



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 115 OF 2019

ADITA MWIKAMBA M'IMWILIAPPELLANT

VERSUS

JOHN MUNG'ATHIA M'MARIGURESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (P.M.) delivered on 19th September, 2019 in Tigania PMCC No. 91 OF 2013)

JUDGMENT

1. The appellant seeks to overturn the ruling made on 19.9.2019 on the grounds that: he was condemned unheard and without notice; his lawyers were properly on record; there was a consent letter between the former and incoming lawyer; this court failed to consider it was a land matter and based the ruling on technicalities instead of substantive justice.
2. This being a first appeal the court is to review, rehearse and re-appraise itself on the entire pleadings, evidence and law so as to come up with its own findings and conclusions. See ***Selle & Anor. -vs- Associated Motor Boat Co. Ltd. & Others [1968] E.A 123.***
3. The appellant as a recorded owner and vide a consent to sue dated 29.1.2013 sued the respondent seeking eviction from **L.R 616 Ankamia Adjudications Section** which the respondent had allegedly forcefully entered into on 29.7.2013.
4. The respondent denied the claim on the basis that the suit land was family/ancestral land which he was lawfully occupying with his family since 1987, the plaintiff's late husband was an elder step-brother to his father, alleged the recording in favour of the appellant was fraudulent and or secretly done, and was holding the land in trust for him and his family.
5. Further, the respondent stated the case had been filed to pre-empt the outcome of an objection No. 697 filed by him on 23.8.2018. The court directed the parties to address it over the issue of jurisdiction.
6. The plaintiff/appellant by written submissions, urged the court to find the case was not based on which, AR objection had been heard and determined, but was over illegal occupation. Further the appellant submitted no objection proceedings were exhibited in the list of exhibits and that a mere receipt could not suffice under **Section 26 G (2) of Cap 283.**
7. The respondent submitted the case was filed to pre-empt A/R **objection No. 697** as per an attached receipt to the written submissions hence the court lacked jurisdiction to entertain the suit under **Sections 17, 18, 19 and 26 of the Land Consolidation Act** as read together with **Section 29 of the Land Adjudication Act.**
8. The respondent relied on the case of ***Stephen Michuki Kiunga-vs- Nkuni M'Turuchiu & 2 Others*** on the proposition that the appellant ought to have exhausted the internal dispute mechanism under the above **Acts** before resorting to court.
9. In line with Owner of the ***Motor Vehicle M.V Lillians -vs- Caltex Oil (K) Ltd [1989] KLR1***, the respondent urged the court to find it lacked jurisdiction to entertain the matter. By a ruling delivered on 11.10.2018 the trial court made a finding by dint of a receipt dated 17.4.2012 the appellant ought to have appealed in line with **Section 26 (1) & (2) of the Land Consolidation Act Cap 283** and that by bringing the suit the appellant was circumventing clear procedures as provided by statute. The suit was struck out with costs.
10. Immediately after the ruling the law firm of **Elijah K. Ogoti & Co. Advocates** came on record through a notice of appointment of advocates on **19.10.2018** and filed a notice of motion seeking for review of the orders striking out the suit and for summons against the District Land Adjudication Officer Tigania West/East to confirm if A/R objection No. 697 was spent, had abated and was non-existent.
11. The basis of the review was that new and important point had been discovered that the A/R objection alleged the basis of striking out the suit was dismissed or abated after the land committee was disbanded as per **Section 181 (a) & (b) of the Land Adjudication Act** a fact which was not within the knowledge of the previous counsel on record.

12. The application was supported by an affidavit sworn by the appellant on 24.10.2018 in which she enclosed **annexture EOK "1"** confirming the closure and disbandment of the land committee.
13. The trial court dismissed the application on 3.12.2018 for no-attendance and non-prosecution subsequent to which an application dated 20.12.2018 for setting aside orders of 3.12.2018 and reinstatement of the application for hearing on merits was filed based on the reason that was served.
14. The application was supported by an affidavit sworn by Elijah Ogoti advocate giving a narration of the events since the filing and subsequent dismissal.
15. The respondent filed a replying affidavit saying the dismissal was lawfully done for non-attendance and non-prosecution.
16. Through a ruling made on 19.9.2019 the court held the application had been filed by a law firm improperly on record contrary to **Order 9 rule 9 of Civil Procedure Rules** for two law firms could not act alongside each other. It dismissed the application leading to the current appeal.

ANALYSIS AND FINDING

17. The appellant takes the view the trial court dwelt on technicalities and not the merits of the land matter hence, condemned her unheard.
18. Having looked at the pleadings and the lower court record, there is no doubt the court based its determination on the issue as to whether it had jurisdiction based on a receipt introduced to court through written submissions by the respondent. The appellant was not given an opportunity to make presentations over the authenticity of the receipt. There were no objection proceedings attached to the statement. Similarly the defendant had not raised the issue of jurisdiction at all in his pleadings.
19. Being a preliminary objection, the court should not have based its determination solely on a receipt and make a finding that it had no jurisdiction without interrogating the veracity or otherwise of the respondent's allegations.
20. Secondly the trial court held the firm of Elijah Ogoti & Co. Advocates was improperly on record and hence could not lodge the application dated 20.12.2018.
21. In ***Speedwall Building Technologies Ltd. –vs- County Government of Migori [2018] eKLR*** the court held legal representation was a Constitutional right and there exists no bar in law to a party being represented by more than one law firm if such a party can afford it.
22. Thirdly, and more important, the appellant had based the application for review under **Order 45 of Civil Procedure Rules** on discovery of new and important point that the alleged A/R objection had abated, or was dismissed and the land committees disbanded by dint of **Section 181 of the Land Consolidation Act**.
23. The replying affidavit by the respondent did not specifically deny that fact he had already lost the objection and the process was awaiting issuance or title deed in favour of the appellant. To my mind the trial court should have determined that point on merits for it went to the core of substantial justice, as opposed to technicalities in line with **Article 159 of the Constitution** as read together with **Section 1A, 1B and 3A of the Civil Procedure Act**.
24. Fourthly, the appellant's counsel gave a reasonable explanation as to why he did not attend court on 3.12.2018. The court minute for 24.11.2018 clearly indicates the firm of Elijah Ogoti & Co. advocates for the plaintiff and Mwenda for the defendant by consent took a mention date for 20.12.2018. How then the date was changed to 3.12.2018 is not clear. Mr. C.P. Mbaabu advocate did not deny those facts that one Mwenda from his law firm had taken another date and not 3.12.2018. It is therefore my finding that the appellant was condemned unheard.
25. In the premises the appeal herein has merits. The same is allowed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

C.P. MBAABU FOR RESPONDENT

OGOTI FOR APPLICANT

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE