**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KITALE**

**ELC APPEAL NO. 8 OF 2019**

**ANN AKUYEN.....APPELLANT**

**VERSUS**

**LOKADOBONG ELIM.....1ST RESPONDENT**

**RICHARD ESINYEN.....2ND RESPONDENT**

**JUDGMENT**

1. The Appeal herein arises from the Ruling of Hon. C.M. Wekesa, Senior Resident Magistrate delivered on **22/10/2019** in **Lodwar E&L Case No. 5 of 2018**. The lower court suit was instituted by the 1st respondent and the 2nd respondent was the defendant which case proceeded to full hearing and judgment was delivered on **30/4/2019**. The applicant herein filed a notice of motion dated **5/8/2019** in that suit seeking orders that:-

> **(a) That this application be certified as urgent, service be dispensed within the 1st instance and interim orders be granted by the honourable court in terms of prayer 2 below:**
>
> **(b) That there be stay of execution of the judgment/decree herein pending the hearing and determination of this application.**
>
> **(c) That the honourable court do review its judgment dated 30/4/2019, the proceedings and all consequential orders and the same be set aside.**
>
> **(d) That the applicant be enjoined as 2nd defendant herein and be allowed to file a memorandum of appearance and statement of defence within a stipulated period that the court may order.**
>
> **(e) That the 1st respondent/plaintiff be ordered to amend his plaint and include the applicant as the 2nd defendant and Akudunyang Esinyen as the 2nd plaintiff.**
>
> **(f) That a temporary injunction to issue against the respondents, his servants and/or agents from trespassing upon, entering/gaining entry, constructing on, selling, leasing, transferring and/or dealing in any manner or interfering with the applicant's possession, control and use of the disputed parcel of land known as Lodwar/Nakwamekwi Block 1/Ngomorkirionok/066 pending the hearing and determination of this application and upon the court granting Order 3, 4 and 5 above, pending the hearing of the main suit.**

2. The application was opposed by the 1st respondent and after the application was heard, the court delivered its ruling and issued an order of dismissal of the application which ruling and order are now the subject of this appeal.

3. The Appellant was aggrieved by the decision of the Hon. Magistrate and has filed the appeal herein, the grounds of which are reproduced hereunder:

> **1. The Trial Magistrate erred in fact and in law by making an observation that there was an appeal pending when the same was not demonstrated in court by the Respondents.**
>
> **2. The Trial Magistrate erred in law and fact by misinterpreting Order 45 Rule 1 Sub-Rule 2 Civil Procedure Rules and Section 80 (b) of the Civil Procedure Act.**

**3. The Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant has no avenue of an appeal other than a Review.**

**4. The Trial Magistrate erred in law and fact by failing to appreciate the principles laid down in the case JMK vs MNM & MFS.**

**5. The Trial Magistrate erred in law and fact by failing to accord the Appellant a chance to be heard hence a miscarriage of justice.**

**6. That the Trial Magistrate erred in law and fact by failing to appreciate that if there was any appeal, the Applicant was not made aware of it and in any event it could not affect the merits of the application.**

4. The Appellant prays that this appeal be allowed and the decision be quashed.

5. Directions were taken to the effect that the appeal be canvassed by way of written submissions. However it is only the Appellant's counsel's submissions that are on the record.

**DETERMINATION**

6. This court, being the first appellate court, has examined and analysed the record and the affidavit evidence as deposed by both parties in the suit below, together with the submissions by their respective counsels on record, and will make its own conclusions.

7. After considering the appeal, the record and the submissions presented herein, I find that the only issue that calls for determination is whether the trial court erred in law by dismissing the application and in so doing failed to accord the appellant an opportunity of being heard, and so condemned her unheard.

8. A look at the application before the trial court gives the impression that the same was an application for review although the provisions of law relied on were not expressly cited in the application. It was however not dismissed on that ground. In any event, **Article 159(1) (d)** of the **Constitution of Kenya 2010** enjoins courts to be guided by the principle that justice must be administered without undue technicalities.

9. Review orders are provided for under the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules.**

**10. Section 80** of the **Civil Procedure Act** provides:-

> **"Any person who considers himself aggrieved:-**
>
> (a) By a decree or order for which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) By a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

**11. Order 45(2)** of the **Civil Procedure Rules** provides:-

> "A party who is not appealing from a decree or order may apply for a review of judgement notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when being respondent, he can present to the appellate court the case on which he applies for the review."

12. From the above set out provisions, the main grounds for review are therefore: **discovery of new and important matter or evidence, mistake or error apparent on the face of the record, or any other sufficient reason. It is a vital condition for its success that the application has to have been made without unreasonable delay.** It is also clear that a party cannot apply for review and appeal from the same decree or order.

13. In the present circumstances, it is evident that the Applicant was neither a party to the proceedings before the trial court nor in the intended appeal. She had laid the basis for her application before the trial court below thus: that she had bought the suit land in the year **2015** and taken possession thereof by renting the premises thereon to tenants; that various authorities have in the past confirmed that the land belongs to her; that she was never made aware of the proceedings before the trial court; that she ought to have been enjoined to the proceedings due to her interest as aforestated; that the survey documents of the plaintiff had been revoked; and that she was condemned unheard. She desires to be heard hence the application that was dismissed and this appeal. Part of the application sought that the plaint be amended and she be allowed to file her defence. Her draft defence and counterclaim were attached to the application.

14. Besides the foregoing the applicant intimated in her application that the 2nd respondent and his brother, Edukunyang, the latter who was the 1st respondent's husband, had land parcels lying in contiguity to one another, and that the 1st respondent had taken over both parcels instead of confining herself to her husband's parcel. The appellant had averred in her affidavit that the 1st respondent's husband should be enjoined as a party to the suit too.

15. It is a cardinal principle of law that no person should be condemned unheard. **Article 50** of the **Constitution** vests in every person the

right to a fair hearing which under **Article 25(c)** cannot be limited. **Section 1A, 1B** and **3A** of the **Civil Procedure Act** provides for the expeditious, just and proportionate determination of disputes before the court.

16. It is clear that the review application was made with the primary aim of facilitating a fresh hearing in which the appellant would be involved.

17. It is the correct legal position espoused by **Order 1 rule 10 (2)** that a court may under certain circumstances enjoin a party at any stage of proceedings. The precise words of that provision are as follows:

> **"10.(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."**

18. In **Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another [2014] eKLR** Nyamweya J was of the view post-judgment joinder is not allowed and stated as follows:

> **"The provisions of Order 1 Rule 10 (2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in Black's Law Dictionary Ninth Edition at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. <u>This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising</u>.**
>
> **Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage."**

19. It is also now clear from latter day case law that joinder of parties at the post-judgment stage is now possible. See the decisions in **J M K -vs- M W M & Another [2015] eKLR; Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR; Kitale Land Case No. 64 Of 2011 Boaz Kipchumba Kaino Vs GH Tanna & Sons and Abdu Mukhwana, Fredrick Sambula, Wanjala Wesela And Robert Makona**

20. In the case of **J M K -vs- M W M & another [2015] eKLR** the court observed as follows:

> **"We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.**
>
> **It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014."**

21. In the **Boaz Kipchumba Kaino** case (supra) the court observed that joinder post judgment was possible only where the clear intention of the parties was laid out in the application especially by way of seeking orders of review or setting aside of the existing judgment and a fresh hearing.

22. In the **Carol Silcock** case (supra) the transfer of the suit land was effected *pendent lite* .That position is in stark contrast with the present case the transfer to the proposed interested party was made before the suit was filed in the magistrate's court. In the **Carol Silcock** case (supra) the Court stated as follows:

> **"It will be a mockery of justice for the court to subject the Plaintiff to another rigour of litigation as against the Intended Interested Party and prove fraud as against the said party.**
>
> **Everyman, as quoted in the proceeding paragraphs, is presumed to be aware of the pending suits, especially litigation involving land governed by the ITPA, 1882. Therefore, purchase made of a property actually in litigation *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly be bound by the judgment or decree in the suit.**

**The Intended Interested Party's argument that the Plaintiff should file a distinct suit as against it flies in the face of the very mischief that the principle of *lis pendens* is supposed to address."**

23. In the light of the foregoing it was therefore incumbent upon the magistrate in the court below to appropriately assess the appellant's circumstances and in her exercise of discretion consider whether the dismissal of the application before her was likely to prejudice the appellant by denying her the opportunity to be heard, as well as whether the trial of the suit before her had, in the circumstances revealed in the application, led to the effectual adjudication of all the issues arising therefrom. It is clear from the defence that the appellant was mentioned but no party applied for her joinder. Though she denies being aware, this court can not tell whether the appellant was aware of the suit or not before the judgment was delivered.

24. In this court's view that denial of a hearing was the necessary sequel to the dismissal of the appellant's application.

25. In **Mbaki & Others V. Macharia & Another (2005) 2 EA 206,** at page **210** the court stated as follows:

> "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

26. In the **JMK case** (supra) the court observed as follows:

> **"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456, Nyarangi, JA asserted at page 459:"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."**

27. Regardless of whether the trial court would have possibly arrived at the same decision perchance the appellant was enjoined to the suit, it behoved it to review its orders on the basis of possible breach of natural justice that would result in the absence of such review and setting aside, allow the application and proceed to hear the appellant in substance on her proposed defence.

28. This court is of the opinion that having regard to the circumstances of the instant suit the instant application was timeously lodged.

29. Consequently I find that the trial magistrate failed to properly exercise her discretion under **Section 80** and **Order 45** of the **Civil Procedure Act and Rules** respectively in favour of the appellant, especially due to the fact that the appellant had no remedy to ventilate her claim other than apply for review and setting aside of the trial court's judgment to pave the way for her to be heard in the dispute.

30. For the foregoing reasons, I allow this appeal to the extent that the trial Magistrate's Order made on **22/10/2019** dismissing the appellants' application dated **5/8/2019** is hereby set aside and in place thereof I substitute it with an order allowing that application for review dated **5/8/2019** on the following terms:-

**(a) The judgment dated 30/4/2019, the proceedings and all consequential orders are hereby set aside.**

**(b) The appellant shall be enjoined as 2nd defendant in Lodwar SPMCC No 5 of 2018 and she shall file a memorandum of appearance and statement of defence and effect service thereof within 14 days from the date of this judgment.**

**(c) That the 1st respondent is hereby ordered to amend his plaint in Lodwar SPMCC No 5 of 2018 appropriately and to include the appellant herein as the 2nd defendant and Akudunyang Esinyen as the 2nd plaintiff.**

**(d) Each party shall bear their own costs of this appeal.**

It is so ordered.

**Dated, signed** and **delivered** at **Kitale via electronic mail** on this **29th day** of **October, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**