact in making a decision against the weight of available.**

2. The Appellant prays that the appeal be allowed and the ruling in the subordinate court be set aside with costs here and below.

3. On 21/7/2021 the appeal was admitted for hearing and this court gave directions that the same be canvassed by way of written submissions. The appellant filed his submissions on 10/8/2021 and the 1st and 3rd respondents filed their submissions on 19/8/2021.

Determination

4. The circumstances in which this court can interfere with the trial magistrate's exercise of discretion are well circumscribed in the **Court of Appeal case of Mbogo and Another v Shah [1968] EA 93** where the court held that it can interfere with the discretion if it's satisfied that the trial court misdirected itself arriving at a wrong decision resulting to an injustice.

5. In order to have a grasp of the history of this appeal, it is essential to give a brief background which is as follows: the appellant filed an application Notice of Motion dated 12/5/2020 seeking orders among others temporary injunction pending the hearing and determination of the application and the main suit. The same was heard and the court granted interim orders until 26/8/2020 when the same was discharged and a ruling delivered in favour of the respondent dismissing the appellant's application.

6. The appellant in his submission raised three issues for determination, one on ownership of the suit land, two whether the learned trial magistrate made a determination of the proceedings without venturing into the merits of the case and three whether the appellant met the threshold for granting an interlocutory injunction.

7. In my view, the first issue is one that is to be determined during the hearing of the main suit and therefore, this court should not deal with the same.

8. Regarding the second issue, the appellant contends that the issue of fraud and misrepresentation required in depth scrutiny before being prematurely determined.

9. On the third issue, the appellant submitted that he had met the threshold as he produced title confirming that he was the 1st purchaser and that his wife had no authority to sell the land since spousal consent and Land Control Board consent was obtained through fraud.

10. It is my considered opinion that the second issue as raised by the appellant is the only issue that suffices at this juncture as the first and third raises issues that are clearly to be heard and determined on merit during the hearing of the main suit.

11. In view of the above, it is therefore my opinion and while in agreement with the appellant that issues of fraud and misrepresentation requires in depth scrutiny and indeed the learned trial magistrate erred by going into the merits of the case at an interlocutory stage.

12. It is my opinion that the learned trial magistrate in her ruling clearly erred by making a conclusive determination that the 1st respondent is the legal owner of the suit land without hearing the main suit.

13. This court also holds that the trial magistrate was only to make a ruling on whether the appellant met the threshold for granting or not granting the temporary injunction. Further, the prayers the appellant was seeking were not on ownership of the suit land.

14. The respondents on the other hand contend that the record of appeal filed does not contain a certified copy of the order appealed against and that an appeal is always against the decree or order of the court and not against the ruling or judgment of the court.

15. **Order 42** rule 2 of the Civil Procedure Rules; this rule provides as follows:-

Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed.

Section 2 of the Civil Procedure Code, also provides as follows;

“Provided that, for the purposes of appeal, ‘decree’ includes judgment and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”

16. The Court of Appeal in the case of **Rentworks East Africa Limited v Coley Njeru Bildad [2021] eKLR, L.W. Gitari J** in allowing the appeal relied on the case of **Emmanuel Ngade Nyoka -v- Kitheka Mutisya Ngata Civil Appeal No.63/2016 (2017) eKLR.** where the Court held as follows:-

“According to the Judge the record of Appeal before him had a certified copy of the Judgment of the court. Consequently, he reasoned, that the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record. We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was mere technicality that could not have sat well with the current constitutional dispensation that called upon courts to go to substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in Section 1A and 1B of the Civil Procedure Act.

Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any. I should therefore proceed to determine the Appeal as the certified copy of the

Judgment of the trial magistrate which is certified has been filed”

17. In view of the above, it is my opinion that the respondent’s argument does not hold as it is only based on technicalities not weighty enough to warrant striking out of the appeal.

18. Having said as above, this court finds that the instant appeal is competent notwithstanding that there is no certified copy of the order or formal decree; it is noteworthy that the appellant has annexed a copy of the ruling and proceedings from the lower court.

19. It is the court’s mission to always do substantive justice and that mission comes into sharp focus in a case where the court is called upon to uphold equity under **Article 10** of the Constitution as well as delicately balance the interest of justice as between the parties; therefore, in the circumstances of this appeal, justice would be better served if the court avoids focus on procedural technicalities. That position has its underpinnings in **Article 159(2) (d)** of the Constitution of Kenya **2010** instead determine the dispute without undue regard to procedural technicalities.

20. The rest of the respondents’ arguments are purely on the substantive issues of the case that are to be heard and determined in the main suit. It is also quite ironical for the respondents to argue under **paragraph 6** of their submissions that the learned trial magistrate based her ruling of **26/8/2020** on merits and then submit under **paragraph 18** that the trial magistrate is yet to hear the evidence and that the issues as raised by the appellant will only be determined upon hearing the evidence of the parties and a determination made. This clearly shows that the respondents in fact agree with this court’s earlier opinion above that indeed the trial magistrate was not supposed to base her ruling on evidence. The trial magistrate therefore misdirected herself by venturing into the main evidence thereby arriving at a conclusive finding, leaving nothing for determination in the main suit.

21. In light of the above, the instant appeal partly succeeds on grounds **3, 4, 5** and **6**. The ruling and order of the **Hon. M.M Nafula (SRM)** delivered and issued on the **26/8/2020** dismissing the appellant’s application dated **12/5/2020** in the subordinate court are hereby set aside and substituted with the order of this court allowing the said application in terms of **prayers Nos 3 and 4** thereof with costs to the appellant herein.

22. The costs of this appeal shall be borne by the respondents jointly and severally.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 25TH DAY OF NOVEMBER, 2021

MWANGI NJOROGE

JUDGE, ELC, NAKURU.