



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT MERU

ELC APPEAL NO. 54 OF 2019

ERASTUS SILAS MUTHAMIA MARETE..... 1ST APPELLANT

THURANIRA MARETE.....2ND APPELLANT

VERSUS

GEDION IKIAO & 24 OTHERS RESPONDENTS

(Being an appeal from the decision and ruling of Hon. G Sogomo (PM) delivered on 21/03/2019 in Tigania PM ELC No. 57 of 2018)

BETWEEN

GEDION IKIAO & 24 OTHERS.....RESPONDENTS

VERSUS

ERASTUS SILAS MUTHAMIA MARETE 1ST DEFENDANT

THURANIRA MARETE 2ND DEFENDANT

JUDGMENT

1. The appellants being the defendants in the trial court were sued by the respondents where the latter sought a permanent injunction restraining the appellants, their servants, agents from entering into their land, changing or interfering with the boundaries; as well as a declaration that the respondents are the legal owners of land parcel Nos. Tigania/Antuamburi/11672 and 11696 - 11718.
2. On 21/03/2019 the trial court delivered a ruling where it ordered that the status quo be maintained and the matter be set down for trial.
3. The appellants being aggrieved by the said ruling filed this appeal based on four (4) grounds which may be summarized into two (2): ***that the learned magistrate erred in law and fact in mixing up and misunderstanding the applications before him resulting in a wrong decision; and failing to comply with the provisions of Order 21 of the Civil Procedure Rules.***
4. This appeal was canvassed by way of written submissions. The appellants submitted that the trial magistrate mixed the applications before him as their application is dated 17.10.2018 where they claim that the respondents' suit before the lower court is res judicata. They aver that the trial magistrate did not address all the issues raised in the said application. They contend that the ruling was insufficient causing the appellants to suffer injustice. The appellants further aver that the trial magistrate only considered the application dated 18.10.2018 filed by the respondents where orders of status quo were granted. Thus, the ruling ought to be set aside and this court re-evaluate the evidence and make its own conclusion. They relied on the cases of **Mwangi Stephen Muriithi v Daniel T. Arap Moi & another [2017] eKLR** and **Ali Waziri Abubakari v District Land Registrar, Kakamega and another [2019] eKLR**.
5. The respondents submitted that the trial court determined that the applications dated 17/10/2018 and 18/10/2018 be heard together. On 21/03/2019 the court delivered its ruling finding that the two applications could only be determined after hearing the parties and that the status quo be maintained, hence, the appeal should be dismissed. However, in the event that this court disagrees and finds that the issues of res judicata were not considered under ***Section 78 of the Civil Procedure Act*** the court may revisit and determine the issues. They relied on the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** to support their submissions.

Determination

6. The issue for determination is ***whether the appeal is merited***. The events leading to the delivery of the ruling of 21.3.2019 are as follows: The respondents (plaintiffs) filed the suit on 19.3. 2018 contemporaneously with the usual application for injunction to restrain the appellants (defendants) from dealing with the suit parcels. The said application is dated 16.3.2018 and was dismissed vide a ruling dated 11.10.2018. The respondents then lodged an application dated and filed on 18.10.2018 for review of the orders of 11.10.2018 (the orders of dismissal of the application dated 16.10.2018). The appellants also lodged an application dated 17.10.2018 filed on 18.10.2018 for the dismissal of the case on the basis that the suit is res-judicata.

7. The proceedings of 18.10.2018 before the trial court are as follows;

“Subject-Notice of motion dated 18/10/2018 and 17/10/2018. Status quo to be maintained. Respondents in respective applications granted leave to file respective affidavits. Mention on 25.10.2018”.

Then on 25.10.2018 the court orders read as follows;

“Notice of motion dated 17.10.2018 to be canvassed by way of written submissions each party having 14 days to file theirs”

8. This far it would appear that the trial court was either to determine both applications going by the records of 18.10.2018 or the court was to only determine the application dated 17.10.2018 going by the records of 25.10.2018.

9. The ruling delivered on 21/03/2019 stated that the subject of the ruling is the motion dated 18/10/2018. It stated as follows:

“To navigate the legal and factual miasma brought about by the miscellany of applications filed by the disputant parties this court orders that status quo be maintained and this matter be set down for trial.”

10. It is apparent that there was a mix up as the trial court only mentioned the respondent’s application dated 18.10.2018. However, a scrutiny of the submissions filed by the parties reveal that the parties were the authors of this mix up. The respondents submissions filed on 21.11.2018 (page 91 of the record of appeal) contain this heading **“PLAINTIFFS’ SUBMISSIONS IN SUPPORT OF THE APPLICATION DATED THE 18TH DAY OF OCTOBER 2018”**, while the appellants submissions filed on 15.11.2018 (page 73 of the record of appeal) bears this heading **“WRITTEN SUBMISSIONS ON AN APPLICATION DATED 18.10.2018”**. The submissions of the parties were filed months before the delivery of the ruling of 21.3.2019, whereby in between, the matter was mentioned on 19.12.2018, 24.1.2019, 31.1.2019 and 28.2.2019. In all these instances, none of the parties clarified that their submissions contained any anomaly. The appellants cannot turn around to blame the court for the mix up.

11. Despite the fact that the parties only cited the application by the respondents (the one dated 18.10.2018), I find that the trial magistrate was alive to the fact that there were other applications and in order to determine the dispute, he found it expedient to give an order for maintenance of status quo and for the suit to proceed to trial. I am wholly in agreement with this finding. The myriad applications filed in a suit usually have the effect of clogging the wheels of justice and diverting the course of the trial. It is therefore not in order for this court to set aside the trial court’s ruling of 21.3.2019. After all, the issues being raised in the application dated 17.10.2018 can still be canvassed in the course of the trial

12. Accordingly, I am of the view that the appeal is not merited. The same is hereby dismissed. Each party to bear their own costs of the appeal. The lower court file is to be transmitted back to the trial court for determination of the case. A copy of this judgment is also to be placed in the original lower court file.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 22.6.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE